# SEND IN THE CLONES: IN SEARCH OF A LEGAL FRAMEWORK FOR HUMAN CLONING TECHNOLOGY IN THE PHILIPPINES

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## I. INTRODUCTION

Just stand aside and watch yourself go by, Think of yourself as "he" instead of "I".

- Strickland Gillian

Human cloning is jumping out of the pages of science fiction, and into reality. Technology has reached the point where it could very well create what was once only a product of mankind's imagination. A few years ago, the concept of human cloning was a mere tool to make fictional stories more interesting, and movies more intellectually amazing. But now, the specter of finally making a human clone is becoming more and more possible and, according to some scientists, it is only a matter of time before the first one is created. All of a sudden, there are news reports of scientists racing to make the first human clone, leaving mankind to wonder at the implications of such a scientific breakthrough.

Like so many inventions and discoveries before it, human cloning technology finds itself at the center of the world's attention. For some, it would seem that science is once again reaching into an area that is very sensitive to human existence. In fact, it *is* human existence itself that science seeks to experiment on. After all, the creation of a clone is arguably no less than an act of creating life itself, and existence always follows life. For others, it is a welcome development, a chance for new discovery and to enrich the knowledge of humankind. But for all, it is a matter of incalculable significance. The question of human cloning is not limited

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within the confines of the scientific method. The question of human cloning has penetrated the hearts and minds of the citizens of the world. No aspect of human existence is left untouched by the issue of human cloning which has apparently leaped into the philosophical, spiritual, moral and legal consciousness of the world. The debate about human cloning is a debate over nothing less than what it means to be human.<sup>1</sup>

The first sign of this amazing leap came when Dr. Ian Wilmut, head of the Roslin Institute in Edinburgh, Scotland, announced the successful cloning of a sheep named Dolly on February 23, 1997.<sup>2</sup> Dolly had been cloned from the nonreproductive tissue of one adult female sheep so that she was genetically identical to her sole progenitor.<sup>3</sup> The world was shocked at this scientific breakthrough. "Dolly became a celebrity, the butt of countless jokes, a symbol of modern science, and a source of hype and even hysteria."4 Almost immediately after news broke out about the cloning of Dolly, the world turned its imagination onto the possibility of applying the same technology to eventually clone a human being. This led to countless speculations on the alleged inevitability of human cloning, and even before the science behind the cloning of Dolly was fully explained, people were already going beyond themselves imagining a world of clones, of armies manufactured out of laboratories, of their favorite science fiction movies coming into reality.<sup>5</sup> The sudden global reaction, also spurred by some scientists who prematurely claimed that they were going to clone the first human immediately,6 created a frenzy of opinions both for and against cloning. Overall, the general emotion that pervaded was fear<sup>7</sup>fear of what was possible, and the implications that they entailed for humankind.

After the Dolly newsbreak, the waters of worldwide public opinion were tempestuous, to say the least, and imagination was running wild.<sup>8</sup> Because of this, then U.S. President Bill Clinton took three separate actions. First of all, he immediately imposed a national moratorium on the use of any federal funds for any human cloning research. In a Memorandum dated March 4, 1997, the President stated that:

<sup>&</sup>lt;sup>1</sup> James D. Watson, Moving Toward the Cloud Man, THE ATLANTIC MONIHLY, May 1971, at 50-53.

<sup>&</sup>lt;sup>2</sup> Dolly the Sheep, at http://www.american.edu/TED/dolly.htm (last visited Feb. 21, 2002).

<sup>&</sup>lt;sup>3</sup> LEON KASS & JAMES WILSON, THE ETHICS OF HUMAN CLONING at vii (1998) (hereinafter Kass & Wilson).

<sup>4</sup> *Id*.

<sup>&</sup>lt;sup>5</sup> Adam Greene, Note: The World After Dolly: International Regulation of Human Cloning, 33 GEO. WASH. INT'L L. REV. 341 (2001).

<sup>&</sup>lt;sup>6</sup> Liz Steinberg, THE DAILY RECORD, Dec. 31, 2001.

<sup>7</sup> Thomas Q. Wilson, The Paradox of Cloning, in KASS & WILSON, supra note 3, at 61 (1998).

<sup>&</sup>lt;sup>8</sup> Cloning: Toward a New Concept of Humanity? at hhtp://www.objectivistcenter.org/articles/ pstephens\_cloning-new-conception-humanity.asp (last visited Jan. 22, 2002).

The new technology also raises profound ethical issues, particularly with respect to its *possible use to clone humans*... Federal funds should not be used for cloning of human beings. I want to make it absolutely clear that no Federal funds will be used for human cloning. Therefore, I hereby direct that no Federal funds shall be allocated for cloning of human beings.<sup>9</sup> (Italics supplied.)

The President's second action was to request the private sector to voluntarily refrain from experimentation for the purpose of creating a human clone. Finally, he asked the National Bioethics Advisory Commission (NBAC) to "thoroughly review the legal and ethical issues associated with the use of this technology and report back to [the President] in 90 days."<sup>10</sup> The report of the NBAC and their recommendations will be discussed in a later chapter of this paper.

The hysteria that erupted over Dolly's cloning slowly subsided over the passing of years. Eventually, the question of human cloning was relegated to the back of most people's minds. However, cloning experiments still continued and the science developed at a rapid pace. For instance, scientists at the University of Hawaii produced more than 50 cloned mice by adopting the SCNT technique used to clone Dolly.<sup>11</sup> It was a significant progress because the developmental process of mice is very similar to humans on a cellular level.<sup>12</sup> Experimentation continued and these experiments were being continuously documented by several news websites dedicated to cloning.<sup>13</sup> The latest development in mammalian cloning reached the headlines on February 15, 2002 when a scientist from Texas A&M University announced that his team had successfully cloned a domestic cat.<sup>14</sup> Named CC, the first cloned cat was actually born as early as December 22, 2001 but the announcement was "delayed until the animal had completed its shot series and its immune system was fully developed."<sup>15</sup>

Even before CC was born, the debate on human cloning kicked into high gear once again on November 27, 2001 when Advanced Cell Technology Inc.

<sup>&</sup>lt;sup>9</sup> William J. Clinton, Memorandum from the Office of the President to the Heads of Executive Departments and Agencies (March 4, 1997), http://grants1.nih.gov/grants/policy/cloning\_directive.htm (posted Dec. 11, 2000).

<sup>10</sup> *Id*.

<sup>&</sup>lt;sup>11</sup> Greene, *supra* note 5, at 3.

<sup>&</sup>lt;sup>12</sup> Id.

<sup>&</sup>lt;sup>11</sup> Sac http://www.globalexchange.com/clonenews htm (last visited Feb.21, 2002).

<sup>&</sup>lt;sup>14</sup> Texas A & M Clones First Cat, at http://www.tamu.edu/aggiedaily/press/020214cat\_pics.html (Feb. 14, 2002).

(ACT), a technology company based in Massachusetts, announced that it had cloned the first human embryo, an unborn child in the early stage of development.<sup>16</sup>

The announcement brought about a renewed interest in human cloning, more so this time due to the fact that it was the human embryo itself which was cloned. The possibility of the first human clone loomed ever closer, and the leap into reality might have very well reached its destination. The debates were revived, and the issues were raised once again. This time, the question of human cloning reached the Philippine legal consciousness, as evidenced by a bill to prohibit human cloning filed by Cong. Constantino Jaraula in the House of Representatives.<sup>17</sup>

Science is on the verge of what promises to be one of the greatest scientific breakthroughs of human existence, but it is being held back by the fact that the debates remain unresolved. A huge question mark still hangs over the propriety of developing the technology of cloning human beings. Moral, ethical and legal issues are still floating around, and each person seems to have a different opinion on how these issues should be resolved. However, recent scientific developments might force the prompt resolution of these issues. U.S. Senator Tom Harkin expressed the view that once science had started down the path toward new knowledge, there was nothing anyone could do to stop its progress.<sup>18</sup> The inevitability of new knowledge should be reason enough for a determination of the legal framework within which human cloning should work, specially when the technology which would allow human cloning is already knocking on the door of tomorrow.

## II. THE SCIENCE OF CLONING: A LOOK INTO HUMAN CLONING TECHNOLOGY

What if the great given – a human being is the product of a union of a man and a woman – is no longer a given?

#### - George Will

## A. The Process of Human Cloning

Cloning is a general term describing any procedure that produces a precise genetic replica of a biological object, including a DNA<sup>19</sup> sequence, a cell, or an

<sup>16</sup> To done or not to done, MALAYA, Dec. 7, 2001, http://www.malaya.com.ph /dec07/ednico.htm.

<sup>&</sup>lt;sup>17</sup> H. No. 1203, 12th Cong., 1<sup>st</sup> Sess. (2001).

<sup>18</sup> Arthur Caplan, If Ethics Won't Work Here, Where? in THE HUMAN CLONING DEBATE 61 (Glenn McGee ed., 2000).

<sup>&</sup>lt;sup>19</sup> DeoxyriboNucleic Acid: any of various nucleic acids that are localized esp. in cell nuclei, are the molecular basis of heredity in many organisms, and are constructed by a double helix held together by hodrogen bonds between purine and pyrimidine bases which project inward from two chains containing alternate links of dexoyribose and phospate. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1983).

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organism.<sup>20</sup> Unknown to many, scientists have been cloning elementary substances such as genes and cells for years. Cloning has long been a practical part of science, utilized primarily for reproducing plant life, or for research on a molecular level.<sup>21</sup> In fact, cellular cloning is a naturally occurring phenomenon; the cells in our bodies are clones, and the process of cloning is one that goes on continually.<sup>22</sup> For example, skin cells turn over rapidly, therefore identical copies are naturally produced to replace the ones that wear out.<sup>23</sup> It is this basic natural principle that serves as the basis for the first and most basic method of cloning: *enbryonic cell separation*.

#### 1. Embryonic Cell Separation

Cloning via embryonic cell separation is a sort of forced replication or "splitting" of undifferentiated embryonic cells to form identical twins, triplets or an even greater number of duplicates.<sup>24</sup> Cloned animals can be easily obtained through embryo separation, as illustrated in the following description:

An egg is fertilized in a culture dish and the first few cell divisions are allowed to occur. At this point, when the small mass of eight or so cells is still barely visible to the naked eye, with a microscope and a micromanipulator probe, a technician mimics the natural process of twinning by delicately teasing apart the ball-shaped early embryo to yield eight or more single cells, each of which is then implanted in a receptive female. In the uterine environment (of the host female) each of these single cells behave like a newly fertilized zygote, instead of a cell that is actually two or three or more divisions away from conception. In this way, eight or more genetically identical animals can be produced where before there would have been only one.<sup>25</sup>

In effect, the egg of the female is fertilized with the sperm of the male outside of the female body, and once the embryo is formed, it is forcefully separated so as to create two or more identical cell groups that would eventually develop into the same number of zygotes.

While embryonic cell separation is in itself quite spectacular,<sup>26</sup> and has been available to scientists for quite some time, it does have some significant limitations. First of all, this technique still requires the sexual union of sperm and egg to create the original embryo. It relies upon the "sperm meets egg" miracle to ignite the spark

<sup>20</sup> KASS & WILSON, supra note 3, at xi.

<sup>&</sup>lt;sup>21</sup> E. Donald Shapiro, To Clone or Not to Clone, 4 N.Y.U. J. LEGIS. & PUB. POLY 23 (2001).

<sup>&</sup>lt;sup>22</sup> Potter Wickware, *History and Technique of Cloning, in* THE HUMAN CLONING DEBATE 28 (Glenn McGee ed., 2000).

<sup>23</sup> Id.

<sup>&</sup>lt;sup>24</sup> Elizabeth Price Foley, The Constitutional Implications of Human Cloning, 42 ARIZ L. REV. 647 (2000).

<sup>&</sup>lt;sup>25</sup> Wickware, *supra* note 22, at 25.

<sup>26</sup> Foley, supra note 24, at 648.

of life,27 thus an organism could not be cloned out of the cell of a single person. Secondly, the technique would only work on undifferentiated embryonic cells. Undifferentiated, or totipotent, cells are cells that have not yet lost their ability to differentiate themselves into the numerous body parts that form living organisms.28 Since the early 1950s, embryonic cell separation has been successfully performed on numerous lower species of animals-such as frogs-using undifferentiated cells, but never using adult, differentiated cells.<sup>29</sup> Put simply, it was not possible to further separate the embryo once it has become differentiated, acquiring certain cellular characteristics. Thus, using this technique, a human can only be cloned by splitting cells while it was still an embryo, and thus an adult human being can never be cloned. This also gives rise to the third limitation of embryonic cell separation. Since the embryo would have to be cloned before it even acquires certain characteristics, there is no way of knowing what one is "getting" as a result because the embryo has not yet developed.<sup>30</sup> "The embryo is a unique combination of its mother's and father's DNA, therefore one cannot predict its unique genetic makeup and hence, its appearance, talents or other genetic predispositions."31

Obviously this is *not* the type of cloning which would evoke a wave of debates and discussions from the public. It is a technique severely limited in scope and function, and is still arguably a mere improvement of the natural way of reproduction. The cloning contemplated by science fiction stories and movies is that which allows the creation of a genetic duplicate of a human being, child or adult, male or female, without the benefit of sexual relations. The "cloning" of science fiction is an asexual form of reproduction; that is to say, it is a manner of procreation that does not require the sexual union of sperm and egg in order to begin the process of cell division, which ultimately leads to the formation of a new living creature.<sup>32</sup> Before Dolly came into the picture, biologists believed that once cells have become differentiated, the process of differentiation cannot be reversed, thus the impossibility of cloning an adult. But Dolly was not produced through this technique. The procedure that created Dolly is more precisely termed *Somatic Cell Nuclear Transfer.*<sup>33</sup>

27 Id.

<sup>28</sup> Id. <sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> Id. <sup>32</sup> Id.

<sup>33</sup> KASS & WILSON, supra note 3, at xi.

### 2. Somatic Cell Nuclear Transfer Cloning (SCNT)34

The procedure involves the transfer of the nucleus of the somatic cell (any cell other than eggs or sperm, which are called germ cells) into an unfertilized egg that has had its own nucleus removed.<sup>35</sup> This procedure is best illustrated by an account of how Dolly was actually cloned:

> The recipient- an unfertilized egg- was prepared by drawing out its DNAcontaining nucleus, but leaving the outer membranes and the yolk. Micropippettes are used at this stage of the work: tiny glass tubes, thinner than hairs, a blunt-ended holding pippette to hold the cell by a mild suction, and the much thinner and sharply pointed insertion pipette for the drawing out and placing in. A donor cell-in Dolly's case a mammary gland of a sixyear old Finn Dorset ewe, is prepared by the inverse process: the nucleus is saved and the rest of the cell is discarded.36

The stage of nucleus removal from the egg is called *enucleation*.<sup>37</sup> Once the egg has been enucleated, the nucleus of the donor's cell is carefully selected and placed next to the empty, enucleated egg.<sup>38</sup> A small electric current is then applied to the enucleated egg and donor's cells. This process fuses the egg and cells together, leaving the donor's cells inside the egg that has now been *re-nucleated*.<sup>39</sup> The electric current convinces the cell to begin dividing as though it has been united with a sperm.<sup>40</sup> Once the dividing cell reaches a viable size, it is implanted into the uterus of a female, who then carries the fetus to term in the usual way. The resulting child becomes an exact genetic duplicate of the DNA Donor.<sup>41</sup>

This new method of cloning, introduced by Dr. Wilmut and adopted by the scientists of Advanced Cell Technology, opened the door to a universe of possibilities. Human cloning through SCNT would have unique characteristics that were not present in the old technique. Some of these characteristics expand the possibilities of human cloning to a point where clones can be made out of adults. At the same time, some of these characteristics would show that human cloning technology is not as "limitless" as others would portray it to be.

<sup>&</sup>lt;sup>14</sup> See Annex A for illustration.

<sup>&</sup>lt;sup>35</sup> Id.

<sup>&</sup>lt;sup>36</sup> Wickware, *supra* note 22, at 30.

<sup>&</sup>lt;sup>37</sup> Foley, supra note 24, at 649.

<sup>18</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id. 41 Id.

# B. Characteristics of Human Cloning via Somatic Cell Nuclear Transfer

The SCNT cloning method would allow human cloning without the need of sexual relations. In fact, it would allow the creation of a human being without the meeting of the spermatozoa of the male and the egg of the female, thus making the cloning method one of asexual nature. All other known methods of procreation, such as sexual intercourse, artificial insemination and *in vitro* fertilization, are sexual forms of procreation because they "rely upon the 'sperm meets egg' miracle to ignite the spark of life.<sup>42</sup> Before the development of SNCT, there was only one other known way of asexual reproduction, and it is known as *parthogenesis*,<sup>43</sup> otherwise known as *virgin birth*.<sup>44</sup> The asexual aspect of human cloning technology has been severely criticized by several authors, including Leon Kass.<sup>45</sup> According to Kass, "asexual reproduction, which produces 'single-parent' offspring, is a radical departure from the natural human way, confounding all normal understandings of father, mother, sibling, grandparent, etc., and all moral relations tied thereto."<sup>46</sup>

Somatic cell nuclear transfer allows the creation of a human embryo through the replication of an adult, differentiated cell. "This development would allow the creation of genetically identical individuals that are a generation apart."<sup>47</sup> As discussed above, scientists can extract a cell from any part of the cell donor's body, and use it to create an entirely new human embryo. Thus, a single cell from any human being can serve as the source of a new human life through SCNT cloning.

Though this technology could allow the cloning of an adult human being, it is absolutely impossible to grow "instant adults". Humans conceived by cloning come into the world in the usual way. The cloned embryo must be implanted into the womb of a human surrogate mother who would have to carry it through a

<sup>\*?</sup> Id.

<sup>&</sup>lt;sup>(1)</sup> Parthogenesis is a form of asexual reproduction. It may occur spontaneously when the egg of a female spontaneously duplicates its DNA and begins dividing as though it had been fertilized by sperm. This phenomenon has been observed in various species. Some scientists have speculated that parthogenetic birth could theoretically account for one out of every two million humans. See LAURENCE E. KARP, GENETIC ENGINEERING: THREAT OR PROMISE? 185 (1976).

<sup>&</sup>lt;sup>44</sup> The eggs of most species, including humans, can be stimulated to grow without fertilization. This occurs naturally and randomly so far as we can ascertain, and may account for alleged examples of virgin birth, including that perhaps of Jesus-but only on the assumption that the son of the God of the Christians was in fact her daughter. For parthogenesis only produces females. See John Harris, Embryos and Hedgehogs: on the Moral Significance of the Embryo, in EXPERIMENTS ON EMBRYOS: COMPILATION 71 (1990).

<sup>&</sup>lt;sup>45</sup> Leon Kass is the Addie Clark Harding Professor in the College and The Committee on Social Thought at the University of Chicago.

<sup>&</sup>lt;sup>46</sup> Leon Kass, The Wisdom of Representance: Why We Should Ban the Cloning of Humans, in THE HUMAN CLONING DEBATE 76 (Glenn McGee ed., 2000).

<sup>&</sup>lt;sup>47</sup> Greene, supra note 5, at 342.

normal gestation period.<sup>48</sup> Contrary to popular speculation, clones are still "born"; they are not created out of thin air. Elizabeth Price Foley<sup>49</sup> used the Michael Jordan example to put this point across to her readers, as follows:

If Michael Jordan, for example, wanted to clone himself, he could do so, but the clonant would be born a baby who would have to be raised, trained and educated as any other child. Michael Jordan II would have his own life experiences-friends, successes and failures, historical perspective on the world, *inter alia*— all of which would combine to form an adult who may or may not be a great basketball player.<sup>50</sup>

Thus, speculations that clones would be created and raised inside a laboratory are unfounded. A clone must be borne by a female; it cannot be given birth in a laboratory.<sup>51</sup> As would be explained later on, our laws would not allow a child to be taken forcibly from his or her surrogate mother. Parental ties would still be significant even for a cloned human being.

The characteristics stated above would lead to the realization that a clone, despite his or her genetic similarity to the cell donor, would still be a different person. Before any legal or philosophical argument could come into the picture, science itself would step in to tell us that the clone would still be a different organism. Even a cloned organism does not inherit *all* its DNA from its progenitor.<sup>52</sup> Even though the egg had been *eucleated* to allow the entrance of the donor cell's nucleus, a small amount of mitochondrial DNA still remains in the cytoplasm of the egg cell.<sup>53</sup> Therefore, the clone is not the *exact* genetic duplicate of the cell donor; the mitochondrial DNA, though very minimal, could still account for some genetic difference between the clone and the donor. This only means that males can never be perfectly cloned, and females can only be perfectly cloned if the somatic cell and the egg.<sup>54</sup> However, scientists have not yet determined how much of an effect the presence of the mitochondrial DNA would have on the cloned human.<sup>55</sup>

<sup>&</sup>lt;sup>48</sup> Foley, *supra* note 24, at 655.

<sup>&</sup>lt;sup>49</sup> Professor of Law, Michigan State University, Detroit College of Law; J.D. University of Tennessee L.L.M. Harvard Law School.

<sup>&</sup>lt;sup>50</sup> Foley, *supra* note 24, at 656.

<sup>&</sup>lt;sup>51</sup> Id.

<sup>52</sup> KASS & WILSON, supra note 3, at xiv.

<sup>53</sup> Id.

<sup>&</sup>lt;sup>54</sup> Id.

<sup>&</sup>lt;sup>55</sup> Id. at xv.

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The premise that the clone is a unique and distinct is further strengthened by the natural existence of identical twins. Twins are "nature's long-standing version of human clones,"<sup>56</sup> yet despite their similar genetic blueprints,<sup>57</sup> and despite the fact that they are raised in almost similar environments, they still show distinct personalities and traits, both intellectually and physically. The existence of identical twins should dispel one popular misconception regarding human clones; genetically identical individuals are not novel and they project distinct personalities.<sup>58</sup> The difference in traits would even be more apparent in the case of a human clone. A human clone developed from an adult cell would be raised in a very different environment than its predecessor. The result would be large physical and mental differences between the human clone and the original person.<sup>59</sup> The misconception of clones being the exact same person, and the argument against it, is given by Philip Kitcher<sup>60</sup> when he wrote:

Those beguiled by gene-talk move quickly from the idea that clones are genetically identical (which is to a first approximation, correct) to the view that clones will be replicas of one another. Identical twins reared together are obviously similar in many respects, but they are by no means interchangeable people. Minute differences in shared environments can obviously play a large role. How much more dissimilarity can we anticipate given much more dramatic variations?<sup>61</sup>

The effect that environment has on a cloned organism's development plays a large part. As a complex organism such as a human being develops, "prenatal and early natal environmental conditions will influence its maturation and can have a significant impact on its development."<sup>62</sup>

To summarize, while many popular myths exist about human cloningevoked from images out of science fiction movies and books-some of these fantastic notions have little grounding in scientific fact. It would be important to separate scientific fact from fiction in order to have a better understanding of the technology that the law is trying to handle.

<sup>&</sup>lt;sup>56</sup> Adam Greene, *supra* note 5, at 342.

<sup>&</sup>lt;sup>57</sup> Twins are developed from a single fertilized ovum that splits into equal halves early in embryonic development and therefore have the same genotype. Identical twins are of the same sex and usually resemble each other very closely both physically and mentally.

<sup>&</sup>lt;sup>38</sup> Greene, supra note 5, at 343.

<sup>&</sup>lt;sup>59</sup> Id.

<sup>&</sup>lt;sup>60</sup> Philip Kitcher is the author of *The Lives to Cone, Abusing Science*, and other books. He is Presidential Professor of Philosophy at the University of Chicago.

<sup>61</sup> Philip Kitcher, Hionon Cloning, in THE HUMAN CLONING DEBATE 142 (Glenn McGee ed., 2000).

<sup>12</sup> KASS AND WILSON, supra note 33, at xv.

## C. Medical Benefits of SCNT Cloning and Research

The National Bioethics Advisory Commission<sup>63</sup> recognized two areas in which human cloning could result in a reasonable medical benefit to human health. The first is in assisted reproduction. One could argue that current reproductive options are insufficient to meet the needs of some couples, particularly where both couples are infertile.<sup>64</sup> The other major medical benefit would be in the field of organ and issue transplantation.<sup>65</sup> Organs created out of cloning cells would run less risk of being rejected by the patient's immune system, thus greatly improving the chances of the patient to survive a transplant operation.

Further research into somatic cell nuclear transfer technology is argued to be beneficial to mankind. Dr. Richard Seed, one of the leading proponents of human cloning, suggests that it may someday be possible to reverse the aging process because of what we can learn from cloning.<sup>66</sup> The technology could also be further developed in order to allow the manipulation of genes so as to remove the risk of fatal genetic diseases.<sup>67</sup>

The medical benefit of assisted reproduction is subject to many moral, social and legal questions. For the purposes of this paper, it would be important to assess the legal rights of the family as regards reproduction by looking into its rights under the Constitution and family law principles. This will be discussed fully in a later chapter.

# D. Limitations of SCNT Cloning Technology

As with any technology, SCNT cloning also has its disadvantages. As of present, the technology is still in its experimental stages and as such is still subject to a certain amount of risk and uncertainty. When Dolly was cloned, the scientists had to go through 276 failed attempts at cloning the embryo that eventually became Dolly.<sup>68</sup> However, the success-failure ratio has greatly improved over the years. When Advanced Cells Technology, Inc. developed the first human embryos, they used 71 eggs from seven volunteers.<sup>69</sup> It can be argued that such an increase is not enough. For some, cloning will never be an acceptable form of reproduction as long as the amount of failed attempts is still significant. Most would argue that the loss of

<sup>&</sup>lt;sup>63</sup> National Bioethics Advisory Commission, Cloning Human Beings: Report and Recommodutions of the National Bioethics Advisory Commusion (1997), at http://bioethics.georgetown.edu/nbac/ (hereinafter Cloning Human Beings).

<sup>64</sup> Id.

<sup>&</sup>lt;sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> KASS & WILSON, supra note 3, at x.

<sup>69</sup> To clone or not to clone, supra note 16.

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many fetuses in experimentation would be "unacceptable because we place too high a value on human life to allow humans to be callously discarded through experimentation."<sup>70</sup> Dr. Hessel Bouma III<sup>71</sup> also raises the question of genetic mutations. He stated that, "genetic material in the nucleus may have accumulated years of mutation, mostly harmful. Clones from adults might therefore have substantially increased risks of cancer and various genetic conditions, including cell aging and increased vulnerability to the possibility of birth defects."<sup>72</sup>

Human cloning technology via somatic cell nuclear transfer could indeed be one of the greatest scientific breakthroughs in human history. When the world realized that human cloning has become an almost inevitable possibility, it reacted in various ways. The available technology drove countries and organizations to act in anticipation of human cloning.

## III. GLOBAL HISTORY OF HUMAN CLONING: HOW THE WORLD REACTED

It is precisely in a broken age that we need mystery and a re-awakened sense of wonder: need them in order to be whole again.

Ben Okri, Binds of Heaven

## A. Worldwide Reaction to Human Cloning

Leon Kass said, "shallow are the souls who have forgotten how to shudder."<sup>73</sup> Perhaps he would be happy to observe that most of the world did indeed shudder at the thought of human cloning.

When the NBAC was tasked by President Clinton to draft a report on human cloning, it concluded that

(I)t is morally unacceptable for anyone in the public or private sector whether in a research or a clinical setting, to attempt to create a child using somatic cell nuclear transfer cloning....(T)he commission believes it would violate important ethical obligations were clinicians or researchers to attempt to create a child using these particular technologies, which are likely to involve unacceptable risks to the fetus and/or potential child.<sup>74</sup>

<sup>&</sup>lt;sup>70</sup> Notes & Comments, Human Cloning: New Hope, New Implications, New Challenges, 15 TEMP. INT'L & COMP. L. J. 171 (2001) (hereinafter New Hope).

<sup>&</sup>lt;sup>71</sup> Hessel Bourna III is a professor of biology at Calvin College in Grand Rapids, Michigan.

<sup>&</sup>lt;sup>72</sup> New Hope, *supra* note 70, at 185.

<sup>&</sup>lt;sup>73</sup> Kass, *supra* note 46, at 72.

<sup>&</sup>lt;sup>74</sup> Cloning Human Beings, supra note 63.

Using this finding as a springboard, the NBAC proposed that legislation should be enacted to ban human cloning in the U.S. until such time as the country would be ready to accept the technology.<sup>75</sup> Thus, several bills were passed in the U.S., both in the federal and the state level, to ban or regulate the use of human cloning technology.<sup>76</sup>

Many public leaders in the United States responded to the announcement about Dolly with immediate and strong condemnation of any attempt to clone human beings in the new manner.<sup>77</sup> The reasons ranged from frightening science fiction imagery to the judgment that cloning of human beings is a serious violation of basic human rights and human dignity.<sup>78</sup>

According to Kass, people are repelled by many aspects of human cloning. "They recoil from the prospect of mass production of human beings, with large clones of look-alikes, compromised in their individuality."<sup>79</sup> Aside from this, Kass also finds the whole idea of human cloning revolting.<sup>80</sup> As to why the human race finds the idea revolting and oppressing, he argues that "we are repelled by the prospect of cloning human beings not because of the strangeness or novelty of the undertaking, but because we intuit and feel, immediately and without argument, the violation of things that we hold dear."<sup>81</sup>

On the other hand, James Q. Wilson answered Kass' arguments by calling for a more learned perspective from everyone, asking people to "pause and identify more precisely what it is about the (human cloning) process that is so distressing."<sup>82</sup> Wilson made the observation that critics of human cloning technology can never pinpoint particularly what aspect of human cloning they find so appalling. However, over the course of the years several writers have sought to define the issues that present themselves whenever human cloning comes into discussion.

### **B.** Cloning: an Issue for the Human Race

Kass' argument that humankind has a natural repugnance to the idea of human cloning<sup>83</sup> should be broken down into specific issues. The issues range from the philosophical to the scientific. These will be discussed briefly only to emphasize

" Id.

<sup>75</sup> Id.

<sup>&</sup>lt;sup>76</sup> WILSON, supra note 7, at 62.

<sup>&</sup>lt;sup>77</sup> Cloning Human Beings, supra note 63.

<sup>&</sup>lt;sup>79</sup> Kass, *supra* note 46, at 78. <sup>80</sup> *Id.* at 79.

<sup>•• 1</sup>a. at •• Id.

<sup>•</sup> *1a*.

<sup>&</sup>lt;sup>82</sup> WILSON, supra note 7, at 61.

the rationale behind the numerous political and legal developments that have taken place in different jurisdictions.

# 1. Religious objections: supplanting God in creation

Religious groups comprise some of the most vociferous advocates of a ban on human cloning. It is argued that human cloning runs in opposition with many religious views on family and procreation. One religious objection is that cloning violates God's will by creating an infant in a way that does not depend on human sexual congress.<sup>84</sup> This would, according to religious groups, be a distortion of God's plan for creation. The NBAC Report on Human Cloning slightly overlooked its policy of not relying on religious persuasion when it even included the Bible account of Creation<sup>85</sup> in its chapter entitled "Considering Ethical and Religious Perspectives on Human Cloning."<sup>86</sup>

### 2. The issue of human dignity

Opponents of continued experimentation on human technology view the process of human cloning as contrary to human worth and dignity. Cloning jeopardizes the personal identity and autonomy of the clone because a cloned child is "deliberately deprived of a normal social identity."<sup>87</sup> Furthermore, it is argued that human cloning would turn humans into mere commodities and artifacts, thereby demonstrating callousness and depersonalization of human life.<sup>88</sup> For proponents of this argument, cloning transforms the procreation process into a "manufacture",<sup>89</sup> thus devolving the creation of the human being into a mechanical process, as opposed to the original magic of sexual procreation.

# 3. Socio-political risk: inequality and discrimination

Many critics of human cloning express concerns that cloning would be used to remove "undesirables" from society through selective breeding.<sup>90</sup> Such a development would lead to severe social inequalities. The opponents of human cloning assert that human cloning is a "dangerous political instrument because in the production of desired human characteristics, generally favored children will diverge from others.<sup>91</sup> The process of cloning might eventually eradicate genetic diversity,<sup>92</sup>

<sup>84</sup> WILSON, supra note 7.

<sup>85</sup> Genesis 1:3.

<sup>86</sup> Cloning Human Beings, supra note 63.

<sup>&</sup>lt;sup>87</sup> New Hope, *supra* note 70, at 178.

<sup>&</sup>lt;sup>88</sup> Id.

<sup>&</sup>lt;sup>89</sup> Id.

<sup>90</sup> Id. 91 Id.

leading the way to a society that discriminates against people without desirable genetic materials.

The reverse aspect of this type of discrimination is even more likely. Clones, being products of unnatural reproductive processes, might be subjected to ridicule from society. At the very least, the clone might suffer the pain of being unaccepted by the society in which he or she is placed. Human beings created through human cloning technology would have to face the bias of a society that fears what it perceives to be unnatural. Furthermore, the government might even step in to control the lives of the clones by regulating their lives, requiring them to register as clones, or denying them some rights available to people born naturally. In fact, there are speculations of human clones constituting their own genetic race, different from the rest of the world.

# 4. The importance of parental ties: preservation of marriage and the family

Critics of human cloning argue that human cloning would eventually destroy the institution of family. After all, when it is no longer necessary for a man and woman to sexually reproduce, the substantial necessity of the two-parent family is suddenly put into question. To many individuals, cloning represents a threat to the traditional vision of family. "Cloning would further 'de-link' sex and procreation, providing another manner of creating children without the necessity of sexual intercourse."<sup>93</sup>

Furthermore, human cloning technology raises very substantial questions regarding family and family relations. For instance, the determination of the actual parent of the cloned human being is still a subject of much debate.

# 5. Scientific issue: Diversity for the welfare of the species

As most evolutionary scientists would argue, the survival of a species partly depends on one important characteristic: sufficient diversity of the species.<sup>94</sup> Many opponents of the technology argue that society has a responsibility to preserve the diversity and integrity of the human gene pool.<sup>95</sup> According to Wilson, we have no

<sup>92</sup> I.I.

<sup>&</sup>lt;sup>91</sup> Elizabeth Foley, *supra* note 24, at 665.

<sup>&</sup>lt;sup>94</sup> WILSON, supra note 7, at 68.

<sup>&</sup>lt;sup>95</sup> Christine Willgoos, FDA Regulation: An Answer to the Questions of Human Cloning and Gemline Gene Therapy, 27 AM, J.L. & MED. 101 (2001).

way of knowing what environmental challenges will confront us in the future.96 "Traits that today are desirable may become irrelevant or harmful in the future; traits that now are unappealing may become essential for human survival in the centuries ahead."97

Cloning creates the opportunity for people to prefer one trait over another. In effect, a trait that could be essential for the species' survival might be accidentally or purposely eradicated from the human race because of gene manipulation.

## 6. A recolting concept: the spare organ farm

One of the most common fears associated with human cloning is that individuals conceived by cloning would be forced to serve as organ donors.<sup>98</sup> For example, a person dying from heart disease might create a human clone of his or her self in order to later "harvest" the heart from the clone. This fear is founded on the possibility that a clone would be treated not as a valued individual, but as a possession or as a commodity.99 Cloning might be used to create an inferior human being at the whim of a genetic donor,<sup>100</sup> thus evoking images of clones in laboratories being used as spare organ banks.<sup>101</sup>

# C. Worldwide Trend of Legislation

Even though Dolly was created in Scotland, the news of the successful cloning sent ripples through the different states and jurisdictions of the world. Some of these countries acted immediately to prepare for the possibilities of human cloning, while some took a little more time to adequately determine a legal stand on the issue. The trend of worldwide action was to legislate on the new technology of human cloning.

# 1. Swift action: the U.S. legislative reaction to human cloning

Less than a week after Dolly was introduced to the world, the President of the U.S. imposed a national ban on the use of federal funds for any human cloning research.<sup>102</sup> Simultaneously, he asked the NBAC to come up with a comprehensive report on the propriety of human cloning technology. In June 1997, the NBAC

<sup>%</sup> KASS & WILSON, supra note 3.

<sup>&</sup>lt;sup>97</sup> Id. at 69.

<sup>&</sup>lt;sup>98</sup> Foley, *supra* note 24, at 656.

<sup>99</sup> Willgoos, supra note 95, at 103. 100 Id. at 103.

<sup>101</sup> Id.

<sup>102</sup> Susan Greenlee, Dolly's Legacy to Human Cloning: International Legal Responses and Potontial Human Rights Violations, 18 WIS. INTL. L. J. 537 (2000).

submitted its report to the President and made the conclusions that "it is morally unacceptable for anyone in the public or private sector to attempt to create a child using somatic cell nuclear transfer cloning."<sup>103</sup> With this premise, the NBAC arrived at the following recommendations:

- 1. The continuation of the current moratorium on the use of federal funding in support of any attempt to create a child by somatic cell nuclear transfer.
- 2. An immediate request to all firms, clinicians, investigators, and professional societies in the private and non-federally funded sectors to comply voluntarily with the intent of the federal moratorium.
- 3. Legislation should be enacted to *prohibit* anyone from attempting, whether in a research or clinical setting, to create a child through somatic cell nuclear transfer cloning. *However*, such legislation should have a sunset clause to ensure that Congress will review the issue after a specified time period in order to decide whether the prohibition continues to be needed.
- 4. Any regulatory or legislative actions undertaken to effect the foregoing prohibition on creating a child should be carefully written so as not to interfere with other important areas of scientific research.<sup>104</sup>

Responding to the recommendations of the NBAC, several legislators filed bills, both in the federal and state level, to either regulate or prohibit the use of human cloning technology *via* somatic cell nuclear transfer. Although many bills concerning human cloning have been sponsored,<sup>105</sup> few states have actually enacted bans on human cloning experimentation.<sup>106</sup> Since the cloning of Dolly, 27 states have addressed human cloning legislation.<sup>107</sup> Of these 27 states, California, Michigan, Missouri and Rhode Island have laws that ban human cloning, research or public funding.<sup>108</sup> However, no legislation has been enacted as of this time in the federal level despite the fact that nine federal congressional bills have already been sponsored.<sup>109</sup>

<sup>&</sup>lt;sup>103</sup> Cloning Human Beings, supra note 63.

<sup>&</sup>lt;sup>104</sup> Id.

<sup>&</sup>lt;sup>105</sup> Alabama, A.B. 1082 (1997), California, Cal. S.B. 1344 (1997), New Jersey, N.J. A.B. 2849 (1997).

<sup>106</sup> Greenlee, supra note 102, at 539.

<sup>&</sup>lt;sup>107</sup> New Hope, *supra* note 70, at 181.

<sup>108</sup> Id. at 182.

<sup>&</sup>lt;sup>109</sup> Id.

One of these bills was introduced by Congressman Stearns on April 3, 2001.<sup>110</sup> The bill, entitled "the Human Cloning *Research* Prohibition Act,"<sup>111</sup> (italics supplied) sought to prohibit the use of federal funding to further human cloning research. The bill proposed the following provision:

"(a) PROHIBITION – None of the funds made available in any Federal law may be obligated or expended to conduct or support any project of research that includes the use of human somatic cell nuclear transfer technology to produce an oocyte that is undergoing cell division toward the development of a fetus."<sup>112</sup>

This bill only echoed the memorandum of President Clinton that prohibited the use of federal funds for human cloning research. However, Stearns also qualified his provision, probably in compliance with similar qualifications made by the NBAC in its report, by providing that:

Nothing in this Act shall restrict other areas of scientific research not specifically prohibited by this Act, including important and promising work that involves -

1. the use of somatic cell nuclear transfer or other cloning technologies to clone molecules, DNA, cells other than human embryo cells or tissues; or

2. the use of somatic cell nuclear transfer techniques to create animals other than humans.<sup>113</sup>

Another bill was introduced by Congressman Weldon of Florida<sup>114</sup> on April 26, 2001. Entitled the "Human Cloning Prohibition Act of 2001,"<sup>115</sup> the bill sought to declare it unlawful for any person to:

(1) Perform or attempt human cloning,

(2) Participate in an attempt to perform human cloning, or

(3) Ship or receive the product of human cloning for any purpose.<sup>116</sup>

<sup>112</sup> *Id.* at sec. 2. <sup>113</sup> *Id.* at sec. 4.

<sup>&</sup>lt;sup>110</sup> H.R. 1372, 107<sup>th</sup> U.S. Cong. (2001).

<sup>&</sup>lt;sup>111</sup> Id.

<sup>&</sup>lt;sup>114</sup> H.R. 1644, 107<sup>th</sup> U.S. Cong. (2001)

<sup>115</sup> Id.

<sup>116</sup> Id. at sec. 3.

Weldon argued that in order for a ban to be effective, it must "stop the cloning process at the beginning because (a) cloning would take place within the privacy of a doctor-patient relationship, and (b) the transfer of embryos is a simple procedure... so that it will be nearly impossible to prevent attempts at reproductive cloning once cloned embryos are available in the laboratory.<sup>117</sup>

It is very interesting to note that the author of this bill had expanded the applicability of his bill even to areas not yet available through current technology. Weldon defined human cloning as follows:

The term human cloning means human asexual reproduction, accomplished by introducing the nuclear material of human somatic cell into a fertilized or unfertilized oocyte whose nucleus has been removed or inactivated to produce a living organism (at any stage of development) with a human or predominantly human genetic constitution.<sup>118</sup>

By using this definition, Weldon foresaw the possibility of human cloning technology improving to a point where it could create a human clone at a later stage of development; in other words, he had the foresight to include "instant adult" clones in his definition of human cloning.

On June 14, 2001, several legislators introduced a bill entitled "The Cloning Prohibition Act of 2001".<sup>119</sup> The proposed law would declare "unlawful for any person (a) to use or attempt to use somatic cell nuclear transfer technology with the intent to initiate a pregnancy; or (b) to ship or transport the cellular product resulting from human somatic cell nuclear transfer technology knowing that the product is intended to be used to initiate a pregnancy."<sup>120</sup> However, the proposed law had a novel provision. The law would require the registration of "each individual who intends to perform human somatic cell nuclear transfer technology."<sup>121</sup>

## 2. In Europe: different legal reactions to human cloning

In Europe, several countries, including France, Denmark and the Netherlands already have laws in place that forbid embryo research, sufficient to make human cloning illegal.<sup>122</sup> The United Kingdom and Belgium allow embryo research, but with certain, highly regulated parameters.<sup>123</sup> Germany, haunted by the

120 Id. 121 Id.

<sup>&</sup>lt;sup>117</sup> Id. at sec. 2.

<sup>&</sup>lt;sup>118</sup> Id.

<sup>&</sup>lt;sup>119</sup> H.R. 2172, 107th U.S. Cong. (2001)

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<sup>&</sup>lt;sup>122</sup> Greenlee, *supra* note 102, at 541.

Nazi attempts at developing a superior race, is one of the strongest opponents of human cloning, and it claims that under its Embryo Protection Act of 1990, human cloning would never be legally allowed.<sup>124</sup> Spain and Italy emphatically prohibits human cloning and views "creating human beings by cloning or other procedure capable of yielding several identical beings" as very serious offenses.<sup>125</sup> Russia, on the other hand, seems to have given its support to human cloning when a parliament member declared that a group of private investors had started financing a cloning project that will eventually clone a human being.<sup>126</sup>

The Council of Europe, an instrument of the European Union, passed the Council of Europe Protocol<sup>127</sup> that prohibits the cloning of human beings. On January 12, 1998, 19 countries signed the protocol and it became the first binding treaty on human cloning.<sup>128</sup> The Protocol provides that "any intervention seeking to create a human being identical to another human being, whether living or dead, is prohibited."<sup>129</sup> The Protocol indicates that its primary purpose is "the protection of human rights and dignity of the human being with regard to the application of biology and medicine."<sup>130</sup>

Another call for action against human cloning within the European Union is the "Resolution on Human Cloning" drafted by the European Parliament.<sup>131</sup> The Resolution defines human cloning as "the creation of human embryos having the same genetic make-up as another human being, dead or alive, at any stage of its development from the moment of fertilization, without any possible distinction as regards the method used."<sup>132</sup> The Resolution relies on fundamental rights as the authority for condemning the practice of human cloning.<sup>133</sup>

## 3. Asian reaction to human cloning

Some Asian countries have denounced human cloning. On March 19, 1997, Malaysia banned human cloning, declaring that having multiple selves would go against God's plan.<sup>134</sup> The very next day, the Chinese Academy of Sciences, the

<sup>124</sup> Id.

<sup>125</sup> Id. 126 Id.

<sup>120</sup> IA.

<sup>&</sup>lt;sup>127</sup> Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, Dec. 1, 1998, http://www.conventions.coe.int/treaty/en/treaties/html/168.htm.

<sup>&</sup>lt;sup>128</sup> Greenlee, *supra* note 102, at 541.

<sup>&</sup>lt;sup>129</sup> Id.

<sup>&</sup>lt;sup>130</sup> Id.

<sup>&</sup>lt;sup>131</sup> Resolution on Cloning, European Parliament, 1997 O.J. (C 115) 14.4/92 (March 12, 1997), http://www1.umn.edu/humants/instree/cloning1.html.
<sup>132</sup> Id.

<sup>133</sup> Id.

<sup>134</sup> New Hope, supra note 70, at 178.

country's leading science body, banned human cloning research in China,<sup>135</sup> stating that banning the use of cloning to copy humans is absolutely necessary to maintain the ethical morality which holds together today's human society."<sup>136</sup>

# IV. THE POSSIBILITY STRIKES HOME: ISSUE AWARENESS IN THE PHILIPPINES

A child is born from parents through a natural process... born from love, not from the cold apparatus of a laboratory.

- President Gloria Macapagal-Arroyo

# A. Human Cloning and the Philippine Situation

Recent newspaper reports reveal an upsurge in cloning technology. Plans to produce the first human clone triggered worldwide reaction ranging from cautious support to outrage, opposition, panic and hysteria. The Philippines, following the lead of the United States of America, Japan, Britain, Israel and Germany, expressed its strong sentiments against human cloning and clamored for a law banning its practice.

In a country predominantly influenced by religion and morality, the voice of the Church is the most resounding. The Catholic Bishops Conference of the Philippines (CBCP), as explained by Archbishop Leonardo Legaspi, has condemned all forms of human cloning—either for reproductive or therapeutic purposes because it goes against human nature and violates two fundamental principles on which all human rights are based: the equality among human beings and the principle of non-discrimination.<sup>137</sup> CBCP Bioethics Chairman Archbishop Legaspi maintained that the destruction of an embryo is plain murder and cloning cannot be justified no matter how much good it might provide for humanity.<sup>138</sup> Six reasons were advanced by the Philippine Church to fortify its stand against cloning human embryos:

1. It is against nature to create an embryo artificially, without any connection with sexuality;

2. Cloning implies the destruction of manipulated embryos. The embryo is already a human being;

138 Id. at 6.

<sup>135</sup> Id.

<sup>136</sup> Id.

<sup>137</sup> Sandy Araneta , CBCP on Human Clorung: No Way, PHIL. STAR, March 14, 2001, at 1.

3. Cloning of a human person is a technique which is devoid of a spiritual dimension;

4. Cloning is against the dignity, uniqueness and originality of each person, and it reduces the person to an object;

5. Cloning violates the principles of equality and non-discrimination, implicating the dominion of one person, the scientist, over another, introducing a selective-eugenic scheme; and

6. Benefits cannot be used as a reason to justify an inherently vitiated procedure.<sup>139</sup>

# B. Philippine Legislative Action on Human Cloning Technology

In the wake of this outcry from religious groups and ethicists, Pres. Gloria Macapagal-Arroyo urged Congress to pass laws against the cloning of human beings. As a devout Catholic, Pres. Arroyo stressed that, "human cloning is against the laws of God. It is against the laws of nature. A baby is born of parents with the help of God through the natural process of a male sperm fertilizing the female egg. A baby is born out of love and not through the cold apparatus in a laboratory."<sup>140</sup> Furthermore, she emphasized that the outcry against human cloning is comparable to the one against abortion that is outlawed in this largely-Catholic nation.<sup>141</sup>

Heeding the call of the President, Cagayan de Oro City's Rep. Constantino Jaraula filed a bill to prohibit human cloning in the Philippines. House Bill No. 1203, which will be discussed in detail later, is still in its preliminary stage (First Reading) in Congress. Similarly, the Department of Science and Technology (DOST), as enunciated by Secretary William G. Padolina, urged the public to take a sober view on the matter even as he clarified the country's biotechnology research and development thrusts. Noting public speculations on possible human cloning, Padolina clarified that human cloning is not within the immediate realm of possibility due to several reasons. Firstly, research into human cloning is not within the priorities of the scientific community and Padolina categorically stated that the DOST has not and will not undertake nor fund research in human cloning.<sup>142</sup> Biotechnology research and development priorities are aimed at improving crops or livestock for better agricultural yield, developing environment-friendly processes in agriculture and industry, and utilizing new knowledge to enhance health in living organisms, including crops, livestock, and people. Secondly, far more resources and

<sup>&</sup>lt;sup>139</sup> Philippines Church Says No to Cloning Human Embryos, MANILA TIMES, March 9, 2001, http://www.cwnews.com/Fides.

<sup>140</sup> Juliet Javellana, Macapagal says no to human doning, MANILA TIMES, Aug 18, 2001, at 2.

<sup>&</sup>lt;sup>141</sup> Macapagal calls for human cloning ban, MANILA TIMES, Aug 17,2001, at 6.

<sup>142</sup> Eddee RH Castro, Human Cloning: Boon or Bane? MANILA BULLETIN, May 26, 1997, at 30.

expertise still have to be devoted before cloning feats could be done with humans. Indeed, human physiology has not been figured out fully and in human cloning, molecular-level understanding of human physiology would be all-important.<sup>143</sup>

### C. Cloning Technology in the Philippines

Dr. Saturnina C. Haplos, acting coordinator of the National Institute of Molecular Biology and Biotechnology of the College of Science in University of the Philippines (U.P.) Diliman, said that cloning can be done in man. Halos said, "The cloning of Dolly demonstrates that cloning individual persons is feasible."<sup>144</sup> Such feat is feasible through *biotechnology*. Modern biotechnology is based on a deep understanding of the technology of life, the mechanics of living machines and the use of this knowledge for practical purpose. It encompasses the concept of cloning, gene splicing and recombinant DNA, which biotechnologists aim to study thoroughly to give rise to an improved quality of life.

In the Philippines, the biotechnology industry is still in its infancy stage. The first biotechnology center was established on December 20, 1979 under the name of National Institute of Biotechnology and Applied Microbiology. Later, the name was changed to the National Institute of Molecular Biology and Biotechnology (BIOTECH). The institute was formed to serve as a research and development center in the country. In 1995, Presidential Decree No. 526 created a National Biotech Network formed at the U.P. system, whose projects are funded and fully supported by the DOST. A year hence, the Biotechnology Association of the Philippines Inc. (BAPI) was organized <sup>145</sup> to further the cause of biotechnology and explore the illimitable opportunities afforded by this breakthrough. The promising developments of Biotechnology in the Philippines<sup>146</sup> manifest the Filipinos' potential to develop a human clone. By adopting the policy of the Philippine government against human cloning, the country's biotechnology research and development program is focusing on more down-to-earth concerns to meet the country's basic requirements.

In the end, human cloning in the Philippines is a tormidable task. It will definitely meet strong opposition from the Catholic Church and from the government. Filipino scientists will have to contend with persuasive ethical and moral suasion that pervade the Filipino mentality. The challenge now is to open the

146 Sæ Annex B.

<sup>&</sup>lt;sup>143</sup> DOST Statement on Cloring-DOST Clarifies Biotechnology R&D Priorities, at http:// dostweb.dost.gov.ph/pcastrd/infoservices/prssrelease/cloning.htm (Feb. 12, 2002).

<sup>144</sup> *Id*.

<sup>&</sup>lt;sup>145</sup> Biotechnology Association of the Philippines Inc., BAPI at http://www.action.com.ph/ webmaster/mike/BAPI/topicsofinterest.html (March 1, 2002).

eyes of the Filipinos that they may realize the breakthrough and benefits afforded by cloning humans, provided regulations are established.

# V. LEGAL STATUS OF THE CLONE

The clone may be a jerk too, but he will be his own individual jerk.

### - Ronald Bailey

The prospect of human cloning experimentation brings out the fear that any human life produced through human cloning technology might be treated as commodities, as nothing more than property for the use and abuse of the people who cloned them. Much of the hesitation associated with the acceptance of human cloning technology arises from humanitarian concerns regarding the possible abuses of the technology and, more importantly, the result of that technology— the human clone.

Any discussion on the legal rights that should be accorded to the human clone depends on the determination of its legal status. There are, however, two aspects to the legal personality of the clone. First of all, the question of legal personality extends to the legal status of the human embryo created by somatic cell nuclear transfer. When does legal personality begin? At what point does the law recognize the existence of human life? These questions are pertinent to the issue of human cloning experimentation. Secondly, what would be the legal status of the human being born out of human cloning technology? Once the human clone comes out of its surrogate mother's womb, what rights would be accorded to it?

# A. From the Beginning: Legal Status of the Human Embryo

Mary Warnock<sup>147</sup> believes that there is a natural presumption that "if it can be shown that the embryo *is* a person, then it will follow that it has rights, for certainly all persons have rights, and, it is sometimes held, only persons have them."<sup>148</sup>

The legal status of the human embryo within the Philippine jurisdiction can be established through the country's policy as regards abortion. The human embryo

<sup>&</sup>lt;sup>147</sup> Mary Wornock is the Chairperson of the Warnock Commission. She is a renowned philosopher and an influential person in embryo research.

<sup>&</sup>lt;sup>148</sup> John Harris, Embryos and Halgebogs: On the moral status of the onlygo, in EXPERIMENTS ON EMBRYOS COMPILATION (Anthony Dison & John Harris eds., 1990).

is considered as an unborn life, and as such is already accorded some level of legal significance and protection by the state and the Constitution.

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# 1. Rights of the Unborn: a short history of the abortion policy in the Philippines

A woman whose pregnancy is unacceptable to the community, a woman who has broken social rules about sexual partners, a pregnant widow, an unmarried girl or a girl too young to be pregnant, a woman who has had sexual intercourse with an outsider or whose pregnancy is the result of an adulterous relationship; these women are often anticipated to have abortion. And through the years, a growing number of Filipinas have had recourse to this illegal act.

The main crux of the controversy behind abortion involves the clash of absolutes, of life against liberty. No right is more absolute than the right to live, and the untimely death of a young child is among life's most awful tragedies. To cause such a death is a great wrong. Thus, if infanticide is wrong, is the destruction of a fetus at eight months of gestation, or at five, any different? On the other hand, nothing is more devastating than a life without liberty. A life in which one can be forced into parenthood is a life without liberty. Rape is among the most profound denials of liberty, and compelling a woman to bear a rapist's child is an assault on her humanity. How difficult is it to force her to remain pregnant and become a mother just because efforts at birth control accidentally failed? From her point of view, the pregnancy is also unsought. From the perspective of the fetus, how the pregnancy began surely makes no difference.<sup>149</sup>

Abortion is illegal in the Philippines. The 1987 Philippine Constitution specifically states that:

The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception. The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the Government.<sup>150</sup>

According to constitutionalist Fr. Joaquin Bernas, this provision can be divided into three parts. The first part formalizes the adoption of an ideology that recognizes the family as the basic autonomous social institution. The provision enjoins the State to strengthen the family and at the same time, prohibits the State from adopting measures that can impair the solidarity of the Filipino family. Calling

<sup>&</sup>lt;sup>149</sup> LAURENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES 3 (1992).

<sup>150</sup> CONST. art II, sec 12.

the family a basic social institution is an assertion that the family is anterior to the State and is not a creature of the State. The categorization of the family as autonomous is meant to protect the family against instrumentalization by the State. As a result, an entire article, Article XV of the 1987 Philippine Constitution, is devoted to the family.

The second part is the product of much debate. It discusses the protection of the unborn. However, it does not say that the unborn person is a legal person; nor does it deny that the State might under certain conditions regard the unborn as a person. Likewise it does not assert that the life of the unborn is placed on exactly the same level as the life of the mother. It recognizes that, when necessary to save the life of the mother, it may be necessary and legitimate to sacrifice the life of the unborn. It, nonetheless, denies that the life of the unborn may be sacrificed merely to save the mother from emotional suffering or to spare the child from a life of poverty.

Ultimately, this part is intended to prevent the State from adopting the doctrine in the United States Supreme Court decision of Roe v. Wade as affirmed in the 1992 case of *Planned Parenthood v. Casey*, which liberalized abortion laws by allowing abortion at the discretion of the mother any time during the first six months when it can be done without danger to the mother.

Indeed, the unborn's entitlement to protection begins *from conception*, that is, from the moment of conception. The intention is to protect life from its beginning, and the assumption is that human life begins at conception and that conception takes place at fertilization. No attempt, however, was made to exactly pinpoint the moment when conception takes place. In the end, this part reflects the respect for life enunciated by the 1987 Philippine Constitution.

The third part of the provision recognizes the indispensable role that the modern State has to play in the field of education. Considering the natural right and duty of parents, as heads of the family, in preparing their children for a socially useful and upright life, parents are then *entitled* to the support of laws designed to aid them in the discharge of their responsibility. This part highlights the inherent duty of the State to act as *parens patriae* and to protect the rights of persons and individuals who, because of age or inherent incapacity, are in an unfavorable position vis-à-vis other parties.<sup>151</sup>

<sup>&</sup>lt;sup>151</sup> JOAQUIN G. BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 76-81 (1996).

The treaties concurred in by the Philippines strengthened the value we accord human life. Foremost of these treaties is the *International Conference on Population and Development* (ICPD) *Programme of Action* that addresses the notion of abortion in detail, as it is the main document manifesting our position and cognition of Reproductive Health. In the *International Covenant on Civil & Political Rights* (1976) *and its Optional Protocol* (1976), it states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."<sup>152</sup>

Consequently, several other propositions were adopted to ensure the health of mothers and children. In the *Fourth World Conference on Women; Declaration & Platform of Action* (Beijing, 1995), it ensured equal access to and equal treatment of women and men in education and health care and enhance women's sexual and reproductive health as well as education.<sup>153</sup> The Universal Declaration of Human Rights (1946) stresses that: "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."<sup>154</sup>

Likewise, in the World Conference on Human Rights with the Declaration & Program of Action adopted by 171 states on June 25,1993, the importance of the enjoyment by women of the highest standard of physical and mental health throughout their life span was recognized.<sup>155</sup> In the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention, 1981), it was provided that:

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.<sup>156</sup>

Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.<sup>157</sup>

<sup>&</sup>lt;sup>152</sup> International Covenant on Civil & Political Rights (1976) and its Optional Protocol (1976), art 6.

<sup>&</sup>lt;sup>133</sup> Fourth World Conference on Women; Declaration & Paltform of Action (Beijing, 1995).

<sup>&</sup>lt;sup>154</sup> Universal Declaration of Human Rights (1946), art 25(2).

<sup>&</sup>lt;sup>155</sup> World Conference on Human Rights with the Declaration & Program of Action adopted by 171 states.

<sup>&</sup>lt;sup>156</sup> Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention, 1981), art 12.1.

<sup>&</sup>lt;sup>157</sup> Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention, 1981), art 12.2.

Equally noteworthy, nonetheless, is the recognition of the *right to privacy*. It was originally recognized in the *Universal Declaration of Human Rights* (1946), which states that: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."<sup>158</sup>

It was reiterated in the International Covenant on Civil & Political Rights (1976) and its Optional Protocol (1976), emphasizing that "(n)0 one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."<sup>159</sup>

These international conventions reflect the clash of absolutes, of life against liberty. Are there ways of approaching issues like abortion that avoid pitting these absolutes against one another? Can a compromise be reached?

In the Philippines, we have already made a choice. Instead of reaching a compromise, we have made a definite stand. As enshrined in the highest law of the land, *life* is deemed superior to liberty. And abortion in any way will never be tolerated.

Our statutes are in harmony with the policy contained in the 1987 Philippine Constitution. The 1975 Child and Youth Welfare Code stipulated that a child has the dignity and worth of a human being from the moment of conception and has the right to be born well.<sup>160</sup> As a result, several laws were adopted to penalize aiding, or performing any criminal abortion. Reprimand, suspension or revocation of registration certificates may be imposed against physicians<sup>161</sup> or pharmacists<sup>162</sup> or midwives<sup>163</sup> involved in this illegal act. In the Revised Penal Code, a more severe punishment was imposed. The following articles defined the essential elements of the crime (involving the destruction of life) and its respective penal proscriptions:

ARTICLE 255. Infanticide. — The penalty provided for parricide in article 246 and for murder in article 248 shall be imposed upon any person who shall kill any child less than three days of age.

<sup>&</sup>lt;sup>158</sup> Universal Declaration of Human Rights (1946), art 12.

<sup>159</sup> International Covenant on Civil & Political Rights (1976) and its Optional Protocol (1976), art 17.

<sup>&</sup>lt;sup>160</sup> Pres. Decree No. 603 (1974).

<sup>&</sup>lt;sup>161</sup> Rep. Act No. 2382 (1959).

<sup>162</sup> Rep. Act No. 5921 (1969).

<sup>&</sup>lt;sup>163</sup> Rep. Act No. 7392 (1992).

If any crime penalized in this article be committed by the mother of the child for the purpose of concealing her dishonor, she shall suffer the penalty of *prision mayor* in its medium and maximum periods, and if said crime be committed for the same purpose by the maternal grandparents or either of them, the penalty shall be reclusion temporal. (As amended by Sec. 7, Republic Act No. 7659.)

ARTICLE 256. Intentional abortion. — Any person who shall intentionally cause an abortion shall suffer:

1. The penalty of *reclusion temporal*, if he shall use any violence upon the person of the pregnant woman.

2. The penalty of *prision mayor* if, without using violence, he shall act without the consent of the woman.

3. The penalty of *prision correctional* in its medium and maximum periods, if the woman shall have consented.

ARTICLE 257. Unintentional abortion. — The penalty of *prision correctional* in its minimum and medium period shall be imposed upon any person who shall cause an abortion by violence, but unintentionally.

ARTICLE 258. Abortion practiced by the woman herself or by her parents. — The penalty of *prision correctional* in its medium and maximum periods shall be imposed upon a woman who shall practice abortion upon herself or shall consent that any other person should do so.

Any woman who shall commit this offense to conceal her dishonor, shall suffer the penalty of *prision correctional* in its minimum and medium periods.

If this crime be committed by the parents of the pregnant woman or either of them, and they act with the consent of said woman for the purpose of concealing her dishonor, the offender shall suffer the penalty of *prision correctional* in its medium and maximum periods.

ARTICLE 259. Abortion practiced by a physician or midwife and dispensing of abortives. — The penalties provided in article 256 shall be imposed in its maximum period, respectively, upon any physician or midwife who, taking advantage of their scientific knowledge or skill, shall cause an abortion or assist in causing the same.

Any pharmacist who, without the proper prescription from a physician, shall dispense any abortive shall suffer *arresto mayor* and a fine not exceeding 1,000 pesos.<sup>164</sup>

Indeed, these provisions magnified our strict adherence to the policies enunciated in the Constitution. It proscribed the harshest penalty of imprisonment, thereby warning anyone against the commission of abortion in any manner.

<sup>164</sup> Act 3815 (1930) (hereinafter REV. PEN. CODE).

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The policy *against* abortion was similarly incorporated in the Revised Administrative Code as amended by Republic Act 4623 and in Republic Act 1937. Importing of any articles, instruments, drugs and substances designed, intended or adapted for preventing human conception or producing unlawful abortion, or any printed matter which advertises or describes or gives directly or indirectly information where, how or by whom human conception is prevented or unlawful abortion produced is severely disallowed.<sup>165</sup> Analogously, articles, instruments, drugs, and substances designed, intended, or adapted for preventing conception or producing abortion, or for any indecent or immoral use, or which are advertised or described in a manner calculated to lead another to use or apply them for preventing conception or producing abortion, or for any indecent or immoral purpose were considered *absolutely non-mailable matter*.<sup>166</sup>

In major Asian countries, there are statutes that provide broad grounds for abortion in the second trimester that is provided free of charge in government hospitals. Only the Philippines is excepted from this norm. Of the 14 countries that do not permit abortions under any circumstances and those that permit them to save the mother's life or health, only the Philippines and Iran have policies other than educational programs and the distribution of contraceptives designed to achieve their stated objectives of lower fertility levels and reduced population growth. Both countries introduced tax incentives for families that limit the number of children and discontinued other government benefits such as food rations and maternity leaves.<sup>167</sup> In 1990, the government instituted a new family planning program that established more incentives including tax exemptions for couples to limit the size of their families to two children in an effort to lower fertility and reduce population, but firmly rejected abortion as a method of family planning.

Based on the study conducted by Rita J. Simon in her book entitled *Abortion: Statutes, Policies, and Public Attitudes the World Over*, it was observed that unlike the positive relationship found between abortion statutes and public opinion, government policies vis-à-vis fertility and population size and abortion statutes appear to be *umelated*.<sup>168</sup> In this sense, the policy adopted by our country abhorring abortion is justified. Government programs adopting abortion to resolve population problems apparently have not yielded positive results.

However, pro-abortion advocates also rely on the right to privacy to further their stand. This contention sparked a heated debate in the United States. The

<sup>165</sup> Rep. Act No.1937 (1957).

<sup>&</sup>lt;sup>166</sup> Rep. Act No.4623 (1965).

<sup>&</sup>lt;sup>167</sup> RITA JAMES SIMON, ABORTION: STATUTES, POLICIES, AND PUBLIC ATITTUDES THE WORLD OVER 23, 141, 144 (1990).

<sup>&</sup>lt;sup>168</sup> Id.

confusion can be gleaned from the divergent stands taken by the US Supreme Court in their rulings. Because the abortion question is so difficult and may be approached in so many ways, it should be no surprise that the approach taken by the US Supreme Court generates continuing controversy.

In the leading case of Roev. Wade, 169 the Supreme Court announced that the United States Constitution protects a woman's right to decide whether to end a pregnancy. The case presented a challenge to a Texas statute that made it a crime to procure an abortion" except where it was procured or attempted by medical advice for the purpose of saving the life of the mother. In this case, the Supreme Court held that a woman's right to decide whether or not to terminate her pregnancy is a fundamental right-part of a "right of privacy"- and only a compelling reason will allow government to interfere with the exercise of that right. During the first third, or trimester, of pregnancy, government may not interfere with a woman's decision to terminate a pregnancy in any way except to insist that it be performed by a licensed physician. In the second trimester, the government has the power to regulate abortion only in ways designed to preserve and protect the woman's health. The Court wrote that this goal becomes compelling at the end of the first trimester because before that time, abortion is less hazardous for the woman than childbirth. Roe says that during the second trimester the only permissible abortion regulations are those designed to ensure that the procedure is performed safely, because the only compelling reason the government has for involvement in the pregnant woman's decision during this period is the protection of her health.

After fetal viability—the point at which the fetus is capable of surviving outside the womb—at approximately the beginning of the final third of a fetus' gestation, protection of fetal life also becomes a compelling reason sufficient under Roe to justify interference with the exercise of the right to choose abortion. At that point, the government can also regulate, or even prohibit, abortion in order to protect fetal life unless the abortion is necessary to preserve the life or health of the woman.

The Court not only held that the right to abortion was not absolute— that protection of the fetus need not necessarily await live birth— it also held that a state or local government could not overcome the woman's right "by adopting one theory of life," the theory that life begins at conception.<sup>170</sup>

The anti-abortion campaign to alter the complexion of the American judiciary truly bore fruit in 1989, in the landmark decision of *William Webster v.* 

<sup>&</sup>lt;sup>169</sup> 410 U.S. 113 (1973).

<sup>170</sup> TRIBE, supra note 14, at 10-13.

Reproductive Health Services.<sup>171</sup> The Webster case presented an abortion clinic's challenge to a Missouri abortion law. In this case, the political scenario played a great role in the overturning of Roe, with the Missouri government and the Bush administration advocating this view. The decision pronounced that the government has an interest in protecting potential human life not just after viability but throughout pregnancy and that that interest is sufficient to permit Missouri's regulatory interference with the exercise of the abortion right. Although it was not expressly said, the Court's ruling suggested that the Court need not examine closely the strength of the government's reasons for limiting access to abortion. It described a woman's right to decide whether to terminate a pregnancy as a mere *liberty interest*, harking back to Chief Justice Rehnquist's Roe dissent, in effect stressing on the fetus's right to live.<sup>172</sup>

In 1992, however, Webster was again overturned and Roe was resurrected. Planned Parenthood v. Casey<sup>173</sup> resolved that

> Considering the confusion around this issue, the Supreme Court found it imperative to review once more the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures. After considering the fundamental constitutional questions resolved by Roe, principles of institutional integrity, and the rule of stare decisis, the Court concluded that the essential holding of Roe v. Wade should be retained and once again reaffirmed. It must be stated at the outset and with clarity that Roe's essential holding, the holding the Court reaffirms, has three parts. First is a recognition of the right of a woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and the Court adheres to each.<sup>174</sup>

As a result, strong objections in the Roe decision continue to enmesh the US Supreme Court. The clash of the absolutes persists. The simplest argument against Roe is that it is antidemocratic. Every time a court holds that a duly enacted law violates the Constitution, it behaves in what might be described as an antidemocratic

<sup>&</sup>lt;sup>171</sup> 109 S.Ct. 3040 (1989).

<sup>&</sup>lt;sup>172</sup> TRIBE, *supra* note 149, at 22.

<sup>&</sup>lt;sup>173</sup> 112 S. Ct. 2791 (1992).

<sup>174 112</sup> S. Ct. 2791 (1992).

way, emphasizing that the legislators and not the judges should decide. A second basis for objection to *Roe* is that it protects a right, the right to privacy, that appears nowhere in the Constitution. The Court, it is said, in a naked power grab and on the strength of nothing more than personal disagreement with the outcome of the legislative process, illegitimately carved out an area and put it beyond the reach of the democratic, political branches of government. The contention then reveals that the right to privacy as an *unerumerated right* is a mere creation of the Supreme Court. In the end, the controversy centers on *judicial legislation*.

The constitutional saga of abortion therefore is far from over. Roe to Webster to Casey strongly suggests a continuing debate. It exposes a Supreme Court more deeply divided than ever on the issue. There is still no majority for any single legal approach and only one vote now stands between the result in Casey and the complete overruling of Roe.

The quintessential reproductive rights case of *Roe v. Wade* was the basis of the 1987 Philippine Constitutional provision on the duty of the State to protect the unborn from conception. This provision was adopted to prevent courts from adopting *Roe* and overturning the Revised Penal Code provisions criminalizing abortion. The historical context in which the legal problem of Jane Roe emerged is characterized by the problematic pursuit of the Constitutional doctrine on the power of the State to regulate a private choice. In *People v. Pomar*,<sup>175</sup> the Supreme Court said that the State should not interfere in policies on maternity benefits that the Court referred to as a private choice between employers and employees. Indeed, the Court's statement that Jane Roe's control over her body can be regulated by the State was strongly in opposition to the clamor of activists to expand State power.

In the Philippines, the Supreme Court is more consistent in its decisions. The firm stand against abortion was apparent in all the cases adjudicated by the Court. Since 1905, the Philippine Supreme Court recognized that abortion is a crime, thereby convicting the people behind this act. This was elucidated in U.S. v. Boston<sup>176</sup> and U.S. v. Jeffrey.<sup>177</sup> In Geluz v. CA,<sup>178</sup> the physician was punished for his involvement in the crime. In Barrientos v. Daarol,<sup>179</sup> the practice of law was similarly evaluated. The Court reasoned that:

The practice of law is a privilege accorded only to those who measure up to the exacting standards of mental and moral fitness. The lawyer, in this case,

<sup>175 46</sup> Phil. 440 (1924).

<sup>176 12</sup> Phil. 134 (1908).

<sup>177 15</sup> Phil. 391 (1910).

<sup>&</sup>lt;sup>178</sup> G.R. No. L-16439, 2 SCRA 801 (1961).

<sup>&</sup>lt;sup>179</sup> A.C. No. 1512, 218 SCRA 30 (1993).

was debarred for having exhibited debased morality in proposing love and marriage to a 20-year old minor knowing that he did not have the required legal capacity. By later on succeeding in having carnal relations, thereby making the complainant pregnant and worse, suggesting abortion, it manifested how *deceiful and grossly immoral* the herein lawyer.<sup>180</sup> (Italics supplied.)

The bulk of our laws on abortion, however, revolved around *unintentional abortion* that ensued from the violence intentionally used against the woman without intending abortion, but leading to the death of the fetus. The leading case of *People v. Salufrania*<sup>181</sup> was subsequently followed by many more cases.

Despite the recognition of the right to privacy in our country, as established in the cases of *Ople v. Torres*<sup>182</sup> and *Morfe v. Mutuc*,<sup>183</sup> the Supreme Court has yet to apply this doctrine on the issue of abortion. Logically, this can be understood as the Court's staunch position against abortion as amplified in the 1987 Philippine Constitution. To date, there is no question on the legality of this Constitutional provision, primarily because of our dominant moral convictions brought about by our Christian upbringing.

The Department of Health (DOH), in collaboration with the local government units, adopts the same policy. But due to the increasing number of women exposed to these dangers, care of post-abortion complications was carefully studied. Women health projects, therefore, tried to answer this concern. However, DOH said that this program is still in its *pilot testing* stage. Concrete results and feedback based on this action have not yet been ascertained. It is interesting to note, however, that the Philippine government is seriously considering the importation of an abortive pill (RU-486). Apparently, even if it is crystal clear that the Philippines is *against* abortion, there are still measures considered by the government which exhibit the same dilemma as in the cases adjudicated by the United States Supreme Court—that clash of absolutes, of life against liberty.

A human being conceived by cloning is covered by this protection. Cloned babies come into the world the usual way. They must be implanted into the womb of a human mother,<sup>184</sup> who carries the embryo through a normal gestation period and gives birth in the normal way. Contrary to the popular conception, there are no instant adults possible with cloning, and the cultural and social experiences of the

<sup>180</sup> A.C. No. 1512, 218 SCRA 30 at 34 (1993).

<sup>&</sup>lt;sup>181</sup> G.R. No. L-50884, 159 SCRA 401 (1988).

<sup>&</sup>lt;sup>182</sup> G.R. No. 127685, 293 SCRA 141 (1998).

<sup>183</sup> G.R. No. L-20387, 22 SCRA 424 (1968).

<sup>&</sup>lt;sup>184</sup> Foley, *supra* note 24, at 655.
clonant would likely be very different from those of the DNA donor.<sup>185</sup> But the process does not end with giving birth to a cloned baby. What is really entailed in cloning is a commitment to have and rear a child. The complete process behind cloning, therefore, involves obtaining of the eggs, acquisition of the DNA to be cloned, transfer of that DNA to a denucleated egg, placement of the activated embryo in a uterus, gestation, and the nurturing and rearing that the birth of any child requires.186

The crucial difference now lies on the intention to rear of the couples who opt for this methodology. If one is not intending to rear their cloned babies, then one's claim to be exercising procreative choice is much less persuasive.<sup>187</sup>

In this abhorrent crime of abortion, a woman intentionally terminates her pregnancy prematurely. In human cloning, if the entire process were followed, gestation and commitment to rear would be indispensable. Clearly then, these elements are contradictory to the notion of abortion, such that if one aborts a cloned baby, that woman would similarly be held answerable to the Courts for transgressing our laws and violating a stanch public policy.

This policy would work in our country given our rules on child rearing and development. After the passage of the Child and Youth Welfare Code<sup>188</sup> and the Family Code,<sup>189</sup> the discernible trend impelled the enactment of Republic Act No. 8043190 on Inter-country Adoption and Republic Act No. 8552191 on Domestic Adoption. Prevalent in these statutes would be the following tenets contained in the Domestic Adoption Act of 1998:

> a) To ensure that every child remains under the care and custody of his/her parent(s) and be provided with love, care, understanding and security towards the full and harmonious development of his/her personality;192

> b) In all matters relating to the care, custody and adoption of a child, his/her interest shall be the paramount consideration in accordance with the tenets set forth in the United Nations Convention on the Rights of the Child;193 and

<sup>185</sup> Id.

<sup>186</sup> John Robertson, Cloning as a Reproductive Right, in THE HUMAN CLONING DEBATE 42-43 (Glenn McGee ed., 2000).

<sup>187</sup> Id. at 51.

<sup>188</sup> Pres. Decree No. 603 (1974).

<sup>189</sup> Exec. Order No. 209 (1987).

<sup>190</sup> Rep. Act No. 8043 (1995).

<sup>&</sup>lt;sup>191</sup> Rep. Act No. 8552 (1998).

<sup>192</sup> Rep. Act No. 8552 (1998), art 1, sec 2(a).

<sup>&</sup>lt;sup>193</sup> Rep. Act No. 8552 (1998), art 1, sec 2(b).

c) To prevent the child from the unnecessary separation from his/her biological parents.<sup>194</sup>

In the case of *Herbert Cang v.* CA,<sup>195</sup> the Supreme Court ruled that the underlying policy in international conventions and the domestic statutes with respect to children is the overriding principle that all actuations should be in the best interest of the child. This is not, however, to be implemented in derogation of the primary right of the parent or parents to exercise parental authority over the child. The rights of parents vis-à-vis the children are not antithetical to each other, as in fact, they must be respected and harmonized to the fullest extent possible.<sup>196</sup>

The element of intention to rear, then, must be extant in the process of human cloning. A good example of a model to regulate the entire human cloning process is found in the adoption model proposed by Glenn McGee and Ian Wilmut in their article entitled *A Model for Regulating Cloning*,<sup>197</sup> where they stated that: "Adoption as a model integrates both the importance of the rights of parents and the importance of the interests of children, even those children who have not yet been born or conceived."

This model is evidently a safe indicator that the Philippines can utilize if and when it decides to take the initial step to understand and develop the human cloning technology.

The commonly raised objection on human cloning, relative to abortion, concerns the problem of so-called *waste embryos*.<sup>198</sup> Adversaries of human cloning cite the *Dolly* experiment as illustrative of the risks that would befall human embryos if human cloning were permitted, proclaiming that only one out of 277 attempts resulted in a live birth.<sup>199</sup> The not-so-subtle insinuation of this statistic is the fact that 276 out of 277 sheep died.<sup>200</sup> It is not denied that in the process of cloning an individual, some embryos would fail to develop and thrive and some would be destroyed. But it would be very hasty and unfair to limit the problem of *waste embryos* to human cloning. It is a problem not unique to human cloning.

Countless other human embryos are naturally or intentionally destroyed each year. An estimated 60-70% of all embryos created through sexual intercourse

<sup>194</sup> Rep. Act No. 8552 (1998) art 1, sec 2(c).

<sup>&</sup>lt;sup>195</sup> G.R. No. 105308 Sept 25, 1998, 296 SCRA 128 (1998).

<sup>&</sup>lt;sup>196</sup> G.R. No. 105308, 296 SCRA 128 (1998).

<sup>&</sup>lt;sup>197</sup> Glenn McGee & Ian Wilmut, A Modd for Regulating Cloning, in THE HUMAN CLONING DEBATE 232 (Glenn McGee ed., 2000).

<sup>&</sup>lt;sup>198</sup> Foley, *supra* note 24, at 670.

<sup>&</sup>lt;sup>199</sup> Id.

<sup>&</sup>lt;sup>200</sup> Id.

are never born.<sup>201</sup> Fifteen percent of pregnancies end naturally through miscarriage.<sup>202</sup> The percentage of live births from *artificial reproductive technologies* (ARTs) such as in-vitro fertilization (IVF) is only about 20%,<sup>203</sup> meaning 80% of the embryos created by ARTs are stillbirths, miscarriages, or more likely, never successfully implanted into the womb.<sup>204</sup> Intentionally aborting an embryo is likewise prevalent all over the world. In the United States alone, approximately one million are aborted annually.<sup>205</sup> And in the Philippines, this rising incidence of abortion is even complicated by our current economic status. Poverty leads some Filipinas to consult those innumerable "*manghibilots*" or quack doctors to perform this offensive act for a minimal fee.

In the end, the occurrence of *waste embryos* is inevitable, whether created by intercourse, by ARTs, by abortion or by *doning*.

Human cloning, unlike the other ARTs, is an asexual method of reproduction. It does not involve the meeting of the egg cell and the sperm cell. To a certain extent, it makes possible the seemingly bizarre situation in which a single person can opt to reproduce, to have children, by causing the *vigin birth* of a much younger identical twin.

Now, if we give human cloning a chance, would the embryo placed back in the mother's uterus to complete the gestation process be covered by the protection to the unborn fetus embodied in the Constitution? According to theologian and constitutionalist Fr. Joaquin Bernas, protection to the unborn fetus starts from conception. He was candid enough to even propose during the 1987 Constitutional Commission that the Due Process Clause should also provide that "the right to life extends to the fertilized ovum."<sup>206</sup> This was subjected to rigorous debate, and eventually, it had to be dropped because it could not be defined and the implications of an unborn fetus being considered as a person possessed of all legal rights would be bizarre and inexplicable.

Corollarily, is conception restricted to the phase when the ovum is fertilized by the sperm? In cloning, there is no union of the egg and the sperm. Does this mean that the child conceived through this methodology would not be covered by the protection? This is not legally sound. In the first place, a child conceived by cloning is a human being (which will discussed in detail later). The fact of its birth

205 Id.

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<sup>&</sup>lt;sup>201</sup> Id. at 671.

<sup>202</sup> Id. 203 Id.

<sup>&</sup>lt;sup>204</sup> Id. at 672.

<sup>206</sup> JOAQUIN G. BERNAS, INTENT OF THE CONSTITUTION WRITERS 166 (1995).

gives its personality and capacity to come within the purview of the protection afforded by our laws. In the second place, the child born through cloning is a human being, a part of a family, a part of the society. To be limited to the common notion of fertilization and close one's eyes to the possibility of asexual reproduction would be detrimental to science and to the human being later on born. If we can embrace the idea of in vitro fertilization or of artificial insemination, why should we deny the same reaction to human cloning and be dictated by our prejudice towards morality and ethics? It is more human, then, to extend the protection to the unborn fetus asexually reproduced, as in human cloning.

# B. The Human Clone as a Person Under the Law

A baby created by cloning who is born would be as fully a "person" under current law as a baby created by sexual intercourse or ARTs such as IVF or artificial insemination.<sup>207</sup> Such children would be fully human containing a full complement of human genes the same as any other human; that their genes would be a combination of the parents of the DNA donor would not alter their humanness.<sup>208</sup> Individuals conceived by cloning would not differ biologically from individuals conceived by coitus or other ARTs.<sup>209</sup> Although a child created by cloning would share his/her genes with another, this has never created a legal obstacle to distinct personality, as evidenced by identical twins and other multiple births. Thus, a child created by cloning would not be considered the same person as his/her donor, but would be legally entitled to recognition as a distinct person.<sup>210</sup> Individuals conceived by cloning, given this framework, would not be considered property but would enjoy the full protection of laws protecting all persons.<sup>211</sup>

Prevalent in the fundamental law of the land is a person's right, not only to life, but to a good life. In Article II of the 1987 Constitution, it was stressed that:

Section 9. The State shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty through policies that provide adequate social services, promote full employment, a rising standard of living, and an improved quality of life for all.

Section 11. The State values the dignity of every human person and guarantees full respect for human rights.

<sup>&</sup>lt;sup>207</sup> Foley, *supra* note 24, at 658.

<sup>&</sup>lt;sup>208</sup> Id.

<sup>&</sup>lt;sup>209</sup> Id. <sup>210</sup> Id.

<sup>&</sup>lt;sup>211</sup> *Id.* at 659.

Section 13. The State recognizes the vital role of the youth in nation-building and shall promote and protect their physical, moral, spiritual, intellectual and social well-being. It shall inculcate in the youth patriotism and nationalism, and encourage their involvement in public and civic affairs.

It is clear from these provisions that the State puts a high premium on each and every Filipino's right to a good life. Section 13 is even more specific in stating that the State should promote the well-being of even its young citizens. Therefore it is the responsibility of the State to ensure the continued development of life, and to provide its citizens with the necessary maturity to make them productive members of the society.

The most telling provision is found in art. III, sec. 1, which states that: " No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws."

What is the right to life then? Bernas explained that

The constitutional protection of the right to life is not just a protection of the right to be alive or to the security of one's limb against physical harm. The right to life is the right to a good life. The emphasis on the quality of living is found in Article II where Section 6 commands the State to promote a life of "dignity" and where Section 7 guarantees "a decent standard of living."<sup>212</sup>

Corollary to this is the Filipino's regard to family as the basic social autonomous institution. The policy espoused by our country, as embodied in our Constitution and in the numerous Conventions we have ratified, puts primacy on the status of the family to ensure good life to all the members of the family, and accordingly, to all the Filipinos.

Article II, sec. 12 of the 1987 Philippine Constitution advocates for the general protection of the family in this wise:

The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception. The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the Government.<sup>213</sup>

<sup>&</sup>lt;sup>212</sup> J. BERNAS, supra note 151, at 31.

<sup>&</sup>lt;sup>213</sup> CONST. art II, sec. 12.

Clearly, this provision makes it the mandate of the State to promote the interests of the family, such that it accepts the principle that the family is anterior to the State and is not a creature of the State. It protects the family from instrumentalization by the State.<sup>214</sup> The second sentence, however, explicitly provides the overriding purpose to begin protection from the time of conception. This is to prevent the State from adopting the doctrine declared by the U.S. Supreme Court in *Roe v. Wade* which liberalizes abortion laws up to the sixth month of pregnancy by allowing abortion any time during the first six months of pregnancy provided it can be done without danger to the mother.<sup>215</sup> Such prohibitory policy adopted by our State, strengthens the respect we accord life.

This protection extended to the unborn, nonetheless, must not be mistaken as an assertion that the unborn is a legal person. Neither must it be taken as an assertion that the life of the unborn is placed exactly on the level of the life of the mother. When necessary to save the life of the mother, the life of the unborn may be sacrificed, but not when the purpose is merely to save the mother from emotional suffering, for which other remedies must be sought, or to spare the child from a life of poverty, which can be attended to by welfare institutions.<sup>216</sup>

An entire section of the Constitution is dedicated to the protection of marriage and of the family as inviolable institutions of the society. The formula of the Constitution is quite simple. It considers a good citizen, accorded with human dignity and respect for its rights, as the basic building block of a good family. Consequently, it considers the family as the basic building block for a society. Thus it is mandated in art. XV of the 1987 Constitution:

Section 1. The State recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and actively promote its total development.

Section 2. Marriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State.

Section 3. The State shall defend:

(1)The right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood;

(2) The right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse, cruelty, exploitation, and other conditions prejudicial to their development;

(3) The right of the family to a family living wage and income; and

<sup>&</sup>lt;sup>214</sup> JOAQUIN G. BERNAS, THE 1987 PHILIPPINE CONSTITUTION: A REVIEWER-PRIMER 24 (1987). <sup>215</sup> *Id.* at 25.

(4) The right of families or family associations to participate in the planning and implementation of policies and programs that affect them.

These provisions make it imperative upon the State to enact legislation that will protect the rights of its citizens and to apply this protection to everyone, regardless of age, culture, gender and even in its manner of conception.

With this, it becomes necessary to reiterate the international conventions or treaties the Philippines has ratified, all of which emphasize the value we accord one's life and one's family.

## International Covenant on Economic, Social and Cultural Rights (1976)

#### Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.

Marriage must be entered into with the free consent of the intending spouses.

International Covenant on Civil & Political Rights (1976) and its Optional Protocol(1976)

#### Preamble

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Fourth World Conference on Women; Declaration & Platform of Action (Beijing, 1995)

15. Equal rights, opportunities and access to resources, equal sharing of responsibilities for the family by men and women, and a harmonious partnership between them are critical to their well-being and that of their families as well as to the consolidation of democracy;

## Universal Declaration of Human Rights (1946)

### Article 3

Everyone has the right to life, liberty and security of person. Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 16

1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

## Convention on the Rights of the Child (1990)

Human rights belong to each of us equally.

All of us are born with human rights—a principle the Convention on the Rights of the Child makes very clear. Human rights are not something a richer person gives to a poorer person; nor are they owned by a select few and given to others as a mere favour or gift. They belong to each and every one of us equally. Children living in developing countries have the same rights as children in wealthy countries. And human rights apply to all age groups— they do not magically begin with a child's passage into adulthood, nor do they stop when the mandate of the Convention ceases on the child's reaching the age of 18.

The Convention places equal emphasis on all of the rights for children. There is no such thing as a "small" right and no hierarchy of human rights. All the rights enumerated in the Convention— the civil and political rights as well as the economic, social and cultural rights— are indivisible and interrelated, with a focus on the child as a whole.

## The Convention on the Rights of the Child

Highlights and defends the family's role in children's lives. In the preamble and in article 5, article 10 and article 18, the Convention on the Rights of the Child specifically refers to the family as the fundamental group of society and the natural environment for the growth and well-being of its members, particularly children. Under the Convention, States are obliged to respect parents' primary responsibility for providing care and guidance for their children and to support parents in this regard, providing material assistance and support programmes. States are also obliged to prevent children from being separated from their families unless the separation is judged necessary for the child's best interests.

Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention, 1981)

#### Preamble

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole

But to enjoy all these rights and privileges, one must first be a "person". The dictionary definition of "person" states the following:

(1) a human being as including body and mind; an individual;

(2) the body of human being or its characteristic appearance and condition;

(3) any human being, corporate or body politic, having legal rights and duties;

(4) one of the three individualities in the triune God, hypostasis.<sup>217</sup>

For Sanchez Roman, a person is any being, physical or moral, real or juridical and legal, susceptible of rights and obligations or of being the subject of legal relations.<sup>218</sup> Falcon maintains that there is no difference between person and man, and defines person as man and all associations formed by man,<sup>219</sup> although this was rather hasty because person is more extensive than man, encompassing even

<sup>&</sup>lt;sup>217</sup> FUNK & WAGNALLS COMPREHENSIVE STANDARD DICTIONARY 942 (1968).

<sup>&</sup>lt;sup>218</sup> 2 Sanchez Roman 110.

<sup>&</sup>lt;sup>219</sup> 1 FALCON 103.

juridical persons.<sup>220</sup> From being a person, one acquires personality. While a person is any being susceptible of rights and obligations, personality is the aptitude of that being of becoming the subject, active or passive, of juridical relations. Personality is thus an attribute of persons. It is a consequence of human existence; it is born with man and stays with him until his death.<sup>221</sup> Now, if personality is the product of capacity in law, a necessary derivation from its existence, its external manifestation would have to be capacity. Capacity, on the other hand, may be juridical or natural. "Juridical capacity, which is the fitness to be the subject of legal relations, is inherent in every natural person....Capacity to act, which is the power to do acts with legal effect, is acquired and may be lost."<sup>222</sup> Juridical capacity is the fitness of man to be the subject of legal relations, capacity to act is the power to do acts with legal effect.

In the Civil Code of the Philippines, a person is defined in this sense:

Art 40. Birth determines personality; but the conceived child shall be considered born for all purposes that are favorable to it, provided it be born later with the conditions specified in the following article.

Art 41. For civil purposes, the foetus is considered born if it is alive at the time it is completely delivered from the mother's womb. However, if the foetus had an intra-uterine life of less than seven months, it is not deemed born if it dies within twenty-four hours after its complete delivery from the maternal womb.<sup>223</sup>

The crux of the matter depends on birth. Birth means the removal of the fetus from the mother's womb; this may take place either naturally or artificially by surgical means. And the law considers the conceived child as born for all purposes favorable to it, if it is later born alive.<sup>224</sup> This was reiterated in Presidential Decree No. 1083, otherwise known as the Code of the Muslim Personal Laws of the Philippines.<sup>225</sup> A child, upon being conceived, becomes a bearer of legal rights and becomes capable of being dealt with as a living person. The fact that it is not yet born is no impediment to the acquisition of rights. A conceived child may be the object of acknowledgment, as this is understood in the law of paternity and filiation.<sup>226</sup>

<sup>220 1</sup> ARTURO M. TOLENTINO, CIVIL CODE OF THE PHILIPPINES ANNOTATED 153 (1990).

<sup>&</sup>lt;sup>221</sup> Id. at 155.

<sup>222</sup> Rep. Act No. 386, art 37 (1949).

<sup>&</sup>lt;sup>223</sup> Rep. Act No. 386 (1949).

<sup>&</sup>lt;sup>224</sup> 1 TOLENTINO, supra note 220, at 169.

<sup>&</sup>lt;sup>225</sup> Pres. Decree No. 1083 (1977). Article 10. Personality, how acquired — Birth determines personality; but the conceived child shall be considered born for all purposes that are favorable to it, provided it be born alive, however, briefly, at the time it is completely delivered from the mother's womb.

Article 8. Legal Capacity — Juridical capacity, which is the fitness to be the subject of legal relations, is inherent in every natural person....Capacity to act, which is the power to do acts with legal effect, is acquired and may be lost. Pres. Decree No. 1083 (1977)

<sup>2261</sup> RAMON C. AQUINO, CIVIL CODE OF THE PHILIPPINES ANNOTATED 72 (1958). See De Jesus v. Sy

Indeed, there are many definitions of what a person is. The bottomline, however, is the fact that one has to be a person to acquire personality and capacity. Birth, legally speaking, is therefore the ideal marker. It is at that instant that the fetus becomes a creature in being and is clearly entitled to that degree of protection that the state owes to all its citizens. It is mainly for this reason that the concept of viability or the capacity to exist independently of the mother has been tied strongly to the definition of fetal status.<sup>227</sup>

A clone is a human being, following these definitions. It is born. A cloned child, so far as we now know, cannot be produced in a laboratory. A mother must deliver it from her womb. Dolly had a mother, and if humans are produced the same way, they will have mothers too.228 A human mother will carry a human clone; she and her husband will determine its fate.229 Cloned babies, therefore, come into the world the usual way. If birth, as contemplated by law, is the reference point for one to be constituted as a person, then cloned babies are likewise deemed persons. He/She is a person imbued with personality and capacity. He/She is a human being with body and mind. He/She is a human being with distinct and peculiar characteristics, appearance and condition. He/She is a person, physical or moral, real and legal, susceptible of rights and obligations or of being the subject of legal relations. As such, he/she must be afforded legal rights and protection as encapsulated in Philippine laws and jurisprudence. He/She is an individual with a right to a dignified life and guaranteed human rights. He/She is a member of the family. He/She is a part of society.

Indeed, in today's age, clones must be regarded as genuine and productive members of civil society. What then should make us exclude clones from the human race simply because they are identical to their fathers or mothers? Clones, in the eyes of childless couples and as supported by law, would still be the result of the greatest miracle on earth, the gift of life.<sup>230</sup> Such life infused to born clones make them as much a person and human as we all are.

Human beings conceived by cloning are reproduced; they are not mere replicas. Each clone would be like an identical twin: nearly the same in appearance, very similar in intelligence and manner, and alike (but not a duplicate) in personality.

Quia, 58 Phil. 866 (1933); Lagdameo v. Lagdameo, CA 50 O.G. 3113; Mohamed Barrueco v. Consul General, 74 Phil. 151 (1944); and In re Mori, 46 O.G. 5460.

<sup>&</sup>lt;sup>227</sup> JOHN MASON, MEDICO-LEGAL ASPECTS OF REPRODUCTION AND PARENTHOOD 97 (1990).

<sup>228</sup> KASS & WILSON, supra note 3, at 72.

<sup>229</sup> *Id*. .t 69.

<sup>&</sup>lt;sup>230</sup> Edgardo Clemente, *Human Clone Clinuc Proposal*, BUSINESS WORLD, Jan. 23,1998, at 30.

Environment will ultimately have an effect on each twin's personality.<sup>231</sup> Indeed, even identical twins, who are nature's clones, are not totally identical. Clones made in a laboratory, then conceived by the mother, would be deemed twins born years or decades apart separated by generational and cultural chasms.<sup>232</sup> So in the midst of all the furor about human cloning, one must not lose sight of the fact that a cloned baby would only be a copy of a person's genes, not a copy of the person. The child would have a completely different life experience from the adult it was cloned from, and the result would be a child with its own personality.<sup>233</sup>

The moralists and the ethicists, spearheaded by the religious, advance several reasons against human cloning. They contend, mainly, that cloning is unnatural and that it enables an individual to act and play God. They claim that cloning does not respect the fact that humans have souls. Cloning would also deprive a person of uniqueness and would subject human clones to enormous mental and emotional disorder.

The most apt response to this level of reasoning would be found in a commentary posted on the Internet, which states that:

Cloning, like any other technology, simply extends man's range of choices. And it is the extension of choice and the pursuit of knowledge that offer man the opportunity to expand the boundaries of his existence. In the end, man's spirit, that within him which searches for truth and morality, that part of his mind that aspires and dreams-his soul- is ultimately the product of his own design. Man's spirit is, fundamentally, not a gift or an accident, but the product of a lifetime's achievement. His soul is the willful product of his own rationality, the manifestation of his conceptual mind. It is not the shallow shudder of humility that ennobles a man's soul, but the enraptured embrace of knowledge, opportunity and choice. Humans will be cloned. Scientific and technological progress has shown few signs of halting for spiritual objections. Like the birth control pill and in-vitro fertilization, the technology of cloning will advance, techniques will be improved, and knowledge will be gained. The inevitable questions that cloning technology will raise-questions about family, rights and what it means to be human-will challenge society's most deeply cherished and most profound beliefs. But such a challenge should not be resisted. Cloning's difficult question can be answered only through a dedicated pursuit of knowledge and exercise of our willful rationality, and in the end, the answer to the debate over human nature may be simply that the nature of man is the product of his own will.234

<sup>231</sup> KASS & WILSON, supra note 3, at 66.

<sup>&</sup>lt;sup>232</sup> Human clones could not be exact copies— experts, PHIL. STAR, March 18,1997, at 14.

<sup>233</sup> Emma Ross, Human doning: misguided hype, MANILA STANDARD, Aug. 16, 2000, at 15.

<sup>&</sup>lt;sup>234</sup> Cloning: Toward a New Conception of Humanity, at http://www.objectivistcenter.org/ articles/pstephens\_cloning-new-conception-humanity.asp (last visited March 6, 2002).

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In the end, what the prudish or squeamish among us must accept is that the human cloning technology, amid its sordid moral costs, can make a person come into being. For clones are human beings, just like us.

## VI. LEGAL RIGHT ANALYSIS: A DISCUSSION OF PERTINENT LEGAL PRINCIPLES

The precept of the law are these: to live honestly, to injure no one, and to give every man his due.

- Anonymous

There are three distinct parties who play significant roles in the human cloning process, and all of them have constitutional and statutory rights that should be considered in determining the appropriate legislation that the Philippines should adopt for human cloning technology. While there is undoubtedly popular support for banning human cloning both at the research and the practical level in the Philippines, there are several possible constitutional impediments to doing so. Even if the cloning ban sought by Cong. Jaraula is enacted, such ban could be challenged on constitutional grounds.

# Science and the Constitution: The Constitutional Right to Scientific Inquiry

One question that should first be directly resolved by the courts of law is whether or not the scientist has the constitutional right to continue his chosen field of research. It could be argued that a total ban on human cloning would amount to a deprivation of a scientist's constitutional right of scientific inquiry. This right could exist as a necessary extension of an individual's freedom of expression as recognized by the Constitution, or as part of an individual's right to liberty.

# 1. Scientific inquiry as a right protected by freedom of expression

As of this moment, no case has been resolved by the Supreme Court that tackles the issue of scientific inquiry. Therefore, Philippine jurisprudence has not ruled on the possible application of the constitutional right to free expression on a scientist's right to pursue his chosen profession.

The right of scientific inquiry is also a huge question mark in American jurisprudence. The First Amendment issue regarding government regulation of scientific experimentation has never been directly addressed by the courts.<sup>235</sup> However, scientists and scholars in the U.S. have argued, "that the First Amendment provides some degree of protection to scientific research or scientific inquiry.<sup>236</sup> In fact, in cases involving the First Amendment protection of political, artistic and literary speech, the Supreme Court has recognized "the value of scientific freedom and the importance of a free flow of ideas."<sup>237</sup>

Experimentation is arguably an essential part of the development and expression of scientific ideas, and must therefore be granted protection.<sup>238</sup> Law professor E. Donald Shapiro<sup>239</sup> argues that, "if experimentation can be seen as either 'expressive conduct' or 'symbolic speech', then it may be protected under the First Amendment. Hence, regulations that would inhibit scientists' ability to discuss and express ideas may be prohibited by the First Amendment."<sup>240</sup>

One of the most commonly held views is that the First Amendment was designed to ensure robust discussion through the protection of a "marketplace of ideas".<sup>241</sup> Justice Holmes introduced this concept in the case of *Abrams v. United States*<sup>242</sup> where he ruled that

"(T)he ultimate good desired is better reached by free trade in ideas, — that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out.<sup>243</sup>

Another view is that the First Amendment was designed to protect speech and expressive conduct that are essential to self-governance.<sup>244</sup> Justice Johnson spoke of freedom of expression in terms of "a full and free discussion of all affairs of public interest."<sup>245</sup> As so well put by Justice Frankfurter in a concurring opinion, "the widest scope of freedom is to be given to the adventurous and imaginative exercise of the human spirit."<sup>246</sup>

<sup>235</sup> Shapiro, supra note 21, at 32.

<sup>236</sup> Id.

<sup>&</sup>lt;sup>237</sup> Id.

<sup>238</sup> Id.

<sup>&</sup>lt;sup>239</sup> J.D., Harvard Law School; L.L.D, New York Law School; Dean Emeritus & The Joseph Solomon Distinguished Professor of Law at New York Law School.

<sup>240</sup> Shapiro, supra note 21, at 33.

<sup>&</sup>lt;sup>241</sup> Foley, *supra* note 24, at 680.

<sup>&</sup>lt;sup>242</sup> 250 U.S. 616 (1919).

<sup>&</sup>lt;sup>243</sup> Id. at 630.

<sup>244</sup> Foley, supra note 24, at 679.

<sup>245</sup> U.S. v. Perfecto, 43 Phil. 58, 62 (1922).

<sup>246</sup> Kingsley v. Regents, 360 U.S. 684, 695 (1959).

These views can also be found in Philippine jurisprudence. In the case of National Press Club v. Comelec,<sup>247</sup> Justice Cruz, in his dissenting opinion wrote:

I realize only too well that the ideas that may be conveyed by the prohibited media advertisements will mostly be exaggerations or distortions or plain poppycock and may intrude upon our leisure hours if not also offend our intelligence and exhaust our patience. We may indeed be opening a Pandora's box. But these are unavoidable in the free society. As part of the larger picture, these impositions are only minor irritations that, placed in proper perspective, should not justify the withdrawal of the great and inalienable liberty that is the bedrock of this Republic. It is best to remomber in this regard that freedom of expression exists not only for the thought that agrees with us, to paraphrase Justice Holmes, but also for the thought that we abbor.<sup>248</sup> (Italics supplied.)

In the case of *Badoy v. Ferrer*, Justice Fernando adopted the following argument espoused by the late Alexander Meiklejohn:

"The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issue shall be decided by universal suffrage... To be afraid of ideas, any idea, is to be unfit for self-government. Any such suppression of ideas about the common good, the First Amendment condemns with its absolute disapproval. The freedom of ideas shall not be abridged."<sup>249</sup>

The purpose of the Constitutional protection of free expression is to protect ideas, "not because of their substantive merit but simply because ideas simulate thought, which in turn breeds the courage and boldness necessary for effective self-governance."<sup>250</sup> In the case of *Gonzalez v. Katigbak*,<sup>251</sup> the Court held:

There is no clear dividing line between what involves knowledge and what affords pleasure. If such a distinction were sustained, there is a diminution of the basic right to free expression....Press freedom, as stated in the opinion of the Court, 'may be identified with the liberty to discuss publicly and truthfully any matter of public concern without censorship or punishment.<sup>252</sup>

The basic constitutional provision is Article III, Section 4, which reads:

<sup>247</sup> G.R. 102653, 207 SCRA 1 (1992).

<sup>248</sup> Id. at 42.

<sup>249</sup> G.R. No. L-32546, 35 SCRA 285 (1970).

<sup>&</sup>lt;sup>250</sup> Thomas I. Emerson, Colonial Intentions and Curront Realities of the First Amendment, 125 U. PENN. L. REV. 741 (1977).

<sup>&</sup>lt;sup>251</sup> G.R. No. L-69500, 137 SCRA 717 (1985).

<sup>252</sup> Id. at 721.

No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.<sup>253</sup>

Clearly, the doctrine of free expression protects the sharing of ideas, expressive conduct and a free-flowing market of thought and opinion. The stimulation of thought is highly encouraged by the Constitution, so much so that it protects even "the thought that we abhor".<sup>254</sup> However, the constitutional provision is not limited to words, verbal or written. According to former Justice Isagani Cruz, "symbolisms may also be used, like the clenched fist, the bended knee, the salute to the flag itself, the mace of the legislature, the picket line, pictures, caricatures and cartoons. [Though] wordless, they articulate."<sup>255</sup> These forms of "expressive conduct" are recognized by U.S. jurisprudence as being covered by the First Amendment as long as the conditions in the case of *Spence vs. Washington*<sup>256</sup> are met, namely:

1. the conduct must be intended to convey a "particularized message", and

2. there must be a great likelihood that the message would be understood by those who view it.<sup>257</sup>

The Philippines also recognizes the concept of "expressive conduct", although the doctrine is not as well developed as its U.S. counterpart. In the case of *Ebranilag, et. al. v. Division Superintendent of Schools of Cebu*,<sup>258</sup> the Court ruled that "government regulation of expressive conduct is sufficiently justified if it is within the constitutional power of the government [and] furthers an important and substantial government interest."<sup>259</sup> However, the court failed to give a definition of "expressive conduct".

Based on the freedom of expression enshrined in the Constitution, the scientist should have the right to share and express his ideas in the "marketplace of ideas" envisioned by Justice Holmes. A scientist should have the right to continuous inquiry, and to express the results of his inquiry. A scientist conducts experiments to either prove or disprove a hypothesis through the scientific method.<sup>260</sup> It can be argued that through experimentation, scientists express their creativity and intellect in much the same way that musicians express themselves through music or artists

<sup>253</sup> CONST. art III, sec. 4.

<sup>254</sup> G.R. No. L-32546, 35 SCRA 285 (1970).

<sup>255</sup> ISAGANI CRUZ, CONSTITUTIONAL LAW 196 (1996).

<sup>&</sup>lt;sup>256</sup> 418 U.S. 405 (1974).

<sup>&</sup>lt;sup>257</sup> Id.

<sup>&</sup>lt;sup>258</sup> G.R. No. 95770, 251 SCRA 569 (1995).

<sup>&</sup>lt;sup>259</sup> *Id.* at 573.

<sup>&</sup>lt;sup>260</sup> Foley, *supra* note 24, at 683.

express themselves through art.<sup>261</sup> A law that would ban scientific research on human cloning could therefore interfere with the "conveyance of a message" in the same way as would a law that banned impressionistic painting or rap music.<sup>262</sup>

# 2. Scientific inquiry as part of right to liberty

The right of the scientist to pursue his scientific research could also fall under the protection of the due process clause as an aspect of liberty that cannot be deprived of him. Article III, sec. 1 provides: "No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws."263

Cruz makes the following comment on liberty:

Subject only to the reasonable restriction of the law, a person is free to do as he pleases. He may marry for love or for money, pursue a profession or engage in manual labor, establish his own business or merely hire out as an employee... in short, do anything that does not offend the public welfare.264

In the case of Rubi v. Provincial Board of Mindoro,265 Justice Malcolm elaborated on the subject, thus:

Civil liberty may be said to mean that measure of freedom which may be enjoyed in a civilized community, consistently with the peaceful enjoyment of like freedom in others... The term cannot be dwarfed into mere freedom from physical restraint of the person of the citizen, but is deemed to embrace the right of man to enjoy the faculties to which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare... liberty includes the right of the citizen to be free to use his facilities in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any avocation, and for that purpose, to enter into all contracts which may be proper, necessary, and essential to his carrying out these purposes to a successful conclusion.<sup>266</sup>

It is well accepted, of course, that neither the freedom of expression nor the right to liberty is absolute. The first right is subject to limitations that may be imposed by the State via its police power, and the second right may be deprived as

<sup>&</sup>lt;sup>261</sup> Id.

<sup>262</sup> See Melville B. Nimmer, The Maning of Symbolic Speech Under the First Amordmont, 21 UCLA L. REV. 29, 35 (1973).

<sup>263</sup> CONST art III, sec. 1.

<sup>264</sup> I. CRUZ, supra note 255, at 103.

<sup>265 39</sup> Phil. 660 (1919).

<sup>266</sup> Id. at 705

long as there is due process. Both exceptions to the rule require a valid intervention on the part of the State, and both may be limited by the police powers of the state.

# 3. Rationale for government limitation?

Can the government exercise its police powers to step in and limit the constitutional rights of the scientist experimenting with human cloning technology? The police power of the state is considered "the most pervasive, the least limitable, and the most demanding of the three powers."<sup>267</sup> However, the Courts will not allow the abuse of this power to the prejudice of rights and civil liberties. In the case of *Badoy v. Ferrer*,<sup>268</sup> the Court held:

Due process limits the sweeping scope of the police power of the State and "forbids governmental action that is unreasonable and arbitrary, or opposed to the community's sense of fair play or to principles of liberty and justice, or not in harmony with a scheme of ordered liberty." The measure which is sought to be justified as falling within the police power should bear a reasonable relation to the proper governmental object and should not go so far beyond the necessity of the case as to be unreasonable, oppressive and arbitrary.<sup>269</sup>

As laid down in a number of cases,<sup>270</sup> the tests to determine the validity of a police measure are as follows:

 The interests of the public generally, as distinguished from those of a particular class, require the exercise of police power; and
The means employed are reasonably necessary and not unduly oppressive upon individuals.

Whether or not the government has legal basis to control and limit the rights of scientists in the case of human cloning technologies can be determined through the use of these two tests.

The first test requires that the subject of the government measure is one that affects the public welfare. It would seem from the onset that science is indeed a valid subject of regulation for police power. The importance of science to public welfare is, in fact, enshrined in the Constitution itself. Article XIV, sec. 10 of the Constitution states:

Sec. 10. Science and technology are essential for national development and progress. The state shall give priority to research and development, invention,

<sup>&</sup>lt;sup>267</sup> I. CRUZ, *supra* note 255, at 40.

<sup>268</sup> G.R. No. L-32546, 35 SCRA 285 (1970).

<sup>269</sup> G.R. No. L-32546, 35 SCRA 285, 290 (1970).

<sup>210</sup> U.S. v. Toribio, 15 Phil. 85; Fabie v. City of Manila, 21 Phil. 486; Case v. Board of Health, 24 Phil. 256.

innovation, and their utilization; and to science and technology education, training and services. It shall support indigenous, appropriate and self-reliant scientific and technological capabilities, and their application to the country's productive systems and national life.<sup>271</sup>

According to Bernas, the provision is "important as an expression of national policy and concern."<sup>272</sup> Commissioner Quesada gave the background for the provision on science and technology; thus:

MS. QUESADA. Science and technology have become strategic factors in the economic growth and progress of developing nations. But we would like to stress the fact that science and technology in the Philippines have really lagged for many years—something like 100 years behind—in the analysis of the science and technology community. Therefore, this particular section would address the inadequacies of the past years to give stress to science and technology.<sup>273</sup>

The intent of the constitutional provision emphasizes the significance of science for the entire nation, thus making it a valid subject of police power regulation. However, the provision would also have an opposite effect. If the government were to take its task to develop science and technology seriously, then it should not abruptly ban all forms of research on the newest genetic technology of human cloning. To do so would be detrimental to the Philippine scientific community and would definitely leave it lagging behind once again.

Even if human cloning technology is a valid subject matter of state regulation, it does not necessarily mean that any legislation enacted by the country is a valid exercise of police power. The legislative act would have to be commensurate with the purpose sought, and must be reasonable in limiting the rights of the subject matter. The propriety of state action would depend on the course it would take, and the legal framework it will adopt for human cloning technology.

## Right of Procreative Liberty under the Constitution and Family Law

Essential to a couple's marital union is a satisfying sexual relationship, a fulfilling covenant to procreate. Ultimately, bearing a child completes the family. Husbands become fathers; wives become mothers. It is this ideal picture that every wedded pair aspires for. Unfortunately, there are people biologically incapable to copulate and give birth. Some relationships fail as a result. Some deny that there is

<sup>&</sup>lt;sup>271</sup> CONST. art XIV, sec. 10.

<sup>&</sup>lt;sup>272</sup> J. BERNAS, *supra* note 151, at 1128.

<sup>&</sup>lt;sup>273</sup> IV RECORD OF THE CONSTITUTIONAL COMMISSION 524 (1986).

something wrong, while some conceal their difficulties. There are some who continue to search for medical advancements to cure their disability, and some leave it all to God. In general, society empathizes with the couple's precarious condition. But what exactly do we have for them?

Funk and Wagnalls hold that "to procreate is to engender or beget an offspring; it is to originate or to produce."274 Similarly, "to reproduce is to give rise to [an offspring] by sexual or asexual generation.275

Corollary to this notion of reproduction is the concept of procreative liberty, or of reproductive freedom. Procreative liberty is the freedom to decide whether or not to leave an offspring. It is a deeply accepted moral value, and pervades many of our social practices. Reproductive freedom-the freedom to decide whether or not to have offspring-is generally thought to be an important instance of personal liberty.<sup>276</sup> The central tenet of reproductive freedom is the fairly obvious fact that the reproductive life is central to self-identity, flourishing and free expression, more generally, for individuals and for families.277

The primary role of reproductive freedom in human cloning then hinges on the importance of allowing individuals and families to think for themselves about having children. Indeed, if the state allows couples to have children in squalor or single parent families, how can it reasonably proscribe human cloning as either unsafe or irresponsible?<sup>278</sup> Cloning would be the only way that man, in fact, could participate biologically in the creation of a person. This more direct involvement would increase the degree to which a couple participates in the creation of a person, and for some, this greater participation may be especially meaningful. Moreover, cloning is a clear affirmation of the couple's mutual love. This is most exemplified in a scenario where the woman acts as the gestational mother and the man's genes are used.279

The 1987 Constitution assures that every Filipino has a right to health, and a right to lead a dignified life with guaranteed full respect for human rights.

> Section 11. The State values the dignity of every human person and guarantees full respect for human rights.280

<sup>&</sup>lt;sup>274</sup> FUNK AND WAGNALLS, supra note 217, at 1005.

<sup>&</sup>lt;sup>275</sup> Id. at 1070.

<sup>276</sup> Robertson, supra note 186, at 45.

<sup>277</sup> McGee & Wilmut, supra note 197, at 224. 278 Id.

<sup>279</sup> Carson Strong, Cloning and Infertility, in THE HUMAN CLONING DEBATE 190-191 (McGee ed., 2000).

<sup>280</sup> CONST. art. II, sec 11

Section 15. The State shall protect and promote the right to health of the people and instill health consciousness among them. $^{281}$ 

The most relevant provisions of the 1987 Constitution, however, would be found in art. III. These provisions are the main arguments used to bolster one's right to procreate. The pertinent sections involved are the following:

Section 1. No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws.<sup>282</sup>

Section 3(1). The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.<sup>283</sup>

The right to procreate can even be related to the high regard we accord the family. A separate article in the Constitution is written in this manner:

Section 1. The State recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and actively promote its total development.

Section 2. Marriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State.

Section 3. The State shall defend:

(1) The right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood;

(2) The right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse, cruelty, exploitation, and other conditions prejudicial to their development;

(3) The right of the family to a family living wage and income; and

(4) The right of families or family associations to participate in the planning and implementation of policies and programs that affect them.<sup>284</sup>

Analogously, the international conventions entered into by our country focus on everybody's right to health. They call for equal access to ensure that basic services are distributed accordingly. The right to privacy is further bolstered by the agreements we have ratified. These treaties elaborately explain and reinforce our commitment to uphold one's right to health, liberty and privacy.

<sup>&</sup>lt;sup>283</sup> CONST. art. II, sec 15.

<sup>282</sup> CONST. art. III, sec. 1.

<sup>&</sup>lt;sup>283</sup> CONST. art. III, sec. 3(1).

<sup>&</sup>lt;sup>284</sup> CONST. art. XV, sec. 1-3.

International Covenant on Civil & Political Rights (1976) and its Optional Protocol (1976)

### Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Fourth World Conference on Women; Declaration & Platform of Action (Beijing, 1995)

17. The explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment;

30. Ensure equal access to and equal treatment of women and men in education and health care and enhance women's sexual and reproductive health as well as education;

Universal Declaration of Human Rights (1946)

#### Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

A very significant convention that we have ratified fortifies our recognition of one's right to procreate. This commitment is contained more precisely and in detail in the *International Conference on Population and Development* (ICPD) *Programme of Action*, which document serves as the main source for the right to reproductive health. The following provisions contain the exact definition and scope of reproductive health:

A. Reproductive rights and reproductive health

7.2. Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility

which are not against the law, and the right of access to appropriate healthcare services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. In line with the above definition of reproductive health, reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counseling and care related to reproduction and sexually transmitted diseases.

7.3. Bearing in mind the above definition, reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community. The promotion of the responsible exercise of these rights for all people should be the fundamental basis for government- and community-supported policies and programmes in the area of reproductive health, including family planning. As part of their commitment, full attention should be given to the promotion of mutually respectful and equitable gender relations and particularly to meeting the educational and service needs of adolescents to enable them to deal in a positive and responsible way with their sexuality. Reproductive health eludes many of the world's people because of such factors as: inadequate levels of knowledge about human sexuality and inappropriate or poor-quality reproductive health information and services; the prevalence of high-risk sexual behaviour; discriminatory social practices; negative attitudes towards women and girls; and the limited power many women and girls have over their sexual and reproductive lives. Adolescents are particularly vulnerable because of their lack of information and access to relevant services in most countries. Older women and men have distinct reproductive and sexual health issues which are often inadequately addressed.

In the Philippines, this right to procreate is limited to married couples. In art. 68 of the Family Code,<sup>285</sup> it is stipulated that: "The husband and wife are obliged to live together, observe mutual love, respect and fidelity, and render mutual help and support."<sup>286</sup>

<sup>285</sup> Exec. Order No. 209 (1987) (hereinafter FAMILY CODE).

<sup>286</sup> Id., art. 68.

The duty to live together of the married couple includes the right to sexual intercourse,<sup>287</sup> and ultimately, to start a family. This, therefore, impliedly gives the married couple the right to procreate. And in the process, when a child is conceived and born, the couple completes the picture and starts to build a family. Article 209 of the Family Code emphasizes that parental authority and responsibility is the "natural right and duty of parents over the person and property of their unemancipated children."

In the U.S., one of the most important cases implying a positive right of procreation is the 1923 decision in *Meyer v. Nebraska*<sup>288</sup> where the Supreme Court struck down a Nebraska law that prohibited the teaching of any language other than English to children prior to the eight grade.<sup>289</sup> Specifically, the Court held that the law violated the "liberty" interest protected by the Due Process Clause,<sup>290</sup> stating in dicta:

Without doubt, the liberty interest of the Due Process Clause denotes not merely freedom from bodily restraint but also the right of the individual to marry, establish a home and bring up children...and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>291</sup>

Thus, the liberty interest protected by the Constitution appeared to the Court, in 1923, to encompass not only the right to be free from physical restraint but also the affirmative rights to individual domestic happiness, marriage, establishment of a home, and the raising of children.<sup>292</sup>

The Supreme Court subsequently, and more specifically, addressed the right of procreation in the case of *Skinner v. Oklaborna*<sup>293</sup> in which the Court invalidated a statute that mandated sterilization for criminals convicted two or more times for felonies involving moral turpitude.<sup>294</sup> Strictly speaking, *Skinner* is on equal protection, not due process. The Court invalidated the law because it forced sterilization upon certain habitual felons convicted of crimes of moral turpitude but left other felons untouched.<sup>295</sup>

<sup>287</sup> ALICIA V. SEMPIO-DIY, HANDBOOK ON THE FAMILY CODE OF THE PHILIPPINES 98 (1998).

<sup>288 262</sup> U.S. 390 (1923).

<sup>&</sup>lt;sup>289</sup> Id. <sup>290</sup> Id.

<sup>&</sup>lt;sup>291</sup> Id.

<sup>&</sup>lt;sup>292</sup> Id.

<sup>&</sup>lt;sup>293</sup> 316 U.S. 535 (1942).

<sup>&</sup>lt;sup>294</sup> Id. <sup>295</sup> Id.

Skinner clearly intimates that procreation is a fundamental right, since the court invoked strict scrutiny,<sup>296</sup> proclaiming that "marriage and procreation are fundamental to the very existence and survival of the human race"<sup>297</sup> and concluded that, by preventing conception, the law in question interfered with "one of the basic civil rights of man."<sup>298</sup>

Further elucidation of this fundamental right is found in *Stanley v. Illinois*,<sup>299</sup> in which the Court stressed that the "right to conceive and to raise one's children," is a right "far more precious...than property rights."<sup>300</sup> And in the case of *Cleueland Board of Education v. La Fleur*,<sup>301</sup> the Court invalidated a restrictive maternity leave policy for teachers and stated that procreational liberty cases established a "freedom of personal choice in matters of marriage and family life."<sup>302</sup> Then, in the celebrated abortion case of *Planned Parenthood of Southeastern Pernsylvania v. Casey*,<sup>303</sup> a majority of the Court stated:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education...These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and therefore], are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state.<sup>304</sup>

The Court established that an individual's decision whether or not to procreate is included among the liberties protected by the Due Process Clause. The rationale for protecting such intimate decisions is likewise clear: because individual views on the "mystery of human life" and the "concept of existence" are so likely to vary from individual to individual, the Court believes that regulating such intimate matters under compulsion of the state would ineluctably usurp individual liberty.<sup>305</sup>

Id.
Id.
Id.
Id.
405 U.S. 645 (1972).
Id. at 690.
1414 U.S. 632 (1974).
Id.
505 U.S. 833 (1992).
Id.
Id.

Similarly, in the Philippines, there is recognition of one's right to procreate, but it has not been explicitly and elaborately discussed. In the case of *Chi Ming Tsoi* v CA,<sup>306</sup> this right was affirmatively recognized. The court held:

The marriage was declared void because the prolonged refusal of the couple to have sexual intercourse came within the purview of psychological incapacity. In any marital union, there are obligations to uphold—to procreate is the most essential. If the couple refused to perform this obligation, the marriage is a farce and must be declared null.<sup>307</sup> (Italics supplied.)

Most of the cases relative to this concern can be connected to the concept of impotence and sterility. It is in these cases that the Court emphasizes the view of society on infertility and sexual dysfunctions and impliedly stresses the importance of procreation in the marital union. Jurisprudence reveals the attitude we have towards this stigma. People see infertility as tending to blacken one's reputation. It smears one's name and wreaks havoc to one's social interaction.<sup>308</sup> As such, the right to privacy accorded to every Filipino ensures that this disgrace is concealed. The case of *Macdangdang v.*  $CA^{309}$  elaborated on art. 255 of the Family Code, focusing on the physical impossibility of the husband to have sexual intercourse with his wife to refute the presumption of a child's legitimacy. The Supreme Court had occasion to distinguish impotence from sterility, mainly citing the case of *Menciano v. San Jose*,<sup>310</sup> which states:

> Impotence refers to the inability of the male organ to copulation, to perform its proper function. It is the inability to have sexual intercourse. On the other hand, sterility refers to the inability to procreate, and not simply the physical inability to perform the act of sexual intercourse.

The right to privacy is another aspect that can be used to bolster one's fundamental right to procreation. The leading case of *Griscold v. Connecticat*,<sup>311</sup> which recognized the individual's right to use contraceptives, stated that, "the rights to marry and to procreate biologically are older than any state law and, for that matter, older than the Constitution or the Bill of Rights."<sup>312</sup> The Supreme Court deemed the statute unconstitutional, thereby acquitting the appellants. It reasoned that:

such statute is violative of the Constitution, infringing on the right of marital privacy which is within the penumbra of specific guarantees of the Bill of

<sup>307</sup> Id.

<sup>&</sup>lt;sup>306</sup> G.R. No. 119190, 266 SCRA 324 (1995).

<sup>&</sup>lt;sup>308</sup> Gonzales vs. CA, 298 SCRA 222 (1998).

<sup>&</sup>lt;sup>309</sup> G.R. No. 49542, 100 SCRA 73 (1980).

<sup>&</sup>lt;sup>310</sup> 89 Phil. 63 (1979).

<sup>&</sup>lt;sup>311</sup> 38 U.S. 479, 14 L.Ed. 2d 510 (1965).

<sup>&</sup>lt;sup>312</sup> Foley, *supra* note 24, at 694.

Although the right of MARITAL Privacy is not specifically Rights. enumerated in the Bill of Rights, it is a legitimate concern that falls under the provision- the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people (9th Am)." Besides, in the 1st, 3rd, 4th and 5th amendments, the RIGHT TO PRIVACY of an individual was strongly recognized. The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptive rather than regulating their manufacture or sale, seeks to achieve goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and, thereby invade the area of protected freedoms.<sup>313</sup>

Griscold was cited in our cases, to illustrate the right to privacy. As held in the case of Ople v. Torres,<sup>314</sup> the essence of privacy is

the right to be left alone. Intrusions unto the right must be accompanied by proper safeguards & well-defined standards to prevent unconstitutional invasions. As such, any law or order that invades individual privacy will be subjected by the court to strict scrutiny. Indeed, Our constitution guarantees this protection in Article 3 (Bill of Rights).<sup>315</sup>

All the cases adjudicated by the Court thus far have dealt with coital reproduction, it is unclear to what extent, if at all, non-coital forms of reproduction, such as artificial insemination, IVF or *doring* are constitutionally protected. The Court's language regarding procreation is clearly broad enough to encompass non-coital forms of procreation.<sup>316</sup> In the Philippines, we are wanting of any case law that discusses ARTs. This must have been due to our conservative orientation and deeply moral and ethical convictions. Or maybe, it is caused by our lack of or inadequate understanding of this technology. In the U.S. where we can pattern our legal framework on ARTs, very little case law exists to bolster this claim. In *Cameron vs. Board of Education*,<sup>317</sup> the decision upheld a single woman's right to conceive a child using artificial insemination, suggesting that the fundamental right of procreation is a broad right, granting women "control [over their] reproductive functions,"<sup>318</sup> thus including not only a right not to become pregnant<sup>319</sup> but also the affirmative right to

<sup>313 38</sup> U.S. 479, 14 L.Ed. 2d 510 (1965).

<sup>314</sup> G.R. No. 127685, 293 SCRA 141 (1998).

<sup>&</sup>lt;sup>315</sup> Griswold v. Connecticut, 38 U.S. 479, 14 L.Ed. 2d 510, 512 (1965).

<sup>&</sup>lt;sup>316</sup> Foley, supra note 24, at 692.

<sup>317 795</sup> F. Supp. 228 (S.D. Ohio 1991).

<sup>&</sup>lt;sup>318</sup> Id. <sup>319</sup> Id.

become pregnant using artificial insemination. The *Cameron* case focused on the woman's right to control her own body, granting women a zone of reproductive privacy.<sup>320</sup> The famous case of *In re Baby M*,<sup>321</sup> also strongly intimated that the affirmative right of procreation not only exists but also includes the use of ARTs.

Is cloning covered by the protection involved in procreative liberty? The question of whether cloning is part of procreative liberty is a significant one considering that we have already shown that non-coital and assisted reproduction are themselves part of the liberty. If reproduction using ARTs is indeed within the ambit of protected activity under due process, cloning may also be afforded protection.

Is there now a distinction between cloning and other forms of reproduction? Cloning involves reproduction, not replication. Reproduction is defined as the act of producing a "counterpart, image or copy" or the "sexual or asexual process by which organisms generate others of the same kind."<sup>322</sup> Replication, on the other hand, is defined as a "copy," an "echo or reverberation," or, interestingly enough "reproduction".<sup>323</sup> Douglas Wallace stated that:

Since only DNA is transferred in cloning, DNA contained in the egg's cytoplasm in the form of mitochondria is *not* cloned or replicated. The resulting child is not a true clone, for its mitochondrial DNA will have come from the egg source who will not usually also be providing the nucleus for transfer. Mitochondrial DNA is only a small portion of total DNA, perhaps 5%.<sup>324</sup>

Another proof that cloning is not replication is that a clone will eventually be distinct and unique, given the different environment it must adapt to. As discussed earlier, if identical twins differ, then clones would likewise be different.

One common ART is IVF. This procedure is performed in special medical clinics for infertile couples, where the viable human embryos are created by mixing husband's sperm and wife's eggs in test tubes. The viable zygotes are put back in the woman, if she is capable of completing a pregnancy, or in surrogate mothers, where they develop into perfectly normal babies in the usual way. Through the years, IVF has won wide acceptance for bringing happiness to couples incapable of having children in a way that seems to stay within the realm of what people conceive as natural.

<sup>&</sup>lt;sup>320</sup> Id.

<sup>321 537</sup> A.2d 1227 (N.J. 1988).

<sup>&</sup>lt;sup>322</sup> Foley, *supra* note 24, at 695.

<sup>&</sup>lt;sup>323</sup> Id.

<sup>324</sup> Douglas C. Wallace, Mitochondrial DNA in Aging and Disease, 277 SCIENTIFIC AMERICAN 40 (1997).

Cloning is basically similar to IVF. The process involves either embryonic cell transfer or nuclear transfer, wherein the cell that reaches its viable size is placed in the womb of the mother who then carries the embryo through a normal gestation period and gives birth in the normal way. Given this likelihood, it can be concluded that cloning is part of ART and falls within the ambit of constitutional protection. The "bearer" of the child would be the gestational mother, and the "begetter" would be the DNA donor. Thus, an individual who wished to use his/her own DNA to replicate himself via cloning would have a constitutional right to do so, as would a woman who wished to gestate a fetus with which she has no genetic relationship. If the donor and the individual who intends to gestate were the same individual, such individual (necessarily a woman) would obviously be the exclusive holder of the procreational right.<sup>325</sup>

Moreover, it must be noted that cloning is directly involved with procreative liberty in situations where the couple initiating the cloning intends to rear the resulting child. This protected interest is perhaps clearest when they are splitting embryos or using DNA from their own embryos or children, but it also holds when one of the rearing partner's DNA is used.<sup>326</sup> In considering the relation of cloning and procreative liberty, the meanings of reproduction, family, parenting, and children rearing are blurred. This blurs even more as we move away from sexual reproduction involving a couple's egg and sperm. But such blurred meanings can be clarified, by simply following the test of how closely the marginal or deviant case is connected with the core.<sup>327</sup>

What was established here, therefore, is that there exists a right to procreate. And within that right is the couple's liberty to choose the method or reproduction they want to adopt, including cloning.

## Constitutional and Statutory Rights of the Human Clone

### 1. Constitutional right to the equal protection of the laws

One of the concerns about human cloning technology is the socio-political risk of inequality and discrimination.<sup>328</sup> However, the prospect of the propagation of a lesser race subject to social discrimination is deterred by the Constitutional safeguards set in place by its framers. The Constitution, in particular the equal

<sup>&</sup>lt;sup>325</sup> Foley, *supra* note 24, at 670.

<sup>&</sup>lt;sup>326</sup> Robertson, supra note 186, at 53.

<sup>&</sup>lt;sup>127</sup> Id. at 54.

<sup>&</sup>lt;sup>328</sup> See discussion *infra*, Part III.B.2.

protection clause,<sup>329</sup> would not in any way allow legislation that would unduly discriminate against children conceived through human cloning technology.

The equal protection clause is a specific constitutional guarantee of the Equality of the Person.<sup>330</sup> The equality it guarantees has been defined as:

(L)egal equality or, as it is usually put, the equality of all persons before the law. Under it, each individual is dealt with as an equal person in the law, which does not treat the person differently because of who he is or what he is or what he possesses. The goddess of Justice is portrayed with a blindfold, not because she must be hindered in seeing where the right lies, but that she may not discriminate against suitors before her, dispensing instead an even handed justice to all.<sup>331</sup>

The Philippine constitution upholds this principle of equality in a long line of cases. In the case of *J.M. Tuason & Co. v. Land Tenure Administration*,<sup>332</sup> the Court stated that:

The ideal situation is for the law's benefits to be available to all, that none be placed outside the sphere of its coverage. Only thus could chance and favor be excluded and the affairs of men governed by that serene and impartial uniformity, which is of the very essence of the idea of law.<sup>333</sup>

The majority opinion further explained its rationale for upholding the constitutional right, by proclaiming that:

the laws operate equally and uniformly on all persons under similar circumstances or that all persons must be treated in the same manner, the conditions not being different, both in the privileges conferred and the liabilities imposed. Favoritism and undue preference cannot be allowed. For the principle is that equal protection and security shall be given to every person under circumstances which, if not identical, are analogous. If law be looked upon in terms of burden or charges, those that fall within a class should be treated in the same fashion, whatever restrictions cast on some in the group equally binding on the rest.<sup>334</sup>

Equal protection simply requires that all persons or things similarly situated should be treated alike, both as to rights conferred and responsibilities imposed.<sup>335</sup>

<sup>329</sup> CONST. art III, sec. 1.

<sup>&</sup>lt;sup>330</sup> J. BERNAS, *supra* note 151, at 124.

<sup>&</sup>lt;sup>331</sup> II SCHWARTZ, THE RIGHT OF THE PERSON 487-488 (1968).

<sup>332</sup> G.R. No. L-21064, 31 SCRA 413 (1970).

<sup>333</sup> Id. at 421.

<sup>334</sup> Id

<sup>335</sup> Ichong v. Hernandez, 101 Phil. 1155 (1957).

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In other words, similar people should not be treated differently, "so as to give undue favor to some and unjustly discriminate against others."<sup>336</sup> However, the duty of the government to ensure the equal treatment of its constituents is not absolute. The equal protection clause does not require the universal application of the laws; the state is not tied down by a non-existent duty to provide for persons who are not equally situated. The government is allowed to classify, through legislation, people placed in different situations. However, such classification must be reasonable, and must actually be based on a significant difference between the groups of people being classified. Legislation that would give human clones a different set of rights would be tantamount to a deprivation of constitutional rights. The law would recognize the person conceived through human cloning as a human being substantially protected both from state and social discrimination.<sup>337</sup> Under the Civil Code, for instance, the right to equal protection of the laws is upheld also against a private individual who "directly or indirectly obstructs, defeats, violates or in any manner impedes or impairs" a person's right to the equal protection of the laws.<sup>338</sup>

The fear that clones would be oppressed by the government in which they are conceived has no basis in law. In fact, the Philippines has already established legislation to prevent any forms of discrimination against its citizens. In the year 1995, Executive Order No. 275 was issued by the President, creating a committee for the special protection of children from all forms of neglect, abuse, cruelty, exploitation, discrimination, and other conditions prejudicial to their development.<sup>339</sup> The order states that the State has the duty to "defend the right of children to assistance, including proper care and nutrition and special protection from all forms of neglect, abuse, cruelty, exploitation and discrimination, and other conditions prejudicial to their development."340 Even as early as 1976, a Presidential Decree was issued to declare all violations of the "international convention to eliminate all forms of racial discrimination" to be criminal offenses.341 The international convention<sup>342</sup> mentioned was previously concurred in by the Philippine legislature on May 18, 1967. The law manifests the intent of the state to uphold the equality of all humans, regardless of race, and this intent could be the cornerstone of more specific legislation to apply to discrimination resulting from the manner of conception.

<sup>&</sup>lt;sup>336</sup> I. CRUZ, *supra* note 255, at 122.

W Sar discussion infra, Part V.B.

<sup>&</sup>lt;sup>338</sup> CIVIL CODE, art. 32.

<sup>&</sup>lt;sup>319</sup> Exec. Order No. 275 (1995).

<sup>&</sup>lt;sup>340</sup> Exec. Order No. 275 (1995).

<sup>&</sup>lt;sup>141</sup> Pres. Decree No. 966 (1976).

<sup>&</sup>lt;sup>142</sup> International Convention on the Elimination of All Forms of Racial Discrimination, General Assembly of the United Nations on December 21, 1965 (entered into force on January 4, 1969).

### 2. Constitutional right against slavery and involuntary servitude

Another unfounded fear associated with human cloning is that individuals conceived by cloning could be forced into slave labor, to serve at the whim of the rich and the powerful. Article III, sec. 18 (2) of the 1987 Constitution is explicit in saying that: "No involuntary servitude in any form shall exist except as a punishment for a crime whereof the party shall have been duly convicted."

Clearly, this constitutional provision safeguards all persons (regardless of how they are conceived) from slavery and involuntary servitude.

Interestingly, Prof. Lori Andrews adheres to the view that human cloning may create a form of genetic bondage or impose a badge of slavery.<sup>343</sup> She argues that because cloning would create a later-born genetic twin, the resulting child's autonomy might be limited where his or her genetic traits and predispositions are already known.<sup>344</sup> The person created by cloning, therefore, may lack the same free will as a person created by sexual procreation and thereby be enslaved in violation of the constitutional guaranty.<sup>345</sup>

Article 3, sec. 18(2) of the Constitution, however, is self-executing; it prohibits slavery and involuntary servitude, whether imposed by the government or a private party, without the necessity of an enabling legislation. It is a specific provision that serves as a further guaranty of liberty embodied in the due process clause. It furnishes the needed protection to allay the fear of Prof. Andrews.

The case of *State v. West*<sup>346</sup> describes involuntary servitude as "the condition of one who is compelled by force, coercion, or imprisonment, and against his will, to labor for another, whether he is paid or not."<sup>347</sup> The concept includes slavery, which is defined as "that civil relation in which one man has absolute power over the life, fortune and liberty of another,"<sup>348</sup> and also peonage, or "a condition of enforced servitude by which the servitor is restrained of his liberty and compelled to labor in liquidation of some debt or obligation, real or pretended, against his will."<sup>349</sup> Any form of restraint of the individual so he can be compelled to work for another would then be violative of this constitutional protection. In *Caunca v. Salazar*,<sup>350</sup> the

<sup>347</sup> Id.

<sup>&</sup>lt;sup>343</sup> Foley, *supra* note 24, at 666, *citing* Lori B. Andrews, *The Current and Future Legal Status of Cloring*, at 65 (paper submitted to the National Bioethics Advisory Commission).

<sup>&</sup>lt;sup>344</sup> Id.

<sup>&</sup>lt;sup>345</sup> Id.

<sup>346 42</sup> Minn. 147 (1889); 43 N.W. 845 (1889).

<sup>&</sup>lt;sup>348</sup> BLACK'S LAW DICTIONARY 1559 (5th ed. 1979).

<sup>&</sup>lt;sup>349</sup> Peonage Case, D.C. Ala. 123 F. 671 (1903).

<sup>&</sup>lt;sup>350</sup> 82 Phil. 851 (1949).

Supreme Court released on habeas corpus a housemaid who was being detained and required to render domestic services in payment for the money advanced for her transportation from the province.<sup>351</sup> This was amplified in the art. 247 of the Revised Penal Code, wherein penalties are imposed "upon any person who, in order to require or enforce the payment of a debt, shall compel the debtor to work for him, against his will, as household servant or farm-laborer." Another stark illustration is the case of *Pollock v. Williams*,<sup>352</sup> wherein the U.S. Supreme Court declared unconstitutional a statute providing that any person who receives an advance in consideration of his promise to perform some work but subsequently fails or refuses to do so shall be presumed prima facie to have induced the advance with intent to defraud. The effect of such presumption would be to compel him to perform the work for fear of criminal prosecution, in violation of the prohibition against involuntary servitude.<sup>353</sup>

The notion of involuntary servitude in human cloning can be seen in two aspects. The first aspect focuses on prejudice-based conditions that stamped individuals of a certain race as inferior by restricting or denying them freedoms enjoyed by the superior race. Clones, in this scenario, may be treated as inferiors, discriminated upon by the superior race (comprised of individuals conceived naturally). In truth, however, individuals conceived by cloning are unlikely to constitute a separate race as that term is commonly understood. The dictionary defines "race" in numerous ways, none of which appears to apply to individuals conceived by cloning. It is defined as a "local geographic or global human population distinguished as a more or less distinct group by genetically transmitted physical characteristics."354 It is also defined as a "group of people united or classified together on the basis of common history, nationality or geographical distribution."355 Yet another definition is that it is a "genealogical line, lineage..."356 Human beings conceived by cloning would not be distinguished by genetically transmitted physical characteristics since each would have the genetic makeup of his or her donor. Such individuals would no more constitute a distinct race than would their DNA donors. Likewise, humans conceived by cloning would not constitute an ethnic group united or classified together on the basis of common history, nationality or geographical distribution, because such individuals would be born into different families, at different times, and in different nations around the world. Finally, humans created by cloning would not constitute a distinct genealogical line

<sup>&</sup>lt;sup>351</sup> I. CRUZ, supra note 255, at 275.

<sup>&</sup>lt;sup>152</sup> 322 U.S. 4 (1944).

<sup>&</sup>lt;sup>153</sup> I. CRUZ, supra note 255, at 276.

<sup>&</sup>lt;sup>354</sup> Foley, *supra* note 24, at 668.

<sup>&</sup>lt;sup>355</sup> Id. at 669.

<sup>&</sup>lt;sup>156</sup> Id.

because each would have a different DNA. They would therefore constitute a lineage different from their DNA donors.<sup>357</sup>

A ban on human cloning would not prevent discrimination based on prejudicial notions of the inferiority of the race of individuals so conceived, but rather such discrimination based on fears about the social, moral and ethical implications of the procedure itself. Consequently, it is more likely that the prejudice would manifest itself as a desire to prevent the formation of a superior race rather than a desire to prevent discrimination based upon notions of such individuals' inferiority.<sup>358</sup>

Critics of human cloning might further argue that humans conceived by cloning would be inherently inferior because such individuals would lack the same degree of free will as individuals conceived naturally. The argument would be that because an individual conceived by cloning would have a certain foreknowledge of his life, e.g., his appearance or his predisposition to certain genetic talents or conditions, he ineluctably would have an inferior existence. This reasoning, however, ignores the fact that other genetically identical individuals, e.g., identical twins, are not considered to be inferior beings, either socially or legally. Although identical, a distinct personality is established by an individual conceived by cloning. Indeed, any successfully created human clone will never have the exact same personality as the original person because there are differences in environment and upbringing.359 A clone is not a mere carbon copy of someone else, not an automaton depicted in science fiction, not a sheer replica of its donor. As many scientists have emphasized, a clone would not in fact be an identical copy, but more like a delayed identical twin. And just as identical twins are two separate peoplebiologically, psychologically, morally and legally, though not genetically-so, too, a clone would be a separate person from her non-contemporaneous twin. Experts agree that human clones could not be exact copies.<sup>360</sup> Moreover, to characterize an individual conceived by cloning as lacking in free will because he shares his genes with another disregards the importance of innumerable environmental factors and assumes that genetics defines individual destiny to such an extent that nothing else matters.<sup>361</sup> So despite society's current emphasis on and fascination with genetics, <sup>362</sup> it seems clear that such genetic reductionism is not warranted by evidence.<sup>363</sup>

<sup>&</sup>lt;sup>357</sup> Id.

<sup>&</sup>lt;sup>358</sup> Id.

<sup>&</sup>lt;sup>359</sup> Massie K. Santos, *Human Cloning: Looking for an error-free process*, MANILA TIMES, Aug. 17, 2001, http://www.inq7.net (last visited March 6, 2002).

<sup>&</sup>lt;sup>360</sup> Human clones could not be exact copies-experts, supra note 232.

<sup>&</sup>lt;sup>361</sup> Foley, *supra* note 24, at 670.

<sup>362</sup> Id.

<sup>&</sup>lt;sup>363</sup> Id.

The second aspect deals with what Leon R. Kass calls "despotic domination".<sup>364</sup> Kass sees the parent of the cloned child as subjecting it to a set of demands—forcing it, in effect, to become a particular kind of person. It is mainly contended that cloning is wrong because of the inability of the cloned child to consent before his conception to his existence as a clone. This is a rather absurd assertion because consent prior to conception on the part of *any* creature is an utter impossibility. Ultimately, in all cases, all parents exert a profound influence upon their children's lives. And many, if not most, take an active role in the design of their children. Parents select the language and culture in which their children are raised, and ideally give them moral and philosophical guidance. In the end, cloning does not allow parents a greater degree of control over their children's lives; it simply provides them with better information and reasonable expectations about the child's relative fitness, overall health, and intellectual potential.<sup>365</sup>

## 3. Constitutional right against deprivation of life, liberty and property

One of the most common and striking fears associated with human cloning is that individuals conceived through cloning would be forced to serve as organ donors. As discussed in Chapter III of this paper, there is a belief that the clone would be treated as a commodity, and not as a human person. At this point, it can already be established that the human clone would indeed be a person under the law, and as such would be protected by the laws of the state.

"Clones are people. You must treat them like people. We don't forcibly take organs from one twin and give them to the other. Why would we do that in the case of clones?"<sup>366</sup> A person cannot be forced to serve as an organ donor. No law would allow a situation where any human being would be forced to surrender an organ, whether life-sustaining or not, for the benefit of any other person. Any law that would allow a situation where a competent adult is required to sacrifice his tissue or organs— against his will— for the benefit of another would surely deprive that person of life or property without due process of law. Article III, sec. 1 of the Constitution provides that "no person shall be deprived of life, liberty or property without due process of law."<sup>367</sup>

<sup>&</sup>lt;sup>164</sup> Kass, supra note 46.

<sup>365</sup> Commutary: Cloning: Toward a New Conception of Humanity? http://www.objectivistcenter.org/ articles/pstephens cloning-new-conception-humanity.asp (last visited Jan. 22, 2002).

<sup>&</sup>lt;sup>366</sup> Ronald Bailey, What's Wrong with Cloning Peoples in THE HUMAN CLONING DEBATE 110 (Glenn McGee ed., 2000).

<sup>367</sup> CONST. art. III, sec. 1.

The due process clause protects all persons, natural as well as artificial.<sup>368</sup> The human being conceived through somatic cell nuclear transfer technology would be covered by this constitutional protection. He cannot be deprived of the use of any body parts or organs without his consent, or without the due process required by law. The forcible taking of organs for the benefit of another amounts to a denial of right to life.

Any measure that would endanger his health or subject him to unnecessary pain or to unreasonable physical exertion would be subject to challenge.<sup>369</sup> In fact, life' should embrace "the enjoyment by the individual of all the God-given faculties that can make his life worth living.<sup>370</sup>

The utmost importance given to life under the Constitution is also provided by the country's penal laws. Due to the fact that a person conceived *via* cloning technology is vested with legal personality, he or she would fall under the coverage of the Revised Penal Code of the Philippines. Title Eight of the Penal Code provides penalties for acts that constitute violence to persons, ranging from parricide<sup>371</sup> to slight physical injuries.<sup>372</sup> Perhaps, the provisions that are most applicable to the forcible taking of organs or body parts are those falling under chapter two of the same Title. The chapter includes the provision on mutilation which states:

> The penalty of *redusion temporal* to *redusion perpetua* shall be imposed upon any person who shall *intentionally mutilate another by depriving him*, either totally or partially, of some essential organ for reproduction. Any other intentional mutilation shall be punished by *prision mayor* in its medium and maximum periods.<sup>373</sup> (Italics supplied.)

The provision should be applied to a taking of the cloned person's organ or body part where there is no consent on his or her part.

Human beings cannot be forced to serve as organ donors. Under Philippine law, life-sustaining organs may only be removed from a person upon his or her death, and only in circumstances specifically provided by law. Under Republic Act No. 7170, otherwise known as the Organ Donation Act of 1991, organs may only be removed upon the death of a person if he had executed a legacy of donation

<sup>&</sup>lt;sup>368</sup> I. CRUZ, *supra* note 255, at 99.

<sup>&</sup>lt;sup>369</sup> Id. at 101.

<sup>&</sup>lt;sup>370</sup> Id. at 102.

<sup>&</sup>lt;sup>371</sup> Rev. Pen. Code, art. 246.

<sup>&</sup>lt;sup>372</sup> Rev. Pen. Code, art. 266.

<sup>&</sup>lt;sup>373</sup> Rev. Pen. Code, art 254.
prior to his death,<sup>374</sup> or when any of the following persons donates all or any part of

- 1) Spouse;
- 2) Son or daughter of legal age;
- 3) Either parent;
- 4) Brother or sister of legal age; or
- 5) Guardian over the person of the decedent at the time of his death.<sup>375</sup>

It must also be noted that these people may only donate parts of the decedent's body where there is an absence of any contrary intention to do so. Thus, we can see here the evident supremacy of the consent of a human being as regards the taking of organs or body parts from his body.

## VII. DEVELOPING THE LEGAL FRAMEWORK: LEGAL ACTIONS TOWARDS HUMAN CLONING

It has happened already, or it is still to come. And forewarned is seldom forearned.

- Neil Gaiman

#### A. Available Legal Responses to New Scientific Breakthroughs

Law embodies the moral judgments of a society, and "once the people decide which of many, often-competing moral views they desire, law can provide the tool to create the desired outcome."<sup>376</sup> In the case of human cloning technology, the law must step in lest the state be caught unprepared to handle the new possible scenarios it could bring about.

In the field of scientific research, the government has the interest to step in and regulate. This interest is enshrined in the Constitution. In the past, however, citizens have used the law to indicate four different attitudes toward new or emerging scientific potential.<sup>377</sup> There have been four legal responses to new scientific breakthroughs. They are as follows:

1. Encouraging the scientific activity;

his body:

<sup>&</sup>lt;sup>174</sup> Rep. Act No. 7170 (1992), sec. 3.

<sup>375</sup> Rep. Act No. 7170 (1992), sec. 4.

<sup>&</sup>lt;sup>176</sup> Susan R. Martyn, Human Cloning: The Role of Lea, 32 U. TOL. L. REV. 375.

<sup>&</sup>lt;sup>177</sup> Id.

- 2. Leaving science alone and seeing what happens (*laissez faire* policy);
- 3. Controlling an activity through legal regulation; and
- 4. Banning the idea or breakthrough.<sup>378</sup>

The government has been one of the greatest supporters of scientific advancement in history, both in the Philippines and in other countries. For instance, the highly anticipated completion of the Human Genome Project<sup>379</sup> would not even be possible if not for the massive government support that it continuously enjoys. Likewise, nuclear power would never have been discovered were it not for massive government spending on the research.<sup>380</sup> The Philippine government, in fulfillment of its constitutional mandate to give priority to scientific research and development,<sup>381</sup> continues to fund scientific research indirectly through academic projects, such as the Molecular Biology and Biotechnology Program (MBBP)<sup>382</sup> established in April of 1987.

A *laissez faire* policy, on other hand, entails leaving scientific research to its own devices. In other words, such a policy would give a free hand to science in terms of scientific research and development, and the government would have to rely on the scientists to act for the welfare of the scientific community and the public welfare in general. However, this policy gives rise to the possibility of much abuse and misuse of any technology, especially human cloning technology.

The regulation of science has been a very popular response to scientific breakthroughs in recent history. As one biologist would even argue, "the social control of science<sup>383</sup> has existed as long as scientific activity has existed."<sup>384</sup> In the Philippines, scientists themselves welcome the active participation of the government in the field of scientific research. Dr. Geminiano de Ocampo made the following statement: "Promotion of scientific research is not enough. Promotion as it is currently implemented includes funds for project grants-in-aid, scholarships for

<sup>&</sup>lt;sup>378</sup> Id.

<sup>&</sup>lt;sup>379</sup> Human Genome Project is a 13-year effort coordinated by the Department of Energy and the National Institutes of Health. The project was originally planned to last 15 years, but effective resource and technological advances have accelerated the expected completion date to 2003.

<sup>&</sup>lt;sup>380</sup> Martyn, *supra* note 376.

<sup>&</sup>lt;sup>381</sup> CONST. art XVI, sec. 10.

<sup>&</sup>lt;sup>382</sup> See National Institute of Molecular Biology and Biotechnology at http://www.upd.edu.ph (last visited Feb. 16, 2002).

<sup>&</sup>lt;sup>383</sup> Social control of science is any form of control of either goal directed or non-goal directed science exerted by individuals or groups other than the scientists responsible for the initiation and prosecution of the experiments. Governmental control falls under this definition of social control. See Arthur Steinberg, The Social Control of Science, in GENETICS AND THE LAW 301 (1976).

<sup>384</sup> Arthur Steinberg, The Social Control of Science, in GENETICS AND THE LAW 301 (1976).

science training, dissemination of science information and the findings of scientific research and incentives to engage in scientific research activities."385

Of course, the simplest response would be to ban the technology altogether. Identifying the breakthrough as illegal would eliminate the risks associated with the technology, and would spare the government from possible outrage from the different sectors of society strongly opposed to human cloning technology. On the other hand, history provides numerous examples of scientific breakthroughs initially banned that eventually gave way to the relentless accuracy of the discovery.<sup>386</sup>

## B. Legal Response in the Interest of the State

In determining an appropriate legal framework to apply to human cloning technology in the Philippines, we believe that government regulation promises to be the best model to follow. Human cloning clearly requires the regulation of the government, and the scientific community would welcome reasonable scientific regulation.<sup>387</sup>

The other options suffer from defects that would render them inappropriate for the Philippine situation. Full government support (encouragement) without regulation could lead to a rampant misuse of the developing technology. Scientists would in effect be given the free rein to continue experimentation even to the detriment of some public policies and societal principles. Furthermore, for the government to fund human cloning research without any form of legislative regulation would manifest a disregard for the valid legal and humanistic issues raised by opponents of human cloning technology.

Similarly, a *laissez faire* policy would open the door to much abuse from the scientific community. Scientific curiosity, when left on its own, may indeed produce valuable insight, but it may lead to a disregard of human rights and public welfare.<sup>388</sup> Scientists often pursue worthy goals, but might lack the wisdom to grasp the human or environmental harm that follows.<sup>389</sup> Furthermore, the Philippine government has long since abandoned the *laissez faire* principle in implementing its governance policies. As early as 1919, Justice Holmes already opposed the use of the policy in the Philippine government. In the *Rubi* case, he stated that: "The doctrines of laissez faire and of unrestricted freedom of the individual, as axioms of economics

<sup>&</sup>lt;sup>185</sup> Geminiano de Ocampo, Life Sciences in the New Constitution, in SCIENCE AND THE NEW CONSTITUTION 73 (1970).

<sup>186</sup> Martyn, sigra note 376, at 251.

<sup>&</sup>lt;sup>187</sup> Susan M. Wolf, Why NBAC is Wring, in THE HUMAN CLONING DEBATE 116 (McGee ed., 2000).

<sup>&</sup>lt;sup>188</sup> Martyn, *supra* note 376, at 251.

<sup>389</sup> Id.

and political theory, are of the past. The modern period has shown a widespread belief in the amplest possible demonstration of governmental activity."390

The ban on human cloning technology is a move supported by the Roman Catholic Church and by Pres. Arroyo. Cong. Jaraula has already filed the bill designed to prohibit human cloning, from experimentation to its actual implementation.

However, a complete ban on the technology would raise constitutional concerns, as discussed in the previous chapter. Legislation banning human cloning technology could be questioned as being unconstitutional on the following grounds:

- 1. It would deprive the scientist of his constitutional right to scientific inquiry, as protected by the due process clause,<sup>391</sup> and to freedom of expression;<sup>392</sup>
- 2. It would be an infringement on the procreative liberty of a couple seeking to conceive a child through reproductive cloning technology;<sup>393</sup> and
- 3. It would deprive the eventual product of human cloning technology of appropriate legal protection because there would be no legal framework contemplating its existence.

Furthermore, a complete ban would be detrimental to the following state interests:

- 1. It could work to prohibit scientists from continuing research on other medical and scientific benefits of somatic cell nuclear transfer;
- 2. It would leave Filipino scientists at a greater disadvantage in terms of research development, when placed alongside other countries;
- 3. It would prevent the development of a cloning technology that is physically safer for the children it produces; and
- 4. It might force researchers endeavoring to initiate human cloning research to leave the country and continue experiments in another jurisdiction.

Banning is a shortcut solution that could not serve as an appropriate legal framework for human cloning technology in the Philippines, for legal, political and practical reasons. A total legislative ban on cloning misses the big picture altogether.

<sup>&</sup>lt;sup>390</sup> Rubi v. Provincial Board of Mindoro, 39 Phil. 660 (1919).

<sup>&</sup>lt;sup>391</sup> CONST. art. III, sec. 1. See also discussion infra, Part VI.A.

<sup>&</sup>lt;sup>392</sup> CONST. art. III, sec. 4. See also discussion infra, Part VI.A.

<sup>&</sup>lt;sup>393</sup> CONST. art. III, sec. 1. See also discussion orfra, Part VI.B.

After all, there are interests to be balanced, and simply dropping the axe on cloning technology would be an injustice to the rights of those developing and seeking to use the technology.

Regulation as the national response to human cloning technology would best serve national interests. Once a proper model of regulation is adopted, the government may work to balance the interests of both the supporters and the critics of human cloning technology. The concerns of cloning opponents would be considered, and regulatory measures will be taken so as to assure that such concerns will not take place. At the same time, the government will be upholding the constitutional and statutory rights involved for proponents of human cloning technology. Afterwards, once the human clone is actually conceived, the regulatory measures would be adequate to protect him or her because the legal framework had already contemplated his coming into existence.

#### VIII. THE PHILIPPINE LEGAL FRAMEWORK

A law explains a set of observations; a theory explains a set of laws.

John L. Casti

This paper proposes that the Philippines should follow a framework based on government regulation towards human cloning technology. There are, however, many variations of the regulatory model available for the adoption of Philippine legislature. A discussion on the distinct model to be applied to the Philippine situation should begin with an analysis of the legal framework already being considered in the legislative houses of the Philippines.

## A. An Analysis of the Proposed Legal Framework from the Legislature

During the first regular session of the Twelfth Congress of the Philippines, Cagayan de Oro Rep. Constantino G. Jaraula filed House Bill No. 1203, recommending the passing of the "Cloning Prohibition Act of 2001." The Bill "seeks to prohibit human cloning in the country and to provide penalties for violation thereof."<sup>394</sup> The text of the Bill—so far the only legislative action taken on the issue of human cloning— is reproduced here, as follows:

<sup>&</sup>lt;sup>194</sup> H. No. 1203, 12th Cong., 1st Sess. (2001).

#### House Bill 1203

#### An Act Prohibiting Human Cloning in the Philippines and Providing Penalties for Violation Thereof

Be it enacted by the Senate and the House of Representatives of the Philippines in Congress assembled:

Section 1. Title -- This Act shall be known as the "Cloning Prohibition Act of 2001"

Section 2. Declaration of Policy - It is the policy of the State to value the dignity of every human person and guarantee full respect for human rights. The State recognizes the sanctity of family life, and is committed to protect and strengthen the family as a basic autonomous social institution. Towards this end, the government must and shall ban the conduct of human cloning since every human being has intrinsic dignity and worth which must be preserved, respected and safeguarded.

Section 3. Prohibition - It shall be unlawful to conduct nor undertake human cloning in the Philippines, even on an experimental basis.

For purposes of this Act, human cloning shall mean a method involving the production of a group of genetically identical cells or organisms derived from a single individual. It shall encompass or include any activity or overt act designed directly towards human cloning.

Section 4. Penalty - Any person who violates this Act shall be punished, upon conviction, by a fine of not less than Fifty Thousand Pesos (P 50,000.-) nor more than Five Hundred Pesos (P 500,000.-), or by imprisonment of not less than Five (5) years nor more than Ten (10) years, or both such fine and imprisonment at the discretion of the court. If the violation is committed by a corporation or association, its President, Manager, Director or head shall be made liable therefor. If the violation is committed by an alien, he/she shall fully serve the sentence and pay the fine, and thereafter he/she shall be deported immediately without further proceedings, and shall forever barred entry from entry to the country.

Section 5. Implementing Rules and Regulations - Within sixty (60) days from the effectivity hereof, the Department of Health in coordination with the Department of Science and Technology, shall issue rules and regulations necessary for the effective implementation of this Act.

Section 6. Repealing Clause - All laws, decrees, orders, rules and regulations or any part thereof which are inconsistent herewith are hereby repealed or amended accordingly.

Section 7. Effectivity - This Act shall take effect fifteen (15) days after its complete publication in the Official Gazette or in any two (2) national newspapers of general publication.

#### The bill creates an inappropriate legal framework for human cloning technology

The bill exposes the misapprehension of many Filipinos on the concept of human cloning. It evinces a deficiency in understanding the science of cloning. Concepts such as gene-splicing techniques, chromosome mapping and other DNA techniques, and gene piracy were adopted in the explanatory note of the bill without clearly defining these notions.<sup>395</sup> It is apparent that these terminologies were adopted without conducting a necessary comprehensive scientific inquiry. In truth, it is arguably wanting of any scientific framework. The most telling sign of this deficiency is the vague and imprecise definition of human cloning. Section 3 defines human cloning as "a method involving the production of a group of genetically identical cells or organisms derived from a single individual." The definition is incomplete and inadequate to specifically pinpoint which areas of scientific research are prohibited and still allowed. It failed to address the basic techniques employed in cloning— of embryo cell cloning and of nuclear transfer cloning. Indeed, it would not be surprising to learn that the author of this bill actually got his idea of cloning from movies or from television. The overnight production in giant vats or glass chambers of many full-grown versions of a single person, like that depicted in the movie *Multiplicity*<sup>396</sup> is not the way human clones are made.<sup>397</sup> Clones are not instant adults.

Certainly, this lack of scientific accuracy in the movies and television may have contributed to the fear of technology. Such fear is the motivating factor that shuts the door to any scientific inquiry on the matter. Such fear is cloaked as moral and ethical reasoning.

Proponents against human cloning, as espoused in the explanatory note of the bill, fear that the widespread practice of human cloning would undermine important social, ethical and moral values. One, that there is possible abuse to people who may be used as objects of experiments and to children who may be exposed to physiological harm associated with a diminished sense of individuality and personal autonomy. Two, that there is probable degradation in the quality of parenting and family life. These are the exact thoughts, as dictated by our Catholic upbringing, which most likely beclouded the lawmaker in proposing this bill. And this was a major hindrance that led him to his severely limited idea of human cloning.

The bill likewise adopts the policy of the State that values the dignity of every human person and the sanctity of family life. A deeper understanding of human cloning would show that this policy is fortified by this technology. A clone, as explained, is a person, a human being with legal personality. Similarly, a clone is a member of the family; it may be an offspring or a sibling that strengthens even more

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<sup>395</sup> See Annex C.

<sup>&</sup>lt;sup>396</sup> Movies tend to exaggerate the "instant adults" unage of cloning. See MULTIPLICITY (Columbia Pictures, 1996) (portraying a man, played by Michael Keaton, who underwent a surgical procedure and emerged with an adult duplicate).

<sup>397</sup> Santos, supra note 359.

our basic autonomous social institution. Indeed, in order to truly value the worth and dignity of every human being, one must value the worth and dignity of even a cloned individual.

Sans a clear definition and a strong public policy to ban human cloning, the bill must be reviewed and improved upon. Even assuming that the bill would serve one or more compelling government interests, such bill may nonetheless be deemed *unconstitutional*, as discussed in the previous chapters of this paper.<sup>398</sup> A ban on human cloning would be detrimental to our legal system as it would violate the constitutional and statutory principles that safeguard the rights of the individual.

Several sections of the proposed bill betray a lack of understanding of the issues that have been discussed in this paper. For instance, sec. 3 of the proposed law sought to "prohibit human cloning in the Philippines, even on an experimental basis.<sup>399</sup> This could severely hamper the development of other areas of research that are fully or slightly related to somatic cell nuclear transfer technology. This, despite the fact that research of such nature may lead to other medical breakthroughs that could save many lives. Furthermore, sec. 2 of the bill makes mention of the duty of the state to "recognize(s) the sanctity of family life"400 and its commitment "to protect and strengthen the family as a basic autonomous social institution."401 Yet, the proposed legislation failed to consider the other side of the family equation: the right of the married couple to procreate in order to strengthen their own family. Jaraula makes use of family values as a justification for banning human cloning; it is ironic that he is also disregarding family values based on constitutional liberties, in order to justify his proposals. Finally, as discussed above, Jaraula's definition of human cloning is gravely in need of improvement. Jaraula is in effect banning all forms of cloning, including cellular and embryo cloning which have long been staples of modern biotechnology. Clearly showing a lack of understanding of recent biotechnological developments, Jaraula would effectively destroy biotechnology research at almost all levels.

In the end, it is proposed that we carefully look at the current legal construct and instead draft a bill that will regulate the research on human cloning. Banning human cloning sends the regrettable message that politics, religion and public pressure triumph over logic and law. If citizens and lawmakers openly embrace the benefits afforded by human cloning and warmly accept the reality that clones are people too, then we can face this brave new world, confident that our laws are adequate to carry us all safely into the twenty-first century.

<sup>&</sup>lt;sup>398</sup> See discussion infra, Parts VI.A & B.

<sup>&</sup>lt;sup>399</sup> H. No. 1203, 12th Cong., 1st Sess. (2001).

<sup>400</sup> *Id.*, sec. 2.

<sup>401</sup> Id.

#### B. Finding a Regulatory Model for the Philippines

So far, other countries have also adopted a model of banning. The bills introduced into the U.S. Senate, for example, have either proposed for a total ban on human cloning technology<sup>402</sup> or a ban on government funding for experimentation regarding the technology.<sup>403</sup>

So far, the only legal framework proposed for legislation in the Philippines fails to address the constitutional and practical issues raised by both the proponents and the critics of human cloning. Regulation still remains to be the most viable government reaction for the human cloning issue. However, merely declaring that the government should regulate the use of human cloning would also suffer the same infirmity as the bill that sought to ban the technology altogether.

Ian Wilmut and Glenn McGee<sup>404</sup> approached the idea of regulation with three possible models: the *reproductive freedom model*, the *pediatric model* and the *adoption model*.<sup>405</sup>

The reproductive freedom model looks at regulation from the point of view of the married couple who wishes to exercise their procreative liberty through human cloning. Those who advocate the primary role of reproductive freedom in the human cloning debate point to the importance of allowing individuals and families to think for themselves about having children.<sup>406</sup> Thus, the thrust of the government would be to develop a regulatory model that would:

- 1. Uphold the reproductive freedom of the married couple;<sup>407</sup>
- 2. Limit the use of the technology to those who are legally covered by procreative liberty<sup>408</sup>; and
- 3. Assure the safety of the technology for the couple who will undergo the cloning process.

The pediatric model, on the other hand, would be concerned about the harm that cloning might have on the cloned child. One strong argument is that all harm to the cloned child should be prevented; this argument is made in the spirit of

<sup>402</sup> H.R. 1644, 107th U.S. Cong. (2001).

<sup>&</sup>lt;sup>403</sup> H.R. 1372, 107th U.S. Cong. (2001).

<sup>&</sup>lt;sup>404</sup> Glenn McGee is the author of *The Perfet Baby: A Pragmatic Approach to Genetics*, and of many articles in the field of bioethics. He is assistant Professor and Associate Director for Education at the University of Pennsylvania Center for Bioethics.

<sup>&</sup>lt;sup>405</sup> McGee & Wilmut, supra note 197, at 223

<sup>406</sup> Id. at 225.

<sup>&</sup>lt;sup>407</sup> See discussion infra, Part IV.B.

<sup>408</sup> Id.

what we call the pediatric model, which emphasizes not the rights of the procreators, but the responsibility to care for those created.<sup>409</sup> Regulation must be developed in such a way as to protect the interests and well-being of the cloned child. After all, there are valid claims of possible harm to the child, namely that the child would be psychologically affected by his own humanity, and that the child would be deprived of individuality and identity. Even more alarming is the possibility that the child would be treated in some way as the parents' property, or at the very least as someone who should follow exactly in the cell donor's footsteps. The regulatory model to be adopted should realize the possibility of these ill effects on the cloned child, and must take pains to assure that none of them will take place. This can be done through the pediatric model of regulation.

It is argued that the each of the two previously discussed models would be insufficient on its own, seeing that each would only cater to a particular side of the human cloning issue between the clone and the cloner. However, Wilmut and McGee believe that the two can be merged into one model— the adoption model. The adoption model takes into consideration both the right of a couple or an individual to rear a child, and at the same time assures that the child is adequately protected. Parents who seek to adopt children are required, in virtually every nation, to seek prior approval from a regional authority or court.<sup>410</sup> The adoption model is framed out of recognition that the adoption of a child is

an unusual way to enter into a family, devoid of pregnancy and birth and textured by its own social and moral features. The adoption process cannot replace these elements of gestation and preparation for childbirth. However, in an important sense it gives communal imprimatur to the creation of a family, drawing on other social rituals for sealing a permanent and loving commitment.<sup>411</sup>

The adoption model can be illustrated through the laws that allow adoption in the Philippines. For instance, under the Domestic Adoption Act,<sup>412</sup> the adopting parents are required to have "a genuine intention of adoption."<sup>413</sup> Furthermore, it states that, "adoption should always be in the best interest of the child."<sup>414</sup> These factors are even determined by a licensed social worker who would conduct a case study for each person applying for adoption.<sup>415</sup> The adoption law always looks at the best interests of the child, as evidenced by one of its policies which states that: "In

<sup>&</sup>lt;sup>409</sup> McGee & Wilmut, *supra* note 197.

<sup>410</sup> Id. 411 Id.

<sup>&</sup>lt;sup>412</sup> Rep. Act No. 8552 (1997).

<sup>&</sup>lt;sup>413</sup> *Id.*, sec. 11.

<sup>414</sup> Id., sec. 11.

<sup>415</sup> Id., sec. 11.

all matters relating to the care, custody and adoption of a child, his/her interest shall be the paramount consideration in accordance with the tenets set forth in the United Nations Convention on the Rights of the Child."<sup>416</sup>

However, the adoption model still would not be sufficient to address the other concerns about human cloning technology. It is also the task of the model to devise a regulatory approach that addresses safety in permitting scientific research and progress in a sphere of immense importance to couples and the children. Thus, the model should take into consideration the continuous development of cellular research, in particular somatic cell nuclear transfer technology. The model should allow the scientific research, yet at the same time regulate it, to assure that no human rights are disregarded in the process.

## C. The Appropriate Philippine Legal Framework: A Proposal

A Philippine legal framework on human cloning technology should work on the premise of regulation. The following recommendations are made for the regulation of the technology in the Philippines:

### 1. Limitation of regulated technology - specific definition of human cloning technology

The regulatory model should at the onset define what technology is sought to be regulated by the government. As previously discussed, cloning technology can come in many forms and a definition would be necessary to determine specifically what areas of scientific research would be tantamount to human cloning research subject to government regulation. After all, it would not be beneficial to control other areas of scientific research where there is no reasonable need to do so.

For this purpose, we propose that human cloning technology should be legally defined as follows:

The term "human cloning" is a reproductive technology using *somatic cell nuclear transfer* technology, whereby the nucleus of a human somatic cell is introduced into a female egg cell to produce a human embryo. The human embryo would in turn be implanted into the uterus of a female who carries the embryo to its normal gestation period, and would be born as a human infant with a similar genetic constitution as the human source of the somatic cell.

<sup>116</sup> Id., art 1, sec 2(b).

#### 2. Cloning as a reproductive science only

It should be declared as a policy of the regulatory model that human cloning technology would be a scientific process used only for the purpose of human procreation. A human clone would not in *any circumstance* be used to produce a human being to be an organ donor, or a subject of further experimentation. Human cloning should only be for the purpose of creating a child— meant to be placed in a family environment— for the rearing of parents who wish to exercise their constitutional procreative liberty. The technology to clone human beings should, in effect, be treated solely as a reproductive technology. Any other purpose, as mentioned above, would have no basis in law or public policy, and would directly go against the legal personality of the resulting human clone.

This would be an application of the *adoption model* espoused by Wilmut and McGee.

#### 3. Availability to a legally married couple only

The technology should only be available to legally married couples who wish to reproduce and conceive a child of their own. The married couple is the institution sought to be protected by the right of procreative liberty.<sup>417</sup> Since human cloning should be limited to use as a reproductive technology, the child should be created for the purpose of being raised by a family. The child should not be prejudiced by entering into an unstable environment, and should be infused into the normalcy of family existence. Furthermore, the child should have a legitimate status under Family Law so as to avoid the disadvantages that come with an illegitimate status. This is in line with the pediatric model of regulation previously discussed.

The Family Law of the Philippines seeks to strengthen the two-parent concept of family. Article 1 provides that: "Marriage is a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life. It is the foundation of the family and an inviolable social institution..."<sup>418</sup>

The Family Code declares that it is the policy of the State to protect the traditional family, which was statutorily described using the traditional two-parent concept. Furthermore, art. 149 provides that the family is "the foundation of the nation, is a basic social institution, which public policy cherishes and protects." The state is seeking to protect the Filipino family, as defined by the Family Code in art. 1.

<sup>&</sup>lt;sup>417</sup> See discussion infra, Part VI.B.

<sup>&</sup>lt;sup>418</sup> FAMILY CODE, art. 1.

The protection of the family is even more manifest when the Code provided for the rules on paternity and filiation. Article 164 specifically provides that "children conceived or born during the marriage of the parents are legitimate." On the opposite end of the spectrum, those "children conceived and born outside a valid marriage are illegitimate."<sup>419</sup> The child does not enjoy the status of legitimacy if he or she is born outside the confines of a valid marriage. Such a situation would unjustly prejudice the rights of the conceived clone, especially since some civil rights are only accorded to the legitimate child. The law provides that legitimate children shall have the right:

- To bear the surnames of the father and the mother, in conformity with the provisions of the Civil Code on Surnames;
- (2) To receive support from their parents, their ascendants, and in the proper cases, their brothers and sisters, in conformity with the provisions of this Code on Support; and
- (3) To be entitled to the legitime and other successional rights granted to them by the Civil Code.<sup>420</sup>

Of course, aside from the fact that a child cloned from an unmarried couple or individual would have lesser rights than a legitimate child, he would also have to contend with the social stigma that comes with being a "bastard" child. As a product of artificial reproductive technology, the child should not be subjected to even more social prejudice.

#### 4. Vigilant government assistance and surveillance

The government should take an active level of assistance to couples who would wish to avail of human cloning reproductive technology. Care must be taken to assure that the technology would be executed by medical practitioners who are adept with the technology. The government must likewise determine the childrearing capability of any couple who wishes to avail of the reproductive technology. Finally, the government should assure that the child would be free from any harm usually connected with human cloning, whether physical, sociological or psychological harm.

<sup>419</sup> FAMILY CODE, art. 165.

<sup>&</sup>lt;sup>420</sup> FAMILY CODE, art. 174.

## 5. Determination of technology safety levels

The government should take a hands-on approach in determining the level of safety of any process that would involve human cloning reproductive technology. It should set standards of safety as regards the use of the technology. It would be up to the government, in its regulatory authority, to determine whether or not the technology is safe enough to assure the creation of healthy human life, and whether or not the couple would be free from harm. As long as these standards are not met, the government should have the authority to halt the initiation (or prevent the continuation, as the case may be) of the cloning process.

### 6. Establishment of a regulatory body

The government should of course have a regulatory body to execute the state regulation policy towards human cloning technology. The regulatory body will be tasked with implementing the government policy of regulation towards human cloning technology. In line with this, the body would come up with Implementing Rules and Regulations to implement the legislation enacted. In addition to this, the body should have the following tasks:

Determine the standards of safety of human cloning technology;
Monitor the continued use and development of human cloning technology in the Philippines;
Monitor areas of scientific research directly related to human cloning technology, as defined in this paper; and
Other functions as provided by law.

For now, we propose that two government institutions should serve as regulatory bodies for human cloning reproductive technology. The Department of Health should work hand in hand with the Department of Science and Technology. The creation of a government Bureau dedicated to biotechnology should be considered, not only for human cloning technology, but for the development of therapeutic human cloning technologies as well.

#### 7. Therapeutic cloning technologies

One of the greatest critiques of a total ban on human cloning technology is the danger of such a ban prohibiting other areas of cellular research that may prove beneficial to medical research. Continuation of research on therapeutic cloning technologies should be assured. The country should have a policy on the development of biotechnology, so as not to prejudice scientific research.

#### D. Proposed Legislation

Having made the aforementioned recommendations, this paper now proposes legislation in order to establish the legal framework for human cloning technology in the Philippines.

### AN ACT TO REGULATE THE USE OF HUMAN CLONING TECHNOLOGY IN THE PHILIPPINES AND ALL EXPERIMENTATION DIRECTLY RELATED THERETO, AND PROVIDING PENALTIES FOR VIOLATIONS THEREOF

Be it enacted by the Senate and the House of Representatives of the Philippines in Congress Assembled:

Section 1. Title - This Act shall be known as the "Cloning Regulation Act of 2002."

Section 2. Declaration of Policy – It is the policy of the State to promote scientific research development, and to respect the rights of scientists to pursue their chosen fields of research. The State also recognizes the right to procreative liberty of married couples in its commitment to protect and strengthen the family as a basic social institution. The State also respects the rights of a child to a dignified life, guaranteeing full respect for human rights. Finally, the State values human life at all levels, and endeavors to advance its propagation. Towards this end, the government must allow the development of human cloning reproductive technology, and all related experimentation, provided that they are regulated accordingly.

Section 3. Areas of scientific research concerning human cloning reproductive technology shall be subject to the following guidelines:

- (a) Human cloning reproductive technology shall be used solely for procreative purposes. Cloning human beings for any other purpose would not be allowed by law;
- (b) Only married couples are deemed to have a right to procreative liberty, and as such are the only ones who may avail of human cloning reproductive technology;
- (c) A child conceived through human cloning reproductive technology is deemed a human person as it is defined under the law, and enjoys all the rights and privileges naturally accorded thereto;
- (d) The human child conceived through human cloning would be protected by the State from all forms of discrimination and abuse, in accordance with his Constitutional rights to equal protection and due process;

Section 4. For the purposes of this Act, the term "human cloning" shall mean a reproductive technology using *somatic cell nuclear transfer* technology, whereby the nucleus of a human somatic cell is introduced into a female egg cell to produce a human embryo. The human embryo would in turn be implanted into the uterus of a female who carries the embryo to its normal gestation period, and would be born as a human infant with a similar genetic constitution as the human source of the somatic cell.

Section 5. The status of the child created through human cloning reproductive technology shall be governed by existing laws on Persons and Family Relations.

Section 6. All areas of experimentation directly related to human cloning technology and therapeutic cloning technology, as defined in Section 4 hereof, shall be monitored by the government regulating body so as to assure compliance with the guidelines set by this law, by the Implementing Rules and Regulations to be drafted by the regulating body.

Section 7. Violations & Penalty – Any violation of the guidelines provided herein shall be deemed illegal and punishable by law. Any person convicted of such violation shall be punished by a fine of not less than Fifty Thousand Pesos (P50,000) and not more than Two Hundred Thousand Pesos (P200,000), or by imprisonment of not less than six (6) months nor more than two (2) years, or both at the discretion of the court. If the violation is committed by a corporation or association, its President, Manager, Director or head shall be made liable therefore. If the violation is committed by an alien, he/she shall fully serve the sentence and pay the fine and thereafter he/she shall be deported immediately without further proceedings, and shall be forever barred from entry to the country.

Section 8. Jurisdiction – All actions and proceedings arising out of this Act shall fall under the jurisdiction of the Regional Trial Courts. *Provided*, that the Supreme Court may designate a special court to handle cases regarding this nature.

Section 9. Regulatory Body – The Department of Health and the Department of Science and Technology shall be the administrative bodies tasked with the regulation of human cloning reproductive technology in the Philippines. Within sixty (60) days from the effectivity of this Act, they shall issue the Rules and Regulations necessary for the effective implementation of this Act.

Section 9. Repealing Clause - All laws, decrees, orders, rules and regulations and any part thereof which are inconsistent with this Act are hereby repealed or amended accordingly.

Section 10. Effectivity – This Act shall take effect fifteen (15) days after its complete publication in the Official Gazette or in any two (2) national newspapers of general circulation.

Approved,

## IX. CONCLUSION

Creating the smallest living thing, creating life, no matter how small, is greater than creating a vast dead planet. A thing that lives is a universe.

#### - Ben Okri, Binds of Heaven

While it is true that human cloning reproductive technology is not yet fully developed in the Philippines, that fact should not serve to deter any act on the part of the government to prepare itself for the inevitable arrival of the new genetic science. The government should not hide behind the cloak of technological deficiency, but rather it should always look ahead and see the possibilities that science may offer for its constituents. The State should never disregard science such is the mandate of the Constitution that declared science as an essential State priority.

Human cloning technology is developing at an alarming rate, and if any nation would be passive, it would find itself ill-prepared for the situations that cloning would make possible. This early, the task falls upon government to determine its own capabilities of handling the influx of the new technology, and to develop an actual legal framework that would apply to the new technology. However, in developing this framework, the State should not be easily swayed by public clamor which is, as of the moment, still wallowing in the deepest mires of misconception. The people have yet to be informed of the intricacies of human cloning technology; it would be an irresponsible move for the government to accede to the cries of a misinformed public when it should, before all else, consider all the rights involved.

There are two sides to every coin, and two versions of each story. The issue becomes much more important because the story to be told is the story of human life itself— existence as we know it. Given the immense importance of this issue to humanity, it should be given more thought and consideration.

The legal framework proposed in this paper is one that resulted, we hope, from a learned point of view— one that has been witness to both sides of the coin, both versions of the story of human life. And hopefully, the day will come when the two versions will finally meet, and everyone will see the coin for what it really is— the beauty of human life.

ANNEX A Illustration of the SCNT human cloning process



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## Annex B Major Events in the Commercialization of Biotechnology

1973	First cloning of a gene
1975	First hybridoma created
1976	Genentech, first firm to exploit rDNA technology
1981	Gene Synthesizing machines developed; First
	monoclonal antibody kit approved
1982	Rat gene transferred into mice; First rDNA animal
	vaccine (for colibacillosis) approved for use in Europe; Frist
	rDNA pharmaceutical (human insulin) approved for use in USA
	and UK
1984	Cloning and sequencing of entire HIV genome; DNA
	fingerprinting technique discovered
1985	Genetic markers found for kidney disease and cystic
	fibrosis; Development of PCR Technology; FDA approval of
	recombinant human growth hormone
1986	Supply of AIDS and hepatitis screening and diagnostics
	to bloodbanks; First interferon products approved for cancer:
	Intron A and Roteron B; First approval for a genetically
	engineered human vaccine: Recombivax HB for prevention of
1000	Hepatitis B
1989	Cystic fibrosis gene discovered; FDA approved epoietin
	(EOP); Bioremediation gains attention, as microbe-enhanced
1000	First biogeneration of the second sec
1990	First bioengineered 100d additive (recombinant renin)
	approved by FDA; First approval of numan gene therapy clinical
	chronic Granulomatous disease
1001	First of a new class drugs colony stimulating factors:
1771	Neupogen for Chemotherapy-induced neutropenia: First approval
	for hone marrow transplant: Leukine for neutrophil recovery
1997	First interlekin derived product: Proleukin for renal
1//2	cell cancer: Frist recombinant blood clotting factor approved in
	the U.S.: Recombiate for haemophilia

## ANNEX C HOUSE BILL NO. 1203 Introduced by Honorable Constantino Jaraula

### Explanatory Note

This bill was filed with the 11th Congress as House Bill NO. 12896, with the following Explanatory Note:

This bill seeks to prohibit human cloning in the country and to provide penalties for violation thereof.

For several years now, development in gene-splicing techniques have given scientists remarkable opportunities to understand the molecular basis of how a cell functions, not only in diseases, but in everyday activities as well. Rapid advances in chromosome mapping and other DNA techniques brought about a new effort called Human Cloning.

This technology is expected to take 15 years to complete the initial process alone. But it is reported that U.S. and Chinese scientists are to come out with human cloning in three years. The question on whether its benefits actually outweigh the risks, as well as ethical and moral values, becomes pressing and timely. It must be addressed now.

Critics have expressed several valid concerns about human cloning, one of which is its harm to people who may be used as objects of experiments and to children who may be created in this manner, particularly the physiological harm associated with a diminished sense of individuality and personal autonomy. Others expressed concern about the degradation in the quality of parenting and family life.

Beyond the issue of the safety of the procedure, however, people have expressed fears that the widespread practice of human cloning would undermine important social value by tempting some to manipulate others as if they were objects instead of persons. Arrayed against these concerns are other important social values, such as protecting the widest possible sphere of personal choice, particularly in matters pertaining to procreation and child rearing, maintaining privacy and the freedom of scientific inquiry.

There have also been questions raised on gene piracy. According to reliable reports from the University of the Philippines, scientists posing as anthropologists have been gathering tissue samples from ethnic communities in the Luzon region known for their immunity to cancer and diabetes. Thus, there has been rampant exploitation in pursuit of dominance over the gene race.

Thus, due to the foregoing considerations, this representation believes that at this time, it is morally unacceptable for anyone in the public or private sector, whether in a research or clinical setting, to attempt to clone a human being. Aside from the fact that current scientific information indicates that this technique is not safe to use in humans at this point, it would also violate important ethical obligations.

In view of the foregoing, approval of this bill, which was filed before the 11th Congress but was not acted upon at the time of its adjournment, is earnestly recommended.

## Abstract:

# TOUCH ME NOT: EXPANDING CONSTITUTIONAL FRAMEWORKS TO CHALLENGE LTO-REQUIRED AND OTHER MANDATORY DRUG TESTING

Government sanctioned drug testing is seeing wider use in this country, and no less than the Commission on Human Rights thinks it is perfectly legal. The right against self-incrimination has long been held as inapplicable to physical evidence because collecting such evidence does not involve coercion of the subject. Moreover, the police power and the pernicious effects of drug use seem to justify the discomfort and inconvenience of being compelled to urinate into a bottle by the State.

Drug testing, however, is a penetration into the zone of privacy that is the human body itself, and there are few government policies that are therefore more intrusive. The right to privacy has been established and affirmed in Philippine jurisprudence. However, its scope is still being defined and restricted in case law. With respect to drug testing, it is best invoked in the context of the explicit right against unreasonable searches. This particular right has been applied in persuasive American jurisprudence to the collection of body fluids.

Although drug testing itself is impossible to challenge on constitutional grounds, intrusions of dignity and privacy by the exercise of police power may be validly raised by expanding the right against unreasonable search to protect a person's very body. With this expansion, the level of scrutiny for a drug test program can then be raised from a rational relationship test to a balancing of interests test. Exactly how compelling the "special need" for testing is and how intrusive the means used are can then be challenged.

With the expanded use of drug testing mandated by no less than the Dangerous Drugs Act of 2002, it is imperative that this country examines the limits of drug testing.