THE FOUR-FOLD BRENNAN TESTS:
THE FUNDAMENTALS OF CRUEL, DEGRADING AND INHUMAN PUNISHMENT CLAUSE UNDER THE 1987 PHILIPPINE CONSTITUTION

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> *"What is cruel and unusual is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice and must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."*
> - *Ex Parte Granviel as cited in the case of Echegaray v. Secretary of Justice*

I. INTRODUCTION

DEATH BY HANGING. FIRING SQUAD. LETHAL INJECTION. These are the manners by which death penalty shall be executed under Section 24 of House Bill (H.B.) No. 1 of the Seventeenth Congress which seeks to reimpose the death penalty. Said section of H.B. No. 1 proposes to amend Article 81 of the Revised Penal Code, in this wise:

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ART. 81. ***When and how the death penalty is to be executed. –*** The death sentence shall be executed with preference to any other penalty and shall consist in putting the person under the sentence to death by ANY OF THE FOLLOWING METHODS:

A) HANGING;

B) FIRING SQUAD; OR

C) LETHAL INJECTION.

The death sentence shall be executed under the authority of the Director of CORRECTIONS, WHO SHALL TAKE STEPS TO

> ENSURE THAT THE HANGING, FIRING SQUAD OR LETHAL INJECTION TO BE ADMINISTERED IS SUFFICIENT TO CAUSE THE *INSTANTANEOUS DEATH* OF THE CONVICT.
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> PURSUANT TO THIS, ALL PERSONNEL INVOLVED IN THE HANGING, FIRING SQUAD AND IN THE ADMINISTRATION OF THE LETHAL INJECTION SHALL BE TRAINED PRIOR TO THE PERFORMANCE OF SUCH TASK.
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> THE AUTHORIZED PHYSICIAN OF THE BUREAU OF CORRECTIONS, AFTER THOROUGH EXAMINATION, SHALL OFFICIALLY MAKE A PRONOUNCEMENT OF THE CONVICT'S DEATH AND SHALL CERTIFY THERETO IN THE RECORDS OF THE BUREAU OF CORRECTIONS.
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> THE DEATH SENTENCE SHALL BE CARRIED OUT NOT EARLIER THAN ONE (1) YEAR NOR LATER THAN EIGHTEEN (18) MONTHS AFTER THE JUDGMENT HAS BECOME FINAL AND EXECUTORY WITHOUT PREJUDICE TO THE EXERCISE BY THE PRESIDENT OF HIS EXECUTIVE CLEMENCY POWERS AT ALL TIMES."
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At the outset, it is admitted that these particular bills are still deliberated in Congress and, as such, premature to deal with its constitutionality. However, there has been no other opportunity to substantially discuss the right against cruel, degrading and inhumane punishment. Until now, current events and the present priority of Congress presented an avenue where this right is similarly a priority and should be considered in every step taken by the government in its attempt to resurge the capital punishment. To deal with it later is more dangerous and will more likely lead to irreparable damage.

The imposition of the capital punishment is beyond cavil to be a valid exercise of police power. After all, police power is "plenary and its scope is vast and pervasive, reaching and justifying measures for public health, public safety, public morals, and the general welfare."[3] The power of the state to give life likewise includes the corollary power to take it away. In *People v. Echegaray*,[4] the Court ratiocinated:

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> The dawning of civilization brought with it both the increasing sensitization throughout the later generations against past barbarity and the institutionalization of state power under the rule of law. Today every man or woman is both an individual person with inherent human rights recognized and protected by the state and a citizen with the duty to serve the common weal and defend and preserve society.
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> **One of the indispensable powers of the state is the power to secure society against threatened and actual evil. Pursuant to this, the legislative arm of government enacts criminal laws that define and punish illegal acts that may be committed by its own subjects, the executive agencies enforce these laws, and the judiciary tries and sentences the criminals in accordance with these laws.**
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> Although penologists, throughout history, have not stopped debating on the causes of criminal behavior and the purposes of criminal punishment, our criminal laws have been perceived as relatively stable and functional since the enforcement of the Revised Penal Code on January 1, 1932, this notwithstanding occasional opposition to the death penalty provisions therein. The Revised Penal Code, as it was originally promulgated, provided for the death penalty

[3] MMDA v. Bel-Air Village Association, 385 Phil. 586, 601-602.
[4] G.R. No. 117472, February 7, 1997.

> in specified crimes under specific circumstances. As early as 1886, though, capital punishment had entered our legal system through the old Penal Code, which was a modified version of the Spanish Penal Code of 1870. (*emphasis supplied*)
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However, the imposition of the capital punishment is not without any limits. The 1987 Constitution has elevated the accused's right against cruel, degrading and inhumane punishment into the level among the constitutional civil and political rights, to emphasize:

> Section 19**.** Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to *reclusion perpetua*.
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> The employment of physical, psychological, or degrading punishment against any prisoner or detainee or the use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law.[5]

Section 19 is not a stand-alone provision. It is applied together with, *inter alia*, the Due Process and Equal Protection clauses of the Consitution, as death penalty involved a person's most treasured right – the right to life. This is a right the State must interfere with utmost caution, for the most compelling reason and in the most dignified or respectable manner. Beyond these standards, the imposition of the capital punishment would be the gravest abuse of discretion, more heinous of any crime and is a blatant and capricious disregard of the democratic institutions that the Constitution and the Filipino people holds dearest.

Thus, this article does not delve into the wisdom of death penalty. This is not about whether should the state reimpose it or not. The wisdom therof is best left to the upright and sound judgment

[5] CONST. art. III, sec. 19.

of the Congress. This paper is primarily concerned with the manner by which is it imposed. This paper aims to compare, analyze and comment on the methods of capital punishment being introduced by the current Congress in their attempt to resurrect the death penalty. Basically, this paper seeks to answer and explain the question of "Does H.B. No. 1 violate the Cruel, Degrading and Inhuman Punishment clause of the Consitution?"

II. HISTORY OF THE EIGHT AMENDMENT

The 8th amendment under the Constitution of the United States of America provides *"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."* This amendment originated from the English Bill of Rights of 1689, section 10, which states:

> x x x And thereupon the said Lords Spiritual and Temporal and Commons, pursuant to their respective letters and elections, being now assembled in a full and free representative of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties declare
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> That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;[6]

This provision had its bearings from a chaplain named Titus Oates, known as one of the world's greatest impostor. In 1685, he was convicted of two counts of Perjury for fabricating The Popish Plot: a fictitious conspiracy that gripped the Kingdoms of England and Scotland in anti-

[6] The Avalon Project, English Bill of Rights 1689, Yale Law School, http://avalon.law.yale.edu/17th_century/england.asp, last accessed: March 05, 2017.

Catholic hysteria.[7] In his manuscript entitled *True and Exact Narrative of the Horrid Plot and Conspiracy of the Popish Part against the life of His Sacred Majesty, the Government, and the Protestant Religion,* Oates claimed that The Pope had declared himself lord of the Kingdoms of England and Ireland. The Jesuits commissioned by papal briefs were at work fomenting rebellion in Scotland and Ireland. Chief of all, a "consult" of the English Jesuits had been held at the White Horse Tavern to concert means for the assassination of King Charles II. It was further written in his manuscript that Charles deserved death and the deed was necessary for the Catholic cause. He was either to be poisoned by the queen's physician or shot by silver bullets in St. James' Park.[8] He accused five Catholic noblemen of plotting to assassinate the King. The Parliament took seriously the threat and believed that this plot was real that led them to pass a bill, a second Test Act, that excludes Catholics from membership of both Houses. Anyone suspected of being Catholic was driven out of London and forbidden to be within ten miles of the city.[9] Fifteen known men were executed because of these lies most of whom were priests and archbishops. Two well-known Jesuits, David Henry Lewis and Philip Evans were captured and convicted of high treason for being priests. Both of them were executed.[10] After three years of enjoying his fame, Oates' charm began to wane. Anthony Ashley Cooper, Earl of Shaftesbury, call on Oates to tell his story again before the Shaftesbury. The latter found neither a slightest evidence for that notion nor has in it the least intrinsic probability. The Shaftesbury learned that those who were executed could never have been guilty of those monstrous stupidity.[11] Public opinions were turned against him due to the steady protestations of innocence by all those who were executed which eventually took hold in the public mind. Having had these executions, Chief Justice William Scroggs began to declare people innocent. King Charles, who was notably tolerant of religious differences, was embittered at the number of innocent men he had been forced to condemn.[12]

After King James II acceded to throne, he had Oates retried, convicted and sentenced for perjury, stripped of clerical dress, imprisoned for life, and to be whipped through the streets of London five days a year for the remainder of his life. Lord Chief Justice Jeffreys went on to order that the following week be an unforgettable one for ex-reverend Oates. On the Monday he was to stand in the pillory at Westminster-hall gate for an hour "with a paper over your head (which you must first walk

[7] Wikipedia.org, Popish Plot, https://en.wikipedia.org/wiki/Popish_Plot, last accessed: March 05, 2017.
[8] JOHN POLLOCK, THE POPISH PLOT: A STUDY IN THE HISTORY OF THE REIGN OF CHARLES II, 11-12 (1903).
[9] WIKIPEDIA, supra note 5.
[10] POLLOCK, supra note 6.
[11] Id.
[12] WIKIPEDIA, supra note 5.

with round about to all the Courts in Westminster-hall) declaring your crime." On the Tuesday, he was to stand in the pillory at the Royal Exchange for an hour, sporting the same sign. On the Wednesday he was to be "whipped from Aldgate to Newgate." Thursday was a recovery day. On the Friday he was to be "whipped from Newgate to Tyburn, by the hands of the common hangman." And there was more. Mr. Justice Withins concluded: "[A]s annual commemorations, that it may be known to all people as long as you live, we have taken special care of you for an annual punishment." Every April 24, August 9, August 10, August 11, and September 2 (dates of significance in his perjured testimony), Titus Oates was to be a fixture on the London pillory circuit.[13] So severe were the penalties that it has been suggested that the aim was to kill Oates by ill-treatment, as Lord Chief Justice Jeffreys and his colleagues openly regretted that they could not impose the death penalty in a case of perjury.[14]

In December 1689, the English Parliament enacted the English Bill of Rights of 1689 containing the provision "*that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted*" having in mind the fate suffered by Titus Oates in the hands of magistrates yielding vast powers of the judiciary. To punish cruelly and unusually was to single out an offender on a morally insufficient basis for more punishment than was customarily imposed. That was the kind of punishment that the English Parliament sought to condemn when it enacted the Bill of Rights of 1689.[15]

Less than a century later, the State of Virginia followed suit and adopted this provision in the Virginia Declaration of Rights of 1776. In 1778, the Virginia Convention, alongside other state ratification conventions such as New York, North Carolina, Rhode Island and the Pennsylvania Minority, proposed that this provision be included in the amendments to the U.S. Constitution. James Madison approved such proposal, thus, the 8th amendment was adopted on December 15, 1791 along with the rest of the United States Bill of Rights.[16]

The 8th amendment found its way in our Philippine Constitutions. Article III, section 19 of the present Constitution states:

[13] Laurence Claus, The Antidiscrimination Eighth Amendment, 28 Harvard Journal of Law and Public Policy 119, 28-29 (2004).
[14] Wikipedia.org, Titus Oates, https://en.wikipedia.org/wiki/Titus_Oates, last accessed: March 05, 2017.
[15] CLAUS, supra note 11 at 27.
[16] Wikipedia.org, Eighth Amendment to the United States Constitution, https://en.wikipedia.org/wiki/Eighth_Amendment_to_the_United_States_Constitution#cite_note-1, last accessed: March 05, 2017.

> (1) Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to *reclusion perpetua.*

III. THE PROBLEM IN THE *STATUS QUO* OF SECTION 19, ARTICLE III

Section 19(1) of Article III of the Constitution first took the judicial limelight in the case of *People of the Philippines v. Leo Echegaray*,[17] where the accused-appellant sought the nullity of Republic Act (R.A.) No. 7659, which imposes the capital punishment on certain heinous crimes for being cruel, degrading and inhumane. The Court saw it otherwise, *viz*:

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> The opposition to the death penalty uniformly took the form of a constitutional question of whether or not the death penalty is a cruel, unjust, excessive or unusual punishment in violation of the constitutional proscription against cruel and unusual punishments. We unchangingly answered this question in the negative in the cases of *Harden v. Director of Prison* (81 Phil. 741 [1948]), *People v. Limaco* (88 Phil. 36 [1951]), *People v. Camano* (115 SCRA 688 [1982]), *People v. Puda* (133 SCRA 1 [1984]) and *People v. Marcos* (147 SCRA 204 [1987], In *Harden*, we ruled:
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> "The penalty complained of is neither cruel, unjust nor excessive. In *Ex-parte* Kemmler, 136 U.S., 436, the United States Supreme Court said that 'punishments are cruel when they involve torture or a lingering death, but the punishment of death is not cruel, within the meaning of that word as used in the constitution. It implies

[17] G.R. No. 117472. February 7, 1997.

there something inhuman and barbarous, something more than the mere extinguishment of life.'"

Consequently, we have time and again emphasized that our courts are not the *fora* for a protracted debate on the morality or propriety of the death sentence where the law itself provides therefor in specific and well-defined criminal acts. Thus we had ruled in the 1951 case of *Limaco* that:

"x x x there are quite a number of people who honestly believe that the supreme penalty is either morally wrong or unwise or ineffective. However, as long as that penalty remains in the statute books, and as long as our criminal law provides for its imposition in certain cases, it is the duty of judicial officers to respect and apply the law regardless of their private opinions,"

and this we have reiterated in the 1995 case of *People v. Veneracion* (249 SCRA 246, 253 [1995]).

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We are not unaware that for all the legal posturings we have so essayed here, at the heart of the issue of capital punishment is the wistful, sentimental life-and-death question to which all of us, without thinking, would answer, "life, of course, over death". But dealing with the fundamental question of death provides a context for struggling with even more basic questions, for to grapple with the meaning of death is, in an indirect way, to ask the meaning of life. Otherwise put, to ask what the rights are of the dying is to ask what the rights are of the living.

"Capital punishment ought not to be abolished solely because it is substantially repulsive, if infinitely less repulsive than the acts which invoke it. Yet the mounting zeal for its abolition seems to arise

> from a sentimentalized hyperfastidiousness that seeks to expunge from the society all that appears harsh and suppressive. If we are to preserve the humane society we will have to retain sufficient strength of character and will to do the unpleasant in order that tranquillity and civility may rule comprehensively. It seems very likely that capital punishment is a x x x necessary, if limited factor in that maintenance of social tranquillity and ought to be retained on this ground. To do otherwise is to indulge in the luxury of permitting a sense of false delicacy to reign over the necessity of social survival."
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As can be gleaned from this leading jurisprudence on the matter, death penalty *per se* is not violative of the constitutional prohibition on cruel, degrading and inhumane punishment. Rather, death penalty is a valid exercise of police power if validly and properly applied in specially compelling circumstances. Moreover, as long as the execution of the capital punishment is not "inhumane or barbarous or not just mere extinguishment of life", the prohibition is not breached.

However, this leading case did not sufficiently explained the constitutional standards in the imposition of penalties. The Court had the chance to elucidate on this matter in the case of *People of the Philippines v. Roberto Tongko*,[18] to wit:

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> In *People v. de la Cruz* (92 Phil. 906 [1953]), we 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 in America or which public sentiment has regarded as cruel or obsolete . . . for instance those inflicted at the whipping post, or in the pillory, burning at the stake, breaking on the

[18] G.R. No. 123567, June 5, 1998.

> wheel, disemboweling, and the like . . ." In *People v. Estoista* (93 Phil. 647 [1954]), we further held:
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> **It takes more than merely being harsh, excessive, out of proportion, or severe for a penalty to be obnoxious to the Constitution. The fact that the punishment authorized by the statute is severe does not make it cruel and unusual.** Expressed in other terms, it has been held that to come under the ban, the punishment must be "flagrantly and plainly oppressive," "wholly disproportionate to the nature of the offense as to shock the moral sense of the community."
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> x x x x x x x x x (*emphasis supplied*)

The standards laid down by jurisprudence are too broad so as to properly guide Congress in drafting policies on penalties, especially on the capital punishment. What maybe "disproportionate and shocking to the senses" at the time those Supreme Court rulings were promulgated may not be the same as the present. What may be cruel and degrading before can no longer be held as such today. The standards do not pass the time element. True that standards promulgated by the Supreme Court do not bind the Congress, but the capacity of these precepts to change in time loses their necessity and significance which may lead Congress to impose penalties that are consitutionally infirm *ab initio*. Absence of a more stringent standard gives so much preference to imposition of penalties rather than of protection of the constitutional rights of the accused.

As provided in case law, as long as the statute itself authorized the infliction of such penalty does not necessarily make it cruel and degrading. If this is taken with other principles, Congress may enact a law imposing a penalty therein which is cruel, degrading and inhumane in theory but not in application. Just because Congress authorized it, courts of law may just simply glance upon its reality for the sole reason that the legislature approved the same. All other substantial standards go down the drain to the prejudice of substantial justice and the rights of the accused.

If very strict, timeless and specific standards and tests are crafted so as to protect the vital freedoms of expression and of religion and the right against unreasonable searches and seizures,

among others, then, Section 19 (1) of Article III must also be safeguarded not by broad and shifting criteria but by clear, steadfast, distinct and everlasting principles. If the criteria laid down is left as it is, the State exposes itelf to so much risk of gravely abusing its discretion, violating primary constitutional precepts and rights and, more importantly, taking a life in the end that the compelling reason it sought for death penalty is not achieved. Taking a life, the reason thereof and its execution must always and always will be unquestionable.

IV. AIMS AND GOALS

The primary aim of this paper is to critique the standards and tests on the application of Section 19. As a constitutional right, it is forwarded that the same stringent and nuanced canons must be crafted so as to avoid any prejudice in its application. This paper also seeks the following:

a) To clarify and assemble the judicially promulgated precepts for Article 19;
b) To shed light on the inconsistencies and insufficiency of the current standards set on the right against cruel, degrading and inhumane punishment;
c) To cite the checks observed by the international community and other states in the observation of this right;
d) To deduce and harmonize foreign and international canons with that of the Philippines; and
e) To suggest a additional specific and stringent guidelines in safeguarding the right against cruel, degrading and inhumane punishment.

The ultimate goal of this paper is to provide the most crucial, well-defined, timeless, flexible and specific principles to be applied for Section 19, without trampling upon the Congress' power to impose death penalty, and in harmony with and elucidation of the scattered and blurred jurisprudence on the matter. It is the vision of this paper to avoid any lingering doubts as to what can truly be considered as cruel, degrading and inhumane – to be uniformly applicable to the Legislative, judicial and executive branches of the government.

V. SURVEY OF PHILIPPINE JURISPRUDENCE

Even before the advent of the 1935 Constitution, there was only one case wherein the Supreme Court made a pronouncement regarding cruel, degrading and inhuman punishments.

However, the provision before were not worded as what we know today; but it was coined as "cruel and *unusual* punishment."

The Philippine Organic Act of 1902 or sometimes known as the Philippine Bill of 1902 which was enacted by the United States Congress contained the same provision as expressed under Section 5 which states: "That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[19]

That is why as early as 1902, the Supreme Court, in an *obiter dictum*, discussed whether the penalty of banishment (or what is now known as *destierro*) a cruel and unusual punishment or not. However, in this case, the Court did not define the meaning of cruel and unusual punishment, rather, it discussed the qualifications that make such punishment a cruel and unusual one. In this case of *Legarda v. Valdez*,[20] the Court said:

> x x x It (banishment) cannot be and is not claimed to be a cruel punishment. It is, however, claimed to be a punishment unusual in the United States, and therefore prohibited in these Islands by the instructions of the President to the Commission. Those instructions use the words "cruel and unusual punishment." x x x It is to be observed that the words are "cruel and unusual." ***To be prohibited by this provision the punishment must not only be unusual but it must also be cruel. There is no reason why unusual punishments which were not cruel should have been prohibited.*** x x x So that, if the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition. And we think this equally true of the Eighth Amendment, in its application to Congress. (*Emphasis supplied)*

[19] Official Gazette, The Philippine Organic Act of 1902, http://www.gov.ph/constitutions/the-philippine-organic-act-of-1902/, last accessed: March 29, 2017.
[20] Legarda v. Valdez, G.R. No. 513, February 25, 1902.

The Court also made reference to *Wilkerson v. Utah*[21] where the United States Supreme Court tried to define with definiteness the term "cruel and unusual punishment" *to wit:*

> 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, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that Amendment to the Constitution." Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.

Then came the promulgation of the 1935 Philippine Constitution which contained the exact same provision.[22]

The Supreme Court in 1953 had that rare chance of defining the provision under scrutiny. But its definition was based on the prevalent condition at that time. In the case of *People v. Estoista,*[23] Alberto Estoista, the defendant, heard a wild rooster crowing near their house, a 27-hectare estate which was partly covered with cogon grass, tall weeds and second growth trees. He told his father about it and the latter gave him permission to shoot the wild rooster. Alberto took his father's gun, aimed then shot. Unknown to him, he hit not the wild rooster but their laborer, Diragon Dima, who was setting a trap for wild chicken. During that time, the penalty for possession of firearm was confinement for five (5) to ten (10) years. The part about the cruel and unusual punishment was never raised as an issue. Nevertheless, the Court, in its *obiter dictum*, defined the same in this wise:

> Without deciding whether the prohibition of the Constitution against infliction of cruel and unusual punishment applies both to the

[21] Wilkerson v. Utah, 99 US 130 (1878).
[22] CONST. (1935), art. III, sec. 1:

> (19) Excessive fines shall not be imposed, nor cruel and unusual punishment inflicted.

[23] People v. Estoista, G.R. No. L-5793, August 27, 1953.

> form of the penalty and the duration of imprisonment, it is our opinion that confinement from 5 to 10 years for possessing of carrying firearm is not cruel or unusual, having due regard to the prevalent conditions which the law proposes to suppress or curb. ***The rampant lawlessness against property, person, and even the very security of the Government, directly traceable in large measure to promiscuous carrying and use of powerful weapons, justify imprisonment which in normal circumstances might appear excessive***. If imprisonment from 5 to 10 years is out of proportion to the present case in view of certain circumstances, the law is not to be declared unconstitutional for this reason. The constitutionality of an act of the legislature is not to be judged in the light of exceptional cases. Small transgressors for which the heavy net was not spread are like small fishes, bound to be caught, and it is to meet such a situation as this that courts are advised to make a recommendation to the Chief Executive for clemency or reduction of the penalty. (*Emphasis supplied)*

Here, the Court seems to tell us that the definition of cruel and unusual punishment is dynamic that changes through time. It cannot be pegged at a singular definition but must flow through age and circumstances.

However, in a resolution of a motion for reconsideration filed by Alberto, the Supreme Court had the occasion to define the terms "cruel and unusual punishment." Through Justice Tuason, the Court said:

> It takes more than merely being harsh, excessive, out of proportion, or severe for a penalty to be obnoxious to the Constitution. "The fact that the punishment authorized by the statute is severe does not make it cruel and unusual." (24 C. J. S., 118701188.) Expressed in other terms, it has been held that to come under the ban, the punishment must be "flagrantly and plainly oppressive," "wholly disproportionate to the nature of the offense as to shock the moral sense of the community." (Idem.) Having in mind the necessity for a

> radical measure and the public interest at stake, we do not believe that five years' confinement for possessing firearms, even as applied to appellant's and similar cases, can be said to be cruel and unusual, barbarous, or excessive to the extent of being shocking to public conscience.[24]

In 1968, Justice J.B.L Reyes used this pronouncement as his basis when he addressed the same issue in the case of *People v. Dionisio.* Here, Rosauro Dionisio offered and collected bets for the Special Daily Double Race, a horse race, being conducted in Sta. Ana Racing Club without valid authorization from the Games and Amusement Board. During that time, it was illegal for any person to offer, take or arrange bets on any horse race without authorization from the Board. The penalty for such offense was a fine not less than one thousand pesos nor more than two thousand pesos or by imprisonment of not less than one month nor more than six months. Rosauro was sentenced to suffer imprisonment for one month. He challenged this imposition as cruel and unusual punishment.[25] Justice Reyes disagreed on the position of Rosauro. But what is peculiar in this case is that Justice Reyes justified the imposition by stating that: "the hope of large or easy gain, obtained without special effort, turns the head of the workman, and habitual gambling is a cause of laziness and ruin. The social scourge of gambling must be stamped out. The laws against gambling must be enforced to the limit."

It is apparent from these two cases that what it seems to be an excessive punishment may be justified in order to forestall any harm or injury to the public or to uphold a public policy underlying the law. In this sense, the meaning of the provision is relative as it can be changed depending on the surrounding circumstances of the case.

The same exact provision as that in the 1935 Constitution was carried over to the 1973 Philippine Constitution. It was incorporated under Article IV, Section 21 of the latter.

Capital punishment was imposed right after gaining sovereignty in 1946. Numbers of execution peaked during the Marcos Regime; one of the darkest period in the history of the Philippines. The method of execution from 1946 up to 1976 was through electrocution. Murder, rape and treason were punishable by death. Marcial "Baby" Ama was one of the notable cases under this

[24] People v. Estoista, G.R. No. L-5793, December 03, 1953.
[25] People v. Dionisio, G.R. No. L-25513, March 27, 1968.

mode of execution for he was electrocuted at the age of 16 for murders committed while he was in prison. His son, Kevin "Baby Ama" Calo was also sentenced to death via electric chair. In 1972, a triple execution took place when Jaime José, Basilio Pineda and Edgardo Aquino were electrocuted for the 1967 abduction and gang-rape of young actress Maggie dela Riva. The state ordered that the executions be broadcasted on national television.[26] From 1976, death by firing squad replaced electrocution as its sole method of execution. Drug trafficking was then added to the list of crimes punishable by death. In 1973, Lim Seng, a Chinese drug lord, was sentenced to death by firing squad and the same was broadcasted on national television. It was witnessed by a curious public of some 5, 000 spectators.[27]

Then in 1982, one case reached the Supreme Court where the appellant questioned the penalty of death as cruel, unjust and excessive. In this case of *People v. Camano*[28], the Court overruled such contention and ratiocinated that the death penalty is not cruel, unjust or excessive. It cited the case of *Harden v. Director of Prisons* as its rationale where the Court said:

> The penalty complained of is neither cruel, unjust nor excessive. In Ex-Parte Kemmler, 136 U.S. 436, the United States Supreme Court said that 'punishments are cruel when they involve torture or a lingering death, but the punishment of death is not cruel, within the meaning of that word as used in the Constitution.' It implies there something inhuman and barbarous, something more than the mere extinguishment of life.[29]

Then came the People Power where Ferdinand Marcos was deposed and the late Corazon C. Aquino was installed as the president of the Republic. Under her tutelage, the 1987 Philippine Constitution was promulgated which prohibited the imposition of cruel, degrading and inhuman punishment. There were various cases which tried to give meaning to this provision with definiteness and exactitude. The Bill of Rights Committee of the 1986 Constitutional Commission read the 1973 modification as prohibiting 'unusual' punishment even if not 'cruel.' It was thus seen as an obstacle to

[26] Wikipedia.org, Capital Punishment in the Philippines, https://en.wikipedia.org/wiki/Capital_punishment_in_the_Philippines#cite_note-9, last accessed: March 29, 2017.
[27] Ambeth Ocampo, Lim Seng Remembered, Inquirer.net, July 13, 2016.
[28] People v. Camano, G.R. Nos. L-36662-63, July 30, 1982.
[29] Harden v. Director of Prisons, G.R. No. L-2349, October 22, 1948.

experimentation in penology. Consequently, the Committee reported out the present text which prohibits 'cruel, degrading or inhuman punishment' as more consonant with the meaning desired and with jurisprudence on the subject.[30]

The first of its kind is the case of *Baylosis v. Chavez*[31]. Rafael Baylosis, Benjamin De Vera and one Marco Polo were charged with the violation of Presidential Decree No. 1866 for illegal possession of firearms and explosives in furtherance of or in connection with the crimes of Rebellion or Subversion. The penalty for such crime is death. They were known as high ranking officers of the Communist Party of the Philippines, and its military arm, the New Peoples Army. After the judge denied the motion to quash filed by Baylosis, the latter went up to the Supreme Court attacking the constitutionality of the said law on the ground that the punishment is flagrantly and plainly oppressive, greatly disproportionate to the offense and shocking to the people's sense of justice. Furthermore, the disparity between penalties violates the Constitutional proscription regarding imposition of cruel, degrading and inhuman punishment as Rebellion under the Revised Penal Code is punishable by *prision mayor* while illegal possession of firearm alone under the special law is punishable by *reclusion perpetua*. If the latter was committed in connection with rebellion, the penalty is death. The Supreme Court, through Justice Narvasa, dismissed the contentions and said:

> It is well settled that as far as the constitutional prohibition goes, it is not so much the extent as the nature of the punishment that determines whether it is, or is not, cruel and unusual and that sentences of imprisonment, though perceived to be harsh, are not cruel or unusual if within statutory limits. As pointed out by a brother in the Court, a noted authority on Constitutional Law, this Court has held (in People v. Dionisio, 22 SCRA 1299), "that mere severity does not constitute cruel and unusual punishment. Reiterating the rule first announced in People v. Estoista (93 Phil. 674), it declared that 'it takes more than merely being harsh, excessive out of proportion, or severe for a penalty to be obnoxious to the Constitution . . . to come under the ban, the punishment must be 'flagrantly and plainly oppressive'

[30] JOAQUIN BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES, A COMMENTARY, p. 501, (1996 ed.)
[31] Baylosis v. Chavez, G.R. No. 95136, October 03, 1991.

> 'wholly disproportionate to the nature of the offense as to shock the moral sense of the community.'" ***The same noted author further points out that "a penalty not normally proportionate to the offense may be imposed in some instances without violation of the Constitution * * *** (as) for example, where the offense has become so rampant as to require the adoption of a more effective deterrent, like the stealing of jeeps or coconuts, which is punished by the Revised Penal Code as qualified theft" — or, it may be added, like such crimes as assassinations, bombings and robberies which are committed nowadays with frightening frequency and seeming impunity with the use of high-powered weapons, explosives or similar devices, whether in connection with or in furtherance or pursuance of, rebellion or subversion, or not. *(Emphasis supplied)*

The Court further explained:

> The existence of rebellious groups in our society today, and of numerous bandits, or irresponsible or deranged individuals, is a reality that cannot be ignored or belittled. Their activities, the killings and acts of destruction and terrorism that they perpetrate, unfortunately continue unabated despite the best efforts that the Government authorities are exerting, although it may be true that the insurrectionist groups of the right or the left no longer pose a genuine threat to the security of the state. The need for more effective measures against these nefarious activities, including of course more stringent laws and more rigorous law-enforcement, cannot be gainsaid.

However, in this case, Justice Cruz took a different view from the majority. He elucidated in his dissent:

> I am unable to understand the obvious disparity. In both instances, two circumstances are established, to wit, rebellion and illegal

> possession of firearms. Yet the first offense is punished only with *prision mayor* but the second is punished with *reclusion perpetua.*
>
> Due process requires as a desideratum of fairness the equivalence of the degree of the offense and the degree of the penalty. A serious offense deserves a heavy penalty while a light offense authorizes only a mild penalty. Otherwise stated, a light offense cannot be punished with a heavy penalty, as where, say, littering is penalized with life imprisonment.
>
> It is true, as the ponencia states, that there are cases where an offense not serious per se may be punished with a heavy penalty as a deterrent to its proliferation or because of some special social purpose that may be justified under the police power. But in such cases, it must be established that the offenses are sui generis to justify deviation from the general rule. Lacking such justification, the disproportionate penalty may be struck down as a cruel or inhuman punishment.

Here, the message is quite clear that the imposition of a heavy penalty on an offense of relative gravity must be read in relation to the due process clause of the Constitution. In order for a heavy penalty to fall under the exception, the offense must be *sui generis*. One must also take into consideration the severity of the offense and the length or duration of imprisonment as components in determining whether a punishment is cruel, degrading or inhuman.

In 1997 came the celebrated case of *People v. Echegaray*.[32] Leo Echegaray was the first and the only person executed through lethal injection. He was convicted for raping his own daughter. In his last attempt to save his life, he filed a motion for reconsideration to the Supreme Court challenging the death penalty as violative of the Constitution prohibition in imposition of cruel, degrading and inhuman punishment. Upholding the principle of *stare decisis*, the Court dismissed his contention and affirmed his conviction. Subsequently, the Congress passed a law changing the mode of execution from electrocution to lethal injection. Leo then filed a petition for prohibition and/or injunction praying that the Secretary of Justice be enjoined from implementing the lethal injection on the ground

[32] People v. Echegaray, G.R. No. 117472. February 7, 1997.

that it is unconstitutional for being cruel, degrading and inhuman punishment. The Court, likewise, ruled in the negative. In their resolution, the Court added a new color to definition of cruel, degrading and inhuman punishment. It ruled in this wise:

> Any infliction of pain in lethal injection is merely incidental in carrying out the execution of death penalty and does not fall within the constitutional proscription against cruel, degrading and inhuman punishment. "In a limited sense, anything is cruel which is calculated to give pain or distress, and since punishment imports pain or suffering to the convict, it may be said that all punishments are cruel. But of course the Constitution does not mean that crime, for this reason, is to go unpunished." ***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***. x x x Without exception, these courts have found that lethal injection does not constitute cruel and unusual punishment. After reviewing the medical evidence that indicates that improper doses or improper administration of the drugs causes severe pain and that prison officials tend to have little training in the administration of the drugs, the courts have found that the few minutes of pain does not rise to a constitutional violation.
>
> What is cruel and unusual "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice" and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." ***Indeed, "[o]ther (U.S.) courts have focused on 'standards of decency' finding that the widespread use of lethal injections indicates that it comports with contemporary norms." The primary indicator of society's standard of decency with regard to capital punishment is the response of the country's legislatures to the sanction.*** Hence, for as long as the death penalty remains in our

> statute books and meets the most stringent requirements provided by the Constitution, we must confine our inquiry to the legality of R.A. No. 8177, whose constitutionality we duly sustain in the face of petitioner's challenge. We find that the legislature's substitution of the mode of carrying out the death penalty from electrocution to lethal injection infringes no constitutional rights of petitioner herein. *(Emphasis supplied).*[33]

The same issues were also raised in the case of *People v. Mercado*[34] where Elpidio Mercado was sentenced to death for kidnapping and murdering one Richard Buama. The Court, citing the case of Echegaray, reiterated its long-standing stance that death penalty is not a cruel, degrading or inhuman punishment.

There were few cases where the question of constitutionality was not directed towards death penalty but to the duration or length of the imprisonment which is not commensurate with the offense. Presidential Decree 818 amended Article 315 par. 2(d) of the Revised Penal Code which increased the penalty for the crime of Estafa without the corresponding increase in the threshold amounts.

One of the cases under this law is the case of *People v. Tongko.*[35] Roberto Tongko was sentenced to imprisonment for twenty-seven (27) years after he was convicted of the crime of Estafa by issuing ten (10) worthless checks amounting to ten thousand pesos (P10, 000.00) each check. He challenged the said punishment as too harsh and out of proportion to the crime he committed. However, the Court did not sustain him. It explained:

> We are not persuaded. In People v. de la Cruz, we held that "x x x ***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 in America or which public sentiment has regarded as cruel or obsolete x x x for instance those inflicted at the whipping post,

[33] Echegaray v. Secretary of Justice, G.R. No. 132601. October 12, 1998.
[34] People v. Mercado, G.R. No. 116239, November 29, 2000.
[35] People v. Tongko, G.R. No. 123567, June 5, 1998.

> or in the pillory, burning at the stake, breaking on the wheel, disemboweling, and the like…"
>
> The legislature was not thoughtless in imposing severe penalties for violation of par. 2(d) of Article 315 of the Revised Penal Code. The history of the law will show that the severe penalties were intended to stop the upsurge of swindling by issuance of bouncing checks. It was felt that unless aborted, this kind of estafa "… would erode the people's confidence in the use of negotiable instruments as a medium of commercial transaction and consequently result in the retardation of trade and commerce and the undermining of the banking system of the country." The Court cannot impugn the wisdom of Congress in setting this policy. *(Emphasis supplied)*

In the case of *Spouses Lim v. People,*[36] the spouses argued that inasmuch as the amount of the subject check is P365, 750, they can be penalized with *reclusion perpetua* or 30 years of imprisonment. This penalty, according to them, is too severe and disproportionate to the crime they committed and infringes on the express mandate of Article III, Section 19 of the Constitution which prohibits the infliction of cruel, degrading and inhuman punishment. Still, the Supreme Court, holding its ground, found the contention bereft of merit citing the aforementioned cases of People v. Tongko and People v. Estoista.

Then came the celebrated case of *Corpuz v. People*[37] where the Court finally ruled on the constitutionality of incremental penalty under the Revised Penal Code. Here, it was contended that the range of penalties and the corresponding valuation therefor under the Revised Penal Code are not commensurate to the present value of the Peso today. As such, the imposition of the penalty corresponding to the amount imposed by the Code amounts to cruel, inhuman and degrading punishment. There was a call from the *amici curiae* to declare such incremental penalty as unconstitutional. The Court, through Justice Peralta, opined that this Court cannot declare the incremental penalty as unconstitutional as it would lead to more questions than answers; like what would then be the imposable penalty if the Court did declare so? There would be conundrum in the

[36] Spouses Lim v. People, G.R. No. 149276, September 27, 2002.
[37] Corpuz v. People, G.R. No. 180016, April 29, 2014.

regular course of justice. Corollary to this, the Court cannot impose a ratio of 1:100 as this would amount to judicial legislation. The Court further held:

> Besides, it has long been 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 applies to punishments which public sentiment has regarded as cruel or obsolete, for instance, those inflicted at the whipping post, or in the pillory, burning at the stake, breaking on the wheel, disemboweling, and the like. Fine and imprisonment would not thus be within the prohibition.
>
> It takes more than merely being harsh, excessive, out of proportion, or severe for a penalty to be obnoxious to the Constitution. ***The fact that the punishment authorized by the statute is severe does not make it cruel and unusual.*** Expressed in other terms, it has been held that to come under the ban, the punishment must be "flagrantly and plainly oppressive," "wholly disproportionate to the nature of the offense as to shock the moral sense of the community. *(Emphasis supplied)*

Justice Antonio Carpio has a different view on the matter. In his dissenting opinion, he opined that the proposition that the Cruel Punishment Clause limits the legislature's power to inflict certain forms of punishments only, allowing it to impose penalties disproportionate to the offense committed, runs counter to the grain of decades-old jurisprudence here and abroad. Such interpretation, which rests on a strict originalist reading of the Eighth Amendment of the US Constitution, never gained traction in the United States and it makes no sense to insist that such view applies in this jurisdiction.[38] He further added:

> Indeed, the Filipino people who ratified the present Constitution could not have intended to limit the reach of the Cruel Punishment Clause to cover torture and other forms of odious punishments only because

[38] Corpuz v. People, G.R. No. 180016, April 29, 2014, J. Carpio, dissenting opinion.

> nearly four decades before the present Constitution took effect, the Philippine government joined the community of nations in approving the Universal Declaration of Human Rights (UDHR) in 1948 which bans "torture or x x x cruel, inhuman or degrading treatment or punishment." In 1986, shortly before the Constitution took effect, the Philippines ratified the International Covenant for Civil and Political Rights (ICCPR) containing an identically worded prohibition. These international norms formed part of Philippine law as generally accepted principles of international law and binding treaty obligation, respectively.[39]

In his opinion, he provided two-pronged standards to determine impermissible disproportionality of punishments, *to wit:*

> This Court has had occasion to devise standards of disproportionality to set the threshold for the breach of the Cruel Punishment Clause. Punishments whose extent "shock public sentiment and violate the judgment of reasonable people" or "[are] flagrantly and plainly oppressive" are considered violative of the Clause. Other than the cursory mention of these standards, however, we have made no attempt to explore their parameters to turn them into workable judicial tools to adjudicate claims of cruel punishment. Even if we did, it would have been well-nigh impossible to draw the line separating "cruel" from legitimate punishments simply because these standards are overly broad and highly subjective. As a result, they ratchet the bar for the breach of the Clause to unreasonably high levels. Unsurprisingly, no litigant has successfully mounted a challenge against statutes for violation of the Clause.
>
> Impermissible disproportionality is better gauged by testing punishments against the following alternative parameters: ***(1) whether***

[39] Id.

> ***more serious crimes are equally or less severely punished; or (2) whether the punishment reasonably advances the state interest behind the penalty.*** These parameters strike the proper balance of providing practical tools of adjudication to weigh claims of cruel punishment while at the same time affording Congress discretionary leeway to craft penal statutes addressing societal evils.[40] *(Emphasis supplied)*

In all the cases cited herein, one underlying principle stood out: the interpretation of the constitutional proscription highlights only one facet of the provision; that is, the form and nature of punishments determine whether such violates the constitutional mandate of non-imposition of cruel, degrading and inhuman punishment. This is without regard to the length or duration of the penalty. This is the traditional notion of the provision. As can be gleaned from the case above, there arises a growing disparity between the range of valuation of pesos and the penalty imposed therefor brought about by economic forces. In a sense, we are gearing away from that traditional notion towards unchartered waters of the said provision. Justice Carpio already provided the groundwork within which this provision can be more expounded and understood.

VI. CRUEL, DEGRADING AND INHUMANE PUNISHMENT IN THE PERSPECTIVE OF OTHER NATIONS

Basically, democracy harmoniously works through the compromise of government and state interests with the individual civil and political rights of its constituents. With this, when democratic countries impose the capital punishment, it is difficult – and even impossible – not to exercise this police power without cognizing the right against cruel, degrading and inhumane punishment. This combination complements each other. Significantly, moden trends in the international community suggests that this combination is not only limited to democratic states. Rather, international bodies have pushed for this combination to other non-democratic countries via treaties and international jurisprudence.

[40] Id.

In the review of our jurisprudential metes and bounds on cruel, degrading and inhumane punishment, it is vital that key international and foreign standards and jurisprudence similarly studied.

A. International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights (ICCPR) took the initiative to internationally tackle death penalty and cruel, degrading and inhumane punishment. The most significant provision of the treaty relating to death penalty is Article 6 therein. At the time the ICCPR was drafted (1947-1966), just ten countries had abolished the death penalty, but extensive debate nonetheless took place as to its status under the covenant. Article 6 of ICCPR provided:

x x x x x x x x x

1. 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.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

3. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

> 4. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
>
> 5. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant. [41]
>
> x x x x x x x x x

In brief, Article 6 of ICCPR strictly imposes the following:

a. Right to a fair trial before the imposition of the death penalty;
b. Limitation of the death penalty to only the most serious crimes;
c. Prohibition against imposing the death penalty when other ICCPR rights have been violated;
d. Prohibition against retroactive imposition of the death penalty;
e. Right to seek pardon or commutation of a death penalty sentence;
f. Prohibition against the execution of persons who were under the age of eighteen at the time the offence was committed; and
g. Prohibition against the execution of pregnant women.[42]

As what can be deduced therefrom, the ICCPR concedes that every nation has the inherent power to impose death penalty. But what makes the ICCPR peculiar is that as early as 1947 to 1966 – at the time when the world was recovering from World War II – the execution of the capital punishment should not be cruel, degrading and inhumane. The elaborate and strict guidelines set out by the ICCPR protects and respects the accused's right against cruel, degrading and inhumane punishment. It changed the view on death penalty from the perspective of the state to that of the individual person – the accused.

[41] INTERNATIONAL BAR ASSOCIATION, The Death Penalty under International Law: A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty, May 2008, 3-6.
[42] Id.

The ICCPR was inquired upon as to what constitutes "*particularly horrible*" treatment. In its General Comment 20 (44) of 3 April 1992 on Article 7 of the ICCPR, the UNHRC made it clear that the sentence "*must be carried out in such a way as to cause the least possible physical and metal suffering."*

The ICCPR became the springboard from which the United Nations (UN) assumed the responsibility of elucidating the subject and elevating the discussion therein to achieve a more acceptable, clearer and wider applicability and explanation on cruel, degrading and inhumane punishment.

B. Human Rights Council (HRC)

The HRC (formerly UN Commission on Human Rights) issued various resolutions on the matter, underlining that "**to check that when the death penalty is handed down, it must be carried out in such a way as to cause the minimum suffering possible must not be enforced in public or in any degrading way and that particularly cruel or inhuman means of execution, such as stoning, are stopped immediately.**"[43]

This general policy statement by the HRC unambiguously posits that the right against cruel, degrading and inhumane punishment is the primary consideration and is the utmost obligation of countries during the execution of the capital punishment.

C. UN Human Rights Committee (UNHRC)

In connection with this statement of HRC, the UNHRC relevantly added:

x x x x x x x x x

> By way of principle in a piece of entrenched case law, it believes that **"prolonged detention, in harsh conditions on death row does not in itself constitute cruel, inhuman or degrading treatment, unless there are other overriding circumstances, if detention is due to the fact that the prisoner invoking his right of appeal."**

[43] fiacat.org, The Death Penalty: Inhuman, Cruel and Degrading Treatment, http://www.fiacat.org/the-death-penalty-inhuman-cruel-and-degrading-treatment (last accessed February 2, 2017).

It believes that "incarceration is a necessary consequence of handing down a death penalty, however cruel, degrading and inhuman it may seem."

Moreover, **the UNHRC refuses to consider time as a determining factor** in proving a violation of the ICCPR in order to prevent States that have abolished the death penalty from concluding that an execution should take place as quickly as possible after a sentence has been handed down.

It believes that **an extended wait on death row does not constitute a violation of Article 7 of the ICCPR** (especially if it is linked to exhausting all possibilities of an appeal) **even if it lasts a long time.**

It is only if "overriding circumstances" surrounding the detention are proven that it can be said that the ICCPR has been violated.

So being held in an insalubrious cell without natural light or ventilation and without a mattress or bedding for 23 hours a day and without adequate medical care has been deemed to be contrary to respecting human dignity and a violation of Article 10 of the ICCPR. The same is true if a detainee's mental health deteriorates during detention and he is not given adequate access to care.

In addition, **the UNHRC takes into consideration the psychological effects of incarceration on the individual.**

So informing a person who is sentenced to death of the decision to stay his execution a mere 45 minutes before the set time

> for execution when the decision had been taken 20 hours previously constitutes cruel and inhuman treatment.[44] (*emphasis supplied*)

The stance of the UNHRC revolutionized that the state's duty to protect the accused against cruel, degrading and inhumane punishment does not begin at the time of the execution but from the time the death sentence is handed down until the imposition thereof. This includes the time of incarceration. Therefore, the right against cruel, degrading and inhumane punishment is not limited on the method of execution but also includes the circumstances and actions prior to execution. This necessarily retrofits this right to be made applicable to all other penalties – especially on imprisonment and fines. This paradigm shift substantially expanded the circumstances and situations that are formerly beyond the scope of the protection against cruel, degrading and inhumane punishment.

D. Stockholm Declaration (1977)

The transformation and extension provided by UNHRC on what consitutes cruel, degrading and inhumane punishment was linked with "Death Row Syndrome" when the Stockholm Declaration was enacted.

Back in 1977, in the Stockholm Declaration, those countries participating in the International Conference on the Abolition of the Death Penalty organised by Amnesty International stated that "the death penalty is the cruelest and most inhuman and degrading punishment that exists and violates the right to life". This premise has been progressively developed in case law in regional Courts (within the Americas and in Europe) and by conventional UN Committees (Human Rights Committee). These international bodies have identified specific situations where the death penalty could amount to inhuman, cruel and degrading treatment:

a. in "death row syndrome"
b. the practise of certain methods of execution.[45]

[44] Id.
[45] Id.

"Death row syndrome" is the traumatic stress imposed on a prisoner by having to wait on prison wings set aside for those sentenced to death.[46] This was relevantly clarified by the European Court of Human Rights (ECHR) in *Soering v United Kingdom*[47]:

x x x x x x x x x

> "For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. The democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The Court agrees with the Commission that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial. Facilities are available on death row for the assistance of inmates, notably through provision of psychological and psychiatric services.
>
> However, in the Court's view, **having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty,** and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 (art. 3). A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration".

[46] Id.
[47] 161 Eur. Ct. H.R. (ser A.) (1989).

> This is thus contrary to Article 3 of the ECHR that states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".
>
> x x x x x x x x x (*emphasis supplied*)

E. International Application and Commentaries

From then on, there has been a continuous and active effort to impose upon states the obligation to observe, protect and respect the right against cruel, degrading and inhumane punishment from the time of arrest, trial, imposition of the death sentence and up to the execution of capital punishment. The standards laid down by ICCPR, UNCHR, Stockholm Declaration and others are further enriched and noted, in this wise:

> x x x x x x x x x
>
> Various methods of execution have also been identified as unacceptable at international law. For example, the Human Rights Committee has deemed the use of the gas chamber to constitute cruel, inhuman and degrading treatment. The Human Rights Committee has also found that 'public executions are… incompatible with human dignity'. The release of the recorded executions of Saddam Hussein and his associates in 2006 was widely criticised, as were the taunts made against him in his last moments. Stonings are heavily criticised as being cruel and inhuman, particularly as the size of the stones is limited in order to prolong the suffering and death of the condemned person. The accidental decapitation of one of Saddam Hussein's associates (considered further below) also raised objection. In the United States, a number of states have ended use of the electric chair as it is considered to be excessively painful, while debates are ongoing about the use of lethal injections. This is due to concerns that when using lethal injections, the cocktail of drugs may result in an extremely

> painful and slow death combined with paralysis. However, the use of lethal injection remains legal at international law at this stage.[48]
>
> x x x x x x x x x

In the judgement *Jabari v.Turkey,*[49] the Court judged that deporting a woman to Iran where she was likely to be condemned to death by stoning was incompatible with Turkey's obligation to respect Article 3 of the ECHR.[50] *Jabari* was an affirmation by the ECHR of its earlier ruling in *Soering v. United Kingdom*.

The *Soering* ruling of the ECHR was further incorporated in the following:

- Jurisdictions of many European countries, Canada and South Africa;
- *Guidelines on Human Rights and the fight against Terrorism*, voted in by the Council of Ministers on 11 July 2002, where paragraph 2 thereto sets out that a person cannot be extradited to a country where he risks the death penalty unless certain guarantees are given; and
- *Protocol amending the European Convention on the Suppression of Terrorism of 1977*, opened to signatures on 15 May 2003.[51]

The Death Row Syndrome enunciated by the Stockholm Declaration and *Soering v. United Kingdom* pervaded not just Europe, Canada and South Africa but likewise the Americas. *Cantoral Benavides v. Peru*[52] and *Hilaire, Constantine, Benjamin and others v. Trinidad and Tobago*,[53] in 2000 and 2002 respectively, the Inter-American Commission on Human Rights (ICHR) considered that the fact of leaving person sentenced to death to await execution, deprived of means of communication, isolated in a small unventilated cell with no natural light and subject to visiting restrictions clearly constitutes inhuman and degrading punishment.[54]

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[48]INTERNATIONAL BAR ASSOCIATION, supra note 41.
[49] Appl. No. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000.
[50] INTERNATIONAL BAR ASSOCIATION, supra note 41.
[51] Id.
[52] Inter-Am. Ct. H.R. (ser. C) No. 69, 43 (b) (Aug. 18, 2000).
[53] Inter-Am. Ct. H.R. (ser. C) No. 94, 43 (b) (June 21, 2002).
[54] INTERNATIONAL BAR ASSOCIATION, supra note 41.

F. American Jurisprudence

While it is true that these principles are not binding upon nations and may even be altered depending on its application on the state-level, various nations took upon themselves to make these guidelines a solid foundation and basis in the application and review of the imposition of the capital punishment and other penalties. Leading this state-level movement, is the United States of America (U.S.A.).

The U.S. Supreme Court took the opportunity to discuss this matter in *Furman v. Georgia*.[55] In this case, Furman was burglarizing a private home when a family member discovered him. He attempted to flee, and in doing so tripped and fell. The gun that he was carrying went off and killed a resident of the home. He was convicted of murder and sentenced to death. The U.S. Supreme Court ruled that the death sentence imposed against Furman constituted a cruel and degrading punishment, ratiocinating that "unless a uniform policy of determining who is eligible for capital punishment exists, the death penalty will be regarded as 'cruel and unusual punishment'."

Justice Brennan, in his concurring opinion, enumerated **four principles in determining whether a particular punishment is 'cruel and unusual'** and which is contrary to death penalty that is the *lis mota* of the case. Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment.

In other words, the standards may be summarized as:

1. The "essential predicate" is "that a punishment must not by its severity be degrading to human dignity," especially torture. (**Is it degrading to human dignity?**)
2. "A severe punishment that is obviously inflicted in wholly arbitrary fashion." (**is it arbitrary?**)
3. "A severe punishment that is clearly and totally rejected throughout society." (**Is it rejected throughout society?**)

[55] 408 U.S. 238, 29 June 1972.

4. "A severe punishment that is patently unnecessary." (**Is it unnecessary?**)

In relation with the four principles provided by Justice Brennan, Margaret Jane Radin of University of Pennsylvania Law Review wrote illuminating points and arguments in the construction and application of these principles, *viz*:

x x x x x x x x x

> In order to decide cruel and unusual punishment claims on the basis of a collective coherent position, a court must be able to identify principles of cruelty capable of generating additions to the list of known cruelties. Therefore, and leaving aside for now what special considerations may obtain when applying the word to punishment, as well as whether "cruelty" has a different meaning in the context of governmental or societal actions than for those of a person, it is necessary to inquire what kinds of individual acts are cruel.
>
> The essence of cruelty appears to be the **gratuitous infliction of suffering** – that is, the **infliction of physical or mental pain without good reason**. If the motivation of an act is reprehensible because the inflicter enjoys seeing people suffer, or knows there is no good reason for inflicting the pain, one can be more certain the act is cruel. In fact, under these circumstances one may be more inclined to say that the inflicter is a cruel person as well as that the act is cruel. The element of bad motivation, however, is not always necessary to cruelty. The act of beating a child so severely as to inflict serious injury would be considered cruel even if the inflicter believed the beating was beneficial to the child's welfare. In contrast to this example, there may also be invasions of individual interests which would not be considered cruel absent some element of impermissible motivation.
>
> A second characteristic of cruelty is hardness or lack of concern or sympathy for human individuals. **This element of cruelty**

also is related to motivation. To degrade a person is to be cruel to her; to be cruel is also to degrade oneself because one who is cruel will be considered "inhuman" by her fellow humans. The preceding discussion of the characteristics of "cruel" acts illustrates the two main elements of cruelty **which must be evaluated in judging the constitutionality of punishments.** First, drawing from the discussion of degrading acts, a cruel act is one which **violates individual and collective human dignity**. Second, drawing from the discussion of the infliction of pain without good reason, a cruel act is one which is **excessive**. These two principles merit closer examination and comparison.

1. DIGNITY

The element of human dignity is a necessary part of any moral conception of cruelty, as can be demonstrated by everyday experience. For example, it is cruel to make a laughing stock of someone or to expose shameful personal information about a person to the public or a peer group merely for the sake of seeing her squirm. On the other hand, it would not necessarily be cruel to laugh at the same person in private or to mention humiliating information in closed conversation, even though to do so might also cause pain. The distinguishing factor in these two situations is that the demand of dignity vis-a-vis one's fellows is more clearly present in the former. The dignity element of cruelty is bottomed on a moral obligation of each person to treat others as persons, with the kind of equal concern and respect that we call "human" or "humane." This felt moral obligation is intensified when persons are in the presence of other members of the human community because the transgression of dignity in the presence of others makes it obvious that the injured person is valued less than a person ought to be valued.

Torture, the primary core case under the cruel and unusual punishments clause, appears to be proscribed primarily because it is inconsistent with the principle of dignity. There are punishments that are too degrading (both to the victim and to the inflicter) to be tolerated. The crux of governmental or societal cruelty is action toward citizens with such a lack of concern and respect as to degrade them and their significance as human persons. Under this definition it is appropriate to consider a repressive or totalitarian government cruel. A person subjected to torture is degraded and treated as a non-person; she may in fact become a non-person in the sense that she may lose those values, characteristics and responses we associate with personhood.

Although the infliction of extreme and prolonged pain may constitute the core meaning of degradation in this context, acts lower on the pain scale, such as being pilloried, can be sufficiently degrading so as to fall within this category of cruelty. Some governmental actions may involve little physical pain, but by cutting an individual off from the human community, may be nonetheless degrading. As a result, a punishment involving no physical pain at all, denationalization, has been assimilated into the dignity aspect of cruelty because it foreclosed "the right to have rights." Justice Brennan has focused on this principle of cruelty and concluded that the fundamental standard for evaluating punishments under the cruel and unusual punishments clause is "the dignity of man."

Referring to classic tortures, he said: **The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded.** They are thus inconsistent with the fundamental premise of the clause that even the vilest criminal remains a human being possessed of common human dignity.

2. EXCESSIVENESS

The basic understanding of a cruel act as one that gratuitously inflicts suffering, or inflicts suffering without good reason, generates another major principle of cruelty, excessiveness. Behind this principle is the idea that there is enough pain in the world, and, hence, it is "inhuman" to increase it more than is necessary. This element of cruelty overlaps in large part with the dignity principle, because to inflict gratuitous suffering on an individual is to fail to treat that individual as a person, worthy of equal concern and respect. The excessiveness principle is particularly germane to punishment cases within Types 2 and 3 involving proportionality and power to criminalize. It is gratuitous to punish someone for behavior that is not punishable; it is excessive to punish someone more severely than her crime warrants. Justice Marshall has quoted Justice Field for the proposition that "[t]he entire thrust of the Eighth Amendment is, in short, against 'that which is excessive'," noting that the rest of the amendment prohibits excessive bail and excessive fines. This excessiveness strand of cruelty was utilized by Justice Stewart speaking for the plurality in *Gregg*, but came to the forefront of eighth amendment adjudication in *Coker v. Georgia*. The *Coker* Court used a **two-pronged excessiveness test**, holding that execution for the crime of rape was excessive and therefore unconstitutional.

In *Coker*, Justice White, joined by Justices Stewart, Blackmun and Stevens, held a punishment to be excessive and violative of the cruel and unusual punishments clause "if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."

3. ARE DIGNITY AND EXCESSIVENESS DISCRETE PRINCIPLES?

Although excessive punishment seems to be degrading to human dignity, and the two principles apparently overlap to a great extent, they may not be coextensive. There are differences in the emphasis of each principle which in the context of the cruel and unusual punishments clause may usefully be thought of as reflecting divergent justifications for punishment. The excessiveness criterion is formulated as related inversely to what is thought reasonable or necessary, while the dignity criterion is formulated independent of these considerations. As a result, there may be non-excessive punishments that infringe human dignity, depending on one's philosophical mode of justification for punishment.[56]

x x x x x x x x x (*emphasis supplied*)

On the aspect of arbitrariness, Sarah Oppenheim's commentary is apropos:

x x x x x x x x x

The foremost cause for the arbitrariness in the imposition of the death penalty is the quality of the defense attorney, demonstrated by the fact that approximately 33% of cases are overturned on appeal. Most prisoners on death row are indigent, and thus represented by public defenders. Many defense attorneys, moreover, are inexperienced in capital cases.

Appointment of defense counsel varies by jurisdiction. Often, the appointment process is based on patronage and judges may appoint attorneys who they know support the death penalty. In other

[56] Margaret Jane Radin, The Jurisprudence Of Death: Evolving Standards For The Cruel And Unusual Punishments Clause, 126 University Of Pennsylvania Law Review, 1042-47, 1052 (1978).

> jurisdictions, defense counsel is chosen from local attorneys who are inexperienced, insufficiently paid, and lack resources to investigate their client's case. In the 1984 case *Strickland v. Washington*, the Court adopted a "highly deferential" standard of "reasonably effective assistance" for counsel. To maintain a claim of inadequate counsel, the petitioner carries a heavy burden, not only of proving counsel was inadequate, but that this prejudiced the trial.[57]
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> However, to extend incompetent legal representation in the domain of cruel, degrading and inhumane punishment is too much a stretch in the application of this is right and is obviously inconsistent and *non sequitur*. Just because the accused was deprived of quality legal counsel does not mean that he is already being punished cruelly and inhumanely. Incompetent legal representation is an aspect of the right of the accused during trial. It is akin to the right to speedy disposition of the case. To qualify it as a standard in cruel, degrading and inhumane punishment is to overburden public prosecutors of their duty which is already heavy and loaded. In the first place, legal representation is not in the nature of a punishment but is an aspect of the trial system. In Philippine jurisdiction, incompetent legal counsels can be civilly held liable and can be administratively disbarred in the law profession. Inept lawyering may lead a person to be convicted of a cruel, degrading and inhumane punishment but it is not the direct and proximate cause for the violation of this right. Besides, certain legal remedies are established to prevent this injustice or cure ineffectual legal counselling – *e.g.* automatic review to the Supreme Court. It is the punishment itself that is cruel – not the quality of defense lawyers which is a subject of a different paper.

[57] Sarah Oppenheim, Capital Punishment in the United States, https://www.wcl.american.edu/hrbrief/spring98/html/death.html (last accessed February 2, 2017).

G. European Jurisprudence and the European Convention on Human Rights

Despite Belarus being the only European country that presently retains the death penalty,[58] Europe has turned the same page with the UN and the U.S.A. by embodying the aforementioned principles on cruel, degrading and inhumane punishment in their legal systems *via* the European Convention on Human Rights (European Convention), Article 3 of which states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."

It can be gleaned from Article 3 that the European Convention subscribed with the view that the right against cruel, degrading and inhumane punishment emcompasses all kinds of penalties and all the circumstances prior and subsequent to imposition of the penalty, particularly the capital punishment. Notwithstanding this reception by the European Convention, the ECHR, in *Selmouni v. France*,[59] pointed out that torture is separate and distinct from cruel, degrading and inhumane punishment:

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> In order to determine whether a particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As the European Court has previously found, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.
>
> The *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* also makes such a distinction, as can be seen from Articles 1 and 16, to wit:

[58] Oliver Smith, Mapped: The 58 countries that still have the death penalty, The Telegraph, September 1, 2016, http://www.telegraph.co.uk/travel/maps-and-graphics/countries-that-still-have-the-death-penalty/
[59] Application No. 25803/94, 28 July 1999.

Article 1

> 1. For the purposes of this Convention, the term **'torture'** means **any act by which severe pain or suffering**, whether physical or mental, is **intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession**, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, **when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity**.

Article 16, paragraph 1

> 1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment." *(emphasis supplied)*

The right against torture and that against cruel, degrading and inhuman punishment are not mutually exclusive. They share almost the same ideals – one can be included in the other – and maybe even applied in many similar occasions. However, as lucidly pointed by ECHR, there is a fine line which distinguishes the two rights. This distinction is further highlighted in *Renolde v. France*:[60]

> According to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The

[60] Application No. 5608/05, 16 October 2008.

> assessment of this minimum level is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. x x x x x x x x x

and in *Lykova v. Russia*:[61]

> x x x x x x x x x
>
> The State of Russia [sic] to have violated Article 3 of the Convention for humiliating and intense ill-treatment inflicted to the victim to extract a confession during unrecorded detention. The ill-treatment resulted to the victim's death. According to the witness's version, the Russian police had beaten the victim by banging his head against hard surfaces several times which was accompanied by sessions of asphyxiation, causing acute pain and suffering. The treatment complained of had taken place during a period of unrecorded detention, which could only have worsened the vulnerability of the victim; and with the aim of forcing the victim to confess. Thus, the ECHR ruled that the acts of violence inflicted on the victim, taken as a whole, had been particularly serious and cruel in nature, and are regarded as acts of torture under Article 3 of the Convention. x x x
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> x x x x x x

These two European jurisprudence provide that cruel, degrading and inhumane punishment necessarily includes torture within its ambit of prohibited actions. However, torture is a far broader concept that right against torture is not just limited at the time that the penalty is imposed. The remedies that can be availed in cruel, degrading and inhuman punishment cannot be applied if the torture that was inflicted on the accused was not at the time he was serving sentence or prior the execution of the capital punishment. Otherwise, if torture is employed, it is tantamount to a violation of the right against cruel, degrading and inhumane punishment. The torture becomes a means in the

[61] Application No. 68736/11, 22 December 2015.

violation of this right and can be a basis in the determination of the various liabilities of those who inflicted the same.

VII. JUSTICE BRENNAN'S FOUR-FOLD STANDARDS

Philippine jurisprudence summarily provides that the application of the right against cruel, degrading and inhumane punishment is circumstantial, that is, the form and character of the punishment must be taken with the charges and its surrounding circumstances against the accused that will determine if the penalty is cruel, degrading and inhumane. In the broadest of terms, Philippine Supreme Court further stated that if the penalty is shocking or obnoxious to the senses of the community, it is cruel, degrading and inhumane. Even, the Supreme Court gave precedence over the presumption of regularity on the part of Congress over the accused's right against cruel, degrading and inhumane punishment without any explanation why the penalty is not cruel, degrading and inhumane. The discussion of this lack of criteria in the Philippine legal system and the lengthy disquisition of foreign and international standards patently expose the Philippines' lagging actions when it comes to the protection of this essential constitutional right. It is from this angle that Philippines must learn, adapt and retrofit foreign and international principles for domestic application.

True that foreign jurisprudence is not binding in the Philippines. However, in this paper, they carry so much persuasiveness and encouragement that it is a height of absurdity to let them pass by. Their contents strongly persuade a substantive matter that is irresistible when it comes to safeguarding the accused and the convict against cruel, degrading and inhumane punishment.

Justice Brennan's 4-fold standards suggests to be the most concise, comprehensive and universally-applicable standards without undermining the state's police power on imposing various penalties. Risking to be repetitive, the 4-fold standards are:

1. The "essential predicate" is "that a punishment must not by its severity be degrading to human dignity," especially torture. (**Is it degrading to human dignity?**)
2. "A severe punishment that is obviously inflicted in wholly arbitrary fashion." (**is it arbitrary?**)
3. "A severe punishment that is clearly and totally rejected throughout society." (**Is it rejected throughout society?**)

4. "A severe punishment that is patently unnecessary." (**Is it unnecessary?**)

Justice Brennan's 4-fold standard can be deduced as the factors of Human Dignity, Arbitrariness and Execessiveness, Communal Acceptability and Purpose.

A. **Human Dignity**

This factor enunciates basic tenet to treat a person as such in all aspects of state prosecution. The government must provide the accused with the most basic of human needs and uphold his dignity at all times. This factor seeks to protect the convict against any form of abuse, either physically and psychologically. It is both a societal and a moral norm and obligation of the state to protect its citizens and their persons – wherever they may be. Such norm and duty does not discriminate if one is a free man or a convicted felon. Thus, it is imperative that in the imposition of penalty, the convict must not be debased below human level.

The Human Dignity factor is consistent with the "Death Row Syndrome" mentioned earlier. To reiterate, Death Row Syndrome is the psychological stress felt by a prisoner who awaits execution of the capital punishment. In international level, this is cruel, degrading and inhumane. The same must be held true in the Philippines. In a country where jails suffer from overpopulation, lack of basic necessities and supplies and even going to the level of being subhuman, subjecting a person to wait for his "day with the gallows," while in this kind of treatment, tramples human dignity. While it has been conceded that incarceration is necessary and *per se* not cruel, degrading and inhumane, such incarceration becomes violative of the Human Dignity factor when the state induces so much psychological attack, including physical ones, before it delivers the fatal blow – execution.

The Philippines must embrace the principle that the right against cruel, degrading and inhumane punihsment becomes available and is automatically operative from the moment the sentence is handed down. From the very hour that the convict begins to serve his sentence, he must not be deprived of the basic necessities – food, water, shelter and clothing. When these are provided beneath the level sufficient for a man to live, the convict is being treated below human standards, as if the person is not a person at all. The Human Dignity factor is violated. Even if these necessities are given but the convict is incarcerated for a long time with indefinite date of

his execution, the convict is likewise punished cruelly, degradingly and inhumanely as the indefiniteness of his execution is puts him in a situation where his life is always subjected to unnecessary pressure, stress and burden.

The Human Dignity factor likewise dwells against any form of physical abuse, *e.g.* torture. For the state to impose physical attacks to the person as a form of penalty is an attack not just on the convict's body but also his human dignity. If the government sponsors or acquisces to torture is the height of injustice and sets aside the humanity of the convict who is still deemed a person in the eyes of the law.

The mere fact that the state government exposes the convict to risk of any psychological, physical abuse, torture and its other forms is already cruel, degrading and inhumane. This is primary factor why stoning and forced labor, among others, are considered cruel, degrading and inhumane.

The Human Dignity tenet is deeply and inextricable connected with the right to life which has acquired an expanded definition and scope. *Secretary of National Defense v. Raymond Manalo and Reynaldo Manalo*[62] aptly teaches:

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> While the right to life under Article III, Section 1 guarantees essentially the right to be alive - upon which the enjoyment of all other rights is preconditioned - the right to security of person is a guarantee of the secure quality of this life, *viz*: The life to which each person has a right is not a life lived in fear that his person and property may be unreasonably violated by a powerful ruler. Rather, it is a life lived with the assurance that the government he established and consented to, will protect the security of his person and property. The ideal of security in life and property pervades the whole history of man. It touches every aspect of mans existence. In a broad sense, the right to security of person emanates in a persons legal and uninterrupted

[62] G.R. No. 180906, October 7, 2008.

> enjoyment of his life, his limbs, his body, his health, and his reputation. It includes the right to exist, and the right to enjoyment of life while existing, and it is invaded not only by a deprivation of life but also of those things which are necessary to the enjoyment of life according to the nature, temperament, and lawful desires of the individual.
>
> x x x x x x x x x (*citations omitted*)

B. **Arbitrariness and Excessiveness**

C. **Purpose**

Taking these two tenets together, Philippine jurisprudence observed these factors faithfully as it consistently held that the penalty must be commensurate to the crime committed. Philippine jurisprudence is steadfast in stating that the capital punishment must not be indisriminately imposed. The Supreme Court backed up Congress to limit death penalty only to heinous crimes. by ruling that it is the element of heinousness that removes the capital punishment from being cruel, degrading and inhumane, as provided in *People of the Philippines v. Leo Echegaray*[63]:

> x x x x x x x x x [T]hat the elements of heinousness and compulsion are inseparable and are, in fact, interspersed with each other. Because **the subject crimes are either so revolting and debasing as to violate the most minimum of the human standards of decency or its effects, repercussions, implications and consequences so destructive, destabilizing, debilitating, or aggravating in the context of our socio-political and economic agenda as a developing nation, these crimes must be frustrated, curtailed and altogether eradicated. There can be no ifs or buts in the face of evil, and we cannot afford to wait until we rub elbows with it before grasping it by the ears and thrashing it to its demission.**

[63] G.R. No. 117472, February 7, 1997.

> The abolitionists in congress insisted that all criminal reforms first be pursued and implemented before the death penalty be re-imposed in case such reforms prove unsuccessful They claimed that the only compelling reason contemplated of by the constitution is that nothing else but the death penalty is left for the government to resort to that could check the chaos and the destruction that is being caused by unbridled criminality. Three of our colleagues, are of the opinion that the compelling reason required by the constitution is that there occurred a dramatic and significant change in the socio-cultural milieu after the suspension of the death penalty on February 2, 1987 such as an unprecedented rise in the incidence of criminality. Such are, however, interpretations only of the phrase "compelling; reasons" but not of the conjunctive phrase "compelling reasons involving heinous crimes". The imposition of the requirement that there be a rise in the incidence of criminality because of the suspension of the death penalty, moreover, is an unfair and misplaced demand, for what it amounts to, in fact, is a requirement that the death penalty first proves itself to be a truly deterrent factor in criminal behavior. If there was a dramatically higher incidence of criminality during the time that the death penalty was suspended, that would have proven that the death penalty was indeed a deterrent during the years before its suspension. Suffice it to say that the constitution in the first place did not require that the death penalty be first proven to be a deterrent; what it requires is that there be compelling reasons involving heinous crimes.

Article III, Section 19(1) of the 1987 Constitution simply states that congress, for compelling reasons involving heinous crimes, may re-impose the death penalty. Nothing in the said provision imposes a requirement that for a death penalty bill to be valid, a positive manifestation in the form of a higher incidence of crime should first be perceived and statistically proven following the suspension of the death penalty. Neither does the said provision require that the death

> penalty be resorted to as a last recourse when all other criminal reforms have failed to abate criminality in society It is immaterial and irrelevant that R.A. No. 7659 cites that there has been an "alarming upsurge of such crimes", for the same was never intended by said law to be the yardstick to determine the existence of compelling reasons involving heinous crimes. Fittingly, thus, what R.A. No. 7659 states is that "**the Congress, in the interest of justice, public order and rule of law, and the need to rationalize and harmonize the penal sanctions for heinous crimes, finds compelling reasons to impose the death penalty for said crimes**." (*emphasis supplied*)

The *Echegaray* ruling must be analyzed with the two-pronged excessiveness test of Justice White in *Coker v. Georgia* which provides that "a punishment to be excessive and violative of the cruel and unusual punishments clause "if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."

Taking *Echegaray* and *Coker* together, it is imperative that death penalty, or any penalty at that matter, should meet the compelling state interests for which the penalty is imposed and must be commensurate with the crime committed. The Excessiveness and Arbitrariness factor takes into consideration the state interests that must be upheld by prosecution of crimes: that is, peace and order, eradication of criminality, and retribution. However, it is also a limitation by itself because the state can only seek retribution up to the extent of the crime committed. Essentially, this is a redefinition and a limitation of the concept of "an eye for an eye."

Furthermore, this must be taken also within the context of rational equivalence. In theft, it is rudimentary that the thing stolen or the value thereof must be returned to the private offended party, in addition to jail time and/or fine for the damage on the part of the state. Anything in excess of such is deemed to be cruel, degrading and inhumane for the state has already achieved its goal of prosecuting the thief when it ordered the return of the thing and incarcerated him. The same holds true in all other crimes. Just because a person killed another does not mean that the killer is automatically doomed to die as well. Just because a drug pusher or user has destroyed so many lives does not automatically give license for the state to take away their lives. Rational equivalence requires

that the penalty must be commensurate to the crime committed. If the killing or drug trafficking was committed with the element of heinousness, as the Supreme Court provided, then the capital punishment can be deemed to be the rational equivalent of the crime committed. This is further qualified by the two-pronged excessiveness test. If death penalty is to be imposed, it must be handed down for the purpose of measurably contributing to the goals of such punishment – the compelling state interests the government sought to urgently forward. If neither compelling state interests nor, even if such exists but is not met by the penalty imposed, the punishment is arbitrary and excessive, thus, cruel, degrading and inhumane.

Fundamentally, the Execessiveness and Arbitrariness and the Purpose tenets on determining whether a penalty is cruel, degrading and inhumane is a check on the police power of the state. Thus, these tenets are to be applied side-by-side with the Lawful Subjects and Lawful Means test. As per jurisprudence, "the lawful subjects and lawful means tests are used to determine the validity of a law enacted under the police power."[64] In this test, "[police] power is validly exercised if (a) the interests of the public generally, as distinguished from those of a particular class, require the interference of the State, and (b) the means employed are reasonably necessary to the attainment of the object sought to be accomplished and not unduly oppressive upon individuals."[65]

D. **Communal Acceptance**

The Communal Acceptance facet is the most diverse aspect in the criteria as it involves all non-legal subjects when pertaining to cruel, degrading and inhumane punishment. The sensitivities and mindset differ from each individual and is made dependent on what perspective the punishment is viewed upon. Arguably, the lack of a definitive study in Philippine context of the sensibilities of the Filipinos on death penalty and what constitutes cruel, degrading and inhumane punishment presents a basic standard on the level of acceptance, of rejection or, even, of apathy when it comes to this right. Despite the absence thereof, this criteria may be scrutinized based on the influx of information from various forms of media and the key statements of significant people from whom the masses derive their stand and opinions.

[64] Planters Products, Inc. v. Fertiphil Corp., G.R. No. 166006, March 14, 2008.
[65] DECS & Dir. of Center for Educational Measurement v. Roberto Rey San Diego & Judge Teresita Dizon-Capulong, G.R. No. 89572 December 21, 1989.

Cong. Edcel Lagman, a staunch oppositor of the reimposition of death penalty, stated the following reasons why the capital punishment is counter-productive in Philippine society:

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> 1. The reimposition of the death penalty will not solve criminality, including the drug menace. Solving the incidence of crime is a multi-dimensional process which ranges from sustained poverty alleviation to much-needed police, prosecutorial and judicial reforms. The severest penalty is not the antidote to criminality.
>
> 2. Pronounced social injustice, crippling poverty, and utter absence of quality of life among the disadvantaged and marginalized sectors are among the root causes of criminality. The data are irrefutable that it is in the poorest of regions and countries where the incidence of criminality is highest. We should address with utmost priority the critical causes of criminality, not only its manifestation.
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> x x x x x x x x x [B]ereaved families of countless victims of so-called "heinous" crimes do not wish death to the perpetrators. The families of victims of enforced disappearance or desaparecidos, like my own family, who lost a member, Atty Hermon Lagman, a labor and human rights lawyer, to involuntary disappearance committed by military elements of martial law. My family and I also do not want death for the assassins of my brother, Filemon "Ka Popoy" Lagman who was gunned down in the UP Campus 16 years ago on February 6, 2001. There are many more likeminded families who want genuine justice, not short-lived retribution.
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> x x x x x x x x x
>
> The "heinousness" of a crime is not determinative of the compelling reasons for reimposing the death penalty. They are not synonymous. Heinousness is not a compelling reason. Congress must

> show and prove separately the determinant factors of "heinousness" and "compelling reasons".
>
> Isolated and sporadic sensational or sensationalized crimes like "chop-chop," placing the victim inside a barrel, and inordinate cruelty inflicted on the victims are not compelling reasons to reimpose the death penalty. The isolated occurrence of one or two of these "once in a blue moon" crimes do not constitute a compelling reason to reinstall capital punishment as required by the Constitution.
>
> Calls for the death penalty after the random commission of such so-called "heinous" crimes are mere knee-jerk reactions from the mob.
>
> Moreover, the perpetrators of occasional sensational crimes are blinded by spontaneous fury due to supervening temporary derangement of the mind. While they should be imprisoned, they need professional psychiatric help, not execution.[66]
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> x x x x x x x x x

A legislator's statements during Congress's session are important sources from which the people can know the wisdom and mindset working during law-making. These deliberations are sourced from multi-faceted philosophy from which the law shall founded. Obviously, the legislators forward a cause they wish to be considered during the debates and deliberations therein. They may be speaking in their own point of view but this point of view, together with that of other legislators, generate the common interests from which the law's policy shall be founded. Since Communal Acceptance is not just limited from our politicians, it also necessary to take the stance of other public officials whoare experts in their own field. One to consider may be that of the Social and Welfare Development Chief Judy Taguiwalo who said, "The use of capital punishment also extinguishes the offender's hopes to reform and engage in rehabilitation. It highlights the permanency of their offense,

[66]Rappler, FULL TEXT: Death penalty will fuel culture of violence – Lagman. (February 8, 2017). Retrieved February 19, 2017, http://www.rappler.com/nation/160875-edcel-lagman-speech-against-death-penalty-bill-full-text.

instead of their capacity to change for the better through the process of restorative justice which would enable them to connect, reconcile, and learn from their offense."[67] She further added that, "[t]his right [to life] should not be disregarded, regardless of an individual's needs, especially since empirical evidence shows that 'criminality' is determined by a number of factors including poverty, lack of education, marginal economic opportunities, even disability."[68]

The expanse of what should be included in the determining the criteria of Communal Acceptance varies from the culture, the mindset, the values and principles upheld, the level of education, access to government and public utilities, location and other influences present surrounding the population. However, economics can provide a persuasive, if not objective, point where the acceptance may be reached. Martin Kasten lucidly provides:

x x x x x x x x x x x x

> The efficiency of the death penalty has been questioned by experts in the United States due to the small number of executions that these thirty-eight states carry out. From an economic perspective, society should only use capital punishment if the marginal benefits outweigh the marginal costs. In the course of analyzing the economic efficiency of capital punishment, and before providing any recommendations, both the benefits and costs of the death penalty must be evaluated. Since the death penalty has been implemented for centuries, many people believe its benefits outweigh its costs.[69]

x x x x x x x x x x x x

It is from this standpoint of economics where the utilitarian aspect of capital punishment may be viewed in its most objective sense, and in simplest empirical science possible. It is conceded that Communal Acceptance is unquantifiable. This is because to make it quantifiable is to disregard other aspects that is deemed to be a source for a communal decision. Rather, the economic approach of

[67] Pasion, P., Taguiwalo: Death penalty 'cruel, degrading, and inhuman'. (February 7, 2017) Retrieved February 20, 2017, Rappler, http://www.rappler.com/nation/160747-dswd-secretary-taguiwalo-death-penalty-cruel-degrading-inhuman.
[68] Id.
69 Martin Kasten, An Economic Analysis of the Death Penalty, University Avenue Undergraduate Journal of Economics, (1996), http://digitalcommons.iwu.edu/cgi/viewcontent.cgi?article=1001&context=uauje.

utilitarianism can be a method to determine Communal Acceptance. Until and unless an objective measure can be made to be able to determine the voice of the citizens on this matter, it is rather impossible for capital punishment and other pertinent penalties to be excluded from the scope of the protection against cruel, degrading and inhumane punishment. And that makes Communal Acceptance a vital factor in the criteria.

Statistics related with death penalty are lauded but they do not necessarily reflect Communal Acceptance nor do they speak of the cruelty, degradation and inhumanity of a punishment. It is through Communal Acceptance that no minor nor pregnant woman should be subjected to capital punishment. It is through this factor that the convict can seek pardon, apply for parole or probation and any other reprieve that the law and government may grant. Internationally speaking, Communal Acceptance on what is cruel, degrading and inhumane as a punishment is already fixed and founded. This trend must likewise be observed in its local application, especially since the Philippines is a signatory to the Second Optional Protocol to the ICCPR.[70] Otherwise, the Philippines would not just be violating a person's constitutional right but also its treaty obligations, among others.

In its entirety, Communal Acceptance espouses the perspective of the community of what is cruel, degrading and inhumane. It does not take what is considered to be obnoxious or shocking to the conscience of the community. Through this factor, the point of view of the population is primarily raised wherein the right against cruel, degrading and inhumane punishment is no longer limited to the perspective of the accused but set side by side with that of the masses. Also, the other tenets are affected. When the community sees the punishment to be cruel, degrading and inhumane, in a way, their individual and collective appreciation of human dignity is likewise affected. When a penalty violates this right, it leaves a bad taste on the consiousness of the community and a bad reputation on the law enforecement activities of the government. The community sees the sentence – either afflictive, correctional or light – as a solution mismatched with the problem. Therefore, when the penalty fails on the aspect of Communal Acceptance, it likewise follows that the punishment failed on the other factors of Human Dignity, Arbitrariness and Execessiveness, and Purpose. There is no other treatment for the punishment but that of being cruel, degrading and inhumane.

[70] Esmaquel, P., UN on death penalty: PH will break int'l law, (December 9, 2016) Retrieved February 20, 2017, Rappler, http://www.rappler.com/nation/155014-un-death-penalty-philippines-violate-international-law.

Conglomerating the scattered jurisprudence of Philippines with the uniform standards observed abroad, Justice Brennan's 4-fold standards, which can properly be called as the *Brennan* Test, effectively provides a substantially clear structure, guide and test in Congress's promulgation of policies and the Supreme Court's interpretation of laws with respect to the right against cruel, degrading and inhumane punishment.

VIII. APPLICATION OF THE *BRENNAN* TEST ON H.B. NO. 1

As posed earlier, H.B. No. 1, as it is presently crafted and together with H.B. No. 4727, reeks of unconstitutionality (if ever it will become a law), violation of rights and invalid exercise of police power because, on its face, it raises the danger of reviving the capital punishment in the Philippines in a cruel, degrading and inhumane way. When death penalty shall be reimposed under H.B. No. 1, it shall be accomplished in three ways – death by hanging, lethal injection or firing squad.

As of the time this paper is written, H.B. No. 4727, which substituted H.B. No. 1, has been trickled down to drug-related crimes only when the House of Representatives approved the same:

- Importation of dangerous drugs and/or controlled precursors and essential chemicals;
- Sale, trading, administration, dispensation, delivery, distribution, and transportation of dangerous drugs and/or controlled precursors and essential chemicals;
- Maintenance of a drug den, dive, or resort;
- Manufacture of dangerous drugs and/or controlled precursors and essential chemicals;
- Cultivation or culture of plants classified as dangerous drugs or are sources thereof
- Unlawful prescription of dangerous drugs;
- Criminal liability of a public officer or employee for misappropriation, misapplication, or failure to account for the confiscated, seized and/or surrendered dangerous drugs, plant sources of dangerous drugs, controlled precursors and essential chemicals, instruments/paraphernalia and/or laboratory equipment including the proceeds or properties obtained from the unlawful act committed; and
- Criminal liability for planting evidence concerning illegal drugs.[71]

[71] Cepeda, M., After Death Penalty vote, House a "chamber of puppets and bullies," (March 2, 2017) Retrieved March 3, 2017, Rappler, http://www.rappler.com/nation/162978-death-penalty-vote-house-chamber-puppets-bullies.

Other than the aforementioned enumeration of crimes, H.B. No 4727 adopted the rest of H.B. No. 1 and all other bills pertaining to the reimposition of death penalty.

Primarily, the mere proposition of administering death penalty in either of the three methods is tantamount to being cruel, degrading and inhumane. It is obviously against human dignity and communal acceptance. It is intentionally arbitrary and excessive and beyond the purpose for which penalties are imposed. If this will be become law, the Philippines will be the first to institutionalize in its criminal justice system three ways of executing a person. The convicted's life is literally at the discretion of law enforcers. The law sanctions them to have such choice. The manner of execution is overboards the fundamental purpose of penalties and disregards the element of heinousness in the measure.

Taken all the jurisprudence vis-à-vis H.B. No. 1, the three methods of death penalty under the bill, coupled with irregularities in the procedure of its execution, violates the Constitutional protection against cruel, degrading and inhumane punishment. The mere fact that there are three modes to cause the instantaneous death of the accused is already shocking to the conscience not just of the community but also of the accused as well. What even makes it more degrading or inhumane is that there is no assurance that any of the methods will cause prompt death so as to alleviate pain and suffering. Moreover, it is oppressive and opens the floodgates of abuse as the choice of the execution rests upon the discretion of the Director of Corrections. This is a power beyond what may be delegated to the Director of Corrections. In other words, the accused is already being subjected to cruel, degrading, unnecessary and prolonged agony and suffering even before the infliction of the penalty itself.

On the lens of the Human Dignity factor, if this bills will become law, it will, without a doubt, subject the convict to psychological, emotional and mental torture. When applied in reality, upon the promulgation of the judgment of conviction, the convict is subjected to psychological torture as he is put in an uncertainty of the kind of execution that he will undergo. Different types of punishment requires different kinds of preparations and viewed with different kinds of perspectives. While the conviction may be valid, it is invalidated by subjecting the convict with the unnecessary stress of knowing how his life will be taken away. If a single method of execution can already make the convict suffer from Death Row Syndrome, the possibilities of acquiring this is multiplied by the presence of three methods. It must be noted as well that the length and conditions of the incarceration can worsen

the psychological trauma already present at the inception. Living the rest of his remaining days, the convict is in a limbo if he will be hanged, fired at the back or be injected with poison.

As the old saying goes, "there are many ways to kill a chicken." The house bills seem to adopt this. But to analogize a human being to a chicken by the proposal of three methods of execution is to treat the convict as a non-human. The is no cogent reason mentioned in the bill as to why there has to be three. A single method of execution could have sufficed. But, no, the proponents forwarded three. To make it worse, the house bills add two kinds of execution that is no longer observed in many, if not all, civilized nations around the world. Firing squad and death by hanging, in modern times, is considered as cruel and degrading. These methods do not even pass their test of providing the instantaneous death of the convict. The convict will suffer agonizing pain and unnecessary humiliation before death takes over. While lethal injection may be the least barbaric of the three methods, the chances of being botched up is always present. In U.S.A. alone, about 3% of all executions are botched.[72] It is in this context that there is an infliction of excessive pain and suffering, if not toture, before ultimately killing the convict. The bills are treating the convicts as sub-human – undoubtedly trampling upon their human dignity.

Since H.B. 4727 failed in the Human Dignity factor, it is not difficult to see why it also suffers the same fate as to the aspect of Arbitrariness and Excessiveness. As mentioned in the earlier, it is arbitrary when the penalty is imposed without any compelling qualifications. It is excessive when the penalty is not proportionate to the crime committed. The authors of the bills conducted a horribly lousy work of simply injecting death penalty to existing provisions of the RPC and other special penal laws. There has been no attempt to properly qualify or contextualize as to the circumstances when the capital punishment are imposed. For example, under the current Section 11 of Republic Act (R.A.) 9165, possession of ten (10) grams of methamphetamine hydrochloride ("*shabu*") is penalized with life imprisonment. Under the house bill, mere possesion of the same quantity of the same illegal drug is already punishable by death. It is unfathomable why the bill did not graduate further the existing law so as limit death penalty only to the severest forms of illegal possession of illegal drugs. It might be their legislative intent to create an immense "chilling effect" for these crimes. However, it does not. It stinks of arbitrariness annd execessiveness. The imposition of the capital punishment is not

[72] CriminalJusticeDegreeHub.com, Cruel & Unusual: The Death Penalty v. The Eighth Amendment, http://www.criminaljusticedegreehub.com/death-penalty-v-the-8th-amendment/ (last accessed February 2, 2017).

appropriate to toe the graduations presented by these bills. To sentence a person to death because of 10 grams of *shabu* is clearly arbitrary and excessive. The life of an offender for illegally possessing 10 grams of *shabu* is equated by the bills similar to those possessing 100 kilograms of the same illegal drug.

When the bill suffers from arbitrariness and excessiveness, Communal Acceptance is subsequently absent. When a penalty tramples upon a person's human dignity and is obviously excessive and arbitrary, it shakes the conscience and consciousness of the community. In a country like the Philippines, to reimpose death penalty via a single method is to surpass overwhelming opposition of the Church, many pro-life movement and others. With H.B. 4727's three methods, the stakes got higher and the opposition got louder and stronger. In lethal injection alone, such as in the case of Leo Echegaray, it is beyond cavil that emotions were high and his execution was sensationalized which led to becoming the first and last execution when death penalty was first reimposed until it was subsequently suspended. The capital punishment does not work in a society that does not fully accept it. It will stay that way as long as the manner for its reimposition is barbaric, numerous and arbitrary. There is nothing acceptable in re-introducing back into the system the firing squad and hanging methods which are already deemed to be cruel, degrading and inhumane both internationally and domestically.

If this bill becomes a law, it tramples upon the human dignity of the community. They will see and feel the arbitrariness and excessiveness of the penalty first hand. This is manifeset when the relatives of the convict are immediately victimized by the execution. When the numbers and its frequency got higher and the executions become more public, it does not uplift the morale of the community. What is seen is a traumatized and shocked citizenry. The pain felt by the accused is somehow felt by those who will see it. The community should not have been subjected to these kinds of misery but they are. The people will feel more scared than one who understands for such imposition. Assuming *arguendo* that such fear is the logical consequence of such legislative measure, it is more against Communal Acceptance and is excessive and arbitrary as it is unnecessary and burdensome to those who should not feel it in the first place.

Finally, even if H.B. 4727 passes the Purpose facet, it will not save the bill from its invalidity. As proposed earlier, lawful means must concur with lawful purpose. One cannot go without the other. As such, it is laudable and noble for the current administration to focus on the country's drug problem.

The drug problem can be an appropriate basis for stiffer penalties and, subject to strict qualifications, for the capital punishment. However, the path that the current Congress is taking, that is to limit death penalty only to drug-related crimes, violates the fundamental purpose for which penalties are imposed. Essentially, penalties are imposed, depending upon their severity, to recompense the injury or damage done. Assuming *arguendo* that it is within the power of Congress to limit death penalty to drug-related crimes, victims of other heinous crimes are deprived of the equal access to all means to be compensated from the crime committed against them. Lacking special reasons for the exclusion of other similarly or more heinous crimes from the reimposition of the ultimate penalty, victims of rape and murder, treason and plunder, among others, suffer from injustice because of the dissimilarity on punishment, as opposed from the victims of drug-related crimes.

If the purpose of Congress is to further curb criminality, this is not achieved by singling out capital punishment to drug-related crimes. Even if it will solve criminality, it is just answering to such crimes which is only one of many more heinous crimes present. Still, assuming that these drug-related crimes cause the commission of other crimes, it is not a solid reason to impose death penalty on a single kind of crime. To single out drug-related crimes is to neglect other heinous crimes. This, in effect, is to set aside the elements of heinousness that has been an integral part in the law-making of penalties which is consistently held by the Supreme Court to be vital in the imposition of penalties. The heinousness of drug-related crimes does not, in anyway, affects the heinousness of other crimes nor removes the latter from such classification.

IX. CONCLUSION

The Congress should not be solely blamed for the prospected law. They proposed H.B. 4727 due to the present circumstances and the thrusts of the current administration. Congress, after all, is presumed to be in the regular performance of its duties and, as such, intends right and justice to prevail. However, H.B. 4727 undermines this presumption. It works against the government and, more significantly, against the people. The authors, in good conscience, posits that the current proposition to revive the capital punishment suffers serious legal infirmities and violates the right against cruel, degrading and inhumane punishment. To water down the capital punishment to drug-related crimes only is excessive, myopic and useless.

Had the Supreme Court provided the lawmakers with an appropriate, resilient and precise criteria for the right against cruel, degrading and inhumane punishment, in the same way that it has provided such kind of strict tests on freedoms of religion, expression and others, this essential right could not have been prone to abuse and not subject to legislative discretion. The scattered, unexplained and ambiguous Philippine jurisprudence on this matter worked against the right itself and the person who possesses the same – the convict. In theory, it is a constitutional right – a right accorded with so much respect across all branches of the government. In reality, it is treated as a "second-class" right under the Constitution which is rarely invoked and is now threatened to be diluted and violated.

Together with all the relevant treaties, protocols, commentaries, statements and jurisprudence of international organizations and tribunals and of foreign courts, the concurrence of the principles of Human Dignity, Arbitrariness and Execessiveness, Communal Acceptance and Purpose resurges the eloquence, importance, respect and priority that the constitutional right against cruel, degrading and inhumane punishment deserves. These principles, as embodied by the *Brennan Test*, harmonizes the Philippines with the modern and international trend of what is cruel, degrading and inhumane. The *Brennan Test* combines all the necessary factors and circumstances to protect the convict from penalties that violates this protection afforded to him by the Constitution itself. The *Brennan Test* coordinates and calibrates Philippines' jurisprudence to a unified, clear and strict criteria in the application of this right. The *Brennan Test* promotes fairness, justice and equity for the legislature in crafting the proportional penalties to achieve the desired state interests. The *Brennan Test* enlightens the courts of justice to be mindful of its duty to impose only the kind of penalty that the accused may deserve.

There is no question that penal statutes are intended to have an *in terrorem* effect, that is, to create a "chilling effect" purported to discourage repitition of the offense, "this does not mean, however, that the Constitution gives Congress the *carte blanche* power to indiscriminately impose and increase penalties."[73] H.B. 4727 absolutely goes beyond this limitation. It seeks not just to the desired and appropriate "chilling effect" but to create a culture of fear. It creates a "chilling effect" to the grave prejudice of the rights and irreparable damage of the convict and to the citizens as well.

[73] Jose Jesus M. Disini, Jr., et al. v. Secretary of Justice, et al., G.R. No. 203335, February 11, 2014.

Wait not before cruelty shall be inflicted upon the accused. See not the convict being treated below human standards. Hear not the bellows across jails because of abuse of discretion leading to unnecessary and mortifying penalties. The chain of vague standards from being applied repeatedly must be broken. This constitutional right of a convict must not rot in jails like how prisoners are treated. This right must be vibrantly revived for their sake. This protection must be resoundingly echoed across all the branches of the government. The safeguard of this right ultimately benefits the people – to be shielded from cruelty, impunity and injustice.