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FROM ABOLITION TO A SOLUTION: A REAL ALTERNATIVE TO CAPITAL PUNISHMENT

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I. INTRODUCTION

Last 5 February 1999, Leo Echegaray was the first man to be executed under Republic Act No. 7659,[1] the Act that restored the death penalty after it was conditionally removed by the 1987 Constitution. The Supreme Court had earlier issued a temporary restraining order that suspended the execution at its original date of 4 January 1999, pending a move in Congress to reconsider whether the law was necessary. This action of the Supreme Court drew dramatic accusatory statements, sparked the formation of a terrorist group which threatened to bomb the Supreme Court, and initiated a move in Congress to impeach all Supreme Court Justices on grounds that had yet to be formulated. Debates were held, emotions ran high and Congress worked until morning to pass a resolution that dispelled rumors about the impending impeachment of the Justices.

The issue of the death penalty divided the whole country. This division put into doubt the widely accepted belief that people had been clamoring for the death penalty in order to address the upsurge of crime in the Philippines.

The hasty manner and disregard for usual procedure with which Congress passed the resolution, as well as the firmness with which the President expressed his intent to veto any repeal of the law even when no such

* Fourth Year LL.B., University of the Philippines College of Law.

[1] An Act to Impose the Death Penalty on Certain Heinous Crimes, Amending for that Purpose the Revised Penal Code, as amended, other Special Penal Laws, and for Other Purposes, Rep. Act No. 7659 (1993).

repeal had been made by Congress, leads to the questions whether the decisions that were made were based on actual facts regarding both sides of the issue or merely on emotions, and whether all avenues were explored before coming to the conclusion that the death penalty is the only way to prevent the commission of heinous crimes.

After chaos comes sobriety. A week after Echegaray was executed, people turned their attention back to the everyday matters of life. Now that emotions have toned down and people seem more willing to listen, it is the time to examine capital punishment in the Philippines, in terms of its ultimate aims, and to search for alternatives if it is discovered that those aims are not met.

II. THE HISTORY OF CAPITAL PUNISHMENT IN THE PHILIPPINES[2]

The Spanish Codigo Penal of 1848 was introduced in the Philippines in 1884 and stood as the main body of criminal law throughout much of the American period. It was revised in 1932, when the Revised Penal Code came into force. Under this law, there were seven capital offenses — treason, piracy, parricide, murder, kidnapping, rape and robbery with homicide. After the Second World War broke out, espionage was added to the list. In the Post-War era, the Anti-Subversion Law[3] was enacted, carrying the penalty of death for leaders of the Partido Komunista ng Pilipinas. However, no executions were carried out under this law.

From 1946 until the election of President Ferdinand E. Marcos in 1965, thirty-five persons were executed — mainly those convicted of savage crimes marked, in the words of the Supreme Court reviewing such cases, by "senseless depravity" or "extreme criminal perversity."

The rule of Marcos (1965-1986) saw the gradual rise of the notion of capital punishment being a deterrent to crime. Its application as such was largely influenced by worsening political tensions, including the formation of

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[2] Amnesty International gives a concise history of capital punishment in the Philippines, from which this paper lifts its own historical narrative of the death penalty. See AMNESTY INTERNATIONAL, PHILIPPINES: THE DEATH PENALTY, CRIMINALITY, JUSTICE AND HUMAN RIGHTS 4-10, (1997).

[3] Rep. Act No. 1700 (1957).

the Communist Party of the Philippines (CPP) and its armed wing, the New People's Army (NPA).

In response to growing political and social tensions, from 1971-1972, Congress created new capital offenses for specific crimes involving hijacking, dangerous drugs or carnapping. Repeatedly citing the need for deterrence, a series of Presidential Decrees made many crimes punishable with death — including crimes involving subversion, possession of firearms, arson, embezzlement and illegal fishing. In a number of Presidential Decrees the imposition of the death penalty was made mandatory for specific offenses. Eventually, a total of twenty-four offenses were punishable by death.

Despite the changing climate and high sentencing rates, the number of executions actually carried out did not undergo a dramatic increase. Of the fifty-two prisoners executed between 1946 and 1976, nineteen executions took place during the pre-martial law administration of President Marcos (1965-1972), with the year 1967 accounting for twelve. During the martial law period itself, twelve executions took place, before a general and unwritten policy of not carrying out death sentences took effect in late 1976. The last judicial execution to take place in the Philippines prior to the abolition of the death penalty in 1987 was carried out by electrocution in October 1976.

During this period, attempts to move towards the abolition of capital punishment were made, but none reached legislative enactment.[4]

Until late 1986, the courts continued to hand down death sentences. In 1987, when the death penalty was finally abolished, 500 prisoners stood on death row. Following the promulgation of the 1987 Constitution, President Aquino announced that all existing death sentences would be commuted and that, in accordance with the 1987 Constitution, the death penalty in every case would be reduced to *reclusion perpetua*.[5]

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[4] In 1969, Senate Justice Committee chairman Senator Salvador Laurel strongly supported abolition in his 'Laurel Report on Penal Reform,' and in 1970, Senator Laurel introduced a Senate bill for this purpose. The bill, however, failed to prosper, as did two bills placed before the National Assembly in 1979.

[5] The decision to abolish the death penalty was influenced by four main arguments expressed in the debates of the Constitutional Commission: firstly, that capital punishment, even if not carried out, was inhuman because it traumatized not only the prisoner but also his family; secondly, that there was

Less than a year from the abolition of the death penalty, members of the armed forces, citing "compelling reasons involving heinous crimes," began lobbying in Congress for the restoration of the death penalty for rebellion, murder and drug-trafficking. This group also argued for the reimposition of capital punishment to combat the intensifying CPP-NPA offensives, which included urban assassination campaigns.

In mid-1987, a bill was put before Congress to reinstate the death penalty for fifteen "heinous crimes" including murder, rebellion and the importation or sale of prohibited drugs. The bill cited right-wing coup attempts as an example of "the alarming deterioration of the peace and order condition throughout the country" and argued for the death penalty both as an "effective deterrent against heinous crimes" and "as a matter of simple retributive justice."[6]

In 1988, the House of Representatives voted for the restoration of capital punishment, and in 1989, three similar bills were put before the Senate.[7] In 1990 the Senate suspended the vote for a year, and in 1991, amidst vigorous public debate and intense lobbying by anti-death penalty groups, did not agree to move to a decision.

A series of horrifying, widely publicized crimes including rape, murder and kidnapping for ransom reinforced the public's fear that lawlessness and criminality had reached unprecedented levels. A number of high-profile murder cases, some perpetuated by corrupt police or town mayors and at times involving children of middle-class families, were widely reported. This

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no solid evidence to show that the death penalty had acted as an effective deterrent against the commission of serious crimes; thirdly, that life was a divine gift and as such should not be put in the hands of a human judge; and fourthly, that modern penal systems favored reformative rather than vindictive punishment.

[6] While supporters in Congress promoted the bill as a counter-insurgency measure, it was quickly acknowledged that the death penalty would not in fact deter politically motivated crimes. Sedition was therefore left off the list "heinous" crimes, and "rebellion" was dropped in a later amendment. Instead supporters argued that "retributive justice" was more important than deterrence, and that terrorists "should not be given the chance to escape and to kill again."

[7] One of these bills, certified by President Aquino as urgent upon the prompting of Defense Minister Fidel Ramos in the aftermath of one of the most serious right-wing military coup attempts, once again called for the death penalty for rebellion, as well as for sedition, subversion and insurrection.

increased public outrage and made the view that the death penalty was necessary to fight such criminality gain ascendancy over the belief that capital punishment was a necessary tool in the anti-insurgency campaign.

Following his election in 1992, President Fidel V. Ramos declared in his first State of the Nation address that the restoration of the death penalty would be a legislative priority of his administration. Citing the need to address public demands for the restoration of law and order, he urged Congress to take speedy action. As the congressional debate resumed, Ramos agreed not to include "political" offenses such as rebellion in the measure discussed by Congress because of the adverse impact this would have on "national reconciliation" in the context of an official peace process — including offers of amnesty — with the major armed opposition groups. However, the list of crimes considered "heinous" was expanded to include smuggling, illegal export of foreign currency and bribery to reflect the administration's emphasis on economic issues.

Both House and Senate eventually voted in favor of the death penalty. Republic Act No. 7659, a joint measure restoring the death penalty, was passed by Congress and signed by President Ramos in December 1993. The law took effect on 1 January 1994. Republic Act No. 8177, approved in 1996, stipulated that the method of execution should be by lethal injection.

The first state sanctioned execution since 1976 took place during the term of President Joseph Estrada, who was elected in 1998. Leo Echegaray, who had been convicted of repeatedly raping his teenage stepdaughter, was executed on 5 February 1999 by lethal injection.[8]

III. A REVIEW OF STATE AUTHORITY IN THE IMPOSITION OF CAPITAL PUNISHMENT

> We smother under padded words a penalty whose legitimacy we could assert only after we had examined the penalty in reality. Instead of

[8] Prior to Echegaray's execution, Representative Salacnib Baterina filed House Bill No. 6083, "An Act Abolishing the Death Penalty in the Philippines," on 1 December 1998. The bill called for the repeal of Republic Act No. 7659 as amended by Republic Act No. 8177.

> saying that the death penalty is first of all necessary and then adding that it is better not to talk about it, it is essential to say what it really is and then say whether, being what it is, it is to be considered as necessary.[9]

A. The constitutional basis for imposing the death penalty

Section 19 paragraph (1) of article III of the 1987 Constitution placed two standards that must be met before the death penalty may be reimposed: First, there must be compelling reasons; second, the death penalty must be imposed only for heinous crimes. The implication of such standards reflects the sentiment that is evolving in the international sphere: that the death penalty should be implemented only as a last recourse. The Constitution did not give any further definition or explanation of the scope of such standards. Thus, it delegated to Congress the discretion to determine when to enact a law imposing the death penalty and to identify the crimes for which such penalty is to be imposed, provided that Congress meets the standards set by the Constitution.

In the case of *People v. Pedro Malabago*,[10] Fr. Joaquin Bernas, a member of the Constitutional Commission which formulated the 1987 Constitution, submitted a Memorandum which explained that these two standards should exist together or must be inseparably related. The compelling reason must flow from the heinousness of the crime such that:

> (1) If the crime is not heinous, it cannot be the source of compelling reasons; and
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> (2) Even if the crime is heinous, it may not be enough to provide compelling reasons for death.[11]

Senator Arturo Tolentino was apparently of the same view. He said, "... there must be some connection or linkage between the crime and the reasons for providing the death penalty for it. That relationship between the crime and the compelling reasons for the penalty must exist to justify Congress

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[9] ALBERT CAMUS, RESISTANCE, REBELLION, AND DEATH at 134 (Justin O'Brien trans., 1960).

[10] G.R. No. 115686, 2 December 1996, 265 SCRA 198.

[11] Joaquin Bernas, Memorandum of the Amicus Curiae at 4, People v. Malabago, G.R. No. 115686, 2 December 1996, 265 SCRA198.

in imposing capital punishment." He further said that the compelling reasons might vary from crime to crime, because such reasons need to be related to the particular heinous crime for which capital punishment is sought to be imposed.[12]

The additional standard of "compelling reasons" is not a redundancy. What it means is that the fact that a heinous crime is committed does not by itself warrant the imposition of capital punishment. What is also necessary is that a compelling reason that is connected to the welfare and safety of society requires the extinguishment of the criminal's life.[13]

B. Pro-death penalty arguments in the context of the constitutional standards

The rationale for imposing Republic Act No. 7659, based on the Constitutional standards, is found in the preface of the Death Penalty Law. It defines heinous crimes as those which are grievous, odious and hateful, that "by reason of their inherent and manifest wickedness, viciousness, atrocity and perversity are repugnant and outrageous to the common standards and norms of decency and morality in a just, civilized and ordered society." It also provides that there are compelling reasons for the reimposition of the death penalty: (1) the upsurge of crimes, which has led to loss of human lives, destruction of property and has affected the nation's efforts towards economic development; and (2) the need to rationalize and harmonize the penal sanctions for heinous crimes in the interest of justice, public order and the rule of law.[14]

Three objectives can be gleaned from these provisions of the law as well as in the deliberations during the Senate, House and Bicameral Conference Committee Hearings. The first objective of the death penalty is for it to serve as a deterrent to the commission of the crimes enumerated therein.[15] This can

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[12] *Debate on S. No. 891*, 9th Cong., (2 February 1993) (Turno en Contra Speech of Senator Arturo Tolentino) [hereinafter Senator Tolentino].

[13] Bernas, *supra* note 11.

[14] Rep. Act No. 7659 (1993) preface.

[15] *Debate on H. No. 62*, 9th Cong. (9 November 1992) (Sponsorship Speech of Representative Manuel Sanchez); *Debate on S. No. 891*, 9th Cong. (1 Feburary 1993) (Turno en Contra Speech of Senator Vicente Sotto): "The death penalty is the most effective means of deterring the commission of crimes of a heinous nature, contrary to the sentiments of others."

be gathered from the policy of the State contained therein, which provides that:

> It is hereby declared the policy of the *State to foster and ensure not only obedience to its authority; but also to adopt such measures as would effectively promote the maintenance of peace and order,* the protection of life, liberty and property, and the promotion of the general welfare which are essential for the enjoyment by all the people of the blessings of democracy in a just and humane society. (emphasis supplied)[16]

This objective is based on man's natural fear of death.[17] Psychologists and philosophers find that death is the most feared phenomenon in the human condition because death is final, irreversible, and because what happens after death is unknown to human beings. Proponents of the death penalty believe that no person in his right mind will risk his life by undertaking a criminal act.[18]

This objective stems from the upsurge of crime in the Philippines. Senator Ernesto Herrera and Representative Pablo Garcia presented statistics in the deliberations of both Houses to support such claim.[19]

A second objective of the law is to ensure the operation of retributive justice. Representative Pablo Garcia, responding to a question by Representative Edcel Lagman, said that:

> ...[t]he position of the committee is that the reimposition of the death penalty is a matter of simple retributive justice. The criminal is punished

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[16] Rep. Act No. 7659 (1993), sec. 1.

[17] Senator Tolentino, *supra* note 12.

[18] *Debate on S. No. 891,* 9th Cong. (1 Feburary 1993) (Turno en Contra Speech of Senator Vicente Sotto) [hereinafter Senator Sotto].

[19] *Debate on S. No. 891,* 9th Cong. (1 February 1993) (Turno en Contra Speech of Senator Ernesto Herrera); *Debate on H. No. 62,* 9th Cong. (10 November 1992) (Interpellations). In the Turno en Contra Speech delivered by Senator Herrera, he cited a statistical study conducted by Mr. Stephen K. Layson in 1985 showing that the execution of a murderer deters the commission of 18 murders. Further, he presented another American study for the period 1933 to 1969 in 1975 by Dr. Isaac Erlich, published in the *American Economic Review,* that a one percent increase in the number of executions per conviction, punishable by death, reduced the number of homicides by 0.6 percent; and a study by Dr. K.L. Wolpin in 1978 showed that the death penalty had a deterrent effect on homicides in England and Wales during the period between 1929 to 1968.

> for his wrongdoing, irrespective of whether that punishment will have any effect on the other would-be criminals or not.

This is based on the principle that criminals have to pay their just deserts, and that the punishment has to fit the crime, in order that the victims and their families may attain justice for the trauma they have suffered due to the wrong that has been inflicted upon them. Senator Tolentino, while abandoning the argument of prevention, proposed that the penalty be imposed as a means of self-defense by the State, a remedy of the State against aggressors, a means it can use to protect itself.[20] Father Bernas also opined that based on the reasons Congress gave in restoring the death penalty, it could be deduced that the death penalty was an exercise of necessity, one which legitimizes self-defense by the State.[21]

The law's third objective is to respond to the call of those who had been clamoring for the reimposition of capital punishment. The pro-death representatives based their claim on surveys conducted by the Philippine News Agency[22] and the Social Weather Station.[23] Because these surveys suggested that the public was in favor of the reimposition of the death penalty, members of the House of Representatives believed that it was their duty to submit to the will of their constituents.

C. Arguments against the death penalty in the context of constitutional standards

In the international arena, the common trend is to move towards the complete abolition of the death penalty or to apply it in a very limited way. United Nations Conventions as well as national laws of countries have taken steps in this direction. Hence, if a punishment's purpose is not only to defend public order and to ensure the protection of the people but also to offer the

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[20] *Debate on S. No. 891*, 9th Cong. (8 February 1993) (Interpellations).

[21] See Bernas, *supra* note 11, at 19.

[22] *Debate on H. No. 62, 9th Cong.* (10 November 1992) (Speech of Pablo Garcia, during the Interpellations), citing the PHILIPPINE FREE PRESS, (7 November 1992). The PNA study was conducted in Metro Manila, and other key cities around the Philippines. It found that 92 percent of Metro Manila respondents favored the death penalty for heinous crimes.

[23] Senator Sotto, *supra* note 18. In the Social Weather Station surveys conducted in December of 1992, 77 percent of the NCR respondents favored the death penalty.

offender a chance to rehabilitate and become a productive member of society, the death penalty should be imposed only in cases of absolute necessity when there is no other means by which society may defend itself.[24] The conditional repeal of the death penalty by the Constitution also conforms to this growing trend.

Contrary to this sentiment, however, Republic Act No. 7659 listed more crimes punishable by death than the law prior to the 1987 Constitution. The Revised Penal Code listed seven crimes as being punishable by death. During the Marcos era, this number increased to 24. In the new law, 46 crimes are considered heinous, 21 of which are mandatory death crimes while 25 are death eligible crimes.[25] Not all the crimes listed in the law were included because they were being committed in increasing numbers. Rather, the reason behind their inclusion in the list was to "maintain the logical symmetry in the penalty structure or profile"[26] because it would have been absurd to impose capital punishment for one kind of heinous crime while merely imposing *reclusion perpetua* for another. For example, the crime of treason should not have been included because the country was not at war when the death penalty law was drafted. This crime was included under Republic Act No. 7659[27] as it would have been ludicrous not to impose capital punishment on what was considered as the most heinous crime.

The objectives provided in the law should be read in the light of the reason for which the penalty was conditionally allowed by the Constitution: capital punishment ought to be used only as a last resort, and only when there are no other possible means of defending society. Had the Constitutional Commission's intention been otherwise, they would not have placed such stringent standards on Congress or would not have conditionally repealed the death penalty at all.

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[24] POPE JOHN PAUL II, EVANGELIUM VITAE (1995).

[25] FREE LEGAL ASSISTANCE GROUP (FLAG), REVIEW OF THE APPLICATION OF THE DEATH PENALTY IN THE PHILIPPINES 1994-1998 at 2 (1999) [hereinafter FLAG].

[26] *Reimposition of the Death Penalty, 1993: Hearings on S. No. 891 and H. No. 62 Before the Bicameral Committee on Justice*, 9th Cong. 5 (1993) (statement of Pablo Garcia, Chairman of the House Panel) [hereinafter Garcia].

[27] Rep. Act No. 7659 (1993), sec. 2.

Thus, the reimposition of capital punishment ought to presuppose that the government had already tried out all other options in addressing the rising crime rate and these other options were not successful in answering the needs for which called for capital punishment.

However, such alternatives were not explored or exhausted by Congress. Congress immediately "jumped the gun" and pushed the emergency button when it felt threatened by the increasing incidence of crime in society. This is not what the Constitution intended. This is not in accord with international trends.

1. The issue of deterrence

It is an objective of the death penalty to deter the convicted criminal from committing another crime. Obviously, this objective is easily attained by the penalty because once it is imposed on the convict, the latter is already dead. However, capital punishment is also intended to deter others from committing similar crimes.

Adherents of the death penalty, however, gloss over the fact that it is not the *severity* of punishment but its *certainty* that makes criminals think twice before committing a crime. Any punishment can serve as a deterrent if it is consistently and promptly employed. When criminals decide to commit a crime or when there is premeditation, they do not necessarily think of the penalty to be imposed. They work under the impression of the extreme unlikelihood that they will be caught or concentrate on actions that will prevent them from being caught. This is all the more so if the crime was not premeditated since such offense is the result of great emotional stress or is because of the influence of external substances such as drugs or alcohol that suspend logical thinking. "Impulsive or expressive violence is inflicted by persons heedless of the consequences to themselves as well as to others."[28]

Even Senator Tolentino admitted that the death penalty cannot be argued on the basis of prevention or deterrence. He said:

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[28]Bedau, Hugo Adam. *The Case Against the Death Penalty* (visited 8 January 1999) <http://www.dnai.com/~mwood/deathpen.html>.

> [I]f we argue on the basis of prevention, there is no penalty — *whether imprisonment or death — that can prevent crime.* That is why, in spite of the fact that that we have the Revised Penal Code or the Penal Code before it already punishing (sic) crimes, those crimes is (sic) still committed. (emphasis supplied)[29]

A study conducted by the Free Legal Assistance Group shows that despite the enactment of the death penalty in 1993, capital punishment did not have any significant deterrent effect on the continued commission of heinous crimes.[30] On the other hand, at a time when the death penalty was being imposed together with Martial Law, the crime rate continued to increase from 1973 to 1976.[31]

2. The theory of retributive justice

The theory of capital punishment being an instrument of retributive justice may be divided into two parts: capital punishment as a means of self-defense by the State, and its being a form of retribution for the victims and the victims' families.

However, a look at the elements comprising self-defense shows that the first argument does not hold water. Self-defense occurs when: (1) there is unlawful aggression; (2) the means employed are reasonably necessary to prevent or repel it; and (3) there is a lack of sufficient provocation on the part of the defendant.[32] Self-defense is contemplated in instances where the offended party has no other recourse but to employ force because of the imminent danger that is going to happen to him if he does otherwise. The second element and the circumstance of imminent danger are not present when the State invokes self-defense to justify the use of capital punishment. There is no situation when the State has no recourse apart from the death penalty with which to protect itself, given that it has far more resources in terms of law enforcement than the convicted criminal does. Thus, the imposition of the death penalty as a means for defending the State is not in line with the idea of fair play.

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[29] *Debate on S. No. 891*, 9th Cong. (8 February 1993) (Interpellations).

[30] FLAG, *supra* note 25, at 29-31.

[31] *Id.*

[32] REV. PEN. CODE, art. 11.

The death penalty, it is argued, also assures the victims of the crime that they will be given justice for the pain and trauma that was inflicted on them. However, punishment by its very nature is retributive and whatever legitimacy found in punishment as just retribution can be satisfied without having to resort to capital punishment. True, criminals have to be punished with the severity appropriate to the offense they have committed and the harm they have done. But severity of punishment has its limitations. Both justice and human dignity serve as these limits. The perception that the victims and their relatives will not be satisfied until the offender is executed is not universal because there are instances when the mere imposition of a penalty on the offender is enough.[33] Likewise, the concept of justice is personal to each and every person. What one may consider as sufficient punishment may be deemed by another.

3. Public opinion

The argument that public opinion is one of the determining factors in imposing the penalty is not reasonable. Representative Edcel Lagman pointed out that neither official public hearings nor plebiscites were conducted in order to determine the true sentiments of the people with respect to the death penalty.[34] The notion that the public was for the reimposition of capital punishment was merely based on surveys, the results of which were influenced by several factors, such as the respondents' understanding of the relevant facts, the tenor of the questions and the selection of respondents who answered the surveys.

D. A price too high to pay

> When we execute a capital defendant in this country, we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial to justify the imposition of state-sponsored killing . . . My 24 years of overseeing the imposition of the death penalty from this Court have left me in grave doubt whether this reliance is justified and

[33] Bedau, *supra* note 28.

[34] *Debate on H. No. 62*, 9th Cong. (12 November 1992) (Interpellations).

> whether the Constitutional requirement of competent counsel for capital defendant is being fulfilled.
>
> — U.S. Supreme Court Justice Harry Blackmun

The Supreme Court has admitted that there is an "alarming inconsistency of non-compliance by the court *a quo* of the procedural rules to be observed"[35] especially in important stages of criminal proceedings such as the arraignment of the accused. Hence, many decisions of the trial court have been struck down for imposing capital punishment on crimes not included in Republic Act No. 7659 and for the reason that the trial court had misappreciated the evidence.

Most of the accused are represented by counselors from the Public Attorney's Office. These public defenders do not have adequate resources to gather documentary and testimonial evidence, conduct investigations and engage the services of experts, considering that their budget is dependent on how much is allocated to their office by the government and how much the accused, who more often than not belongs to the marginalized sector of society, can contribute. Corruption, prevalent in our judicial system, together with the above scenario, leads to injustice.[36] It has been opined that a conviction imposing the death penalty will always be arbitrary because it involves the judgment of a fictitiously infallible human being, whose decision will be based on how each counsel can successfully present his case. Former United States Supreme Court Justice Harry Blackmun stated:

> It seems that the decision whether a human being should live or die is so inherently subjective — rife with all of life's understandings, experiences, prejudices and passions — that it inevitably defies the rationality and consistency required by the Constitution.[37]
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> No combination of procedural rules or substantial regulations can ever save the death penalty from its inherent constitutional deficiencies. The basic question — does the system accurately and

[35] People v. Estomaca, G.R. No. 117485-86, 22 April 1996, 256 SCRA 421, 428.
[36] FLAG, *supra* note 25, at 27-29.
[37] Callins v. Collins, 510 U.S. 1141 (1994, Blackmun, J., dissenting).

> consistently determine which defendants "deserve" to die — cannot be answered in the affirmative.[38]

One life is too high a price to pay, considering the possibilities of judicial error, arbitrariness, and the dangers posed by an incompetent defense counsel. One life is too high a price to pay when the objectives for which the penalty is imposed are not achieved in the first place.

IV. WORLDWIDE DEVELOPMENTS ON THE ISSUE OF CAPITAL PUNISHMENT

The second half of the 20th century has seen major changes in the international scene with respect to official attitudes and policies of various members of the international community on the issue of capital punishment. From an almost universal acceptance of capital punishment, the death penalty is now close to being absolutely proscribed as an archaic and barbaric practice. More and more states are undergoing a radical shift in their penal policies and, in the process, are leaning towards a rehabilitative, as opposed to a retributive, theory of penology.

A. International normative instruments on the death penalty

International norms addressing the limitations of capital punishment and the abolition of the death penalty are essentially a post-Second World War phenomenon. Abolition was implicitly promoted during the drafting of the Universal Declaration of Human Rights[39] in 1948, through the recognition of what human rights law designated as "the right to life."[40] Subsequently, in 1966, the United Nations General Assembly (hereinafter, U.N. G.A.) adopted the International Covenant on Civil and Political Rights (hereinafter, ICCPR), which openly encouraged member nations to adopt measures to reduce the instances of capital punishment, while similarly recognizing the "inherent right to life" and narrowly limiting the application of the death penalty.[41]

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[38] Callins v. Collins, 510 U.S. 1141 (1994, Blackmun, J., dissenting).

[39] G.A. Res. 217 A (III), GAOR 3d Sess., 183d plenary mtg. at 71, U. N. Doc. A/810 (1948).

[40] *Id.* at art. 3.

[41] G.A. Res. 2200 A (XXI), U. N. GAOR 21st Sess., Supp. No. 16, at 53, U. N. Doc. A/6316 (1966).

Discussed hereunder are the various international and regional instruments or agreements which constitute existing conventional international law on the issue of capital punishment. Some of these instruments are international treaties, binding on all states which become parties to them, while some are in the form of resolutions adopted by U.N. bodies and other intergovernmental organizations. Some are of worldwide scope while others emanate from regional intergovernmental organizations and apply to states in those regions. These normative instruments on capital punishment have been categorized into those favoring abolition, those encouraging non-use of capital punishment or those calling for moratoria on executions, and those which limit or reduce the scope of offenses punishable by death or, in the alternative, call for the non-extension of the existing scope of the death penalty or prohibit its reintroduction after abolition.[42] Regardless of the characterization of a particular international instrument, one common underlying theme is apparent: the undesirability of inflicting death on any offender.

1. International treaties favoring abolition

a. The Second Optional Protocol to the ICCPR, which aims for the abolition of the death penalty, was adopted by the U.N. G.A. in 1989. It provides for the total abolition of the death penalty but allows states parties to retain the death penalty in time of war if they make a reservation to that effect at the time of ratifying or acceding to the Protocol.[43] This Protocol is of worldwide scope. The number of states parties to this treaty is 29 as of 1 January 1997.

b. Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), also aims to abolish the death penalty. It was adopted by the Council of Europe in 1982. In particular, it provides for the abolition of the death penalty in peacetime. States parties may retain the death penalty for crimes "in times of war or of

[42] AMNESTY INTERNATIONAL, INTERNATIONAL STANDARDS ON THE DEATH PENALTY — AUGUST 1997 at 3-5 (1997).

[43] G.A. Res. 44/128, U. N. GAOR, 44th Sess., Supp. No. 49, at 206, U. N. Doc. A/44/824 (1989).

imminent threat of war."[44] This particular instrument is regional in scope, with 24 countries as states parties.

c. The Protocol to the American Convention on Human Rights (ACHR) to Abolish the Death Penalty was adopted by the General Assembly of the Organization of American States in 1990,[45] and provides for the total abolition of the death penalty. However, it allows states parties to retain the death penalty in wartime if they make a reservation to that effect at the time of ratification or accession.

2. International instruments for non-use or moratoria on executions

a. Resolution 1997/12 was adopted on 3 April 1997. In this resolution, the U.N. Commission on Human Rights called on all states that had not yet abolished the death penalty "to consider suspending executions, with a view to completely abolishing the death penalty."[46]

b. Resolution 1044 (1994) was adopted on 4 October 1994 by the Parliamentary Assembly of the Council of Europe. The latter urged "all heads of state and all parliaments in whose countries death sentences are passed to grant clemency to the convicted."

c. Resolution 1097 (1996) was adopted on 28 June 1996 by the Parliamentary Assembly of the Council of Europe, which stated that "the willingness...to introduce a moratorium [on executions] upon accession [to the Council of Europe] has become a prerequisite for membership of the Council of Europe on the part of the Assembly."

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[44] Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1982, Council of Europe, art.1.

[45] G. A. Protocol, OAS Doc. 20th Sess. (1990).

[46] U.N. Hum. Rts. Comm. Res. 1997/12, U.N. ESCOR, 37th mtg., Supp. 3, par. 5, E/CN.4/1997/L.20 (1997) [hereinafter U.N. Human Rts. Comm. Res.].

d. Resolutions B4-0468, 0487, 0497, 0513, and 0542/97, were adopted on 12 June 1997, by the European Parliament (the parliamentary body of the European Union) which called on all countries to adopt a moratorium on executions.[47]

3. Reduction in scope of application

a. Resolution 32/61 was adopted on 8 December 1977 by the U.N. G.A. which stated:

> ...the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offenses for which the death penalty may be imposed with a view to the desirability of abolishing this punishment...[48]

b. Resolution 1997/12 was adopted on 3 April 1997 by the U.N. Commission on Human Rights which called on all states that have not yet abolished the death penalty "progressively to restrict the number of offenses for which the death penalty may be imposed."[49]

4. Non-extension of scope and/or non-reintroduction

a. The Human Rights Committee, a body of 18 experts which was established under the ICCPR to monitor the implementation of that treaty, has stated that the "[e]xtension of the scope of application of the death penalty raises questions as to the compatibility with article 6 of the Covenant."[50]

b. The U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions has stated: "The scope of application of the death penalty should never be extended..."[51]

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[47] EUR. PARL. RES. B4-0468, 0487, 0497, 0513 and 0542/97, par. 1, (June 12, 1997).

[48] G.A. Res. 32/61, U.N. GAOR, 32d Sess., par. 1, U. N. Doc. A/32/359 (1977).

[49] U.N. Human Rts. Comm. Res. *supra* note 46, par. 4.

[50] PRELIMINARY OBSERVATIONS OF THE HUMAN RIGHTS COMMITTEE ON THE THIRD PERIODIC REPORT OF PERU SUBMITTED UNDER ARTICLE 10 OF THE COVENANT, par. 15, U.N. Doc. No. CPR/C/79/Add. 67, (1996).

[51] EXTRAJUDICIAL SUMMARY OR ARBITRARY EXECUTIONS: REPORT BY THE SPECIAL RAPPORTEUR, par. 677, U.N. Doc. No. E/CN/4/1994/7, (1993).

c. Article 4 paragraph (2) of the ACHR states that the application of the death penalty "shall not be extended to crimes to which it does not presently apply." Article 4 paragraph (3) states: "The death penalty shall not be reestablished in states that have abolished it."

B. Trends towards abolition: A worldwide perspective

At present, more than half the countries in the world have abolished the death penalty either in law or in practice. Abolition is becoming the general practice of states, with retention becoming the exception. As a matter of fact, the United Nations Security Council, when it established the International Criminal Tribunal for the former nation-state of Yugoslavia and the International Criminal Tribunal for Rwanda, expressly ruled out the death penalty for the gravest of all crimes: genocide, other crimes against humanity, and serious violations of humanitarian law. Moreover, the International Law Commission, a body of some of the world's leading experts appointed by the U.N. G.A., has drafted a statute for a permanent international criminal court which will exclude the death penalty for these crimes.[52] The worldwide trend towards abolition is better appreciated by looking at the abolition movement as it was introduced and gained popularity in various regions of the world.

As can be expected, each region of the world reacted to the abolitionist trend in a manner uniquely its own. A summary follows:

Summary of regional trends on the death penalty[53]

- Western Europe. Here, the abolitionist cause has been widely embraced. There are now only four states that retain the death penalty for ordinary offenses. The last execution took place in Turkey in 1984.

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[52] Amnesty International, *Ill-Treatment and the Death Penalty: A Summary of Concerns* (visited 8 January 1999) <http:\\www.amnesty.org/ailib/aipub/1996/EUR/4571096.html>.

[53] Roger Hood, *The Question of the Death Penalty and the New Contributions of the Criminal Science to the Matter: A Report to the United Nations Committee on Crime Prevention and Control, August 1988* at 105-106 (1988) [hereinafter Report to the Committee on Crime Prevention and Control].

- Eastern Europe. Over the last decade the movement towards abolition has begun to gain a public forum and political creditability in the Soviet Union and the socialist countries of Eastern Europe. The complete abolition of the death penalty in the German Democratic Republic in 1987 may prove to be influential.

- The Middle East and North Africa. Most of the states here have expressed strong support for the continued use of the death penalty, reflecting Islamic beliefs and law.

- Africa South of the Sahara. Only two countries in Africa South of the Sahara have abolished the death penalty for ordinary crimes, but some appear to have become abolitionist *de facto.* However, several countries that seemed to have abandoned the use of the death penalty began to use it again. Very few have an active abolitionist movement.

- Asia and the Pacific. Ten countries have abolished the death penalty. A few others have become abolitionist *de facto.* There is strong official support for the death penalty in several countries, notably the People's Republic of China.

- South and Central America. Six more countries have abolished the death penalty, but the long-term trend towards total abolition has been interrupted at times by political instability when military governments reimposed the death penalty for a variety of offenses against the state and public order.

- The Caribbean. Only one Caribbean country has abolished the death penalty since 1965 and only one other appears to be actively considering it. Some, formerly regarded as abolitionist *de facto,* have executed offenders in recent years.

- North America. Canada abolished the death penalty for ordinary offenses in 1972 and in the United States it was also ruled unconstitutional. However, from 1976 onwards, new statutes have been approved in 36 states although 25 of them have yet to execute anyone.

Presented below in tabular form is a list of countries that have abolished the death penalty since 1976. The table shows that in recent years, an average of two countries a year have abolished the death penalty in law or, having done so for ordinary offenses, have gone on to abolish it for all offenses. The list is based on information available to Amnesty International as of 10 July 1997.

There are now 48 countries that have abolished the death penalty for all crimes, 15 countries that have abolished it for ordinary crimes, and 25 countries that have been abolitionist in actual practice despite the existence of capital punishment in their statute books. These figures amount to a total number of 99 countries that have turned abolitionist, either *de jure* or *de facto.* On the other hand, only 95 countries in the world today have chosen to retain the death penalty.

1. Countries abolitionist in law (Abolitionist De Jure)[54]

Abolitionist for all crimes — Countries and territories whose laws do not provide for the death penalty for any crime:

Table I.

COUNTRY	DATE OF ABOLITION	COUNTRY	DATE OF ABOLITION
ANDORRA	1990	ITALY	1994
ANGOLA	1992	LIECHTENSTEIN	1987
AUSTRALIA	1985	LUXEMBOURG	1979
AUSTRIA	1968	MAURITIUS	1995
BELGIUM	1996	MOLDOVA	1995
CAMBODIA	1989	MONACO	1962
CAPE VERDE	1981	MOZAMBIQUE	1990
COLOMBIA	1910	NAMIBIA	1990
COSTA RICA	1877	NETHERLANDS	1982
CROATIA	1990	NEW ZEALAND	1989
CZECH REPUBLIC	1990*	NICARAGUA	1979
DENMARK	1978	NORWAY	1979

[54] Amnesty International, *The Death Penalty — List of Abolitionist and Retentionist Countries* (visited 7 January 1999) <http:// www.amnesty.org/ailib/intcam/dp/abrelist.html>.

DOM. REPUBLIC	1966	PORTUGAL	1976
ECUADOR	1906	ROMANIA	1989
FINLAND	1972	SAN MARINO	1865
FRANCE	1981	SAO TOME AND PRINCIPE	1990
GERMANY	1949/1987**	SLOVAK REPUBLIC	1990*
GREECE	1993	SLOVENIA	1989
GUINEA-BISSAU	1993	SPAIN	1995
HAITI	1987	SWEDEN	1972
HONDURAS	1956	SWITZERLAND	1992
HUNGARY	1990	URUGUAY	1907
ICELAND	1928	VATICAN CITY	1969
IRELAND	1990	VENEZUELA	1863

TOTAL: 48 COUNTRIES

* The death penalty was abolished in the Czech and Slovak Federal Republic in 1990. On 1 January 1993 the Czech and Slovak Federal Republic divided into two states, the Czech Republic and the Slovak Republic. The last execution in the Czech and Slovak Federal Republic was in 1988.

** The death penalty was abolished in the Federal Republic of Germany (FRG) in 1949 and in the German Democratic Republic (GDR) in 1987. The last execution in the FRG was in 1949; the date of the last execution in the GDR is not known. The FRG and the GDR were unified in October 1990.

Abolitionist for ordinary crimes only — Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances such as wartime:

Table 2.

Country	Date of Abolition	Date of Last Execution
ARGENTINA	1984	
BRAZIL	1979	1855
CANADA	1976	1962
CYPRUS	1983	1962
EL SALVADOR	1983	1973*
FIJI	1979	1964

ISRAEL	1954	1962
MALTA	1971	1943
MEXICO		1937
NEPAL	1990	1979
PARAGUAY	1992	1928
PERU	1979	1979
SEYCHELLES		**
SOUTH AFRICA	1995	1991
UNITED KINGDOM	1973	1964

TOTAL: 15 COUNTRIES
*Date of last known execution
** No executions since independence

Constitutional prohibitions against the death penalty

Out of the 57 countries in the world which, to date, have abolished the death penalty for all crimes, 24 have gone on to prohibit the death penalty in their constitutions, often on human rights grounds. Enshrining the abolition of the death penalty in such constitutions is a way of solidifying abolition by establishing an additional legal basis that can serve as an impediment to any hasty attempt to bring the punishment back.[55]

Table 3.

Country	Title And Date Of Constitution	Article Prohibiting The Death Penalty And Reference To Human Rights
Austria	Federal Constitutional Law of the Republic of Austria, as revised in 1929	Article 85 states: "The death penalty is abolished."
Cape Verde	Constitution of the Republic of Cape Verde (1981)	Article 26 paragraph(2) states: "...in no case will there be the death penalty." Article 26, "The Right to Life and to Physical and Mental Integrity," is included under Title II, "Rights, Liberties and Guarantees."

[55] Amnesty International, *Amnesty International and the death penalty* (visited 8 January 1999) <http:// www.amnesty.org/ailib/intcam/dp/prohibit.html> (hereinafter Amnesty International and the Death Penalty I).

Colombia	Constitution of Colombia (1991)	Article 11 states: "The right to life is inviolable. There will be no death penalty." Article 11 is included under Title II, "Rights, Guarantees and Duties."
Dominican Republic	Constitution of the Dominican Republic (1966)	Article 8 paragraph (1) states: "Therefore, neither the death penalty, torture, nor any other punishment or oppressive procedure or penalty that implies loss or diminution of the physical integrity or health of the individual may be established." Article 8 is included in Title II, section I, "Individual and Social Rights."
Ecuador	Constitution of the Republic of Ecuador (1979)	Article 19 paragraph (1) refers to "The inviolability of life and personal integrity" and states in part: "There is no death penalty." Article 19 is included under Title II, "Rights, Duties and Guarantees."
Germany	Basic Law of the Federal Republic of Germany (of 23 May 1949)	Article 102 states: "The death penalty is abolished."
Haiti	Constitution of the Republic of Haiti (1987)	Article 19 states: "The death penalty is abolished in all cases." Article 19 is included under Title III, "Basic Rights and Duties of the Citizen."
Honduras	Constitution of the Republic of Honduras (1982, in force since 1985)	Article 66 states: "The death penalty is abolished." Article 66 is included under Title III, "Declarations, Rights, and Guarantees."
Iceland	Constitution of the Republic of Iceland (1944)	Article 69, as amended in 1995, reads in part: Capital punishment may never be stipulated by law. Article 69 is included in the section of the Constitution on human rights.
Italy	Constitution of the Republic of Italy (1947)	Article 27 states in part: "The death penalty is not admitted except in cases specified by military laws in time of war." Article 27 is included under Title I, Part One, "Rights and Duties of Private Citizens."

Marshall Islands	Constitution of the Republic of the Marshall Islands (came into effect on 1 May 1979)	"No crime under the law of the Marshall Islands may be punished with death." (Article III)
Micronesia (Federated States of)	Constitution of the Federated States of Micronesia (came into effect on 10 May 1979)	"Capital punishment is prohibited." (Article IV, section 9)
Monaco	Constitution of the Principality of Monaco of (1962)	Article 20 states in part: "The death penalty is abolished." Article 20 is included under Title III, "Liberties and Fundamental Rights."
Mozambique	Constitution of the Republic of Mozambique (1990)	Article 70 states: "1.All citizens shall have the right to life. All shall have the right to physical integrity and may not be subjected to torture or to cruel or inhuman treatment. 2.In the Republic of Mozambique there shall be no death penalty." Article 70 is included under Part II, Fundamental Rights, Duties and Freedoms.
Namibia	Constitution of the Republic of Namibia (1990)	Article 6, "Protection of Life," states: "The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia." Article 6 is included in Chapter 3, "Fundamental Human Rights and Freedoms."
Netherlands	Constitution of the Kingdom of the Netherlands (1983)	Article 114 states: "The death penalty may not be imposed."
Nicaragua	Constitution of Nicaragua (1987)	Article 23 states: "The right to life is inviolable and inherent to the human person. In Nicaragua there is no death penalty." Article 23 is included under Title IV, "Rights, Duties and Guarantees of the Nicaraguan People."
Panama	Constitution of the Republic of Panama (1972)	Article 30 states: "There is no death penalty..." Article 30 is included under Title III, "Individual and Social Rights and Duties."

Portugal	Constitution of the Portuguese Republic (1976)	Article 24, "Right to Life," states: "1. Human life is inviolable. 2. In no case will there be the death penalty." Article 24 is included under Part I, "Fundamental Rights and Duties."
Sao Tomé and Príncipe	Constitution of the Republic of Sao Tomé and Príncipe (1990)	Article 21, "Right to Life" states: "1.Human life is inviolable. 2.In no case will there be the death penalty." Article 21 is included under Title II, "Personal Rights."
Spain	Spanish Constitution (1978)	Article 15 states: "All have the right to life and physical and moral integrity and in no case may they be subjected to torture or inhuman or degrading punishment or treatment. The death penalty is abolished except in those cases which may be established by military penal law in times of war."
Sweden	Instrument of Government of the Swedish Constitution (came into effect on 1 January 1975)	Chapter 2, Article 4 states: "Capital punishment may not occur." Chapter 2 is entitled "Fundamental Freedoms and Rights."
Uruguay	Constitution of the Oriental Republic of Uruguay (1970)	Article 26 states in part: "The death penalty will not be applied to anyone." Article 26 is included under Section II, "Rights, Duties and Guarantees."
Venezuela	Constitution of the Republic of Venezuela (1961)	Article 58 states: "The right to life is inviolable. No law can establish the death penalty, nor any authority apply it." Article 58 is included under Title III, "Duties, Rights and Guarantees."

2. Countries abolitionist in practice (abolitionist *de facto*)

The following are countries and territories which retain the death penalty for ordinary crimes but can be considered abolitionist in practice in

that: (1) they have not executed anyone during the past 10 years or more; or (2) they have made an international commitment not to carry out executions:

Country	Date of Last Execution	Country	Date of Last Execution
ALBANIA	*	MALI	1980
BERMUDA	1977	NAURU	***
BHUTAN	1964**	NIGER	1976**
BOLIVIA	1974	PAPUA NEW GUINEA	1950
BRUNEI DARUSSALAM	1957	RWANDA	1982
CENTRAL AFRICAN REPUBLIC	1981	SENEGAL	1967
CONGO (Republic)	1982	SRI LANKA	1976
COTE D'IVOIRE		SURINAME	1982
DJIBOUTI	***	TOGO	
GAMBIA	1981	TONGA	1982
GRENADA	1978	TURKEY	1984
MADAGASCAR	1958**	WESTERN SAMOA	***
MALDIVES	1952**		

TOTAL: 25 countries and territories

* Preparatory to Albania's joining the Council of Europe, in a declaration signed on 29 June 1996, Pjeter Arbnori, President of the Albanian Parliament, said he was willing to commit his country "to put into place a moratorium on executions until [the] total abolition of capital punishment."

** Date of last known execution

*** No executions since independence

3. Gradual moves towards abolition

a. Reduction in scope

There are several states that have been reluctant to let go of capital punishment. In recognition, however, of the sweeping international trend towards abolition, and perhaps even as a result of certain changes in their individual municipal penal policies, these states have opted to restrict the usage of the death penalty to certain types of crimes — those which are perceived to be the gravest offenses, i.e., "heinous" crimes.

Reduction of the scope of application of the death penalty may be done in two ways: by reducing the number of crimes punishable by death or the so-called capital crimes, and by limiting the types of persons on whom the death penalty may be imposed. Certain international instruments also provide for a reduced scope of the application of the death penalty. The International Covenant on Civil and Political Rights, the American Convention on Human Rights and the U.N. Convention on the Rights of the Child all prohibit anyone under 18 years of age at the time of the crime from being sentenced to death.

b. Moratoria on executions

Only a small number of countries are responsible for the bulk of recorded executions. This list is led by China, with 1,791 executions, followed by Iran, with 139 executions, and then by Nigeria, with less than 100 executions as of 1994. These numbers represent 87 percent of all executions recorded by Amnesty International worldwide.

While choosing to retain the death penalty in their statute books, several countries refrain from executing death row convicts, for a variety of reasons. In January 1996, the Committee of Ministers of the Council of Europe called for a moratorium on executions in member states. A statement made as part of an interim reply to proposals concerning a new abolitionist protocol said: "In the meantime, the Committee of Ministers has encouraged member States which have not abolished the death penalty to operate *de facto* or *de jure* a moratorium on the execution of death sentences."[56]

4. Resistance to the abolitionist trend

a. Retentionist countries

Although the worldwide trend towards abolition has proceeded at a steady pace, in many regions of the world there has been a marked resistance to appeals for change. Indeed there is, in many countries, unwavering official

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[56] Amnesty International, *Amnesty International and the death penalty* (visited 8 January 1999) <http:// www.amnesty.org/ailib/intcam/dp/develop.html>, (hereinafter Amnesty International and the Death Penalty II).

support for capital punishment. Since 1965, no Middle Eastern or North African state has embraced the abolitionist cause. Furthermore, only two nations in Africa, one Caribbean country, one East European, two Asian states, and four of the forty one retentionist states of the United States of America have done the same. Relatively few retentionist states have responded to the appeal made by the United Nations and other international organizations to reduce the range of offenses subject to the death penalty.[57] Nations of the Association of Southeast Asian Nations (ASEAN) are a notable exception to the trend for abolition. All retain the death penalty for a wide variety of crimes and in some countries — notably Singapore and Vietnam — the number of executions is believed to have risen sharply in recent years.

Below is a list of countries that have chosen to retain capital punishment for ordinary crimes:

AFGHANISTAN	ALGERIA	ANTIGUA & BARBUDA
ARMENIA	AZERBAYDZHAN	BAHAMAS
BAHRAIN	BANGLADESH	BARBADOS
BELARUS	BELIZE	BENIN
BOSNIA-HERZEGOVINA	BOTSWANA	BULGARIA
BURKINA FASO	BURUNDI	CAMEROON
CHAD	CHILE	CHINA (People's Republic)
COMOROS	DEM. REP. OF CONGO	CUBA
DOMINICA	EGYPT	EQUATORIAL GUINEA
ERITREA	ESTONIA	ETHIOPIA
GABON	GEORGIA	GHANA
GUATEMALA	GUINEA	GUYANA
GEORGIA	GHANA	GUATEMALA
GUINEA	GUYANA	INDIA
INDONESIA	IRAN	IRAQ
JAMAICA	JAPAN	JORDAN
KAZAKHSTAN	KENYA	KUWAIT
KYRGYZSTAN	LAOS	LATVIA
LEBANON	LESOTHO	LIBERIA
LIBYA	LITHUANIA	MALAWI
MALAYSIA	MAURITANIA	MONGOLIA
MOROCCO	MYANMAR	NIGERIA

[57] ROGER HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE 8 (1989).

NORTH KOREA	OMAN	PAKISTAN
POLAND	QATAR	RUSSIAN FEDERATION
SAINT CHRISTOPHER AND NEVIS	SAINT LUCIA	SAUDI ARABIA
SIERRA LEONE	SINGAPORE	SOMALIA
SAINT VINCENT AND THE GRENADINES	SOUTH KOREA	SUDAN
SWAZILAND	SYRIA	TADZHIKISTAN
TAIWAN (Republic of China)	TANZANIA	THAILAND
TRINIDAD & TOBAGO	TUNISIA	TURKMENISTAN
UGANDA	UKRAINE	UNITED ARAB EMIRATES
UNITED STATES OF AMERICA	UZBEKISTAN	VIETNAM
YEMEN	YUGOSLAVIA	ZAMBIA
ZIMBABWE		

TOTAL: 100 countries and territories. Most of these countries and territories are known to have carried out executions during the past ten years. Of some countries, Amnesty International has no record of executions and is unable to ascertain whether or not executions have in fact been carried out. Several countries have carried out executions in the past ten years but have since instituted national moratoria on executions.

b. The trend towards expanding the scope of the death penalty

There has been a tendency for many states to regard the ultimate sanction as an antidote to crimes that they perceive as rampant. Sometimes, as in China in 1983, capital punishment is imposed as part of a 'law and order' campaign. Thus, over the years, at least fifty-four retentionist countries have increased the number of crimes subject to the death penalty.[58]

c. Attempts to reintroduce the death penalty

Once abolished, the death penalty is seldom reintroduced. Since 1985, over twenty five countries have abolished the death penalty in law or, having previously abolished it for ordinary crimes, have gone on to abolish it for all

[58] Amnesty International and the Death Penalty I, *supra* note 55.

crimes. During the same period only four abolitionist countries reintroduced the death penalty.[59]

C. Related developments in the international community

1. Worldwide developments

a. On the U.N. Economic and Social Council (ECOSOC)

Further progress in the tightening of U.N. safeguards on the death penalty was achieved in July 1996 when ECOSOC adopted a resolution on "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" (resolution 1996/15, adopted on 23 July without a vote). This resolution, originally proposed by Austria, had been adopted by the U.N. Commission on Crime Prevention and Criminal Justice on 31 May 1996 and forwarded to ECOSOC for its consideration. ECOSOC adopted it without amendment. The resolution encourages U.N. member states to ensure that defendants have adequate interpretation or translation facilities if they do not sufficiently understand the language of the court; to allow adequate time for the completion of appeal procedures and petitions for clemency; to ensure that officials involved in decisions concerning executions are fully informed of the status of any such appeals and petitions; and to apply the U.N. Standard Minimum Rules for the Treatment of Prisoners effectively in order to keep to a minimum the suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering.

b. On the Organization For Security And Cooperation In Europe (OSCE)

Within the OSCE, the Office for Democratic Institutions and Human Rights took the first steps towards developing a clearinghouse for information on the abolition of the death penalty in the OSCE area. In particular, it published a report during a review conference in October. Such action helps to fulfill the pledge made by states participating in the 1990 Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (now the OSCE) to "*exchange information within*

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[59] Amnesty International, *The Death Penalty: Facts and Figures* (visited 7 January 1999) <http://www.amnesty.org/ailib/intcam/dp/dpfacts.html>.

the framework of the Conference on the Human Dimension on the question of the abolition of the death penalty and keep that question under consideration."

c. On the African, Caribbean And Pacific States-European Union (ACP-EU) Joint Assembly

The ACP-EU Joint Assembly, a forum of members of the European Parliament (the parliamentary body of the European Union) and representatives of the African, Caribbean and Pacific states which are parties to the Lomé Convention, adopted a resolution on the abolition of the death penalty at their meeting in Luxembourg. Among other things, the resolution requested member states wherein the death penalty is still in force to introduce a three-year moratorium on executions as the first step towards abolition and invited members to support a proposal to be adopted by the U.N. for a universal moratorium on capital punishment.

2. The death penalty in the United States

The United States of America continues to defy the international trend veering away from the use of the death penalty. Instead, a tendency to reintroduce capital punishment can be perceived in some states that previously abolished the death penalty. At present, thirty-eight out of the fifty U.S. states provide for the death penalty in law; the death penalty is also provided under U.S. federal military and civilian law. The total number of convicts executed since the use of the death penalty was resumed in 1977 has now reached 366.

a. Trend towards longer incarceration and restricting parole

Several states, including Virginia, Georgia and Indiana, have recently made available the alternative of life without parole. Taxpayers and lawmakers who have come to realize that capital punishment is extremely costly have supported the move toward life without parole. In Texas, for example, it cost $2.3 million on average to prosecute and execute each case involving capital punishment, as compared to $400,000 for life imprisonment.[60] The development of prison sentences in which parole is restricted, either for a

[60] Carl T. Rowan, *Texas can't resist cries for the death penalty* (last modified 22 October 1997) <http://www.chron.com/content/chronicle/editorial/97/10/23/rowan>.

substantial number of years or *in perpetua*, is a growing trend among states in recent years. As a response to violent murders, almost every state, as well as the federal government, now uses a lengthy guaranteed minimum sentence before parole can even be considered. Thirty-three states employ a sentence of life without parole in some form.[61] A total of fourteen states call for the imposition of a life sentence in which parole is not possible for at least twenty-five years. Others require that the inmate serve at least twenty years before being considered for release.

b. The costs of death penalty[62]

Death penalty cases are much more expensive than other criminal cases and cost more than cases punishable with imprisonment for life with no possibility of parole. The irreversibility of the death sentence requires courts to follow a heightened standard of due process in the preparation and course of the trial. The separate sentencing phase of the trial, in the case of the United States, can take even longer than the guilt-or-innocence-phase of the trial. And defendants are much more likely to insist on a trial when they are facing a possible death sentence.

After conviction, there are constitutionally mandated appeals that drain the resources of both prosecution and defense. Most of these costs occur in every case for which capital punishment is sought, regardless of the outcome. Thus, the true cost of the death penalty includes all the added expenses of the "unsuccessful" trials in which the death penalty is sought but not achieved. Moreover, if a defendant is convicted but not given the death sentence, the state will still incur the costs of life imprisonment, in addition to the increased trial expenses.

Of late, the death penalty has been the subject of political scrutiny in the United States. Various states are starting to take a good long look at their death penalty policy and to evaluate its impact on their budget. Slowly, they

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[61] Richard C. Dieter, *Sentencing For Life: Americans Embrace Alternatives to the Death Penalty* (last modified April 1997) <http://www.essential.org/dpic/dpic.vol.html>.

[62] See Martin Kasten, *An Economic Analysis of the Death Penalty* (visited 25 January 1999) <http:// Yp039.stv438.ilstu.edu/Econ_Web_Pages/Econ/TWA/iss?/Kaksten/Print.html>.

are realizing that capital punishment might be a policy too expensive to maintain.

In assessing the death penalty as a government policy, the economic approach was used by Martin Kasten in his cost-benefit analysis of the death penalty.[63] Among the costs he identified were the investigation costs, trial and sentencing costs, appellate costs, and execution costs. Foregone output or opportunity costs, costs of what he calls "false positives" — cases where an innocent person is executed — and foregone research information are among the other unobtrusive costs also inherent in the prosecution of capital offense cases.

All in all, the costs of a capital case are estimated to range in millions of dollars. These figures might have been considered by state legislatures when they decided to abolish capital punishment in their jurisdictions. These may also be the prime considerations underlying the most recent development in American capital punishment: the limitation of federal *habeas* review. However, most of the costs associated with the death penalty occur at the trial level. Whatever effect cutting back on the writ of *habeas corpus* may have on the time from trial to execution, it is not clear that the changes will make the death penalty less expensive, nor deny the possibility that the imposition of capital punishment may result in the execution of innocent people.

While the benefits of the death penalty could mostly be weighed qualitatively, with reduced incarceration being its most visible benefit, the costs, however, are susceptible of quantitative detail. The investigation, attorney preparation, trial, appellate proceedings, and execution procedures of a capital case exceed the costs associated with a life imprisonment murder case. The death penalty siphons off resources which should be going to the front line in the war against crime—to the police, to correctional systems, and to neighborhood programs which have proven effective in lessening the commission of crimes.

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[63] *Id.*

3. The concept of restorative justice

As more and more countries veer away from capital punishment, their attention then turns to viable and more effective alternatives to the death penalty. Over the past twenty years, restorative justice theory and programs have emerged as an increasingly influential worldwide alternative to criminal justice practice. The concept of restorative justice, rather than retributive justice, does not seek revenge, but seeks to establish harmony.

Restorative justice is defined as a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.[64] It presents itself as an improvement upon traditional criminal justice in that it views criminal acts more comprehensively, recognizing that offenders, rather than mere lawbreakers, harm victims, communities, and even themselves. It gives key roles not only to the government and to the offender but also to the victims and communities as well, measuring success not in terms of how much punishment has been inflicted, but by how much harm has been repaired or prevented. Further, it recognizes the importance of community involvement and initiative in responding to and reducing crime, rather than leaving the problem of crime to the government alone.

Restorative justice rests on several principles: First, that crime is primarily a conflict between individuals that results in the commission of injuries to victims, communities and the offenders themselves; second, the over-arching aim of the criminal justice process should be to reconcile victims, offenders and their communities while repairing the injuries caused by crime; and third, that the criminal justice process should facilitate active participation by victims, offenders, and the communities, and should not be dominated by government to the exclusion of others.

Alternatives to prison are premised upon a restorative concept of justice. Crime is viewed in terms of harming people, not as merely breaking the rules. By extension, offenses should be resolved by fixing relations between victim and offender, not by asserting the abstract interests of the state. As an

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[64] Justice Fellowship, *About Justice Fellowship and Restorative Justice* (visited 18 January 1999) <http://www.justicefellowship.org/about.html>.

alternative to prison, restorative justice hopes to turn the stigmatizing shame of prison, which isolates victims and offenders, into a regenerative shame that recognizes a wrong, establishes responsibility for that wrong, and negotiates a reintegration of the offender into the community. By denying retributive justice, and giving the victim, community, and the offender "ownership" of the offense, restorative justice seeks to correct criminal behavior, heal social problems, give personal meaning to experiences with the justice system, and treat all parties with decency.

Restorative justice has been associated with processes that repair the harm caused by crime through victim-offender reconciliation or mediation programs, family group conferencing, victim-offender panels, victim assistance programs, prisoner assistance programs, and community crime prevention programs. Other outcomes, though reparative in nature, can provide avenues for "making things right." Some of these are restitution programs, community service programs, and victim compensation funds. Among the most common techniques of restorative justice are restitution, diversion, police cautioning, civil action, and victim-offender mediation.

Diversion is the act of creating alternate paths of punishment in the justice system that do not lead to prison. This strategy attempts to deflect the criminal from the social cycle of imprisonment and crime. It usually takes place at the pre-sentencing stage where a host of connections are made between the offender, the victim, and the community. Then, activities aimed at restoring amicability between the parties are undertaken. Diversion has been very helpful in treating younger offenders.

Police cautioning operates by dealing with the young person and his family without laying formal charges against the young offender. The police are instructed to emphasize to the young offender the consequences of continuing to commit crimes. This technique has successfully diverted the majority of juvenile offenders from the court system in New Zealand and Australia.

Civil actions as alternatives to criminal actions are also suggested. In such cases, the judge acts within the parties' definition of the situation. This is a departure from expected behavior in criminal cases where the judge is put in

the untenable position of having to know more than he they actually can. Adherents of restorative justice believe that if more cases are resolved in civil courts, victim satisfaction with sentences will rise and the rehabilitation of offenders will be advanced. This has worked for the Netherlands where women who have been harassed by former partners instituted civil proceedings against the men. They were very pleased with the results, having gained an increased sense of personal authority.

In victim-offender mediation, it is believed that justice will be better served if sentences focused more on the party directly wronged and compensation to the victim was increased.

When considering the range of alternatives to the death penalty, the length of incarceration is not the only issue to be weighed. The discussion should also include alternatives that help reduce the risk of violence and murder. Crime prevention through community policing and gun control, employment opportunities, drug and alcohol rehabilitation programs early intervention for abused and mentally handicapped children are all alternatives to capital punishment in that they lower the risk of crime in the first place.

D. The dynamics of public opinion and politics

Governments that justify the use of capital punishment often use the notion of public support to bolster their use of the death penalty. However, when gauged by opinion polls, public opinion can vary according to the way questions are asked and what options for answers are provided. The decision to kill in the name of the people must of course be made by the body politic. In a perfect world there would be nothing objectionable to implementing a conscious and deliberate decision of the majority. Nevertheless, it is naive to assume that the public knows best. More often than not, the public does not possess all relevant and available data for making an informed decision.

1. Changes in public opinion

Surveys abroad have shown that when voters are offered a variety of alternative sentences, support for the death penalty drops. Gauging sentiment regarding the death penalty is not as easy a task as it first appears. When

opinion polls ask respondents whether they support the death penalty, no alternative punishments are given, and respondents are left to themselves to wonder what might happen if a particular inmate was not executed.

Respondents are often made to believe erroneously that absent execution, offenders will be released to the community after serving a short prison sentence. Even the most ardent death penalty abolitionists might support capital punishment if the alternative was to have dangerous murderers released to live in their neighborhoods.[65] It therefore becomes imperative that survey questions on the death penalty are framed in a manner that tends to elicit responsive answers.

In 1991, a Gallup poll found that seventy-six percent of Americans supported the death penalty, but this dropped to fifty-three percent when they were made to consider life imprisonment without parole as an alternative.[66] When pro-death penalty respondents were asked if they would still favor the death penalty if new evidence showed that the death penalty did not act as a deterrent to murder or that it did not lower the murder rate, only sixty-nine percent of the death penalty supporters maintained their support, and twenty-six percent changed their stand. Clearly, if the public is convinced that the death penalty fails to produce deterrent benefits, support for the death penalty will decline.

In March 1993, the polling firms of Greenberg/Lake and the Tarrance Group conducted a national survey of people's opinions about the death penalty. This poll revealed that an increasing number of Americans favored certain alternative sentences over the death penalty. Although a majority of those interviewed said they favored capital punishment in the abstract, they withdrew this support when the sentence of life imprisonment without parole, coupled with a requirement of restitution, is offered as an alternative. Forty-four percent favored the latter alternative, while forty-one percent selected the death penalty. Even the choice of a sentence that guaranteed restitution and no release for at least twenty-five years caused death penalty support to drop by

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[65] Michael L. Radelet and Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts* (visited 8 January 1999) <http://sun.soci.niu.edu/!critcrim/dp/dppapers/mike_deterence>.

[66] *Id.*

thirty-three percent. These results indicate the public's strong desire for protection from those who have committed society's worst crimes.

There is also a preference for connecting punishment with restitution. Support for the death penalty drops below fifty percent when alternative sentences including restitution are made available options. The seventy-seven percent who favor the death penalty in the abstract, drops to twenty-one percent when a sentence of life with no parole for twenty-five years is considered; if a requirement of restitution is added to that sentence, support drops by thirty-three percent. The sentence of life without parole plus restitution causes a support drop of thirty-six percent and relegates capital punishment to a minority position.[67]

In the Philippines, surveys have consistently shown that public opinion is behind the imposition of capital punishment. It is however possible that this is due to the fact that respondents were *not* given any alternative to death in the said surveys. A time-series study on the respondents' opinion on the death penalty has been conducted nationwide four times a year by the Social Weather Stations (hereinafter, SWS)[68] since 1991. The following are the questions asked:

1. It is not good to impose the death penalty on any convict, whatever his crime may be;
2. People convicted of murder should be subject to the death penalty;
3. People convicted of kidnapping should be subject to the death penalty;
4. People convicted of rape should be subject to the death penalty;
5. People convicted of participation in a military coup should be subject to the death penalty.

The respondents are made to choose from the following answers: (a) agree; (b) undecided; and (c) disagree. A perusal of these questions shows that indeed, the questions asked were in the abstract, and alternative punishments are

[67] Dieter, *supra* note 61.

[68] SWS surveys have been widely used by politicians to support their argument that, being elected representatives of the people, it is their sworn duty to translate into law the desires of their constituents, and if the people clamor for execution, then the State should impose execution for offenders.

glaringly absent.[69] Naturally, faced with a yes or no question regarding the desirability of capital punishment, the respondents would answer in the affirmative for fear of failing to provide the government with the means to control the rising criminality.

Senator Jose Lina, the former Chairman of the Senate Committee on Constitutional Amendments, Revision of Codes and Laws, said that whenever he addressed a forum, the initial position taken by the majority of his audience before he gave a speech on capital punishment would be in favor of the death penalty. He noted, however, that after he had explained the pros and cons of the death penalty, and after open fora had been held, he saw that the people reversed their position regarding capital punishment.[70]

Other factors which, upon consideration by poll respondents, seem to erode support for the death penalty, include: doubts regarding the effectivity of the death penalty; the potential racial injustice that could result from its application; the costs of capital punishment; the absence of uniquely deterrent effects; and the possibility that innocent people could be executed.

A former Justice of the Supreme Court of Japan, a retentionist country, cited pubic opinion as the main reason why Japan is against abolition.[71] In arguing for the abolition of the death penalty, Professor Dando criticizes the government's reliance on public opinion, reasoning that since public opinion is by nature governed by the information given to the public, it may thus be manipulated by the government rather easily.

The importance of well-informed public opinion as a basis for the imposition of capital punishment was also emphasized in Hood's report to the U.N. Committee on Crime Prevention and Control. Hood reported that many countries cite "public opinion" as one of the major reasons for retaining the death penalty. However, a number have abolished it and have consistently resisted attempts to reinstate it, despite such popular support from well-

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[69] SOCIAL WEATHER STATION, SURVEY ON THE DEATH PENALTY (1999).

[70] *Debate for S. No. 891*, 9th Cong. 53 (1993) (Interpellations).

[71] Shigemitsu Dando, *Toward the Abolition of the Death Penalty*, 72 INDIANA L.J., 10 (1996).

informed opinion. He concludes by saying that public opinion polls can prove to be a misleading indicator.[72]

2. The politics of the death penalty

From a certain perspective, politicians cannot be faulted for relying on "public opinion" as a reason for seeking the death penalty; admittedly, they necessarily rely on such social indicators to gauge the sentiment of their constituents. However, as is often the case, politicians nevertheless continue to use the death penalty as some sort of cure-all for crime in a misguided effort to appear tough on crime. As former New York Police Chief Patrick V. Murphy wrote, "[l]ike the emperor's new clothes, the flimsy notion that the death penalty is an effective law enforcement tool is being exposed as mere political puffery."[73]

"Mere political puffery" is an apt description of politicians' stance on the death penalty. Many politicians use capital punishment to distinguish themselves from their opponents. Politicians, in general, have not posed the death penalty as one alternative among a limited number of crime fighting initiatives for which the people must ultimately pay. Rather, the death penalty is used to play on the public's fear of crime and to create an atmosphere in which the extreme view wins.

In 1988, Republican National Chairman Lee Atwater urged his fellow Republicans to capitalize on the issue of crime because "almost every Democrat out there running is opposed to the death penalty." Apparently, the Democrats were listening as well since politicians of all stripes rushed to proclaim their support of capital punishment.[74] In 1990, United States President Bush sought to identify the Republican Party as tough on crime. He introduced a crime bill whose centerpiece was an expansion of the federal death penalty to over forty new crimes. Not to be outdone, the Democrats endorsed a bill allowing the death penalty in over fifty crimes. The bill presently remains in political gridlock, despite two years of debate.[75]

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[72] Report to the Committee on Crime Prevention and Control, *supra* note 53.

[73] Patrick V. Murphy, *Death penalty useless*, USA TODAY, 23 February 1995, at 11A.

[74] *Id.*

[75] As one legal commentator put it: "What they mean when they say they're 'getting tough' is simply

V. AN ALTERNATIVE: LIFE IMPRISONMENT WITHOUT GOOD CONDUCT TIME ALLOWANCE AND/OR WITH PRODUCTIVE LABOR (LIGTAP)

A. Introduction to the chapter

Thus far, this paper has discussed the reasons for an absolute, unqualified stand against capital punishment, and highlighted recent developments in the international scene which support this stand. In this section, an alternative will be offered to answer the need for a severe penalty for those who commit heinous crimes.

Notwithstanding the stand against capital punishment, this paper recognizes and upholds the responsibility of the state to protect everyone from people who are dangerous. Also, seeking vengeance in the form of punishment for persons who have committed heinous crimes is a legitimate human response. But the government should not base public policy entirely on public outrage that may give impetus to acts of retribution. Rather, the government has a responsibility to exercise moral leadership by advancing legal and penal systems that are based on reason, justice and respect for international human rights standards.[76]

Going a step further than saying "no" to a penalty that seems to be popular in the Philippines today, this paper proposes a solution to the problem of appropriate punishment for those who commit heinous crimes. This alternative has been carefully studied to see to it that its implementation respects the rights of the prisoners. The viability of its application given the current economic situation of the country has also been considered.

This paper proposes the removal of good conduct time allowance for prisoners serving life sentences, and to make them do productive labor partly to reform them, partly to punish them, and partly to allow the state to be reimbursed for the costs of incarceration.

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that they are talking tough." *See* D. Von Drehle, *A Broader Federal Death Penalty: Prelude to Bloodbath or Paper Tiger?* THE WASHINGTON POST, 29 November 1991, at A29, quoting Franklin Zimring, director of the Earl Warren Legal Institute.

[76] *Hearings for S. No. 891*, 9th Cong. 29 (1993) (Sponsorship Speech of Senator Joey Lina).

B. Perception v. reality: What does life imprisonment mean in the Philippines?

1. The public perception of life imprisonment.

Senator Francisco Tatad expresses the widespread view that imprisonment is not sufficient punishment for convicts who have committed heinous crimes:

> Rightly or wrongly — fairly or unfairly, [people] have come to believe that the justice system does not work — that nobody is arrested anymore, or that if criminals do get arrested, they are never tried; if tried, they are never convicted; *if convicted, they are not made to suffer the pains of living hell but given the privileges of honored guests in a pre-paid inn.* (emphasis supplied)[77]

David McCord, a graduate of the Harvard Law School and a distinguished professor of law at the Drake Law School, pointed out the reasons why the people's retributivist impulse was not satisfied by the life-without-parole (LWOP) alternative.[78] He narrated some public perceptions of the prison experience, which were not far from the perceptions mentioned by Senator Tatad. He reported that people perceived that the prisons pampered and coddled the criminals, that the lives of the latter were largely composed of idle time, that incarceration was really a pretty good life and not as hard and miserable as the victims and their relatives hoped it would be.[79]

The kind of life prisoners lead may be viewed as easy if compared to the sufferings experienced by their victims and the latter's respective families. Without going into the validity of the public's retributivist impulse, which will be discussed fully in a succeeding chapter, this paper will first focus on the actual prison experience and check how close the public perception is to the realities of a prisoner's life.

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[77] *Hearings for S. No. 891*, 9th Cong. 17 (1992) (Co-sponsorship Speech of Senator Francisco Tatad) [hereinafter, Tatad].

[78] David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA L. REV. 1, 46, (1998).

[79] *Id.* at 47-49.

2. Life imprisonment as defined by law in the Philippines.

Life imprisonment has been held by the Supreme Court to have the same meaning as *reclusion perpetua*,[80] which is the penalty imposed by the state on certain crimes as defined in the Revised Penal Code (RPC). There is no provision in the RPC mentioning life imprisonment, only *reclusion perpetua.* Hence, at present, life imprisonment means an incarceration lasting from twenty years and one day to forty years.[81] Good conduct time allowance, or the deduction on a prisoner's sentence if he behaves in prison, could significantly decrease this maximum of forty years.[82] However, offenders sentenced to *reclusion perpetua* and even death are *not* eligible for the grant of probation that could be given by the Board of Pardons and Parole.[83] On the other hand, the 1987 Constitution provides that the President may grant pardon to the criminal after the latter's conviction.[84]

In addition to imprisonment, *reclusion perpetua* carries with it the accessory penalties of civil interdiction for life or during the period of the

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[80] Garcia, *supra* note 26.

[81] REV. PEN. CODE, amended by RA No. 7659 (1993), art. 27.

[82] REV. PEN. CODE, art. 94. *Partial extinction of criminal liability.* Criminal liability is extinguished partially:

x x x

3. For good conduct allowances which the culprit may earn while he is serving his sentence.

REV. PEN. CODE art. 97. *Allowance for good conduct.* The good conduct of any prisoner in any penal institution shall entitle him to the following deductions from the period of his sentence:

1. During the first two years of imprisonment, he shall be allowed a deduction of five days for each month of good behavior;
2. During the third to fifth year, inclusive, of his imprisonment, he shall be allowed a deduction of eight days for each month of good behavior;
3. During the following years until the tenth year, inclusive, of his imprisonment, he shall be allowed a deduction of ten days for each month of good behavior; and
4. During the eleventh and successive years of his imprisonment, he shall be allowed a deduction of fifteen days for each month of good behavior.

REV. PEN. CODE, art. 99. *Who grants time allowance.* Whenever lawfully justified, the Director of Prisons shall grant allowances for good conduct. Such allowances once granted shall not be revoked.

[83] Pres. Dec. No. 968 (1976), amended by Pres. Decree No. 1257 (1977); Batas Pambansa Blg. 76; and Pres. Dec. No. 1990 (1985), sec. 9.

[84] Const. art. VII, sec. 19, par. (1). Except in cases of impeachment, or as otherwise provided in this Constitution, the President may grant reprieves, commutations, and pardons, and remit fines and forfeitures, after conviction by final judgment.

sentence, as the case may be, and that of perpetual absolute disqualification, which the offender shall suffer even though pardoned as to the principal penalty, unless the same shall have been expressly remitted in the pardon.[85] Civil interdiction is defined as follows:

> Art. 34. *Civil Interdiction.* Civil interdiction shall deprive the offender during the time of his sentence of the rights of parental authority, or guardianship, either as to the person or property of any ward, of marital authority, of the right to manage his property, and of the right to dispose of such property by any act or any conveyance inter vivos.

Perpetual absolute disqualification for public office, on the other hand, shall produce the following effects, as provided in the Code:

> Art. 30. *Effects of the penalties of perpetual or temporary absolute disqualification.*
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> x x x
>
> 1. The *deprivation of the public offices* and *employment* that the offender may have held, even if conferred by popular election.
> 2. The *deprivation of the right to vote in any election* for any popular elective office or *to be elected* to such office.
> 3. The *disqualification for the offices or public employment* and for the *exercise of any of the rights mentioned.*
>
> x x x
>
> 4. The *loss of all the rights to retirement pay or other pension* for any office formerly held. (emphasis supplied)[86]

Therefore, despite the fact that persons sentenced to *reclusion perpetua* in its maximum stand to suffer forty years imprisonment, civil interdiction for life, and perpetual absolute disqualification, it is possible that those sentenced to *reclusion perpetua* may be pardoned by the President anytime after final conviction. They cannot be denied from availing of this presidential prerogative, once it is given, because it is the Constitution that provides for pardon. Furthermore, if convicts behave during incarceration, the Director of Prisons could shorten the periods of their sentence as allowance for good conduct.

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[85] REV. PEN. CODE, art. 40.

[86] REV. PEN. CODE, art. 30.

3. The conditions of prison life.

Once incarcerated, the public, which relies on the State to contain, discipline, and rehabilitate the former, forgets the criminals. Therefore it is good to determine what constitutes actual prison life. This shall give the public a clearer picture of what happens to those sentenced to life imprisonment (henceforth called "lifers").

Lifers are placed in the Maximum Security Compound of the New Bilibid Prisons, located in Muntinlupa. There are numerous problems and issues relating to institutional confinement, most of which can be traced to inadequate funding given to jail establishments. Overcrowding is one of these problems, for it brings about a deterioration or breakdown in a prison system and is a major cause of riots and disturbances in prison.[87] However, the facilities in Muntinlupa cannot be enlarged because its operation needs take precedence over the needs of the inmates. Moreover, large prisons become places of endemic violence.[88] Overcrowding has also caused the place to be unsanitary. In addition, Senator Lina reports that prisoners get raped; are given lousy, distasteful, and insufficient food; and are made to live with bad ventilation.[89] These led the Senator to conclude that the prison system is generally not rehabilitative and actually leads the offender into the life of a more hardened criminal.

McCord enumerates several pains of imprisonment suffered by inmates. These are: loss of access to the outside world, unpleasant physical environment, loss of autonomy, loss of outside relationships, pervasive violence, monotony, unpredictability, and sense of unreality.[90] Rules must be followed at all times. Prisoners are separated from their families, causing them profound pain. There is a chronic fear of suffering violence — even sexual violence — because of housing violence-prone prisoners in close proximity to relatively defenseless victims. There is an atmosphere of absolute, crushing boredom. As a result, prisoners feel a sense of unreality. One *might* conclude that the public's perception that prisoners have it too easy is simply a

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[87] Ramon J. Liwag, *Correcting Corrections*, XI CRIMINAL JUSTICE J. 13 (1993).

[88] *Id.* at 14.

[89] *Debate for S. No. 891*, 9th Cong. 48 (1993).

[90] McCord, *supra* note 78, at 57.

manifestation of willful ignorance that should be ignored in determining public policy.[91]

Interestingly, McCord proceeds to rebut these arguments by providing how some prisoners have negated the pains of imprisonment. He attributes this to three factors. First, prisoners are individuals, and each comes to a prison with a peculiar background and characteristics. Second, most human beings have an incredible capacity to adapt themselves to almost any environment. Third, most prisoners come from outside environments that share many of the characteristics of prison: physical shabbiness, economic want, lack of meaningful opportunities, violence, and unpredictability. Obviously, the more the prison experience resembles the living situation that the prisoner experienced outside the prison, the less pain one expects the prisoner to suffer from being in prison. These three insights together induce a phenomenon McCord calls "lowered expectations." A person with lowered expectations can sometimes find pleasure in circumstances which dissatisfy, or appall, persons with higher expectations.[92] Thus, there are various strategies available whereby individual inmates can avoid the retributive aspects of prison existence,[93] especially since they are given a considerable amount of freedom to move around within the prison grounds. Also, they have relatively minimal demands upon their time during the day.

It is this significant possibility of prisoners creating satisfying prison existences that, McCord believes, leads the public to think that mere imprisonment is not a fitting punishment in highest condemnation cases.

McCord also believes that the life-without-parole (LWOP) alternative fails to satisfy the retributive impulse of the public because it is not limited to highest condemnation cases. Those convicted of heinous crimes and non-heinous crimes suffer the same penalty. Thus, there is no way for the State to distinguish between the severity of punishment that corresponds to varying classes of crimes. This fails to satisfy the public's expectation that certain

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[91] *Id.* at 67.
[92] *Id.* at 69.
[93] *Id.* at 80.

heinous crimes deserve a special punishment above and beyond even other extremely serious crimes.[94]

Retribution, however, should not be the focus of our penal laws. Modern penal laws now focus on the rehabilitation of the criminal, not on the crime.[95] If a rehabilitative penalty can, at the same time, touch upon the retributive objective, then it could be a sanction just as effective but more humane and just, as compared to capital punishment and its alarming results.

C. LIGTAP and the five penological objectives

The primordial aim of criminal law is the prevention and control of crime so that men may live and feel secure in the free enjoyment and development of their capacities for happiness. Public safety is ensured by preventing the commission of offenses through: (1) the deterrent influence of the sentences authorized; (2) the rehabilitation of those convicted; and (3) their confinement when required in the interest of public protection.[96]

The purposes or objectives of penal law have various names that have evolved through the years. These are: specific deterrence or prevention or restriction; general deterrence or exemplarity; self-defense; reformation or rehabilitation; and retribution or justice.

The rationale behind the objective of self-defense is that the State, like the individual, has the right to punish the criminal in order to prevent a wrong from being committed against itself. Since every crime threatens the existence of the State, every crime may be punished by the State.

Adherents of specific deterrence consider the object of punishment to be the prevention of the offender from committing future crimes and the suppression of the danger that society could be subjected to should the law be breached by the criminal. Thus, the individual convict, parolee, probationer, or released inmate is prevented from repeating his criminal act. Its "effectiveness is the joint product of the punishment already suffered, including

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[94] *Id.* at 81.

[95] Lorenzo U. Padilla, *The History of Penal Law*, 40 ATENEO L. J. 109, 119 (1996).

[96] Alfredo Tadiar, *Philosophy of a Penal Code*, 52 PHIL. L. J. 165, 173 (1977).

whatever rehabilitative treatment may have been given, and the fear of punishment for whatever new crime he may intend to commit...."[97] This restrictive theory assumes that by confining the convicted offender in a penal institution or restricting his liberty to a penal farm or colony, he is physically removed from society and thereby prevented from committing any further offense during the period of his sentence.[98]

General deterrence seeks to accomplish its object solely through terror. The public is deterred from the commission of a crime to avoid the punishment which they fear. The commission of crimes is thus restrained and inhibited through the *fear* of punishment. This fear is attained by showing the sufferings of the convicted offender to the public. The message of general deterrence could be stated thus: "Do not do what that malefactor did or you will suffer the same unpleasant consequences."[99]

The general object is to deter all crimes. This, however, is impossible according to Professor Alfredo Tadiar in his paper "Philosophy of a Penal Code,"

> The tendency to [commit] crime, or deviance from rules, is therefore the natural while conformity is the artificial. So long as laws are enacted that do not merely reflect current morality but seek to generate and impose a morality that is not yet accepted, in fact, *so long as rules exist at all*, so long will deviance, hence, crime, continue to exist. (emphasis supplied)[100]

The most basic assumption from the concept of deterrence as viewed by the classical school of criminology is that man is a rational being with freedom of will to calculate the pains and pleasures of a contemplated course of conduct and to make a rational decision on the basis of such calculation. Therefore, people suffering from some mental disease or those who commit crimes in the heat of overwhelming passion when they are temporarily deprived of all reason and capacity to make a rational choice of conduct are impossible to deter.[101] Another assumption is that the offender must be aware

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[97] *Id.* at 43.
[98] *Id.* at 20.
[99] McCord, *supra* note 78, at 32.
[100] Tadiar, *supra* note 96, at 186.
[101] *Id.* at 44.

not only of the prescribed penalty but of a reasonable certainty of its imposition upon him should he be caught. The problem here is that the actual effect of imprisonment upon unspecified members of the general populace can only be speculated. But the offender who had already experienced actual punishment may be deemed to be truly aware of all that it entails.

Sanction awareness is impressed upon the general public through widespread publicity. The more publicity attending the imposition of punishment, the more forcefully the point is driven home to more people that painful consequences await the commission of evil deeds.[102] This is most likely the reason why LWOP is largely perceived to be an ineffective deterrent to crime. Since prisoners are not visible to the public eye, it is easy for outsiders to assume that they are having an easy life in prison. This makes the LWOP alternative contrast sharply with the clearly brutal sanction of capital punishment.

Furthermore, the theory of deterrence assumes that the potential offender fears punishment and consequently desires to avoid it. Thus, where no fear exists among those in whom terror is sought to be instilled, deterrence does not work.

According to the theory of deterrence, punishment should be productive of much pain and suffering, be as shameful and as painful as is humanly possible to bear. The more brutal the punishment, the more effective the deterrent principle becomes. However, preponderant evidence accumulated by sociological studies point to certainty and celerity of punishment as being much more efficacious than severity in deterring crime.[103] The speed and certainty of punishment depends foremost on police efficiency in the detection of crime and identification of the offender. Such speed also serves to deprive the offender of the enjoyment of the fruits of his crime. As sociological findings indicate, such intervening enjoyment between the crime commission and penalty imposition significantly attenuates the deterrent effect of punishment.[104]

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[102] *Id.* at 47.
[103] *Id.* at 52.
[104] *Id.*

Retributive punishment stems from the deep-seated human instinct to seek revenge against those who have inflicted wrongs, and to vindicate the absolute rights or laws violated by the criminal. This justifies the execution of murderers for retributive reasons. "Murderers should suffer, and life imprisonment is insufficient suffering as retribution for taking a life."[105]

In the interest of public safety and order, however, violent expression of such retributivist instinct must be curbed.[106] Therefore the State took over and away from the offended party what the latter considers to be his natural right to punish the offender. The offended party still assumes and expects that the penalty to be imposed will be in the form of a punishment, one that will make the criminal suffer; otherwise, the punishment is a non-response, or, even worse, a reward.[107] Moreover, he thinks that the penalty should be appropriate to the crime, under the theory of "just deserts." Worse, mass media influences public opinion regarding justice issues by framing their coverage of crime in a certain way. Only the most simplistic details are presented, usually only of the vicious and exceptional cases; as a result the public thinks all people labeled as criminals deserve harsh punishment.[108]

The retributive impulse is particularly applicable to heinous crimes or what McCord terms as "highest condemnation cases." He observed the powerful twofold effect of these cases: "First, they tend to be the most highly publicized cases, and thus certainly play a highly significant role in the development of the strong public sentiment in support of death penalty in the abstract. Second, at the level of specific cases, these crimes are the ones that can consistently cause people to abandon whatever preference they may have

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[105] Radelet and Akers, *supra* note 65.

[106] Tadiar, *supra* note 96, at 174.

[107] McCord, *supra* note 78, at 30.

[108] Austin Lawrence, *Prison and its Alternatives: A Content Summary*, (visited at 18 January 1999) <http:// publish.awo.ca/~aplawren/papers/work/prison_and_its_alternatives/prison_english.html>. *Prison and Its Alternatives* is a ten-part documentary produced by David Cayley for the CBC Radio show Ideas. This report is a synopsis of the analyses, cases, and conclusions that were offered by expert participants on the program.

for an alternative to imprisonment."[109] McCord summarized the applicability of the retributive impulse to highest condemnation cases:

> First, a highest condemnation offender deserves punishment that exacts an exceedingly high level of suffering so as to be proportionate to the severity of the crime. Because the prospect of being executed, and the actual extinguishment of one's life by execution, can be expected to generate a high level of suffering in the offender, death is an acceptably proportionate punishment. Second, the pronouncement of a sentence of death vindicates the expressive need to separate highest condemnation offenses from the mass of less heinous crimes, and to label those highest condemnation crimes as demonstrating the ultimate way that criminals can violate the rights of others.
>
> It is little wonder that capital punishment holds such powerful sway at the abstract "standard polling question" level, and in particular highest condemnation cases: it feels so right based on our widespread and deeply rooted retributive sentiments.[110]

But as correctly pointed out by Professor Tadiar, this sense of "penalty-appropriateness" seems to alter with the forward march of civilization. He emphasized that "to an enlightened society, efficiency and effectivity are not the only considerations in judging the quality of criminal justice. Other societal values relating to the dignity and worth of each man, decency, fairness and propriety must be given their proper consideration."[111]

Retributive punishment, especially the death penalty, is not a balm for the wounds of violence. In other countries, there are groups led by victims' families who choose forgiveness over retribution.

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[109] McCord found these "exacerbaters," the existence of which classified a crime as one deserving the highest condemnation: (1) the defendant employed a method of killing that is particularly repulsive because he inflicted more damage than seemed necessary to cause death; (2) the defendant was on a crime spree in which serious crimes other than the homicide that resulted in the death sentence were committed; (3) there were multiple victims; (4) the defendant also kidnapped and raped his victim; (5) defendant had a serious pre-existing criminal record such that the homicide resulted in the death sentence clearly indicated that defendant had not learned his lesson; and (6) the victim was a child. McCord, *supra* note 78, at 24.

[110] *Id.* at 34.

[111] Tadiar, *supra* note 96, at 174.

A statement of Murder Victims Families for Reconciliation (MVFR) reads as follows:

> As families that have lost a loved one to the violence and insanity of murder, we know that violence is not a solution, and that state killing will only continue the cycle...Through our own painful struggles, we have learned that a deeper peace comes through forgiveness. We can never forget the pain our families have suffered, and we work for a day when no other family is forced to endure this suffering...To the politicians, we say *"Don't kill in our name."* (emphasis supplied)[112]

MVFR clearly does not speak for every family that has suffered a loss. Their anti-death penalty activism is a powerful message, however, to those who assume that capital punishment brings closure and peace to surviving families and friends. The death penalty is often viewed as the ultimate punishment for the ultimate crime. But it should be abolished as a remnant from the past.[113]

Capital punishment caters to the retributive and deterrent objects of penology, which belong to the Classical or Juristic school of crime analysis. This school of thought concentrates mainly on the crime itself. The concern is to predetermine the proper relation between the gravity of an offense and the corresponding penalty in order on the one hand to satisfy the victim's desire for revenge and his sense of penalty-appropriateness, and on the other hand, to deter others from committing similar offenses.[114]

In direct contrast to this view is that of the Positivist School, to which the penological objective of reformation belongs. Here, there is a shift in focus and emphasis from the crime committed to the criminal himself. Punishment is to be justified solely by its reformative effect upon the criminal.[115] The rehabilitative aim is "to uplift and redeem valuable human material and prevent unnecessary and excessive deprivation of liberty and economic usefulness."[116] The good in every man, even hardened criminals, is sought. The humanitarian

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[112] The Friends Committee on National Legislation, *FCNLs Death Penalty Page*, (visited 5 February 1999) <http://www.fcnl.org//dp.htm#1>.

[113] *Id.*

[114] Tadiar, *supra* note 96, at 173-175.

[115] *Id.* at 184.

[116] *Id.* at 183, citing People v. Ducosin, 59 Phil. 109 (1933).

philosophers led by Rousseau started this theory. According to these philosophers, the good can take care of themselves so it is the duty of the State to take care and reform those whom society labels as 'bad.'

Where the rehabilitative ideal clashes with the retributive and deterrent objectives is where it seeks to completely eradicate the concept of punishment and substitute it with the idea of preventing crime through treatment.[117] Due to the gradual shift from retribution to rehabilitation, convicts in prisons can be found being taught gainful trade which they could put to use after release and are given medical and even psychiatric treatment to help them cope with their physical, emotional and mental problems. The reformists also advocate the building of correctional systems which do more than house offenders; they seek to provide offenders with the opportunity to become useful, productive citizens after their release from correctional supervision. Offering a continuum of treatment options and punishment sanctions during their period of supervision could do this. Those in favor of rehabilitation hold that in addition to protecting the public from violent and repeat criminal offenders, a primary purpose of the justice system ought to be to hold offenders accountable for making victims whole again, while granting victims the right to be heard in criminal proceedings.[118]

The Revised Penal Code that is currently in force in the Philippines is based on the Classical theory; thus scant regard is given to the human element. Seldom do prisoners come out of the national penitentiary rehabilitated and reformed. Thus, it is high time that a review is made of our penal laws to venture into the Positivist theory.

> Thus, government's readoption of the death penalty is an incongruency in the rehabilitative thrust of the correctional modernization program that may set back our criminal justice system. In this light, government should review Republic Act No. 7659. Moreover, the death penalty has defeated its main purpose of deterring the commission of heinous crimes, more particularly rape.
>
> I have always maintained that what ultimately deters potential offenders from committing crimes is not the severity of punishment,

[117] *Id.* at 184.

[118] Justice Fellowship, *supra* note 64.

> such as death by lethal injection, electrocution or by whatever means, but the certainty of apprehension, speedy and fair prosecution, and eventual conviction if warranted.
>
> — Representative Edcel Lagman[119]

D. Life imprisonment without parole and with hard labor as proposed by the original Senate Bill 891

Lawmakers have already considered providing for the penalty of life imprisonment without good conduct time allowance and with hard labor under the original Senate Bill No. 891 as sponsored by Senator Lina and co-sponsored by Senator Francisco Tatad. The sponsorship speech of Senator Lina contains the following insights:

> A learned circuit judge, J. Wallace Tashima, of the California Central District, maintains that *all the benefits of society from criminal sentencing, save one of retribution or revenge, can be achieved by life imprisonment.* The goals of personal deterrence or preventing the offender from repeating his offense, protecting society, providing an adequate degree of punishment are all achieved by life imprisonment without the possibility of parole. All that the advocates of death want the death penalty to do, life imprisonment can do, according to Reverend Father Fausto Gomez, a staunch human rights advocate and defender of the right to life and human rights.
>
> In an enlightened criminal justice system, imprisonment can provide an opportunity for rehabilitation of the offender.
>
> xxx
>
> (1) [T]here is no empirical evidence that death is a more potent deterrent than the threat of life sentence; (2) unlike capital punishment where execution of a convicted prisoner is irrevocable, imprisonment does not create the risk that an innocent person may be executed and provides room and time for rectification of judicial error; and (3) execution does not leave room for correction, reform and a change of heart, while imprisonment allows for reform.[120]

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[119] Edcel Lagman, *The Role of Congress in the Modernization of the Philippine Correctional System,* XIV CRIMINAL JUSTICE J. 19, 20 (1996).

[120] *Debate for S. No. 891,* 9th Cong. 29-30 (1993).

This bill called for the modification of *reclusion perpetua*, by removing the availability of parole within the thirty years of imprisonment and by allowing executive clemency only after the convict had served thirty years in full. It also provided for a maximum period of imprisonment of forty years. This bill, however, was amended by the Senate to provide for the reimposition of the capital punishment for heinous crimes as described in the bill, despite the sponsors' findings that there were no compelling reasons for such reimposition. Senate Bill No. 891 is the Senate version of the death penalty bill which eventually became Republic Act No. 7659, the law reinstating capital punishment. This same law increased the maximum period of *reclusion perpetua* to forty years.

Since the proposal to impose LWOP was already struck down by the Senators for being ineffective as compared to capital punishment, it could be said that this paper is raising a moot point in offering what appears to be the same kind of punishment as that which the original Senate Bill No. 891 provided.

This paper's proposed alternative, however, differs from that of Senator Lina's with regard to the kind of labor it hopes to impose upon the convicts. The definition of hard labor contained in the original bill is unrealistic, given the current situation of inadequate funding given to jail establishments, and the near-impossibility of increasing that funding due to the current economic crisis.[121]

The said bill described hard labor to consist of heavy physical work imposed upon a prisoner for at least ten hours a day. Examples of heavy physical work enumerated in the bill are: construction work, dredging of *esteros* or rivers, laying down of railway tracks, waste disposal, etc. Clearly, the application of this definition means that offenders convicted of committing heinous crimes will have to be heavily supervised *outside* of prison grounds. While the convicts' performance of these functions translates into savings for the government, an increased number of jail guards will be necessary to prevent the prisoners from causing danger to the outside community, from escaping, and from slacking in the performance of the supposed hard labor. In

[121] Liwag, *supra* note 87.

other words, the quick implementation of this form of labor in the near future is unrealistic due to the inability of the State to hire more guards to supervise offenders.

Hard labor aims to provide the convicts with useful labor in the hope of rehabilitating them into productive workers rather than idlers, and to reimburse the State for the growing costs of confinement.[122] It is a way to keep prisoners occupied and to make them less of a state burden. McCord states several reasons why the penal system cannot guarantee the efficacy of hard labor as a severe punishment for crimes. The foremost reason is based on the fact that it is human nature not to truly commit oneself to activities that one is forced to engage in against one's will. This dictates that an unwilling convict/ laborer will, at every opportunity, be a slacker.[123] Besides, hiring one guard per highest condemnation criminal to supervise labor is obviously prohibitively expensive.[124]

Another point of difference between this bill and the proposed alternative, LIGTAP, is the fact that the sponsors of the original Senate Bill insisted that executive clemency should only be afforded the convict after the latter had served thirty years, which was the previous maximum number of years provided by the RPC for the penalty of *reclusion perpetua*. On the other hand, it can be argued that the constitutional provision granting the President the power to pardon any convict cannot be limited by Congress by law since the Constitution, being ratified by the people, is the highest law of the land. Therefore, executive clemency should be allowed any time after conviction as provided in the Constitution, even for offenders in heinous crimes. While it is true that the extent of the power of the President to pardon convicted criminals could be exercised arbitrarily, and could be bestowed only on those people who are in the President's favor, this is a limitation about which nothing can be done — at least, not unless the Constitution is amended to provide that pardon will only be given after service of forty years for criminals who have committed heinous crimes.

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[122] McCord, *supra* note 78, at 90.
[123] *Id.* at 92.
[124] *Id.* at 93.

E. A more realistic alternative: Life imprisonment without good conduct time allowance and/or with productive labor

Alternatively, the law as it stands can be amended by substituting capital punishment for heinous crimes with life imprisonment of forty years ***without*** good conduct time allowance (LIGTAP). Heinous crimes for which LIGTAP is imposed are differentiated from lesser condemnation crimes that similarly call for the sentence of *reclusion perpetua*. Furthermore, the Revised Penal Code can be amended to provide for productive labor as an additional penalty for heinous crimes, as punishment and as a means to recoup expenses incurred during the long incarceration of the convicts.

This alternative is proposed, despite widespread public opinion in support of capital punishment and this alternative's apparent failure to meet one of the major objectives of penal law, which is that of retributive justice, because there is a need for Congress to have a logical, rational and open frame of mind to arrive at decisions that vitally affect human lives.

To a certain extent, lawmakers must educate the public, especially when it starts to dictate arguments that, to their logical minds, do not seem to be for the best interests of the people, nor meet the objectives for which they purportedly stand. Respect for human rights does not depend on public opinion but on how far the legislators will fight for human rights *regardless* of public opinion.[125]

Despite this alternative's apparent failure to meet the aim of retributive justice, it is clear that the retributivist impulse, albeit natural, is harmful to society when used as the laws' primordial aim. There are dangers that are certain to arise when a legal system places too heavy a reliance on any single one of the penological objectives. There is a real conflict between the objectives of retribution and rehabilitation and specific deterrence and rehabilitation.[126] Retributive punishment concentrates its focus too strongly on the victim's desire for revenge and becomes its brutal instrument. On the other extreme, the rehabilitative ideal is so concerned with the offender's

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[125] *Debate for S. No. 891*, 9th Cong. 32 (1993).

[126] McCord, *supra* note 78, at 26.

interest that it supplants the concept of punishment. Professor Tadiar suggested that the answer to this vexing dilemma could be found by following the doctrine of the famous Greek philosopher Aristotle, that of "The Golden Mean."

Consequently, whereas the proposed alternative does not fully conform to the retributivist impulse, this is not at all detrimental to society. The good thing about this alternative is that it permits society to denounce particularly heinous crimes in a powerful way by creating a special punishment for such offenders.[127] Thus, it is still punishment to a certain extent, but the kind that makes room for rehabilitation. In this respect, it is most unlike the penalty of death which assumes that convicted offenders do not deserve to be reformed. The Philippines needs a system that gives a convict a chance to prove his innocence, if he is indeed innocent, a system that allows him to make reparation and penance if he is indeed guilty, and a system that allows him to reform and reorder his life.[128] Establishing strict rules of behavior in prison, and consistently enforcing them, could teach wrongdoers both respect for authority and regular habits conducive to obedience to the law.[129]

Even those in favor of the death penalty would agree that LIGTAP is a tough penalty for a terrible crime, since it means that, should the convict fail to obtain pardon from the President, the criminal will die in prison and will never commit another crime against the public. Life without parole, as discussed in the chapter on worldwide developments, has been increasingly adopted by many countries as an alternative to capital punishment. It remains the task of Congress to continue to define what crimes should be considered as heinous and thus, deserving of this proposed extreme penalty.

In consonance with the rehabilitative ideal, offenders can be made to perform *productive,* not necessarily hard, labor within prison grounds. Considering the rising costs of incarceration, it is only proper for the State to recover part of the expenses from the prisoners themselves. Therefore, convicts can be made to till the land in Muntinlupa to produce crops that could be the main source of their food. If there is any excess, their harvest could be

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[127] *Id.* at 122.

[128] Tatad, *supra* note 77, at 21.

[129] McCord, *supra* note 78, at 85.

sold to outsiders and the proceeds could be added to the budget for food of the prison facility.

In addition to performing agricultural labor, these offenders can also be made to perform labor for the government within the boundaries of the New Bilibid Prisons. Among the things that could be assigned to them are the painting of license plates; the making of streamers, billboards and other signs to be used by government agencies and instrumentalities; and to serve similar needs of the government for painting jobs, carpentry work, and the like. Part of the vast area occupied by the New Bilibid Prisons could be transformed into a junk shop, wherein convicts are made to recycle dry (hence, not foul-smelling) waste into valuable materials which could be used or sold by some government agencies, depending on their nature. The idea is to tap the prisoners as permanent manpower for the government, allowing the latter to save on wages which it would have paid contractors hired to perform these services.

Notwithstanding this proposal, it must still be pointed out that punishment is a negative form of guiding conduct for it teaches only *after* a violation has been committed.[130] Our criminal justice system is composed of the following steps: (1) investigation; (2) arrest; (3) prosecution; (4) judicial determination of guilt; and (5) punishment.[131] The first four steps are more important than the fifth one, in that if the first four are properly functioning, then the State need not, ideally, rely on punishment to control crime. Professor Tadiar points out that the "difficulty with the notion of punishment" is that "no one type fits all persons who should be punished. What is punishment to one person may not be so regarded by others. Some criminals are sensitive to pain, others to humiliation, others to confinement, and still others to nothing more than a stern word of warning."[132] This concurs with McCord's theory that the ability of the prisoner to adapt to prison life depends on his expectations and his environmental background, so that some perceive it as hell while others are able to create satisfying prison experiences.

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[130] Tadiar, *supra* note 96, at 170.

[131] *Debate for S. No. 891*, 9th Cong. 6 (1993).

[132] Tadiar, *supra* note 99, at 194.

There is a need to look for a real alternative to capital punishment in the Philippines. The extreme conditions provided for in the Constitution that warrant the imposition of capital punishment are not present today. There are no existing compelling reasons as defined by the framers of our Constitution. As long as studies consistently show that death penalty is not a deterrent to crime, then it remains a huge risk, if not a grave loss, to execute offenders since the intended effect is not met in the long run. The quirks in our criminal justice system which spell a likely occurrence of convicting innocent persons pose enough justification for abolishing this extreme penalty.

Public opinion on the issue of capital punishment had been shown to be a weak basis for legislation because of the tendency of respondents to base their opinion on their retributivist impulses, especially when the surveys upon which said opinion was based did not offer the respondents any alternatives to capital punishment. More importantly, it is the task of our lawmakers to control such retributivist impulse so that human rights, especially the constitutional right not to be deprived of life, liberty and property without due process, will be upheld at all times.

Across the globe, there is a trend towards the abolition of the death penalty. Significantly, more than half the countries in the world have become abolitionist in law or in practice. Alternative punishments have been sought by other states, and these efforts have led them to apply life imprisonment without parole.

While it is true that the incidence of heinous crimes in our country calls for the government to respond to these crimes by meting out appropriate punishment to offenders, such punishment should be limited so that it will strike a balance among the penological objectives without necessarily ignoring any of these important purposes. Reform and rehabilitation, rather than retribution, should be the focus of penal law, to keep up with the developments in civilization. Capital punishment, being part of man's dark past, should be allowed to remain just that, a reminder of the past.

Life imprisonment without good conduct time allowance and/or with productive labor is a sound alternative to capital punishment because (1) it is more humane, as it allows the convict to live and be remorseful of the crime

which he has committed; (2) it is just as effective because it prevents the criminal from re-committing the crime in society; and (3) it is least costly in terms of human life since it leaves room for correcting errors.

Although McCord proposes a different alternative, his conclusions are still applicable.[133] Like his proposal, the primary merit of LIGTAP is that it moots all the arguments against capital punishment. It resolves qualms about the propriety of taking human life; avoids the problem that even the most carefully constructed human system cannot dispense the death penalty in a completely even-handed fashion; eliminates the virtual certainty over time of executing innocent persons; renders pointless the ultimately inconclusive debate about whether capital punishment has a general deterrent effect; and eliminate the agonizing strains on all concerned that are inevitably entailed in the protracted capital litigation process.[134]

The costs of capital punishment are difficult to estimate because of the risk that the life taken away is the life of an innocent man. The proposed alternative seeks to prevent such a loss, while making actual offenders pay for their transgressions.

However, punishment is only the last step in the criminal justice system. No form of punishment will be successful if no changes are made in the other aspects of the said system. For a more efficient way of dealing with crime and justice, thorough introspection on the part of the State is required. Problems exist in our law enforcement agencies, correctional facilities, judicial courts, and other aspects of our justice system. Congress should work on improving these first and foremost, before taking the last resort — the imposition of punishment, particularly capital punishment. Our country's difficulties cannot be solved if our legislators take the easiest or most popular route. Any permanent change in the incidence of crime will have to be a result of the cooperative efforts of all the branches of the government.

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[133] We cannot agree to his suggestion of putting highest condemnation criminals through some years of solitary confinement before incarcerating them for life, because, as stated in his paper's title, McCord sought for the penalty which would meet the retributivist impulse and at the same time conform to their constitutional provisions on the rights of prisoners.

[134] McCord, *supra* note 78, at 133.

VI. RECOMMENDATIONS

A. The repeal of Republic Act No. 7659

Capital punishment has no place in our present society. Instead, a new concept of life imprisonment should be imposed as an extreme penalty for those who commit heinous crimes. Republic Acts No. 7659 and 8177 should be repealed. In the place of these laws, Congress must pass a bill that will lower all death sentences to life imprisonment without good conduct time allowance and/or with productive labor (LIGTAP). In the meantime, our legislators should determine which crimes should carry the penalty of additional labor. Also, they should define further what kind of productive labor will be required of these offenders. As discussed, the reform and rehabilitation of these offenders ought to be borne in mind before designing the appropriate penalty for each crime.

B. Institutional reforms

The gravity and severity of punishment for highest condemnation crimes requires that the government places safeguards to ensure the rights of the accused and of prisoners. Adequate legal counsel should be afforded those who are accused of committing heinous crimes.

Punishment will not solve this country's problems on rising criminality. The government should focus on the underlying causes of crime rather than on eliminating the criminals. There is a need to look into, reform and improve the following: the police, the law enforcement agencies, the prosecution arm of the Government, the judiciary, the legal profession, the prison system, the social and political institutions, and society as a whole.[135]

Guillermo P. Enriquez, Jr., former Vice-Chairman and Executive Officer of the National Police Commission, suggests the following as the areas to be corrected in our justice system:[136]

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[135] Tatad, *supra* note 77, at 18.

[136] Guillermo Enriquez, *A National Strategy Against Criminality*, XI CRIMINAL JUSTICE J. 16 (1993).

- There shall be no room for *compadre*, extended family and *palakasan* systems or inter-agency professional rivalries in the enforcement of the law.
- All law enforcement agencies shall restructure their organizations and redeploy resources to pursue programs such as, but not limited to: (a) enhancement of an integrated and unified crime reporting system; (b) establishment of a modern crime alarm and reaction system; (c) improvement of police intelligence and investigation units; (d) acquisition of more sophisticated investigation equipment.[137]
- All police commanders must strive to increase police visibility by deploying more uniformed men and marked vehicles in critical areas. The deterrent effect of uniformed patrols on criminals is very great and the feeling of security among residents generated by smart-looking and pro-people uniformed policemen is immeasurable.[138]
- A relentless, no-nonsense program to remove misfits and scalawags from the police ranks, public safety services, prosecution, courts and from our penal services must be pursued.[139]

In addition, employment opportunities should be provided, rehabilitation programs for drug and alcohol dependents should be maintained; abused children should be taken care of at the earliest possible time; and ownership of guns should be controlled at all times.

Although a longer period of incarceration for those who have committed heinous crimes is suggested, we are definitely not saying that criminals should not be made to suffer unjustly while in prison. The United Nations has set minimum standards for the treatment of prisoners, upholding their human rights. Some of these standards to be followed by our correctional system are:

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[137] *Id.*
[138] *Id.* at 17.
[139] *Id.* at 18.

1. Requirement to provide adequate food;[140]
2. Requirement to provide sanitation and medical care;[141]
3. Requirement to provide accommodation which is not tantamount to ill-treatment;[142]
4. Requirement to ensure that use of punishment cells does not amount to ill-treatment;[143] and
5. Requirement to ensure that conditions in juvenile detention do not amount to ill treatment.[144]

The Standard Minimum Rules, as embodied in national legislation and other regulations, shall also be made available to all prisoners and all persons under detention, on their admission and during their confinement.[145]

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[140] U.N. Standard Minimum Rules for the Treatment of Prisoners, rule 20, par. (1), as cited in Amnesty International, *Ill-treatment and the Death Penalty: A Summary of Concerns* (visited 8 January 1999) <http://www.amnesty.org/ailib/aipub/1996/EUR/4571096.html> [hereinafter U.N. Standard Minimum Rules for the Treatment of Prisoners].

[141] U.N. Standard Minimum Rules for the Treatment of Prisoners, rule 13; rule 15; rule 17(2); rule 22(2).

[142] U.N. Standard Minimum Rules for the Treatment of Prisoners, rule 10; rule 19.

[143] U.N. Standard Minimum Rules for the Treatment of Prisoners, rule 31.

[144] U.N. Convention on the Rights of the Child, art. 37, par. (a), (c).

[145] Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners, procedure 4, as cited in Amnesty International, *Ill-treatment and the Death Penalty: A Summary of Concerns* (visited 8 January 1999) <http://www.amnesty.org /ailib/aipub/1996/EUR/ 4571096.html>.

ARTICLE

THE REGULATION OF CYBERSPACE

Charmaine H. Perdon
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