

PRESIDENTIAL DECREE 1835: IMPOSING DENATIONALIZATION AS A PENALTY

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I. INTRODUCTION

Police power, along with taxation and eminent domain, is a prerogative enjoyed by the State. It enables the polity to perform some of the most vital functions of communal existence.¹ There is no express provision for it in the Constitution, nor is it necessary. It is inherent in the very concept of the State and is a manifestation of the exercise of sovereign rights. Mr. Justice Laurel identified police power "with State authority to enact legislation that may interfere with personal liberty or property in order to promote the general welfare."² It has been described as "the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution. . ."³ Police power is thus a dynamic agency suitably vague and far from precisely defined, rooted in the conception that men in organizing the State and imposing upon its government limitations to safeguard constitutional rights did not intend thereby to enable an individual citizen or a group of citizens to obstruct unreasonably the enactment of such salutary measures calculated to insure communal peace, safety, good order, and welfare.⁴

The right of prosecution and punishment for a crime is one of the attributes that by natural law belongs to the sovereign power, instinctively charged by the common will of the members of society to look after, guard, and defend the interests of the community, the individual, and social rights and the liberties of every citizen and the guaranty of the exercise of his rights.⁵ Under its police power, the State has the authority to define and punish crimes and to lay down the rules of criminal procedures; it has a large measure of discretion in creating and defining criminal offenses.⁶ Certainly however, such power is not without bounds, but must be circumscribed by the guarantees laid down in our Constitution.

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¹ FERNANDO, *THE CONSTITUTION OF THE PHILIPPINES*, 514 (1974).

² *Calalang v. Williams*, 70 Phil. 726, 133 (1940).

³ *Ermita-Malate Hotel and Motel Operators Association v. Mayor of Manila*, G.R. No. L-24692, July 31, 1967, 20 SCRA 849, 856 (1967).

⁴ *Edu v. Ericta*, G.R. No. 32096, October 24, 1970, 35 SCRA 481, 488 (1970).

⁵ *U.S. v. Pablo*, 35 Phil. 94, 100 (1917).

⁶ *People v. Santiago*, 43 Phil. 120, 124 (1922).

Subversion is one such act which the state has seen proper to punish as a crime. The word "subversion" has never been defined by our laws. However, our laws have constantly illustrated what a subversive "association or organization" is. The Anti-Subversion Act⁷ provides:

SEC. 2. The Congress hereby declares the Communist Party of the Philippines to be an organized conspiracy to overthrow the Government of the Republic of the Philippines for the purpose of establishing in the Philippines a totalitarian regime and place the Government under the control and domination of an alien power....

This enactment also penalizes the following acts:

SEC. 4. After the approval of this Act, whoever knowingly, wilfully and by overt acts affiliates himself with, becomes or remains a member of the Communist Party of the Philippines... shall be punished by the penalty of *arresto mayor* and shall be disqualified permanently from holding any public office, appointive and elective, and from exercising the right to vote; in case of a second conviction, the principal penalty shall be *prision correccional*, and in all subsequent convictions the penalty of *prision mayor* shall be imposed...

Subsequently, this law was amended by the Revised Anti-Subversion Act⁸ which provides:

SEC. 2. Any association, organization, political party, or group of persons organized for the purpose of overthrowing the Government of the Philippines or for the purpose of removing from the allegiance to said government or its laws, the territory of the Philippines or any part thereof, with the open or covert assistance or support of a foreign power by force, violence, deceit or other illegal means shall be considered and is hereby declared a subversive organization.

This law imposes substantially the same penalties for proscribed acts as the amended act. Finally these laws were further amended and codified by the Anti-Subversion Law of 1981⁹ which penalizes:

SEC. 4. Whoever knowingly, wilfully and by overt act affiliates with, becomes or remains a member of a subversive association or organization as defined by Section 2 hereof, whether committed within or outside the territorial jurisdiction of the Philippines, shall be punished by reclusion temporal and *in addition thereto shall suffer the forfeiture of his rights as a citizen of the Philippines... and confiscation of his property real or personal in favor of the State...* [emphasis supplied]

The scope of the present paper is to focus on the penalty provided in the latest amendment to the law on subversion which provides for the forfeiture of the rights as a citizen of any subversive. This penalty, the writers believe, amounts to denationalization by the state and is equivalent

⁷ Rep. Act No. 1700 (1957).

⁸ Pres. Decree No. 885 (1976) as amended by BP Blg. 31 and Pres. Decree No. 1736 (1980).

⁹ Pres. Decree No. 1835 (1981).

to the loss of citizenship itself. It can be said that a citizen is one who exercises such rights as are associated with such status and to strip him of them is similar to depriving him of the status. The imposition of denationalization as a penalty for a crime is startling since this form of punishment has been decried by civilized nations. The implications of denationalization as a penalty will be analyzed in relation to basic constitutional guarantees, international law and the various penologic objectives. A historical antecedent of denationalization as a form of punishment will also be presented.

The writers are not unaware of the promulgation of a subsequent Presidential Decree¹⁰ which has amended Presidential Decree No. 1835. The amendatory decree has explicitly repealed the denationalizing provision of Presidential Decree No. 1835, allegedly in the spirit of reconciliation. The existence of this subsequent decree notwithstanding, a discussion of the validity of a penalty of denationalization would still be relevant for three reasons. One, the subsequent decree itself expressly provides that it shall take effect fifteen (15) days after its publication in the Official Gazette. As of this writing, no such publication has yet been made, hence the legal effectivity of the subsequent decree is still of serious doubt.¹¹ Secondly, assuming that the said decree has taken effect, the legislative prerogative of denationalizing by way of penalty has been exercised. It is precisely the objective of this paper to analyze whether denationalization by way of penalty is within the ambit of the legislative power. Thirdly, assuming again that the said decree has taken legal effect, it cannot revive the rights lost or taken away from any individual who might have been convicted and denationalized by the repealed decree. It is a fundamental principle of law that the repeal of a statute does not undo the consequences of its operation while in force, if any, unless so directed by express language or necessary implication. In sum, the topic of denationalization as punishment for a crime is of academic and practical importance, what with the rash of alleged subversive activities being committed throughout the country at this period in our history.

II. HISTORICAL ANTECEDENTS

In punishing acts determined to be inimical to society, man has displayed a critically limitless imagination. Over time, such punishments have developed from simple physical maltreatment to more sophisticated and insidious forms of deprivation. The loss of the rights of citizenship is one such deprivation which has come into its own in the modern era, although its roots as a penalty extend far back in time.

The earliest form of such a punishment was the decree of outlawry. This was instituted for the persistent failure of an individual to appear in

¹⁰ Pres. Decree No. 1915 (1985).

¹¹ See, *Tañada v. Tuvera*, G.R. No. L-63915, April 24, 1985, 136 SCRA 27 (1985).

court to answer an accusation.¹² By this decree, the accused is placed outside the law, his person being subject to complete destruction.¹³ Outlawry also resulted in the forfeiture of the accused's property in favor of the king, very much similar to the provision in Pres. Decree No. 1835 that a person convicted of subversion will forfeit all his properties to the State.¹⁴ Hence, there is practically an open season for hunting the accused because anyone can capture him and if captured, "the outlaw could be hanged merely upon proof of the outlawry having been made."¹⁵

Outlawry was used to force the accused to appear in court. During the period when such punishment was resorted to, there was no state agency which had the manpower to secure the attendance of the accused. Such was the rationale for outlawry since "a country without prisons and without a regular police force did not have the machinery required to compel the appearance of accused persons."¹⁶ With the advent of correctional facilities and the development of police forces, the decree of outlawry was abandoned.

Another punishment which is akin to outlawry was that of sanctuary and abjuration. A person accused of a crime can flee to a sanctuary, generally a local church or monastery, where he would admit the commission of the crime, and thereafter proceed in safety to a designated port of departure and leave the realm, on no occasion to return.¹⁷ Under Henry VIII, the accused was branded before he left the kingdom so as to facilitate identification in case he returned.¹⁸ The return of the accused to the realm would make him liable to be hanged.¹⁹ The person who has abjured was generally regarded as dead because his wife was treated a widow and his properties forfeited in favor of the King.²⁰ However, sanctuary and abjuration cannot be construed strictly as a punishment. It was rather like a condition to a pardon, wherein the accused's life was spared, but he should leave the kingdom in return. Because of this characteristic, it became more of an incentive to crime rather than a deterrent and hence was abolished in 1604.²¹

A development of the institution of sanctuary and abjuration was the punishment of banishment. It came into vogue towards the end of Elizabeth's reign, and was given by way of penalty first to non-conformists and popish

¹² WALSH, A HISTORY OF ANGLO-AMERICAN LAW 25 (1932). [Hereinafter cited as WALSH].

¹³ Maxey, D., *Loss of Nationality: Individual Choice or Government Fiat?*, 26 ALBANY L. REV. 163-164 (1962). [hereinafter cited as Maxey].

¹⁴ See Pres. Decree No. 1835, Section 4 (1981).

¹⁵ PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 431 (1956). [hereinafter cited as PLUCKNETT].

¹⁶ WALSH, *supra*, note 11 at 25.

¹⁷ Banks, M., *Criminal Law — Banishment*, 32 N.C.L. REV. 221 (1954) [hereinafter cited as PLUCKNETT].

¹⁸ PLUCKNETT, *supra* note 14 at 431.

¹⁹ Maxey, *supra* note 12 at 164.

²⁰ *Ibid.*

²¹ Banks, *supra*, note 16 at 221-222.

recusants, and later to incorrigible criminals.²² The punishment of banishment merely forbids the return of the person banished before the expiration of the sentence.²³ A variation of this punishment emerged in the 16th century wherein a convict was transported to a place outside the realm. Transportation involved the concept of deprivation of liberty after the convict arrives at the place to which he has been banished.²⁴ This method of punishment emerged because of the availability of newly found colonies and the objective of ridding England of undesirable types of citizens.²⁵ The American Revolution in 1776 ended the transportation of convicts to America. The British then sent their convicts to Africa but they immediately died when confronted with the diseases and the climate in that area.²⁶ Hence, England began transporting her criminals to Australia. The residents of Australia, however, resisted the sending of criminals to their homeland. This, together with the "poor deterrent value of such a practice forced England to abandon transportation "as a method of punishment in 1864.²⁷ However, the penalty of banishment as a condition to a pardon has been held to be valid on the by a note or memorandum appendant to legitimate judgment of imprisonment which gave the convict the alternative of leaving the State.²⁹ This procedure was also frequently used against vagrants, wherein they were given a specific number of hours to get out of the city, country or state.³⁰ The vagrant was "floated" from town to town because for every "floater" ejected, a new one arrives from another town.³¹ The same result as banishment obtains in cases of pardons granted and accepted, on condition that the criminal depart from and remain outside the state.³² The imposition of banishment as a condition to a pardon has been held to be valid on the basis of the power of the sovereign to grant a pardon which includes the lesser power to grant a conditional pardon, so long as it is neither immoral, illegal nor impossible of performance.³³ Here in the Philippines, the penalty of banishment is presently prescribed by the Revised Penal Code for death inflicted under exceptional circumstances.³⁴ It provides:

Art. 247. Death or physical injuries inflicted under exceptional circumstances. — Any legally married person who, having surprised his spouse in the act of committing sexual intercourse with another person, shall kill any of them or both of them in the act or immediately thereafter,

²² Maxey, *supra*, note 12.

²³ Banks, *supra*, note 16.

²⁴ *Ibid.*

²⁵ BARNES, *THE STORY OF PUNISHMENT* 69 (1972).

²⁶ *Id.* at 73.

²⁷ Miller, G., *Banishment — A Medieval Tactic in Modern Criminal Law*, 5 UTAH L. REV. 365 (1957). [hereinafter cited as Miller].

²⁸ Landsen, D., *Validity of Sentence of Banishment*, 26 ILL. L. REV. 81 (1931).

²⁹ See *State v. Hatley*, 110 N.C. 52; 14 S.E. 751 (1892).

³⁰ Miller, *supra*, note 26 at 368.

³¹ *Ibid.*

³² See *State ex. rel. O'Conner v. Wolfer*, 54 N.W. 1065 (1893); *Ex parte Snyder*, 33 S.W. 106, (1895); *State v. Barnes*, 10 S.E. 611 (1890).

³³ *Ex parte Hawkins*, 81 Okla. Cr. Rep. 34; 159 P. 2d 752 (1945).

³⁴ Article 247, Act No. 3815 (1983), otherwise known as the Revised Penal Code.

or shall inflict upon them any serious physical injury, shall suffer the penalty of *destierro*.

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These rules shall be applicable, under the same circumstances, to parents with respect to their daughters under eighteen years of age, and their seducers, while the daughters are living with their parents.

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Thus, in case of death or serious physical injuries, the accused, who would otherwise be liable criminally for homicide, parricide, murder or serious physical injuries, as the case may be, is punished only with *destierro*, which is mere banishment for six months and one day to six years from the scene of the crime.³⁵ The penalty of banishment in this case does not result in the loss of the rights of citizenship. It is not even strictly a penalty because it is intended really for the protection of the offender.³⁶

Another mode of punishment is that of denaturalization, which may consist either in the cancellation of the certificate of naturalization because the essential requisites for naturalization did not exist or in revocation of the certificate of naturalization because of acts of the naturalized persons after naturalization.³⁷ The process of denaturalization is essentially an administrative function, but there are aspects of criminal proceedings in it. The proof of an immigration law violation necessary for denaturalization is usually the criminal past of the defendant.³⁸ It is imperative that the defendant be shown to have lied about having a spotless criminal record, and that, as a result, citizenship was obtained because of such misrepresentation. To prove that the defendant lied, the Government must prove that the defendant has committed a crime about which he lied.³⁹ An example of this is the denaturalization proceeding brought by the United States Department of Justice, at the behest of the Polish, Soviet and West German governments, against naturalized American citizens for their complicity in Nazi war crimes.⁴⁰

Lastly, and more importantly, there is the penal sanction of loss of nationality by the unilateral act of the State because of some act or conduct of the national.⁴¹ Even before the issuance of Presidential Decree No. 1835, there have been instances of mass denationalizations undertaken by several

³⁵ AQUINO, *THE REVISED PENAL CODE* 1250 (1976).

³⁶ *People v. Coricor*, G.R. No. 48768, 79 Phil. 672 (1947).

³⁷ Hudson, M., *Nationality, Including Statelessness*, 2 YEARBOOK, THE INTERNATIONAL LAW COMMISSION 10 (1952). [hereinafter cited as Hudson]; VELAYO, *PHILIPPINE CITIZENSHIP AND NATURALIZATION* 165 (1964); See Section 1(5), Comm. Act No. 63 (1936), as amended by Rep. Act No. 106 (1947).

³⁸ Breuer, S., *Comment: The Denaturalization of Nazi War Criminals, Is There Sufficient Justice for Those Who Would Not Dispense Justice?* 40 MD. L. REV. 46 (1981).

³⁹ *Ibid.*

⁴⁰ Swartz, B., *Denaturalization of Nazi War Criminals After Federenko*, 15 N.Y.U.J. INT'L. L. AND POL. 169 (1982).

⁴¹ Hudson, *supra*, note 36.

states for various political and criminal acts committed by its citizens.⁴² Of the various denationalizing statutes of the different nations around the world, the American statutes bear the closest similarity to Presidential Decree No. 1835. In 1940, loss of nationality was made a consequence of conviction for treason, desertion or attempted overthrow of the government by force.⁴³ In 1944, draft avoidance in time of war was added to the list of expatriating crimes.⁴⁴ In 1954, the Expatriation Act of 1954 provided for the automatic loss of United States nationality by persons convicted of certain existing crimes, including rebellion and insurrection, seditious conspiracy, and advocating the overthrow of the government.⁴⁵ The difference between these American laws and Presidential Decree No. 1835 is that the former were justified as denationalization through expatriation, which was contested by eminent jurists, while the latter is a direct denationalization without the citizen's consent.⁴⁶

III. CONSTITUTIONAL LIMITATIONS

A. No person shall be deprived of his liberty without due process of law.

One of the most vital consequence of a conviction under Presidential Decree No. 1835 is that of deportation. As has been previously discussed, Presidential Decree No. 1835 is a denationalizing statute. It strips, by way of penalty, a Filipino, whether natural born or naturalized, of his citizenship. Once denationalized, a person is considered never to have been a citizen at all. He will therefore also lose the right of residence here in the Philippines, which right is but implied from citizenship.⁴⁷ Moreover, he will be an alien in the eyes of the law.⁴⁸ As such alien, he will be vulnerable to deportation proceedings under Section 37 (a) and 38 of Commonwealth Act No. 613. The said law provides:

Sec. 37(a). The following aliens shall be arrested upon the warrant of the Commissioner of Immigration or of any other officer designated by him for the purpose and deported upon the warrant of the Commissioner of Immigration after a determination by the Board of Commissioners of the existence of the ground for deportation as charged against the alien.

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⁴² See International Law Commission, National Legislation Concerning Grounds for Deprivation of Nationality, U.N. Doc. No. A/CN.4/66 (1953); UNITED NATIONS LEGISLATIVE SERIES.

⁴³ 54 STAT. 1168 (1940), 8 U.S.C. 1481 (a) (8), (9) (1952).

⁴⁴ 58 STAT. 746 (1944), 8 U.S.C. 1481 (a) (10) (1952).

⁴⁵ Pub. L. No. 772 (U.S. Expatriation Act of 1954), 68 STAT. 1146 (1954).

⁴⁶ See Pollack, S., The Expatriation Act of 1954, 64 YALE L. J. 1165 (1955). [hereinafter cited as Pollack].

⁴⁷ CLPCI EDITORIAL STAFF, CITIZENSHIP, NATURALIZATION, IMMIGRATION AND ALIEN REGISTRATION LAWS ANNOTATED 3 (1977).

⁴⁸ An "alien" means any person who is not a citizen of the Philippines, Philippine Foreign Service Code, Section 156(c) (1984).

(8) Any alien who believes in, advises, advocates or teaches the overthrow by force and violence of the Government of the Philippines, or of constituted law and authority, xxx or who is a member of or affiliated with any organization entertaining, advocating or teaching such doctrines, or who in any manner whatsoever lends assistance, financial or otherwise, to the dissemination of such doctrine.

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Sec. 38. An alien ordered deported, shall, at the option of the Commissioner of Immigration, be removed to the country whence he came or to the foreign port at which he embarked for the Philippines, or to the country of his nativity or of which he is a citizen or subject, or to the country in which he resided prior to coming to the Philippines.

The deportation of aliens may also be authorized by the President of the Philippines under Section 69 of the Revised Administrative Code, with "full discretion to determine whether an alien's stay in the country is undesirable."⁴⁹ It is very much settled that every sovereign state has the inherent power to deport aliens in order to secure its self-preservation and to uphold the public interest.⁵⁰

The administrative proceeding of deportation will be commenced against a denationalized citizen only after he has served his prison sentence or once he has gained his freedom. He will surely be proceeded against for deportation because the constitutive acts which resulted in his conviction under Presidential Decree No. 1835 are precisely the grounds set forth in the above-quoted Section 37 (a) (8) of Commonwealth Act No. 613. Thereupon, after the determination by the Board of Commissioners of the ground for deportation, an order for deportation is made and a warrant for the arrest of the denationalized citizen is issued.⁵¹ This will necessarily result in the confinement of the denationalized citizen pending his expulsion from the Philippines to either of the places enumerated in Section 38 of Commonwealth Act No. 613. This confinement of the denationalized citizen ordered deported was upheld by the Supreme Court in 1949, when it said: "It must be admitted that temporary detention is a necessary step in the process of exclusion or expulsion of undesirable aliens and that pending arrangements for his deportation, the Government has the right to hold the undesirable alien under confinement for a reasonable length of time."⁵²

It would seem at this point that the Government will finally be rid of a pest from its territory. However, there is still the problem of executing the order of deportation to any of the different places enumerated in Section 38 of Commonwealth Act No. 613. Who wants an undesirable Filipino?

⁴⁹ Go Tek v. Deportation Board, G.R. No. L-23846, September 9, 1977, 79 SCRA 17 (1977), citing Tan Tong v. Deportation Board, 96 Phil. 934, 936 (1955).

⁵⁰ BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 48-49 (1915).

⁵¹ Neria v. Vivo, G.R. Nos. L-26611-12, September 30, 1969, 29 SCRA 701, 708 (1969).

⁵² Borovsky v. Commissioner of Immigration and Director of Prisons, G.R. No. 2852, June 30, 1949, 84 Phil. 161 (1949).

Which state will receive a person which has been denationalized by his own country and deported therefrom? Surely, no state has the obligation to receive a natural born Filipino citizen who has been denationalized. There have been instances when the former state of nationality of a stateless person refused to receive back such person when deported from the Philippines.⁵³ Hence, if the denationalized citizen cannot be deported, his confinement will be extended indefinitely. This result, it is submitted, contravenes the due process clause of our Constitution.⁵⁴

The use of habeas corpus to test the legality of an alien's confinement has been allowed in many instances where his liberty is being denied without due process of law.⁵⁵ The writ of habeas corpus has been granted to secure the liberty of a stateless person who has been confined for more than two years but whose deportation cannot be effected because he cannot be deported to any place.⁵⁶ In this case, the alien was charged, but had never been convicted of engaging in subversive activities. The Government recommended to the Supreme Court that the alien's application for liberty be denied on the fear that he may pursue his subversive inclinations. The Supreme Court, rejected the Government's suggestion and ordered the alien's immediate release upon the following conditions that the alien be placed under Government surveillance in such form and manner as may be deemed adequate to insure that he keep peace and be available when the Government is ready to deport him.⁵⁷ For some denationalized citizens, however, deportation can never be forthcoming, especially for natural born citizens. For them, therefore, life will always be under the watchful eyes of the State.

B. No cruel or unusual punishment shall be inflicted as a penalty for a crime.

The provision is epigrammatic and concise — "Excessive fines shall not be imposed, nor cruel or unusual punishment inflicted"⁵⁸ — but many important points concerning its meanings, scope, and application are still in doubt. There was also such a provision in the 1935 Constitution, but instead of the phraseology "cruel or unusual", the wording was "cruel and unusual."⁵⁹

The source of this provision can be traced to the Eighth Amendment of the United States Constitution which declares that "Excessive bail shall

⁵³ See *Mejoff v. Director of Prisons*, G.R. No. 2855, July 30, 1949, 84 Phil. 218 (1949).

⁵⁴ CONST. Art. IV, Sec. 1 (1973).

⁵⁵ *Lao Tang Bun v. Fabre*, G.R. No. 1673, October 22, 1948, 81 Phil. 682; *De Bishop v. Galang*, G.R. No. L-18365, May 31, 1963, 8 SCRA 244 (1963).

⁵⁶ *Mejoff v. Director of Prisons*, G.R. No. 4254, September 26, 1951, 90 Phil. 70 (1951).

⁵⁷ *Id.* at 78.

⁵⁸ See *supra*, note 54, sec. 21.

⁵⁹ CONST., Art. III, Sec. 1(19) (1935).

not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." The phrase "cruel and unusual punishment" formed a part of the Virginia Declaration of Rights adopted in 1776.⁶⁰ James Madison placed it in the constitutional amendments he drafted in 1789, approved by Congress, and incorporated into the Constitution in 1791 as part of the Eighth Amendment.⁶¹ Like other parts of the Bill of Rights, this amendment was intended to allay the doubts of those who feared that the new federal government, unchecked by specific constitutional limitations, might ride roughshod over personal liberties.⁶²

Going further, back in time, the origin of the substance of the constitutional limitation embodied in the Eighth Amendment has sometimes been traced to the provisions of the Magna Carta, the document which so often has been credited as the source for all the principal doctrines guaranteeing our personal liberties.⁶³ However, it is the English Bill of Rights of 1689 which is said most often to be the origin of the phrase "cruel and unusual punishment" and the wording of the subsequent American Bill of Rights, thus, has been seen as a mere verbatim copy thereof.⁶⁴ The phrase "cruel and unusual punishment" came into being when Parliament was summoned in late January, 1689 following the flight of James II.⁶⁵ The Journals of the House of Commons record that on January 29, 1689, a committee was appointed to draft general statements containing "such things as are absolutely necessary to be considered for the better securing of our religion, laws and liberties."⁶⁶ The final draft of the declaration which was enacted into law on December 16, 1689, included the following relevant section:

Sec. 10. That excessive bail ought not to be required nor excessive fines imposed nor cruel and unusual punishments inflicted.⁶⁷

Judges and scholars alike have been content to accept the conclusions of the American framers that the clause was originally designed to prohibit barbarous methods of punishment.⁶⁸ The eighth amendment prohibition against cruel and unusual punishments was doubtless prompted by the barbarities that had marred the administration of English criminal law.⁶⁹ There were to be no burnings, brandings, disembowelings, and the like in

⁶⁰ Browdy, J. and Saltzman, R., NOTE: *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846 (1961). [hereinafter cited as Browdy].

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Schwartz, D. and Wishingrad, J., *The Eighth Amendment, Beccaria and the Enlightenment: A Historical Justification for the Weems v. U.S. Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 783 (1974). [hereinafter cited as Schwartz].

⁶⁴ *Id.*, at 788.

⁶⁵ Granucci, A., "Nor Cruel and Unusual Punishment Inflicted"; *The Original Meaning*, 57 CALIF. L. REV. 839 (1969). [hereinafter cited as Granucci].

⁶⁶ *Ibid.*

⁶⁷ *Id.*, at 855.

⁶⁸ *Id.*, at 839; See, NOTES, 4 VAND. L. REV. 680 (1951).

⁶⁹ Browdy, *supra*, note 60 at 847.

the new American republic, the eighth amendment standing guard against those vindictive and atrocious punishments, which in former ages have disgraced the annals of many nations."⁷⁰ The protection of personal rights which was produced by the reaction to such abuses has prompted some writers to suggest that the amendment clearly prescribed those tortures used during the late years of the Stuart Monarchy.⁷¹

That the eighth amendment prohibits, at a minimum, the infliction of "inhuman and barbarous" punishments has been repeatedly recognized by the United States Supreme Court. In *Wilkerson v. Utah*,⁷² the Court made this observation: "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution."⁷³ Thus, not only would the amendment forbid inhuman and tortuous punishment, but it would also prohibit other forms or modes of punishment which were marked by inherent cruelty.⁷⁴ The Supreme Court declared in *In re Kemmler*⁷⁵ that any penalty would be unconstitutionally cruel if it involved "torture or lingering death, such as burning at the stake, crucifixion, breaking on the wheel or the like."⁷⁶ In *Louisiana ex rel. Francis v. Resweber*,⁷⁷ Mr. Justice Reed stated: "The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."⁷⁸ It can be seen, therefore, that the Supreme Court, at a minimum, has wholeheartedly accepted the history of the cruel and unusual punishment provision as a protection against barbarous modes of punishment.⁷⁹

Several Philippine cases have adhered to such interpretation. In *Legarda v. Valdez*,⁸⁰ our Supreme Court declared: "Punishments are cruel when

⁷⁰ *Ibid.*

⁷¹ STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1896 (1970).

⁷² 99 U.S. 130 (1878).

⁷³ *Id.* at 135-136.

⁷⁴ *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996, 997 (1964).

⁷⁵ 136 U.S. 436 (1890).

⁷⁶ *Id.* at 447.

⁷⁷ 329 U.S. 459 (1947).

⁷⁸ *Id.* at 464.

⁷⁹ Schwartz, *supra*, note 63 at 791; see *Foote v. State*, 59 Md. 264 (1882); *State v. Stubblefield*, 58 S.W. 337 (1900); *Spencer v. State*, 112 N.W. 462 (1907); *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893); *State v. Feilen*, 126 P. 75, 76 (1912).

⁸⁰ 1 Phil. 146 (1902). See also *People v. Dionisio*, G.R. No. L-25513, March 27, 1968, 22 SCRA 1299 (1968); *U.S. v. Pico*, 18 Phil. 386 (1911).

they involve torture or a lingering death. It implies something inhuman and barbarous, something more than the mere extinguishment of life."⁸¹ In *People v. de la Cruz*,⁸² it was held that "The prohibition of cruel and unusual punishments is generally aimed at the form or character of the punishment rather than its severity in respect of duration or amount, and apply to punishments which never existed or which public sentiments have regarded as cruel or obsolete, for instance, those inflicted at the whipping post, burning at the stake, breaking on the wheel, disemboweling, and the like."⁸³

However, the view has been espoused that the framers of the American Constitution misinterpreted the meaning of the cruel and unusual punishment clause of the English Bill of Rights of 1689, and that the phrase should be equated with the disproportionality of the punishment and not simply the barbarity of the method of punishment.⁸⁴ It was intended as a general prohibition on excessive penalties and could not have been merely an interdiction of barbarous methods of punishment practiced in Stuart, England — such as was imposed for the crime of treason following the abortive rebellion of the Duke of Monmouth, wherein each rebel was hanged by the neck, put down while still alive, disembowelled, his bowels burnt before him, then beheaded and quartered⁸⁵ — because none of the "cruel" methods of punishment which were then employed ceased to be used after the passage of the Bill of Rights.⁸⁶

The prohibition of excessive punishment through the establishment of maximum limits, was an early development in the western world. It was first expressed in the Old Testament of the Bible in the Book of Exodus.⁸⁷ One of the laws given to Moses by God of the Jewish nation, Yahweh, was the *lex taliones* — an eye for an eye, a tooth for a tooth.⁸⁸ "Talio" is Latin for "equivalent to" or "equal." The *lex taliones* requires punishment equal to the crime. "As the injury inflicted, so must be the injury suffered."⁸⁹ Following the Norman Conquest of England in 1066, the problem of excessive fines became so prevalent that three sections/paragraphs of the Magna Carta was devoted to the regulation and prohibition of excessiveness in punishments.⁹⁰ Thus by the year 1400 there was the long standing principle of English law that the punishment should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged.⁹¹

⁸¹ *Id.* at 149 citing Justice Clifford in *Wilkerson v. Utar*, 99 U.S. 130, 135 (19).

⁸² 92 Phil. 906 (1953).

⁸³ *Id.* at 908.

⁸⁴ See Granucci, *supra*, note 65 at 844, 860.

⁸⁵ Mulligan, W., *Cruel and Unusual Punishment: The Proportionality Rule*, 47 *FORDHAM L. REV.* 639, 640 (1979) [hereinafter cited as Mulligan].

⁸⁶ Granucci, *supra*, note 65 at 855.

⁸⁷ *Id.* at 844.

⁸⁸ Exodus 21:24.

⁸⁹ Granucci, *supra*, note 65, at 844.

⁹⁰ HOLT, *MAGNA CARTA* 323 (1965).

⁹¹ Granucci, *supra*, note 65 at 846.

Thus prior to the adoption of the Bill of Rights in 1689, England had developed a common law prohibition against excessive punishment in any form. It is indeed a paradox that the American colonists omitted a prohibition on excessive punishments and adopted instead the prohibition of cruel methods of punishment, which had never existed in English law.⁹² The shift in meaning was apparently not deliberate as the framers either copied the clause without any understanding as to its original meaning or they had a distorted notion of its meaning derived from the English legal treatises available at the time.⁹³ Neither should such adopted interpretation seem strange. In the 17th century, the word "cruel" has a less onerous meaning than it has today. In normal usage it simply meant severe or hard.⁹⁴ The Oxford English Dictionary quotes as representative Jonathan Swift, who wrote in 1710, "I have got a cruel cold. . . ."⁹⁵

Nevertheless, at the turn of the 20th century, the United States Supreme Court developed an expanded view of the cruel and unusual punishment clause.⁹⁶ It is now settled that in a proper case the provision prevents not only inhuman methods of punishment, but also punishments disproportionate to the offenses for which imposed.⁹⁷ The principle dictates that a punishment which is grossly or excessively severe in relation to the gravity of the crime charged must be struck down by the courts as violative of the eighth amendment.⁹⁸ To justify the court in declaring the punishment cruel and unusual, the punishment must be so disproportionate to the offense committed as to shock the moral sense of reasonable man as to what is right and proper under the circumstances.⁹⁹

The question as to whether a term of imprisonment could be so excessively disproportionate to the offense so as to be within the eighth amendment was not addressed to the United States Supreme Court until 1892 and then only in dicta in the dissenting opinion. In *O'Neil v. Vermont*,¹⁰⁰ Messrs. Justice Field, Harlan, and Brewer were of the opinion that: "The inhibition is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged. The whole inhibition is against that which is excessive either in the bail

⁹² *Id.* at 847.

⁹³ *Id.* at 860.

⁹⁴ *Ibid.*

⁹⁵ See 2 OXFORD ENGLISH DICTIONARY 1216 (1933).

⁹⁶ Granucci, *supra*, note 65 at 842.

⁹⁷ See *State v. Driver*, 78 N.C. 423 (1878); *U.S. v. Ju Toy*, 198 U.S. 253 (1905); *Sustar v. County Court of Marion City*, 201 P. 445 (1921); *Cox v. State*, 181 N.E. 469, 472 (1932); *State v. Kimbrough*, 46 S.E. 2d 273 (1948); *Powers v. Hunter*, 339 U.S. 986 (1950); *State v. Evans*, 245 P. 2d 788 (1952). For Philippine cases, see *U.S. v. Borromeo*, 23 Phil. 279 (1912); *People v. Estoista*, 93 Phil. 647 (1953); *People v. Araneta*, 48 Phil. 650 (1926).

⁹⁸ Mulligan, *supra*, note 85 at 645.

⁹⁹ _____, *Recent Cases: Criminal Law-Punishment and Prevention of Crime—Cruel and Unusual Punishment*, 12 IOWA L. R. 88 (1926) citing *Sustar v. County Ct. of Marion City*, 101 Or. 657, 201 Pac. 445 (1921).

¹⁰⁰ 144 U.S. 323 (1892).

required, or fine imposed, or punishment inflicted."¹⁰¹ In 1910, the Supreme Court decided in *Weems v. United States*,¹⁰² which is now regarded as the definitive case with respect to the proportionality principle. The defendant, an official of the Philippine Government, was convicted of falsifying public records and was sentenced under the Penal Code of the Philippines, then a United States territory, to fifteen years of hard and painful labor, with a chain at the ankle hanging from the wrists. He was stripped of parental authority, marital authority and the right to administer property. He was placed under surveillance by the state for the rest of his life, denied the right to vote and prohibited from holding public office or from changing his residence without permission.¹⁰³ Mr. Justice McKenna, writing for the majority of the court, stated that "the penalty imposed is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind."¹⁰⁴ While the language of *Weems* arguably does not support the doctrine of proportionality, it was plainly not the length of the imprisonment alone, considered in relation to the gravity of the offense, that determined the result.¹⁰⁵ Rather it was the combination with a good deal of laid on unpleasantness offensive for its severity that supported the characterization of Weem's punishment as cruel and unusual.¹⁰⁶ The Court was repelled by the nature of the penalty as well as its lack of proportion to the seriousness of the underlying crime. Mr. Justice McKenna noted that the United States did not even punish more serious crime, such as inciting rebellion, as severely. He compared the statute with legislation enacted by the Philippine Commission on counterfeiting and noted that this much more serious offense carried with it no greater penalty than that attached to Weem's crime. These contrasts, he concluded, revealed that the punishment sought to be inflicted on Weems was unconstitutionally excessive.¹⁰⁷ In the same case, Mr. Justice White and Mr. Justice Holmes dissented and argued that the amendment only prohibited "the infliction of . . . cruel bodily punishments."¹⁰⁸ Mr. Justice McKenna, in rebutting the dissent's position, conceded that the framers probably had the physical cruelties of old in the forefront of their minds when they placed the eighth amendment in the Constitution, "but surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts . . . They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which

¹⁰¹ *Id.* at 339-340.

¹⁰² 217 U.S. 349 (1910).

¹⁰³ *Id.* at 364.

¹⁰⁴ *Id.* at 377.

¹⁰⁵ Packer, H., *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1075 (1964).

¹⁰⁶ *Ibid.*

¹⁰⁷ See *supra*, note 102 at 380-381.

¹⁰⁸ *Id.* at 397; see Liss, B., *Eighth Amendment: Judicial Self-Restraint and Legislative Power*, 65 MARQUETTE L. REV. 434 (1982).

inflicted bodily pain or mutilation."¹⁰⁹ Thus, whether the colonists merely went beyond their ancestors in drafting their laws, whether they actually intended to give the phrase a far different meaning than that which was intended by its English counterpart, or whether the American framers misunderstood the trust of the English provision,¹¹⁰ it has been held that the eighth amendment is evolutionary in nature and limits both the amount and the nature of permissible punishment.¹¹¹

All that has been said thus far seem to comprehend the word "cruel" alone. What significance, if any, is to be given to its companion, "unusual". It has been said that "unusualness seems to have been absorbed into the concept of cruelty and survives only to flavor the total prohibition with a sense of the bizarre."¹¹² In *Trop v. Dulles*,¹¹³ Mr. Chief Justice Warren stated: "Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn . . . These cases indicate that the Court simply examines the particular punishment involved in the light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual'.¹¹⁴ It is certain at any rate that 'unusual' does not mean 'novel', for such an interpretation would bar any innovation in penology.¹¹⁵ Thus the word 'unusual' has a very restricted meaning, if at all, only as a modifier of cruel.¹¹⁶ However, as has been mentioned,¹¹⁷ the wording of our constitutional provision has been altered by the use of the disjunctive "or" instead of the conjunctive "and" as is found in the 1935 Constitution, the eighth amendment and the English Bill of Rights. It may have been the intention of the framers of our present constitution to give the word "unusual" an import of its own, independent of the word "cruel". This interpretation is significant in the light of the decision in *Legarda v. Valdez*¹¹⁸ where our Supreme Court held that banishment, although unusual, was considerably less cruel than a prison sentence and hence was not unconstitutional. If the case were to be decided today, it might be argued that banishment is an unusual punishment and therefore unconstitutional, whether or not such punishment is cruel.¹¹⁹

¹⁰⁹ *Id.* at 372.

¹¹⁰ Schwartz, *supra*, note 63 at 789.

¹¹¹ Wheeler, M., *Towards a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 842 (1972).

¹¹² Armstrong, M., *Banishment: Cruel and Unusual Punishment*, 111 U. PA. L. REV. 758, 779 (1963). See also Navasky, W., *Deportation as Punishment*, 27 U. KAN. L. REV. 213 (1959).

¹¹³ 356 U.S. 86 (1958).

¹¹⁴ *Id.* at 100. (footnote 32)

¹¹⁵ Browdy, *supra*, note 60 at 849, citing *Matter of Candido*, 31 Hawaii 982, 992 (1931).

¹¹⁷ See *supra*, note 59.

¹¹⁸ See *supra*, note 80 at 148.

¹¹⁹ See *Mickle v. Henrichs*, 262 F. 687 (1918).

In *Trop v. Dulles*,¹²⁰ an American soldier had been convicted by a court martial of wartime desertion and dishonorably discharged. In 1952, he applied for a passport but was refused on the ground that under the terms of the Nationality Act of 1940, persons convicted of desertion in wartime and dishonorably discharged therefor automatically lost their American citizenship.¹²¹ Trop then brought a declaratory judgment proceeding to have his status as a citizen affirmatively determined. Mr. Chief Justice Warren wrote: "The expatriate has lost the right to have rights . . . (He is subjected) to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what prescriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious."¹²² Although in this case, denationalization could not be considered excessive in relation to the nature of the crime since such a crime was also punishable by death, the penalty was struck down as violative of the eighth amendment because of the nature or mode of the punishment. The Court held: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . We believe . . . that the use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."¹²³ The decision revolutionizes the scope of the cruel and unusual punishment. In the past, most authorities seem to have assumed that the cruel methods barred by the eighth amendment relate to physical brutality only, but the *Trop* decision extends cruel and unusual punishment to include mental cruelty.¹²⁴

Denationalization implies a purpose to strip the criminal of certain rights and privileges otherwise accorded to his erstwhile countrymen: Because Trop deserted the United States in time of war, the United States repudiated most of its obligations to him by making him an alien and by deporting him, may repudiate its remaining obligations.¹²⁵ The society of which Trop is a member in effect announces that it does not care what happens to him, and by making Trop stateless, the United States acquiesces

¹²⁰ See *supra*, note 113 at 187-88.

¹²¹ See *supra*, note 43.

¹²² See *supra*, note 113 at 102.

¹²³ *Id.* at 100-101.

¹²⁴ Browdy, *supra*, note 60 at 863.

¹²⁵ See *supra*, note 74 at 1002.

in his expulsion from the human community.¹²⁶ But no description of expatriation as the loss of particular rights is adequate, for it represents a loss of the right to have rights.¹²⁷ In a sense, expatriation is not itself punishment, but a blanket authorization of punishment. This feature of expatriation might alone be sufficient to bring about its invalidation.¹²⁸ The individual becomes a stateless person with no right to stay anywhere on the face of the earth.¹²⁹ Denationalization is a type of punishment which accomplishes deprivations so severe, of values so fundamental, as to be an unjustifiable punishment for any crime.¹³⁰

Denationalization may also come under the proscription of an "unusual" penalty. An unusual punishment has been defined "as one that was unknown at common law or has become obsolete in modern times."¹³¹ The penalty prescribed by Presidential Decree 1835 certainly falls within this definition as it has never been imposed in the Philippines until such enactment.

IV. *International Law Limitations on the Right of States to Denationalize its Citizens*

In principle, nationality is within the purview of a State's municipal law.¹³² In this sense, "international law is indifferent to the question when and by what means a national may lose his nationality."¹³³ However, when the State's withdrawal of nationality from its citizens will result in certain impairment of rights under international law, the State's power to denationalize will not be so unlimited.¹³⁴ One such instance is when a state denationalizes its citizen in consequence of a criminal offense, the result of which is to avoid its international duty to other States. To illustrate, a denationalized citizen may find himself within the territory of another State after having been deported thereto. As has been previously stated, no State likes an undesirable alien, much less an undesirable Filipino, and thus this State will again deport him. The State may find difficulties in expelling the denationalized alien if it cannot find any State against whom to impose the international law rule that "every state is obliged to receive its own nationals."¹³⁵ The latter rule could be easily ignored by the original state by the simple expedient of saying that the person to be deported back to its territory has already been denationalized. There being no more legal link

¹²⁶ *Ibid.*

¹²⁷ Pollack, *supra*, note 46 at 1190.

¹²⁸ *Id.* at 1192; see also Sutherland, A., *Due Process and Cruel Punishment*, 64 HARV. L. REV. 271 (1950).

¹²⁹ *Id.* at 1190.

¹³⁰ *Id.* at 1194.

¹³¹ 1 COOLEY, CONSTITUTIONAL LIMITATIONS 694 (1927).

¹³² BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 380 (1979).

¹³³ 2 O'CONNEL, INTERNATIONAL LAW 742 (1965).

¹³⁴ Fong, C., *Some Legal Aspects in the Search for Admission Into Other States of Persons Leaving the Indo-Chinese Peninsula in Small Boats*, 52 B.Y.B. INT'L. L. 53, 105 (1981).

¹³⁵ Williams, J., *Denationalization*, 8 B.Y.B. INT'L. L. 45, 55 (1927).

which binds this State to the denationalized citizen, such State can effectively avoid an obligation under international law. It has been suggested that this cannot be legally sustained because "it seems contrary to positive international law to admit an international right can thus be destroyed."¹³⁶ Moreover, a denationalizing statute has been characterized as an abuse of rights by a State in so far as "it is an attempt by the State of nationality to evade the duty of receiving back its nationals and would thus cast a burden on the other States."¹³⁷ Hence, Presidential Decree No. 1835, as regards its denationalizing aspect, would undoubtedly be held contrary to international law in any dispute where any complaining State wishing to deport an undesirable denationalized Filipino will challenge the said law's validity.

Because of this anomalous situation, the international community has moved to develop an international norm to correct the problem. The incidence of political upheavals and territorial changes in the international arena has resulted in the displacement of thousands of individuals, who have thus been variously described as floatsam or *res nullius*, and vessels on the open sea, not sailing under any flag.¹³⁸ Hence, in 1930, the draft of the Special Protocol Concerning Statelessness¹³⁹ was opened for signature, and provided a partial answer to our problem thus:

Article 1. If a person, after entering a foreign country, loses his nationality without acquiring another nationality, the State whose nationality he last possessed is bound to admit him, at the request of the State in whose territory he is:

X X X X

(i) if he is permanently indigent either as a result of an incurable disease or for any other reason; or

(ii) if he has been sentenced, in the State where he is, to not less than one month imprisonment and has either served his sentence or obtained total or partial remission thereof.

X X X X

This special protocol would have been a partial solution because the State of former nationality would still be bound to receive back a denationalized citizen notwithstanding the severance of nationality. Unfortunately, it never entered into force. In 1948, however, it was explicitly laid down by the international community, in a declaration sponsored by the United Nations, that every individual has the right to a nationality and that "no one shall be arbitrarily deprived of his nationality."¹⁴⁰ This declaration specifically confronted the power of the States to withdraw the nationality of their citizens. In 1950, a resolution was adopted by the Economic and

¹³⁶ *Id.* at 56.

¹³⁷ Hudson, *supra*, note 36.

¹³⁸ Weis, P., *The United Nations Convention on the Reduction of Statelessness*, 11 I.C.L.Q. 1073 (1962). [hereinafter cited as Weis].

¹³⁹ League of Nations Document, C.27.M.16.1921 V. in 5 HUDSON, INTERNATIONAL LEGISLATION 387 (1936).

¹⁴⁰ United Nations Universal Declaration of Human Rights, Article 15, U.N. Doc. No. A/810 (1948). See also YRBK. of the U.N., 1948-49 535, 535 (1948-49).

Social Council of the United Nations which provided for recommendations for the reduction of statelessness.¹⁴¹ Gravely aware of the precarious position of displaced persons, the international community, in 1960, entered into the Convention Relating to the Status of Stateless Persons.¹⁴² Significantly, this Convention laid down the foundation for subsequent work on the matter, by providing the agreed definition of a Stateless person as one who is not considered as a national by any State under the operation of its law.¹⁴³ In 1961, the United Nations Convention on Statelessness¹⁴⁴ entered into force, specifically prohibiting a contracting State from depriving a person of his nationality if "such deprivation would render him stateless."¹⁴⁵ Although binding only on the parties to the Convention, it is based on the principles and objectives pervading in the Charter of the United Nations and may be in the process of crystallization to being a general principle of international law,¹⁴⁶ if not one already.

Given all these developments in international law, the denationalizing provision of Presidential Decree No. 1835 is indeed a backward step. The Philippines has been very active in the development and codification of international laws. It cannot therefore feign ignorance on the adverse effects of Presidential Decree No. 1835 on international law, as well as on our relationship with the members of the international community.

V. *Penologic Limitations on Denationalization as a Punishment*

The fundamental aim of punishment is to ensure that "men may live and feel secure in the free enjoyment and development of their capacities to attain happiness."¹⁴⁷ At least two schools of thought have emerged, each claiming to espouse the best way of achieving this penologic objective. The retributive school believes that the individual has an inherent instinct of revenge, "the desire to lash out and strike back at those who have hurt"¹⁴⁸ them. The theory is that the offender must himself suffer at least the same degree of pain that he has inflicted. Tested against this theory, denationalization would seem not to serve the public's retributive impulses because it may not result in any negative effect on the person who suffers it.¹⁴⁹ The convicted subversive, by his being such, does not want to have the binding link of nationality to the State being run by the administration or government he is trying to oust. The retributive effect of a punishment is very subjective

¹⁴¹ Resolution 319 B 111 (XI), August 11, 1950.

¹⁴² 360 U.N.T.S. 130 (1960).

¹⁴³ *Id.* Article 1(1).

¹⁴⁴ Weis, *supra*, note 138 at 1096.

¹⁴⁵ Article 8(1); *Id.* at 1093.

¹⁴⁶ Weis, *supra*, note 138 at 1087.

¹⁴⁷ Tadiar, A., *A Philosophy of a Penal Code*, 52 PHIL. L.J. 165, 173 (1977). [hereinafter cited as Tadiar].

¹⁴⁸ *Id.* at 173-174.

¹⁴⁹ Pollack, *supra*, note 46 at 1193.

in nature and should not be confused with the concept of a punishment as being cruel and unusual by itself without considering the vengeful instincts of the offended public. A punishment may be cruel and unusual and still may not conform to the retributive aim of punishment.

The second school of thought is the so-called utilitarian approach which is further subdivided into the categories of rehabilitation, deterrence and isolation.¹⁵⁰ Denationalization by itself has no rehabilitative characteristic. The ultimate goal of the government is to oust the denationalized citizen from the country, away from the authorities of the State which should be helping him. If he cannot be ousted immediately, he is confined pending deportation, without benefit of any correctional facilities. It is true that under Presidential Decree No. 1835, the convicted subversive will first be imprisoned in a correctional institution before he is denationalized. He may be rehabilitated while in prison so there is no need to rehabilitate him after denationalization. But this is beside the point. Rehabilitation, if ever, was effected by the imprisonment, not by denationalization.

The deterrent effect of punishment is premised upon the assumption that "man can frighten man into decency, goodness, or at least a moral neutrality."¹⁵¹ Hence, the most efficient punishment is that "which makes the strongest and most lasting impression on the minds of others."¹⁵² Individuals under temptation to commit a crime will avoid such criminal behavior if such will entail a swift, severe and certain punishment.¹⁵³ Again, denationalization has little, if any, deterrent effect. It will not prevent the denationalized citizen from continuing to commit subversive activities.¹⁵⁴ Even if he is successfully deported abroad, he might still pursue his objectives and injure Philippine interests more successfully than he could if he had stayed in the country.¹⁵⁵

The denationalization of a convicted subversive does not result in his isolation. If deported, he is still free to associate with his colleagues. If he is released, as in the *Mejoff* case,¹⁵⁶ but subjected to surveillance, he would still be free from isolation, though limited in his criminal acts.

In sum, it has been suggested that the only objective that is served by denationalization is that of economy to the State.¹⁵⁷ Instead of imprisoning the convicted subversive for a long period of time, it would indeed be less expensive to just denationalize and deport him.

¹⁵⁰ Wheeler, *supra*, note 111 at 845.

¹⁵¹ ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 27 (1954).

¹⁵² GOODWIN, *CRIMINAL MAN* 77 (1957).

¹⁵³ Tadiar, *supra*, note 147 at 188.

¹⁵⁴ Pollack, *supra*, note 46 at 1193.

¹⁵⁵ *Ibid.*

¹⁵⁶ See *supra*, note 56.

VI. Conclusion

Denationalization is a retrogressive punishment. It has its deep roots in the ancient outlawry and the medieval banishment. It has retained something of the place it once shared with the thumbscrew, the rack, and other medieval implements of torture chiefly because of the subtle nature of its barbarism and its practical usefulness in the deflection, if not resolution of difficult political and social problems.¹⁵⁸ At its present state, it is only disguised to hide its primitive nature. Under the contemporary legal system, the validity of denationalization as a punishment is at best dubious. One argument against denationalization turns on public policy, as this form of punishment entails fostering dangerous citizens on other states.¹⁵⁹ It is also a cruel and unusual punishment, and may result in the deprivation of the denationalized citizen's liberty without due process of law. Furthermore, international law prohibits denationalization statutes which impair rights of other states and which will result in statelessness. Lastly, denationalization does not serve any penologic objective.

The Republic of the Philippines has long taken pride in being the first democracy in Asia. Recent events in February 1986 have confirmed such pride to be well-founded. However, punitive denationalization has been identified with totalitarian states.¹⁶⁰ It has been stated that the "degree of totalitarian infection" is measured by the "extent to which the concerned government use their sovereign right to denationalize."¹⁶¹ Although no denationalization has ever been imposed as a penalty under Presidential Decree No. 1835, one cannot but ponder about the enactment of such a denationalizing statute in relation with the country's present political situation. Whether or not this piece of legislation was a desperate response by the administration to a clear and present threat of subversion or is merely a political tool to expeditiously and conveniently get rid of one's political enemies is still an open-ended question. In any case, it should be recognized that the place for the state's criminals is within the borders of the State. The fact that the subversive's criminal act is directed against the existence of the State itself is no excuse to deviate from this rule. Denationalization as a punishment should not be considered as one of the weapons of the State in its legal arsenal against crime because it avoids the main problem of subversion. Subversives, just like other criminals, should be treated in such a way that there will be the possibility of their consequent restoration to society as responsible and productive members thereof.

¹⁵⁷ Pollack, *supra*, note 46 at 1193.

¹⁵⁸ Armstrong, *supra*, note 112 at 786.

¹⁵⁹ _____, *Recent Decisions*, 30 COLUM. L.R. 1057, 1057 (1930).

¹⁶⁰ Pollack, *supra*, note 112 at 1198.

¹⁶¹ ARENDT, *THE ORIGINS OF TOTALITARIANISM* 278 (1966).