

Constitutional Deconsecration: Enforcing an Imposed Constitution in Duterte’s Philippines

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I. INTRODUCTION

Paralleling their educational and economic programs, the Americans pursued an ambitious effort to train the Filipinos to govern themselves ... But the political evolution of the Philippines under [United States'] tutelage was to a series of spasms, as priorities and personalities changed both in Washington and in Manila. The Americans soon discovered to their disappointment that, for all their benign intentions, they were never able to transplant their ideals in a society with totally dissimilar values.

— Stanley Karnow¹

[H]uman rights (sic) is always the anti-thesis of government.

— President Rodrigo Roa Duterte²

Since winning the Philippine elections in May 2016, President Rodrigo Roa Duterte (Duterte) attracted attention and criticism from the international community and rights groups that say his anti-drug policies amount to human rights abuses. He launched a crackdown on drug dealers and users, “[urging] citizens and the police to conduct extra-judicial killings of suspects.”³ More than 7,000 people have been killed in this crackdown on drug abuse, and Duterte announced that it would continue until the end of his term in 2022.⁴

Duterte remains popular in the Philippines. His popularity raises questions about Filipinos’ commitment to constitutionalism.⁵ How does a country that is trained in American constitutionalism express support for a

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1. STANLEY KARNOW, *IN OUR IMAGE: AMERICA’S EMPIRE IN THE PHILIPPINES* 227 (1989).
 2. Dharel Placido, Duterte: Human rights is ‘anti-thesis’ of government, *available at* <http://news.abs-cbn.com/news/09/30/16/duterte-human-rights-is-anti-thesis-of-government> (last accessed Oct. 31, 2017).
 3. BBC News, Profile: Duterte the controversial “strongman” of the Philippines, *available at* <http://www.bbc.com/news/world-36659258> (last accessed Oct. 31, 2017).
 4. Conor Gaffey, Philippine President Rodrigo Duterte suspends drug war to “cleanse corrupt police”, *available at* <http://europe.newsweek.com/philippines-suspends-drugs-war-cleanse-corrupt-police-549938?rm=eu> (last accessed Oct. 31, 2017).
 5. See Larry Catá Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 PENN ST. L. REV. 671, 671-76 (2009). Constitutionalism, as the Author uses it here, imposes limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights.

President who, egging on police and vigilantes to kill suspected drug users, has not the faintest idea of what “due process” is? How do a people whose legal system is largely based on the United States model ignore blatant violations of human rights, or sit mutely when the President maligns and challenges any constitutional check on his actions? When Filipinos applaud the denial of due process as thousands of suspects are killed, there are serious doubts as to whether Filipinos truly understand the basic tenets of constitutional government.

These two — Duterte’s actions and public acquiescence — reflect what the Author calls “constitutional deconsecration” or the processes of removing the sacred character of the Constitution.

In this Article, the Author argues that Filipino indifference or acquiescence to Executive acts that clearly violate the Constitution is the product of Philippine colonization. The United States’ attempts to create the Philippines in its own image and likeness did not, as it could not, instill in the citizens the same reverence towards constitutionalism.

The Philippine Constitutions are sacred texts in Philippine law and history only to its priests — the small circle of lawyers trained by their elders. The Constitution is the bible of the Supreme Court,⁶ but few outside the legal profession can profess an understanding of the legal framework bequeathed by their American forebears. The administration’s departures from constitutional strictures are done with ease because these concepts were grafted onto indigenous notions of law and justice. Constitutional doctrines such as “separation of powers” and “due process” are understood differently. In short, the Author argues that the transfusion of constitutional ideas in the context of colonization inevitably leads to constitutional deconsecration.

The Author will also show that constitutional deconsecration in the Philippines happens in a second way. Duterte is not implementing the Constitution; he refuses to recognize the constitutional order, including the separation of powers and any kind of restriction on the President’s power. He views the existing system of checks and balances as borrowed, and an impediment to the country’s progress.⁷

6. See *Lambino v. Commission on Elections*, 505 SCRA 160, 265 (2006).

7. Kapil Komireddi, *Despite its heavy cost to the poor, Duterte won’t stop his war on drugs*, available at <http://www.thenational.ae/opinion/comment/despite-its-heavy-cost-to-the-poor-duterte-wont-stop-his-war-on-drugs> (last accessed Oct. 31, 2017).

Constitutional deconsecration in the Philippines happens inadvertently and inevitably by resistance to colonization, and then deliberately by the refusal of Duterte to follow the Constitution's strictures. Together, these portend a bleak future for democratic governance in the Philippines.

II. THE WAR

Duterte's administration is making international headlines, mostly for a string of killings⁸ of suspected drug users. Duterte is delivering on a campaign promise to launch a "war on drugs" and to aggressively go after suspected pushers and users.⁹ He promised fast results through harsh punitive measures.¹⁰ Duterte did not mince words during the campaign; he threatened to disband Congress, tame the courts, and ignore human rights advocates if they stood in his way.¹¹

Philippine politics has taken a violently illiberal turn since Duterte's election.¹² Thousands having been killed by police officers and vigilantes without due process represents a phenomenon that reflects "an extraordinary departure for a country that, until recently, was offering the world a remarkable demonstration of the virtues of democracy."¹³ Duterte eggs the

8. See Manuel Mogato, Philippine drugs war gets complex as Duterte creates new super-agency, *available at* <http://www.reuters.com/article/us-philippines-drugs/philippine-drugs-war-gets-complex-as-duterte-creates-new-super-agency-idUSKBN16HIYV> (last accessed Oct. 31, 2017). More than 8,000 have been killed in the war on drugs as of this writing. *Id.*

9. See generally Vanda Felbab-Brown, The human rights consequences of the war on drugs in the Philippines, *available at* <https://www.brookings.edu/testimonies/the-human-rights-consequences-of-the-war-on-drugs-in-the-philippines> (last accessed Oct. 31, 2017).

10. Julio C. Teehankee & Mark R. Thompson, *Electing a Strongman*, J. DEM., Volume No. 27, Issue No. 4, at 127. *Contra* Mark R. Thompson, *Populism and the Revival of Reform: Competing Political Narratives in the Philippines*, CONTEMP. SOUTHEAST ASIA, Volume No. 32, Issue No. 1, at 1-28 [hereinafter Thompson, *Populism and the Revival of Reform*].

11. Teehankee & Thompson, *supra* note 10.

12. Mark R. Thompson, *Bloodied Democracy: Duterte and the Death of Liberal Reformism*, J. CURRENT SOUTHEAST ASIAN AFF., Volume No. 35, Issue No. 3, at 40 [hereinafter Thompson, *Bloodied Democracy*].

13. Christian Caryl, President Duterte's Crazy Drug War Is Just the Beginning, *available at* <http://foreignpolicy.com/2016/11/02/president-dutertes-crazy-drug-war-is-just-the-beginning-philippines/> (last accessed Oct. 31, 2017).

police on, giving inflammatory speeches calling for the slaughter of drug-dealers, and promising to protect officers who kill suspects.¹⁴

Around 30 people are killed daily in the Philippines as a result of the President's crackdown on crime.¹⁵ Amnesty International claims that "the vast majority of these killings appear to have been extrajudicial executions — that is, unlawful and deliberate killings carried out by government order or with its complicity or acquiescence."¹⁶ Human Rights Watch, in its own report, claims that "Duterte's repeated calls for killings as part of his anti-drug campaign could constitute acts instigating law enforcement to commit the crime of murder. His statements encouraging vigilantes among the general population to commit violence against suspected drug users could constitute incitement to violence."¹⁷ The International Narcotics Control Board reported "that extrajudicial action, purportedly taken in pursuit of drug control objectives, is fundamentally contrary to the provisions and objectives of the three international drug control conventions, under which all actions must be undertaken within the due process of law."¹⁸

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14. See *The President of the Philippines Admits His War on Drugs Has Been Dirty*, ECONOMIST, Feb. 4, 2017, available at <http://www.economist.com/news/asia/21716061-drug-squad-officers-are-implicated-kidnapping-extortion-and-murder-president?fsrc=scn/fb/te/bl/ed/the-president-of-the-philippines-admits-his-war-on-drugs-has-been-dirty> (last accessed Oct. 31, 2017).
15. Cecille Suerte Felipe, *30 people killed daily in 167 days under Duterte*, PHIL. STAR, Dec. 15, 2016, available at <http://www.philstar.com/headlines/2016/12/15/1653666/30-people-killed-daily-167-days-under-duterte> (last accessed Oct. 31, 2017).
16. Amnesty International, "If You are Poor, You are Killed": Extrajudicial Executions in the Philippines' "War on Drugs" (Report from Amnesty International), available at <https://www.amnesty.org/en/documents/asa33/5517/2017/en> (last accessed Oct. 31, 2017).
17. Human Rights Watch, *License to Kill: Philippine Police Killings in Duterte's "War on Drugs"* (Report from the Human Rights Watch on the Duterte Administration's "War on Drugs") at 17, available at https://www.hrw.org/sites/default/files/report_pdf/philippines0317_web_1.pdf (last accessed Oct. 31, 2017).
18. International Narcotics Control Board, *Report of the International Narcotics Control Board for 2016*, at 73, available at https://www.incb.org/documents/Publications/AnnualReports/AR2016/English/AR2016_E_ChapterIII-AnalysisOfTheWorldSituation.pdf (last accessed Oct. 31, 2017).

The victims of these shootings were poor and many were suspected drug users, not dealers.¹⁹ Almost all of the victims were either unemployed or worked menial jobs, “including as rickshaw drivers or porters, and lived in slum neighborhoods or informal settlements.”²⁰

Dozens of children have been killed in the campaign, but Duterte dismisses these deaths as “collateral damage.”²¹ Duterte claims responsibility for every death in his war.²²

A. Popular

Duterte is comfortable with his actions, unrepentant, and confident of public support. The reports of executions have not produced uproar from the public. A week after taking office, surveys showed that Duterte enjoyed a 91% trust rating.²³ The Social Weather Stations reported that the government received the highest approval for its war on drugs and the promotion of human rights in a survey conducted nearly a hundred days after Duterte took office.²⁴ Interestingly, his approval ratings cut across economic classes.²⁵ His satisfaction ratings remained steady at the end of 2016

19. Human Rights Watch, *supra* note 17.

20. *Id.*

21. Brennan Weiss, Children and Duterte’s drug war: Lessons from the past, *available at* <http://www.aljazeera.com/indepth/features/2017/02/children-duterte-drug-war-lessons-170216121942335.html> (last accessed Oct. 31, 2017). *See also* Jodesz Gavilan, List: Minors, college students killed in Duterte’s drug war, *available at* <https://www.rappler.com/newsbreak/iq/179234-minors-college-students-victims-war-on-drugs-duterte> (last accessed Oct. 31, 2017).

22. Ed Margareth Barahan, *Duterte tells Church, HRW he’s responsible for war on drugs*, PHIL. DAILY INQ., Mar. 4, 2017, *available at* <http://newsinfo.inquirer.net/877391/duterte-tells-church-hrw-hes-responsible-for-war-on-drugs> (last accessed Oct. 31, 2017).

23. Rishi Iyengar, *The Killing Time: Inside Philippine President Rodrigo Duterte’s War on Drugs*, *available at* <http://time.com/4462352/rodrigo-duterte-drug-war-drugs-philippines-killing> (last accessed Oct. 31, 2017).

24. Eimor P. Santos, Gov’t bags ‘very good’ SWS satisfaction rating: Drug war ‘excellent,’ ‘very good’ in human rights, *available at* <http://cnnphilippines.com/news/2016/11/17/SWS-satisfaction-rating-Duterte.html> (last accessed Oct. 31, 2017).

25. The National Administration’s initial net rating was very good in all classes. It was a very good +68 in class D, very good +62 in class E, and very good +58 in class ABC. Social Weather Stations, Third Quarter 2016 Social Weather Survey: Initial net satisfaction rating of the Duterte National Administration is a “Very

with 73% of adults satisfied with the performance of the Administration, dropping slightly from the September 2016 numbers.²⁶ Duterte's net trust rating has been excellent for four consecutive quarters since rising from the *moderate* +26 (54% much trust, 28% little trust) in May 2016.²⁷

Duterte's war, observers say, rejects "decades, if not centuries, of hard-won moves toward respect for human rights and the rule of law."²⁸ The Philippine example shows how easily we "tear up some of the most basic rules which had been seen as underpinning a civilized society. Worse still, it can even be popular."²⁹

The spate of extrajudicial killings has attracted the attention of the International Criminal Court (ICC). ICC Prosecutor Fatou Bensouda said her office is watching for signs of officials "ordering, requesting, encouraging[,] or contributing" to the commission of crimes against humanity.³⁰

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- Good" +66, available at <http://www.sws.org.ph/swsmain/artcldisppage/?artcsyscode=ART-20161117111243> (last accessed Oct. 31, 2017).
26. Social Weather Stations, Fourth Quarter 2016 Social Weather Survey: Net Satisfaction Rating of the Duterte National Administration Stays Very Good at +61, available at <http://www.sws.org.ph/swsmain/artcldisppage/?artcsyscode=ART-20170110095415> (last accessed Oct. 31, 2017).
27. Social Weather Stations, First Quarter 2017 Social Weather Survey: Net trust in Rody Duterte stays Excellent at +70, available at <https://www.sws.org.ph/swsmain/artcldisppage/?artcsyscode=ART-20170506182359> (last accessed Oct. 31, 2017).
28. Peter Apps, The Terrifying Lessons of the Philippines' Vigilante President, available at <http://news.abs-cbn.com/focus/12/02/16/opinion-the-terrifying-lessons-of-the-philippines-vigilante-president> (last accessed Oct. 31, 2017).
29. *Id.*
30. Alastair Wanklyn, *International Criminal Court puts Duterte on notice as critics begin to speak up*, JAPAN TIMES, Oct. 17, 2016, available at <http://www.japantimes.co.jp/news/2016/10/17/asia-pacific/icc-warns-duterte-crimes-humanity-critics-begin-speaking> (last accessed Oct. 31, 2017).

III. DUTERTISMO

A. *The President*

Duterte was elected President of the Philippines by an overwhelming margin; he received more than 16.6 million votes, 6.6 million more than his closest rival,³¹ or 39 percent of the total number of votes.³²

One explanation for voter support for Duterte is the pent-up anger among the middle class at the deterioration of public order and concerns about growing drug abuse.³³ He tapped into anxieties about criminality, rampant smuggling, incompetence, and government corruption of those now marginally better off after a couple of decades of solid growth.³⁴ Duterte won because he promised change and did not campaign like a traditional politician; he made himself appear like a “game changer” who “does not care about [public relations].”³⁵

Duterte was the outlier in a field of presidential candidates. His personality and style of governance is the product of the bloody, messy, democratic transition in Mindanao, the country’s conflict-torn southernmost

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31. Resolution of Both Houses Approving the Report of the Joint Committee, Declaring the Results of the National Elections held on May 9, 2016, for the Offices of President and Vice President, and Proclaiming the Duly Elected President and Vice President of the Republic of the Philippines, Res. of Both Houses No. 1, 17th Cong., Joint Pub. Sess. (2016). See also *The Wall Street Journal*, *Rodrigo Duterte Wins Philippine Presidency in Official Count*, WALL ST. J., May 27, 2016, available at <https://www.wsj.com/articles/rodrigo-duterte-wins-philippine-presidency-in-official-count-1464373202> (last accessed Oct. 31, 2017).
 32. Richard C. Paddock, *Rodrigo Duterte’s Rivals Concede Philippine Elections*, N.Y. TIMES, May 10, 2016, available at <https://www.nytimes.com/2016/05/11/world/asia/philippines-election-rodrigo-duterte-president.html> (last accessed Oct. 31, 2017).
 33. Julio C. Teehankee, *Weak States, Strong Presidents: Situating the Duterte Presidency in Philippine Political Time*, 32 J. DEVELOPING SOC’Y 293, 305 (2016).
 34. *Id.* at 306.
 35. Natasha Isidro, Lorenzo Acuña, & Alexis Romero, *Why Duterte won despite himself*, PHIL. STAR, June 29, 2017, available at <http://www.philstar.com/news-feature/2016/06/29/1597834/why-duterte-won-despite-himself> (last accessed Oct. 31, 2017).

island.³⁶ As mayor of Davao City, he dealt with death squads battling various criminals and New People's Army Sparrow units.³⁷ His critics install human rights as a key foundation of governance; Duterte sees it as a hindrance and "prefers instead the force of his personality articulated through extrajudicial methods that have defined his experience with politics."³⁸ Duterte regards public criticism to be an injury to his personhood, requiring less of a rational defense as an irrational torrent of abuse meant to reduce his critics to silence or death.³⁹

His background, the mayor of a city once known as the "murder capital" of the Philippines,⁴⁰ places him on a different plane. His critics belong to a post-1945 world of rights meant to constrain fascist horrors and revolutionary excess. Duterte comes from an older world of authoritarian politics that draws on fascist discourse and revolutionary martyrdom to do away with any constraints.⁴¹ He is used to governing by decree and has not had to deal with strong political opposition, significant institutional checks, or close media scrutiny. This explains his disrespect for democratic norms and processes.⁴²

Duterte is an illiberal populist who mobilized a mass constituency through the (social) media with the use of radical rhetoric portraying the elite as a corrupt faction that coddles drug dealers and addicts.⁴³ He changed

36. See Sheila Coronel, 'I Will Kill All the Drug Lords', *available at* <http://www.theatlantic.com/international/archive/2016/09/rodrigo-duterte-philippines-manila-drugs-davao/500756> (last accessed Oct. 31, 2017).

37. Vicente L. Rafael, *Duterte, War maker*, PHIL. DAILY INQ., Nov. 17, 2016, *available at* <http://opinion.inquirer.net/99159/duterte-war-maker> (last accessed Oct. 31, 2017).

38. *Id.*

39. *Id.*

40. James Somper, *Rodrigo Duterte, 'the punisher', sworn in as Philippines' president*, TELEGRAPH, June 30, 2016, *available at* <http://www.telegraph.co.uk/news/2016/06/30/rodrigo-duterte-the-punisher-sworn-in-as-philippines-president> (last accessed Oct. 31, 2017).

41. Rafael, *supra* note 37.

42. David G. Timberman, *Elite Democracy Disrupted?*, J. DEM., Volume No. 27, Issue No. 4, at 143.

43. Nicole Curato, Politics of Anxiety, Politics of Hope: Penal Populism and Duterte's Rise to Power, J. CURRENT SOUTHEAST ASIAN AFF., Volume No. 35, Issue No. 3, at 96.

the prevailing liberal reformist political order into an illiberal one through a new law and order governing script, new key strategic groups (the communist left and the police), and the quick removal of remaining liberal constraints (particularly in Congress and the Supreme Court). Duterte constructed a strongman political model at the local level before “nationali[z]ing” it after his election as President.⁴⁴

B. *Dutertismo*

Political theorists define the logic underpinning populism as the construction of an antagonism between “the people” and “the dangerous other.”⁴⁵ Some distinguish the people from corrupt elites, while some populists denounce immigrants and refugees for undermining the West’s way of life.⁴⁶ Duterte used “penal populism” to pit virtuous citizens against hardened criminals who are beyond redemption. Duterte’s appeal lies in his promise to overcome the corrupt bureaucracy in the justice system and deliver peace and order in a swift and decisive manner.⁴⁷ Duterte’s anti-crime message resonated because it was supported by his undisputed record of performance in addressing such a concern.⁴⁸

Duterte is popular because of the clarity of his message about who can be killed: drug lords, drug addicts, and criminals; preferably men, habitual criminals and drug addicts who repeatedly went into rehabilitation but were never cured.⁴⁹ The State, in Duterte’s words, is wasting resources spending

44. Thompson, *Bloodied Democracy*, *supra* note 12, at 42.

45. See Curato, *supra* note 43, at 94.

46. *Id.*

47. *Id.* Populists also point to the “dangerous others” who threaten the people such as special interests groups. Populists on the left tend to point to the danger of large economic corporations and financial interests. However, these broad distinctions do not always hold. The current radical and populist right also opposes international corporate interests and globalization; a discourse that is more common to the left. Populists on the right, on the other hand, tend to scapegoat minority groups such as immigrants, the unemployed, environmentalists, and feminists. See Andrej Zaslove, *Here to Stay? Populism as a New Party Type*, 3 EUR. REV. 320, 323 (2008).

48. Ronald D. Holmes, *The Dark Side of Electoralism: Opinion Polls and Voting in the 2016 Philippine Presidential Election*, J. CURRENT SOUTHEAST ASIAN AFF., Volume No. 35, Issue No. 3, at 33.

49. Danilo Andres Reyes, *The Spectacle of Violence in Duterte’s “War on Drugs”*, J. CURRENT SOUTHEAST ASIAN AFF., Volume No. 35, Issue No. 3, at 118-19.

money for food, accommodation, and doctors for their rehabilitation.⁵⁰ Killing criminals promises personal safety, public safety, and law and order, which is very appealing to ordinary people who experience insecurity in their daily lives.⁵¹ The protection of the family and its members is a core value in Filipinos' family tradition, one that they cherish the most. Duterte's reputation of actively targeting criminals, and his track record in Davao of being able to deliver on his political promises, boosted his popularity and that of those who copied him.⁵²

Populists like Duterte launch anti-elitist campaigns, although Duterte himself is part of the elite.⁵³ They emphasize popular sovereignty and "rely on media-based appeals more than clientelist ties."⁵⁴ Populism is an effective narrative in the Philippines. Former President Joseph Ejercito Estrada used it to direct appeals to the poor and won handily as a Senator (1987), Vice-President (1992), and President (1998).⁵⁵

The sociologist, Professor Randy S. David, coined the term "*Dutertismo*" in his column in the Philippine Daily Inquirer.⁵⁶ David pointed out that during the campaign for the presidency, Duterte ducked details and promised just one thing - the will and leadership to do what needs to be done, to the point of killing and putting one's own life on the line.⁵⁷ David writes —

This is pure theater [—] a sensual experience rather than the rational application of ideas to society's problems. Observing the same phenomenon in Europe in the 1920s, the Marxist critic Walter Benjamin interpreted the events that saw the rise of [Adolf] Hitler and [Benito] Mussolini as the

50. *Id.* at 119.

51. *Id.* at 118.

52. *Id.* at 118-19.

53. See generally Mark R. Thompson, *Reformism vs. Populism in the Philippines*, J. DEM., Volume No. 21, Issue No. 4, at 158.

54. *Id.* Populism involves media-carried promises to help the common people at the expense of the elite. Clientelism harvests votes through material incentives or violent threats in their bailiwicks. See Thompson, *Populism and the Revival of Reform*, *supra* note 10, at 7.

55. Thompson, *Populism and the Revival of Reform*, *supra* note 10, at 2.

56. Randy David, '*Dutertismo*', PHIL. DAILY INQ., May 1, 2016, available at <http://opinion.inquirer.net/94530/dutertismo> (last accessed Oct. 31, 2017).

57. *Id.*

transformation of politics into aesthetics. In Germany, this phenomenon came to be known as Nazism; in Italy, it was called Fascism.⁵⁸

Duterte performed crisis well; using illegal drug use as the most significant issue contrasting his approach from mainstream narratives that painted a near-rosy picture of the economy that only needed to be tended with reform.⁵⁹ His foul language is an integral part of the populist appeal. Invoking the discourse of crisis requires a new language characterized by frankness and sensational language.⁶⁰ His crude language and coarse demeanor allows him to come across — to his admirers — “as an endearing rogue who articulates without fear their own resentments and fantasies.”⁶¹

The events that led to Duterte’s presidential run is a clear example of the theatrical nature of contemporary populism and the role digital media plays as the stage for the populist performance.⁶² His apparent indecisiveness on whether to run for President kept him in the media and set the stage for his soap opera. Sociologist Nicole Curato observed that

Duterte’s populist style interrupted the usual practice of patronage during electoral campaigns ... Duterte’s campaign was able to forge an authentic community of believers engaged in politics online and invested in action offline. This is not to say that Duterte has gone beyond traditional practices. It was not uncommon, for example, for local candidates to carry Duterte’s name in their sample ballots with money attached for vote buying. Nevertheless, the energy Duterte’s candidacy created among the citizenry is a significant achievement in a country whose elections has been described as run by guns, goons, gold[,] and, recently, gigabytes. The 2016 electoral race saw the rise of a public figure that has found its voice in the mayor of Davao City. Duterte has changed the tenor of political conversation. The tone is indignant, often violent, sometimes offensive, but it is hopeful nonetheless, and it has energized a citizenry once resigned to politics as usual.⁶³

58. *Id.*

59. Nicole Curato, *Flirting with Authoritarian Fantasies?: Rodrigo Duterte and the New Terms of Philippine Populism*, J. CONTEMP. ASIA, Volume No. 47, Issue No. 1, at 142.

60. *Id.*

61. Randy David, *The Political Outsider*, PHIL. DAILY INQ., Apr. 24, 2016, available at <http://opinion.inquirer.net/94430/the-political-outsider> (last accessed Oct. 31, 2017).

62. Curato, *supra* note 59, at 5.

63. *Id.* at 7.

Duterte's image tied authenticity and masculinity together to challenge the high-class backgrounds of both President Benigno Simeon C. Aquino, III, and his chosen candidate, Manuel A. Roxas, II. Duterte cursed everyone and flaunted his crudeness as a marker of his maleness, boasting of his womanizing, claiming that he wished he had raped an Australian missionary, and after the election, catcalling a female reporter at a press conference.⁶⁴

Allegations of Duterte's involvement with "Death Squads" fed the legend about his persona creating a heroic image of the "Dirty Harry of the Philippines."⁶⁵ His one-liners added to his image, to wit: "If I win [the mayoral elections], more criminals will be killed because I have vowed to protect the people of this city," "criminals and rebels do not have a monopoly on evil," and "if I'm going out, I'm going out with my guns blazing."⁶⁶

One common feature of populism is that "the people" are contrasted with a corrupt elite and often also a minority group seen to be a cause of societal ills, who are put outside of "authentic" society. Today's populists are often not explicitly anti-democratic, but their "principled anti-pluralist" conception of "the people" — simple and good — means that they are only "impersonators" of democrats.⁶⁷ There are different ideological directions in populism. James Putzel, a Development Studies professor, distinguished between "left populism" which "taps into people's anger by appealing to their sense of social justice and calling for the regulation of capitalism," and "right populism" that "appeals to people's fears and prejudices," such as that of Donald Trump.⁶⁸

64. Duncan McCargo, *Duterte's Mediated Populism*, 38 CONTEMP. SOUTHEAST ASIA 185, 188 (2016).

65. Philip Sherwell, *Philippines' 'Dirty Harry' takes lead in presidential race amid controversy about vigilante killings*, TELEGRAPH, Dec. 8, 2015, available at <http://www.telegraph.co.uk/news/worldnews/asia/philippines/12027584/Philippines-Dirty-Harry-makes-bid-for-presidency-amid-controversy-about-vigilante-killings-of-alleged-criminals.html> (last accessed Oct. 31, 2017).

66. Brenda Carina Oude Breuil & Ralph Rozema, *Fatal imaginations: death squads in Davao City and Medellín compared*, 52 CRIME L. SOC. CHANGE 405, 405 (2009).

67. Cas Mudda, *The Populist Zeitgeist*, 39 GOV'T & OPP. 541, 544 (2004).

68. Thompson, *Bloodied Democracy*, *supra* note 12, at 50-51 (citing James Putzel, *Can Duterte 'populism' bring lasting peace, development*, PHIL. DAILY INQ., Aug. 28, 2016, available at <http://opinion.inquirer.net/96846/can-it-bring-lasting-peace-development> (last accessed Oct. 31, 2017)).

Duterte is an illiberal “right” populist who portrayed the elite class as corrupt and coddlers of drug dealers and addicts. Duterte did not talk about “globalization” and “capitalism” (as “left” populists do) but about a specific group deemed sub-human and worthy of extermination: drug dealers and users. Duterte considers drug addicts “beyond redemption” because “once you [are] addicted to [crystal meth], rehabilitation is no longer a viable option.”⁶⁹ In Duterte’s “war on drugs,” suspects die in “encounters” with police, are shot by motorcycle-riding vigilante gunmen, or are killed by trained and unofficial police death squads.⁷⁰ The guilt of victims is assumed — never proven, investigated, or questioned.⁷¹ The thousands of extrajudicial killings during Duterte’s first few months in office and his denunciations of the United Nations,⁷² Western countries,⁷³ and human rights groups, both international and domestic,⁷⁴ that dared to criticize his

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69. Marlon Ramos, ‘*Shabu addicts beyond redemption*’, PHIL. DAILY INQ., July 21, 2016, available at <http://newsinfo.inquirer.net/797735/shabu-addicts-beyond-redemption> (last accessed Oct. 31, 2017).
70. Thompson, *Bloodied Democracy*, *supra* note 12, at 40 (citing Michael Bueza, In Numbers: The Philippines’ ‘war on drugs,’ available at www.rappler.com/new-break/iq/145814-numbers-statistics-philippines-war-drugs (last accessed Oct. 31, 2017).
71. Thompson, *Bloodied Democracy*, *supra* note 12, at 51 (citing Rappler, PH anti-corruption drive most improved — PERC, available at <https://www.rappler.com/nation/132034-anti-corruption-campaign-improved-ph-perc> (last accessed Oct. 31, 2017).
72. Agence France-Presse in Manila, *Philippines president calls UN ‘stupid’ for criticising drug war*, GUARDIAN, Aug. 17, 2016, available at <https://www.theguardian.com/world/2016/aug/17/philippines-president-rodrigo-duterte-un-stupid-criticising-drug-war> (last accessed Oct. 31, 2017).
73. Agence France-Presse, Germany to PH envoy: Duterte’s Hitler remarks ‘unacceptable’, available at <https://www.rappler.com/nation/147851-germany-philippine-envoy-duterte-hitler-remarks-unacceptable> (last accessed Oct. 31, 2017) & Dharel Placido, Obama to Duterte: Do war on drugs ‘the right way’, available at <http://news.abs-cbn.com/news/09/08/16/obama-to-duterte-do-war-on-drugs-the-right-way> (last accessed Oct. 31, 2017).
74. See, e.g., Damien Gayle, *More than 700 people killed in Philippines drugs crackdown*, GUARDIAN, Aug. 2, 2016, available at <https://www.theguardian.com/world/2016/aug/02/more-than-700-killed-in-less-than-three-months-in-filipino-drugs-crackdown> (last accessed Sep 24, 2017) & JC A. Beltran & Angel T. Villamor, *Youth, sectoral groups assail Duterte on human rights*, GUIDON, Dec. 11, 2016, available at <http://www.theguardon.com/1112/main/2016/12/youth-sectoral-groups-assail-duterte-human-rights> (last accessed Oct. 31, 2017).

violent drug crackdown signal “a more virulent form of populism.”⁷⁵ His contempt for the legal system is best exemplified by the death toll of his war on drugs.

IV. UNCONSTITUTIONAL ACTS

So far, academics have presented explanations for Duterte’s personality and style of governance and have made us understand how he generated a following and won the elections.

What the Author is attempting to understand is how this following is sustained *after* the President demonstrated his contempt for the rule of law, the separation of powers, and checks and balances: the basic structure of the Philippine legal system.

Duterte cites his training as a lawyer and a former prosecutor to say that he knows the limits of the power and authority of the president. He made the claim that, “I know what is legal and what is not.”⁷⁶ Unfortunately, virtually everything Duterte said during the presidential campaign and after he assumed the presidency smacks of illegality, if not unconstitutionality. Here are a few examples:

- (1) On the second day of his campaign, Duterte said he will provide a “pre-signed form” for pardon to law enforcers, thus assuring them protection should they be sentenced for any offense that they may be charged with in the course of the “war on drugs” citing a provision in the 1987 Constitution⁷⁷ that “the president can grant either conditional or full pardons to criminals.”⁷⁸ The provision he referred to provides that “[e]xcept in cases of impeachment, or as otherwise provided in this Constitution, the

75. Thompson, *Bloodied Democracy*, *supra* note 12, at 51 (citing James Putzel, *Can Duterte ‘populism’ bring lasting peace, development*, PHIL. DAILY INQ., Aug. 28, 2016, available at <http://opinion.inquirer.net/96846/can-it-bring-lasting-peace-development> (last accessed Oct. 31, 2017)).

76. Rodrigo Duterte, Inaugural Address of President Rodrigo Duterte Oath-taking of the President of the Philippines, (June 30, 2016) (transcript available at <http://www.gov.ph/2016/06/30/inaugural-address-of-president-rodrigo-roa-duterte-june-30-2016> (last accessed Oct. 31, 2017)).

77. PHIL. CONST. art. VII, § 19.

78. Raymond Dullana, Duterte: I’ll pardon cops who kill criminals, civilians in line of duty, available at <http://www.rappler.com/nation/politics/elections/2016/122044-duterte-pardon-cops-kill-criminals> (last accessed Oct. 31, 2017).

President may grant reprieves, commutations, and pardons, and remit fines and forfeitures, after conviction by final judgment.” The same does not provide for a pre-signed form for pardon.⁷⁹

- (2) Duterte promised he would need only three to six months to get rid of corruption, drugs, and criminality. If he fails to accomplish this task, he said he would hand over power to Senator Ferdinand R. Marcos, Jr., who lost in his bid to become vice-president.⁸⁰ This clearly contravenes Section 8 of Article VII of the Constitution, which states that “[i]n case of death, permanent disability, removal from office, or resignation of the President, the Vice-President shall become the President to serve the unexpired term.”⁸¹
- (3) Duterte also said, “Just because you [are] a journalist you are not exempted from assassination, if you [are] a son of a bitch. Freedom of expression cannot help you if you have done something wrong,”⁸² prompting journalists to speak out against such a threat.⁸³ The Constitution, however, provides that “[n]o law shall be passed abridging the freedom of speech, of expression, or the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.”⁸⁴
- (4) Upon being confronted with demands for due process, Duterte responded by brushing away these concerns. He stated that critics should go to courts for due process because he is not

79. PHIL. CONST. art. VII, § 19.

80. Ariel Paolo Tejada, *Duterte: I'll let Bongbong take over if I don't resolve crimes in 3 months*, PHIL. STAR, Feb. 20, 2016, available at <http://www.philstar.com/headlines/2016/02/20/1555035/duterte-ill-let-bongbong-take-over-if-i-dont-resolve-crimes-3-months> (last accessed Oct. 31, 2017).

81. PHIL. CONST. art. VII, § 8.

82. Roberty Sawatzky, *Duterte: Killing Corrupt Journalists Justified*, available at <http://edition.cnn.com/2016/05/31/asia/philippines-duterte-journalists> (last accessed Oct. 31, 2017).

83. *Id.*

84. PHIL. CONST. art. III, § 4.

required to provide it.⁸⁵ This is also contrary to Section 1, Article III of the Constitution.⁸⁶

- (5) Duterte expressed his plan to pardon himself once he steps down from office in 2022.⁸⁷ This is contrary to the first paragraph of Section 19, Article VII of the Constitution, which provides that “[e]xcept in cases of impeachment, or as otherwise provided in this Constitution, the President may grant reprieves, commutations, and pardons, and remit fines and forfeitures, after conviction by final judgment.”⁸⁸
- (6) The Chief Justice of the Supreme Court expressed concern after Duterte named judges in his list of suspects saying that these judges should not surrender without a warrant of arrest. Duterte did not appreciate the reminder and warned the Supreme Court that if they order him around, he would instruct “everybody in the executive department not to honor you.”⁸⁹ He continued to tell the Chief Justice off — “Just because you are the Supreme Court, you order me? I will not follow you”⁹⁰ and asked if she would rather he declare martial law.⁹¹ This warning goes against the principle of separation of powers, as well as Section 18 of Article VII of the Constitution, which provides for the requisites of the exercise of the President’s emergency powers, and the checks and balances thereto.⁹²

85. Pia Ranada, Duterte to drug suspects: You want due process? Go to courts, *available at* <http://www.rappler.com/nation/139837-duterte-due-process-courts> (last accessed Oct. 31, 2017).

86. “No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.” PHIL. CONST. art. III, § 1.

87. Pia Ranada, Duterte to pardon ‘truthful’ cops accused of abuse in war vs drugs, *available at* <http://www.rappler.com/nation/140064-duterte-pardon-police-military> (last accessed Oct. 31, 2017).

88. PHIL. CONST. art. VII, § 19.

89. Pia Ranada, Duterte to Sereno: Want me to declare martial law?, *available at* <http://www.rappler.com/nation/142510-duterte-sereno-declare-martial-law> (last accessed Oct. 31, 2017).

90. *Id.*

91. *Id.*

92. PHIL. CONST. art. VII, § 18.

- (7) Duterte threatened to kill human rights activists⁹³ and lawyers who defend suspects in the drug trade.⁹⁴
- (8) His statements on his interpretation of the rule of law are disturbing. On one occasion he said, “I mean, if I use the contemporary rules, Constitution, I really can’t do it. Because you want to kill them all [but] you will not have enough time,”⁹⁵ Duterte said. Shortly thereafter, he articulated perhaps the most candid and chilling explanation for his theory of governance, “We in government are admonished to follow the rule of law and that is what makes it hard, because you follow the rule of law, sometimes it could lead to perdition for people,” said Duterte. He then said the Filipino people face a tough decision that may require “innovation” of the law, “I would like to follow the rule of law. It is rules which make up the law. But when *shabu*⁹⁶ was coming in, strong and fast, we had to make a choice. We innovate the law, the rule of law or we let our people suffer. That’s the choice.”⁹⁷

The Constitution, in the President’s eyes, can be cast aside if exigencies require it. The rule of law itself can be disregarded.⁹⁸ In his view, public officers are not bound by the law if it can prevent “suffering.”⁹⁹

93. Marlon Ramos, *Duterte threatens rights activists*, PHIL. DAILY INQ., Nov. 30, 2016, available at <http://newsinfo.inquirer.net/849192/duterte-threatens-rights-activists> (last accessed Oct. 31, 2017).

94. Marlon Ramos, *Duterte warns drug lords’ lawyers*, PHIL. DAILY INQ., Dec. 9, 2016, available at <http://newsinfo.inquirer.net/852028/duterte-warns-drug-lords-lawyers> (last accessed Oct. 31, 2017).

95. Christina Mendez, *Duterte: So many to kill, so little time*, PHIL. STAR, Nov. 12, 2016, available at <http://www.philstar.com/headlines/2016/11/12/1642968/duterte-so-many-kill-so-little-time> (last accessed Oct. 31, 2017).

96. Shabu is the common name used to refer to Methylenedioxymethamphetamine Hydrochloride. It is also known as “Meth,” or “Ice.” An Act Instituting the Comprehensive Dangerous Drugs Act of 2002, Repealing Republic Act No. 6452, Otherwise Known as the Dangerous Drugs Act of 1972, as Amended, Providing Funds Therefor and For Other Purposes [Comprehensive Dangerous Drugs Act of 2002], Republic Act No. 9165, § 3 (x) (2002).

97. Pia Ranada, *Duterte: Leaders need to do ‘wrong’ to protect people*, available at <http://www.rappler.com/nation/152342-duterte-do-wrong-protect-people> (last accessed Oct. 31, 2017).

98. Yuji Vincent Gonzales, *Duterte: Sometimes, rule of law can be stupid proposition*, PHIL. DAILY INQ., Nov. 14, 2016, available at <http://newsinfo.inquirer.net/>

This is the first of two branches of the crisis in the Philippines under the Duterte Administration — the President believes he has the discretion to determine when the Constitution will be applied. The standard he applies is amorphous and subjective.

The cost of this model of governance is the loss of thousands of lives without the benefit of due process.

The second branch is the acquiescence of the public that suggests Filipinos have another standard by which they judge the acts of the President.

V. CONSTITUTIONALISM¹⁰⁰

The carnage happening in the Philippines raises questions on Filipinos' understanding of constitutionalism. Constitutionalism is defined as a determination to bring government under control and to place limits on the exercise of its power.¹⁰¹ The modern concept of constitutionalism has two themes. The first is the existence of certain limitations imposed on the State, particularly in its relations with citizens, based on a certain clearly defined set of core values. The second is the existence of a clearly defined mechanism for ensuring that the limitations on the government can be legally enforced. In other words, the government that exceeds its limitations should be held accountable.¹⁰² Under constitutionalism, citizens must have a right to political participation and their government must be controlled by substantive limits on what it can do.¹⁰³ It is

844177/duterte-sometimes-rule-of-law-can-be-stupid-proposition (last accessed Oct. 31, 2017).

99. *Id.*

100. This Section draws heavily from the Author's previous work. See Dante B. Gatmaytan, *Can Constitutionalism Constrain Constitutional Change?*, 3 *NW INTERDISC. L. REV.* 1, 30-33 (2010).

101. Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 *GEO. L.J.* 1411, 1434 (2008).

102. Charles M. Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from South Africa*, 55 *AM. J. COMP. L.* 1, 7 (2007).

103. Walter F. Murphy, *Constitutions, Constitutionalism and Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 3 (Douglas Greenberg, et al. eds. 1993).

a sufficiently shared willingness to use law rather than force to resolve disagreements; to limit government power and to protect human rights through law and defined processes; to provide a reasonable degree of predictability and stability of law that people may rely on as they structure their lives; and to maintain a government that is legitimate and effective enough to maintain order, promote the public good, and control private violence and exploitation.¹⁰⁴

The scholarship on constitutionalism continues to grow as scholars examine the concept from a variety of perspectives. Scholars speak of the features, components, core elements, and postulates of constitutionalism, all of which overlap occasionally.

Constitutionalism is said to have three *features*: (1) the supremacy principle — that the government itself should be subjected to the governance of law; (2) the limited government principle — that requires institutional mechanisms both limiting the arbitrary exercise of state power and recognizing individual rights and freedoms; and (3) the entrenchment principle — the constitutional limitations on state power cannot be subject to change by recourse to routine political processes.¹⁰⁵

Mark Tushnet, a renowned scholar of Constitutional law, identifies three *components* of constitutionalism. First is a commitment to the rule of law — a generally observed disposition to exercise public power pursuant to publicly known rules.¹⁰⁶ Second is a reasonably independent judiciary.¹⁰⁷ Third is a reasonably regular and reasonably free and open elections, with a reasonably widespread franchise.¹⁰⁸

Legal scholar Charles M. Fombad identifies the *core elements* of constitutionalism as:

- (1) The recognition and protection of fundamental rights and freedoms;
- (2) The separation of powers;

104. Vicki C. Jackson, *What's in a Name? Reflections on Timing, Naming, and Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1254 (2008).

105. John Worley, *Deliberative Constitutionalism*, 2009 B.Y.U.L. REV. 431, 439 (2009).

106. Mark Tushnet, *Comparative Constitutional Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1230 (Mathias Reimann & Reinhard Zimmerman eds., 2006).

107. *Id.* at 1232.

108. *Id.* at 1234.

- (3) An independent judiciary;
- (4) The review of the constitutionality of laws; and
- (5) The control of the amendment of the constitution.¹⁰⁹

Constitutionalism restricts the range of choices available to governing majorities.¹¹⁰ This is why constitutionalism is said to be in tension with democracy. In fact, the existence of democracy or certain democratic values or institutions within a country does not necessarily indicate that there is constitutionalism. There are many situations where democracy can be used to subvert constitutionalism.¹¹¹

Constitutionalism, on one hand, is also said to be at odds with democracy because it resists change.¹¹² In this view, constitutional change is permitted to correct some historical mistakes, but a constitution's fundamental principles and the governmental structures it creates should be more or less immutable and placed beyond the scope of democratic politics.¹¹³

On the other hand, constitutionalism is also defined as the widespread adherence to the democratic rules and norms contained in the Constitution and other basic laws governing political life.¹¹⁴ It is a generally accepted

109. Fombad, *supra* note 102, at 7-8. Constitutionalism is said to have the following basic postulates: (1) a system of classification, (2) the core object of which is to define the characteristics of constitutions (those documents organizing political power within an institutional apparatus), (3) to be used to determine the legitimacy of the constitutional system as conceived or as implemented, (4) based on rule of law as the fundamental postulate of government (that government be established and operated in a way that limits the ability of individuals to use government power for personal welfare maximizing ends), and (5) grounded on a metric of substantive values derived from a source beyond the control of any individual. These postulates separate constitutionalist systems from perversions of legitimate government such as tyranny, oligarchy, and mob rule. *Id.* See also Catá Backer, *supra* note 5, at 679.

110. Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 TEX. L. REV. 1861, 1861 (2004).

111. Fombad, *supra* note 102, at 9.

112. Joel I. Colón-Ríos, *De-Constitutionalizing Democracy*, 47 CAL. W.L. REV. 46, 47 (2010).

113. *Id.* at 48.

114. Susan Alberts, *How Constitutions Constrain*, 41 COMP. POL. 127, 127 (2009).

requirement for democratic consolidation because a government and state apparatus that acts within the constraints of law would allow citizens to exercise their political rights.¹¹⁵

The literature shows that constitutionalism constitutes restraints on government action. By any metric, the Duterte government's approach to the drug problem in the Philippines falls short of the requirements of constitutionalism. His contempt for the separation of powers, constitutional checks, and due process all go against the idea of constitutionalism.

VI. COLONIZATION

A. Inadequate Explanations

There are ways to explain support for Duterte's extrajudicial acts. One view claims that frustration with the government's inability to provide basic security, among other things, is said to have led to rising public demand for new leaders who would take more action.¹¹⁶ When people feel unprotected from crime, the threat makes them support vigilante justice, which feels like the best option for restoring order and protecting their personal safety.¹¹⁷ This reasoning was also used to explain why Filipinos acquiesced to Marcos' authoritarian rule.¹¹⁸

115. *Id.*

116. University of the Philippines Professor of Political Science, Teresa S. Encarnacion Tadem, has commented that

[p]eople are quite frustrated with crime, corruption[,] and inequality in the Philippines. ... He comes at a time when promises are being made[,] but not fulfilled, and people want somebody who can enforce policies that will actually do something.

Nash Jenkins, *Why Did the Philippines Just Elect a Guy Who Jokes About Rape as Its President?*, available at <http://time.com/4324073/rodrigo-duterte-philippines-president-why-elected> (last accessed Oct. 31, 2017).

117. Amanda Taub, *How Countries Like the Philippines Fall into Vigilante Violence*, N.Y. TIMES, Sep. 11, 2016, available at <http://www.nytimes.com/2016/09/12/world/asia/the-philippines-rodrigo-duterte-vigilante-violence.html> (last accessed Oct. 31, 2017).

118. Peter R. Kann, *The Philippines Without Democracy*, 52 FOREIGN AFF. 612, 614 (1974). This account claims popular support for authoritarian government lay in the promise of efficiency, economic gains, and social reforms that martial law may provide, to wit —

Filipinos were not and are not alienated from the concept of democracy. If they were in a mood to tolerate a turn toward

Others also point out that the lack of outrage is because Filipinos have been conditioned to look away from the carnage in the Philippines — “This genocide is being ignored because, for too long, the dehumanization of people who use drugs and calls for their death have been an acceptable part of the ‘drug war.’”¹¹⁹

These no doubt contribute to the support for Duterte’s actions. The Author’s inquiry, however, begs the next question – do we subscribe to vigilante justice or dehumanize others despite what the law demands? In other words, does the Constitution, with its provisions on due process, not prevent us from ignoring rights?

Political analyst Richard Javad Heydarian said that democracy and liberal values in the Philippines are not fully internalized and that the country is still a fledgling democracy.¹²⁰ Again, the question is – why? It has been more than a century since the Americans attempted to create the Philippines in its image and likeness. How much time do Filipinos need to internalize these ideals? Perhaps the question is not *when* we will internalize these ideals, but *why* Filipinos have not done so.

authoritarianism it was because of certain bitter experiences with the workings of the system and with politicians who corrupted that system. Filipinos do not tolerate authoritarianism because they are ignorant about democracy, which is the case with many people in neighboring states. The Philippines, for all of its political defects, was more of a democracy than almost any other Third-World country, and Filipinos have paid a real, not a token, political price for whatever benefits — in government efficiency, economic prosperity[,] and social reforms — martial law may provide.

Id.

119. Maia Szalavitz, *Why we ignore thousands of killings in the Philippines: The victims were drug users*, WASH. POST, Oct. 6, 2016, available at https://www.washingtonpost.com/posteverything/wp/2016/10/06/why-we-ignore-thousands-of-killings-in-the-philippines-the-victims-were-drug-users/?tid=ss_fb&utm_term=.0b61935d3e43 (last accessed Oct. 31, 2017).

120. Nyshka Chandran, President Duterte’s war on drugs threatens the Philippines’ rule of law, available at <http://www.cnbc.com/2016/08/24/president-dutertes-war-on-drugs-threatens-the-philippines-rule-of-law.html> (last accessed Oct. 31, 2017).

The Author suggests that the real reason for the Filipinos' lack of fealty towards the rule of law is the absence of a "constitutional moment."¹²¹ The problem is that the American constitutional values were introduced under colonial conditions and could not have transferred American understanding of constitutional values to the new nation.

B. The Colony

Philippine-United States relations began, historians used to say, as "a pious endeavor to liberate Cuba from Spanish oppression."¹²² This project propelled the United States to oust Spain from the Philippines as well and to crush the Filipino independence movement.¹²³ War eventually erupted between the United States and the Filipinos, but before then the latter had already organized itself and produced a political constitution known as the Malolos Constitution, named after the town where the revolutionary government had settled.¹²⁴ These efforts to establish a Filipino Constitution were crushed as a casualty of the war.

The Americans took on the task of training their new subjects to govern themselves in the American democratic manner. They often believed that they were about to transform the latter into a people with a mission, the subordinate one of "Americanizing" the Orient.¹²⁵ Confident in their own proven powers and in the superiority of their own form of democratic government, they showed from the beginning every intention of discarding

121. Bruce Ackerman has a claim that the theory embodied in the 1787 United States Constitution is a theory of "dualist democracy," where institutional structure presupposes a distinction between periods of "normal politics" on the one hand and "constitutional moments," or periods of higher lawmaking, on the other. See Eben Moglen, *The Incomplete Burkean: Bruce Ackerman's Foundation for Constitutional History*, 5 YALE J.L. & HUMAN. 531, 532 (2013).

122. KARNOW, *supra* note 1, at 79.

123. *Id.* The narrative claiming that the United States was unprepared for its role as a colonizer has been challenged by recent scholarship. See STUART CREIGHTON MILLER, "BENEVOLENT ASSIMILATION": THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899-1903 13-30 (1982). See also Owen J. Lynch, *The Legal Basis of Philippine Colonial Sovereignty*, 62 PHIL. L.J. 279, 294-316 (1987). Lynch provides a summary of the legal bases of American sovereignty over the Philippines. *Id.*

124. CESAR ADIB MAJUL, *THE POLITICAL & CONSTITUTIONAL IDEAS OF THE PHILIPPINE REVOLUTION 9-10* (1967).

125. Howard T. Fry, *The Breakdown of the American Democratic Experiment in the Philippines: An Historical Analysis of a Crisis in Modernization*, 23 AUSTRL. J. POL. & HIST. 383, 387 (1977).

any form of evolutionary growth and of relying instead upon the closest approach practicable to their own governmental system.¹²⁶

American imperial policy was based upon the idea of assimilation, making “the colonial societies over in the American model,” and a tendency to show scant respect for the prevailing culture in any of the new dependencies.¹²⁷ The American administration in the Philippine Islands went ahead with its plans for a political and social revolution intended to culminate in the provision of an American-type democratic system. The Filipinos’ own attempts at constitution-making during the period of the Philippine Revolution were condemned by the United States’ Philippine Commission as violating “so many of the principles laid down by Hamilton and Madison in the *Federalist*.”¹²⁸

President William McKinley’s instructions to the second Philippine Commission betrayed an intention to discard evolutionary growth (the British approach in colonization) in the framing of a new system of government. These instructions started out by exhorting the commission to

bear in mind that the government which they are establishing is designed ... for the happiness, peace[,] and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices to the fullest extent compatible with the accomplishment of the indispensable requisites of just and effective government.¹²⁹

Yet the next sentence showed that the way to a “just and effective government” needed an American-style constitution. The instructions continued, in this manner —

At the same time the Commission should bear in mind, and the people of the Islands should be made plainly to understand, that there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately, been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these

126. *Id.*

127. Robin W. Winks, *Imperialism, in THE COMPARATIVE APPROACH TO AMERICAN HISTORY* 258 (C. Vann Woodward ed., 1997).

128. Fry, *supra* note 125, at 388–89.

129. *Id.* at 389.

principles and these rules of government must be established and maintained in the Islands for the sake of their liberty and happiness however much they may conflict with the customs or laws of procedure with which they are familiar.¹³⁰

As the United States prepared to release its colony, it took steps to ensure that American government would grow on Philippine soil. The United States Congress enacted the Philippine Independence Act, popularly known as the Tydings-McDuffie Act,¹³¹ which provided for a 10-year commonwealth status, after which, full and complete independence would be granted.¹³² A Constitutional Convention, elected under the terms of the Act,¹³³ sat from early October until the latter part of February, when it adopted a draft which was submitted to President Theodore Roosevelt for his approval.¹³⁴ A preliminary draft was prepared by a sub-committee of nine between 9 and 20 October, and this was ultimately adopted by the convention without substantial change.¹³⁵ Its contents were derived, both in

130. *Id.*

131. An Act to Provide for the Complete Independence of the Philippine Islands, to Provide for the Adoption of a Constitution and a Form of Government for the Philippine Islands, and For Other Purposes [Philippine Independence Act], Public Law No. 73-127, § 1 (1934).

132. *Id.* § 10 (a).

133. *Id.* § 1.

The Philippine Legislature is hereby authorized to provide for the election of delegates to a constitutional convention, which shall meet in the hall of the house of representatives in the capital of the Philippine Islands, at such time as the Philippine Legislature may fix, but not later than [1 October] 1934, to formulate and draft a [C]onstitution for the government of the Commonwealth of the Philippine Islands, subject to the conditions and qualifications prescribed in this Act, which shall exercise jurisdiction over all the territory ceded to the United States by the treaty of peace concluded between the United States and Spain on [10 December] 1898, the boundaries of which are set forth in article III of said treaty, together with those islands embraced in the treaty between Spain and the United States concluded at Washington on [7 November] 1900. The Philippine Legislature shall provide for the necessary expenses of such convention.

Id.

134. J.S. Reeves, *The Constitution of the Philippines*, 29 AM. J. INT'L L. 476, 477 (1935).

135. *Id.*

substance and in form, in very large measure, from the Federal and State Constitutions of the United States.¹³⁶

The Convention was required to submit the draft Constitution to the President of the United States, who would then determine whether it conforms to the limitations of the Tydings-McDuffie Act.¹³⁷ If the President found that the Constitution does not conform with the provisions of the Act, he advises the Governor General of the Philippine Islands, stating in his judgment the Constitution does not so conform and submitting provisions which will, in his judgment, make the Constitution so conform.¹³⁸ The Governor General, in turn, submits such message to the Constitutional Convention for further action by them pursuant to the same procedure hereinbefore defined, until the President and the Constitutional Convention are in agreement.¹³⁹

Once the Constitution was signed by President Roosevelt, Filipinos ratified the Constitution in a national plebiscite; elections were held; and on 15 November 1935, the Commonwealth of the Philippines was inaugurated.¹⁴⁰ Manuel L. Quezon (Quezon) was elected President of the Commonwealth.¹⁴¹

The votes cast in favor of the adoption of the Constitution were 1,213,934 (96.6%); 42,690 (3.4%) votes were cast against it.¹⁴² The total votes cast in the plebiscite were barely one-fifth of the number of qualified voters.¹⁴³ The number of votes cast in the plebiscite is telling. It suggests that

136. *Id.*

137. *Id.*

138. Philippine Independence Act, § 3.

139. *Id.*

140. Gerald E. Wheeler, *The Movement to Reverse Philippine Independence*, 33 PAC. HISTL. REV. 167, 168 (1964).

141. *Id.*

142. Conrado Benitez, *The New Philippine Constitution*, 8 PAC. AFF. 428, 428 (1935).

143. Reeves, *supra* note 134, at 476. On 10 July 1934, 202 delegates were elected by the qualified voters to become part of the Constitutional Convention. The Convention opened on 30 July and Senator Claro M. Recto elected as President. It proceeded with organization of committees and the general discussion of constitutional trends and problems. On 9 October, a special committee of seven was appointed to draft a Constitution. The final draft was submitted on 20 October. On 31 January 1935, the Convention approved the draft as amended in open sessions; a special committee on style completed the

the political exercise did not capture the interest or imagination of the voters.

The adoption of United States' legal concepts in the Philippines may be classified as an externally-dictated transplant because it involved "a foreign individual, entity[,] or government that indicates the adoption of a foreign legal model as a condition for doing business or for allowing the dominated country a measure of political autonomy."¹⁴⁴ This type of transplant includes transplants "whose acceptance is motivated by a desire to please foreign states, individuals[,] or entities — whether in acquiescence to their demands, or to take advantage of opportunities and enticements that they offer."¹⁴⁵ Legal scholar Vernon Valentine Palmer describes the model as an "intercolonial transfer."¹⁴⁶ After displacing Spain as the colonizer, the United States chose to cultivate the loyalty of the Spanish-speaking educated elite faction,¹⁴⁷ careful not to replace Spanish law in keeping with this "policy of attraction."¹⁴⁸ In any case, the creation of a mixed system has often taken place when a people has lost its political sovereignty, yet has refused to give up the right to keep living in accordance with its own personal or private laws.¹⁴⁹

The Philippine case is part of a pattern of decolonization — imperial powers drafted the post-independence constitutions of colonies as part of the process of decolonization. Colonizers would design the institutional and legal

revision, and on the 8th of February the Convention approved the final draft, which was signed by the members on 19 February. *Id.*

144. Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 847 (2003).

145. *Id.*

146. *Id.*

147. VERNON VALENTINE PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* 27 (Vernon Valentine Palmer ed., 2001).

148. *Id.* at 29.

149. Vernon Valentine Palmer, *Mixed Legal Systems — The Origin of the Species*, 28 TUL. EUR. & CIV. L.F. 103, 116 (2013). Legal hybrids are those countries or political entities that have a presence of substantial common and civil law elements in their legal system; or those countries where we expect to find, in addition certainly to other mixed elements, that common law and civil law constitute the basic building blocks of the legal edifice. *Id.* See Kensie Kim, *Mixed Systems in Legal Origins Analysis*, 83 SO. CAL. L. REV. 693, 705 (2010).

architecture of another political community without its consent.¹⁵⁰ The Constitution was presented as a finished product with local participation to ensure the acquiescence of local elites, with fundamental questions of constitutional choice safely remaining in foreign hands and did not entail meaningful, substantive decision-making power.¹⁵¹

C. Context

The transfer of constitutional ideas could not have been easy. The Philippines was a Spanish colony for over three centuries. The United States was seeking to implant the common law system in a country where the civil law system and indigenous legal systems were operating.¹⁵²

This “legal transplantation” or the imposition of law accompanied 19th century colonialism, and it radically reshaped the law of much of Africa, Asia, and the Pacific.¹⁵³ Colonial officials typically eliminated customs they considered repugnant, such as polygamy, witchcraft, payback killings, suttee, ritual gift-giving ceremonies such as the potlatch, and many other kinds of practices defined as “savage” or “uncivilized.”¹⁵⁴ The law was also mobilized to control and restrain behaviors attributed to inherent flaws of character such as laziness or licentiousness.¹⁵⁵

Not everything could be superseded by an imposed legal system. Quezon acknowledged the limited impact of constitutional transplants. While he welcomed the influence of external forces on the forging of the Philippine nation, he was quick to express the role of resistance —

If Spain had done nothing in the Philippines but the wielding of scattered and separate elements into the consummate structure of our nationality, which has not only enabled us to assimilate another civilization such as that brought to us by the United States[,] but has also prevented the basic and distinctive elements of our personality from being carried away by strange currents, thus bringing us to the triumph of our aspiration to be an

150. See generally Sujit Choudhry, *Old Imperial Dilemmas and the New Nation Building: Constitutive Constitutional Politics in Multinational Politics*, 37 CONN. L. REV. 933 (2005).

151. *Id.*

152. *In re Shoop*, 41 Phil. 213, 225–26 (1920).

153. Sally Engle Merry, *Law, Culture, and Cultural Appropriation*, 10 YALE J.L. & HUMAN. 575, 588 (1998).

154. *Id.*

155. *Id.*

independent nation; I repeat that if this had been the only work of Spain in the Philippines, it would in itself be sufficient, in spite of the mistakes which, in the words of the poet, were ‘crimes of the times and not of Spain,’ to raise in every Filipino heart [—] if this has not already been done [—] a monument of undying gratitude to the memory of Spain side by side with that which we should erect in honor of the American people. These two civilizations, the Latin and the Anglo-Saxon, which the fortunes of war have brought to us to make the soil of our land more fruitful, have molded our national character in a manner so different from that of neighboring nations that in addition to the results of our own efforts, it may be said in truth that to both civilizations we owe in large measure our aptitude and fitness to assume the responsibilities of the present government and of the independent State which will inevitably follow.¹⁵⁶

Quezon’s view was that something survived Spanish and American demands and not everything was “carried away by strange currents.”¹⁵⁷ The nation is a site of survival, “living on [what] comes from taking the foreign in and remaking it into an element of oneself.”¹⁵⁸

There is a similar appraisal used to explain the impact of the 1973 Constitution.¹⁵⁹ According to economist and historian Nikolai G. Wenzel, the Constitution failed, because while it was ideal on paper, “it was unsuited to Filipino constitutional culture, and thus a bad choice, doomed to be rejected by the cultural recipient.”¹⁶⁰ He explains the inherent conflict between the Spanish colonial tradition (personalism/*caudillismo*, authoritarianism, top-down centralization, and government of men rather than law) and constitutionalism under rule of law —

The Philippines, which was a Spanish colony until the end of the [19th] century, started at a disadvantage as it had no organic tradition of rule of law. After Spanish colonialism, instead of having the opportunity to

156. Manuel L. Quezon, *Spain’s Contribution to Filipino Culture in Development*, Address at the Tabacalera Building, Manila (Jan. 11, 1936) (transcript available at <http://www.officialgazette.gov.ph/1936/01/11/speech-of-president-quezon-on-spains-contribution-to-filipino-culture-and-development-january-11-1936/> (last accessed Oct. 31, 2017)).

157. VICENTE L. RAFAEL, *THE PROMISE OF THE FOREIGN: NATIONALISM AND THE TECHNICS OF TRANSLATION IN THE SPANISH PHILIPPINES* 3 (2005).

158. *Id.* at 4.

159. Nikolai G. Wenzel, *Lessons from Constitutional Culture and the History of Constitutional Transfer: A Hope for Constitutionally Limited Government?*, 20 INT. ADV. ECON. RES. 213, 221 (2014).

160. *Id.*

experiment with its own traditions, the country remained a [United States] colony for another 35 years, after which a [United States] inspired [C]onstitution was adopted out of the blue. Beyond the general traits of former Spanish colonies, several particular Filipino cultural characteristics were inimical to a [United States]-style [C]onstitution of limited government and enshrined rights. First, the *caudillo* strongman tradition was particularly strong in the Philippines. Second, parallel to the Spanish colonial tradition of a government of men rather than laws, the Filipino constitutional culture was all too willing to place political expediency over constitutional principle; as long as the economy was growing, the [C]onstitution was respected; but the constitutional culture was a fair-weather friend to the formal [C]onstitution. Third, the Filipino founding evinced a certain schizophrenia on the subject of rights, as the [C]onstitution's emphasis on individual rights was largely alien to the Spanish and Filipino traditions, which emphasized family/communal rights and *raison d'état*.¹⁶¹

Wenzel adds —

The seeds of liberty, limited government, and rule of law, were cast on ground too thin to allow them to blossom and suggests that the Philippines might have fared better if it had respected the dynamic of the natural state, rather than attempting to force a jump over the doorstep to open access order.¹⁶²

The Author's argument is that colonization, insofar as it attempts to recreate a people in the image and likeness of the colonizer is itself doomed to fail.

The survival of "Filipino cultural characteristics" would have an impact on the creation of the State. International Relations professor Joel S. Migdal theorized that the emergence of a strong, capable state can occur only with a tremendous concentration of social control.¹⁶³ Such a redistribution of social control occurs by creating catastrophic conditions that undermine existing strategies of survival which are the basis of social control.¹⁶⁴ Western policies in colonial territories "led to the reestablishment of fragmented social control in societies in Africa and Asia."¹⁶⁵ Whether a state ends up strong or weak

161. *Id.*

162. *Id.*

163. JOEL S. MIGDAL, STRONG SOCIETIES AND WEAK STATES: STATE-SOCIETY RELATIONS AND STATE CAPABILITIES IN THE THIRD WORLD 262-63 (1988).

164. *Id.*

165. *Id.*

depends on the distribution of social control in society.¹⁶⁶ In those rare instances in which strong states did emerge in the Third World, highly disruptive forces undermined the social bases of social control.¹⁶⁷

Decolonization did not materially affect the manner in which the provision of social services in rural communities remained largely dependent on local-level networks of reciprocity and mutual assistance.¹⁶⁸ As the case of informal associations and networks in the Philippines shows, there has been a long history of non-state provision of individual and community welfare that stretches back for as long as the written record exists.¹⁶⁹ The social bases of control of pre-conquest Philippines remained strong after colonizers left. As in most cases in Asia,¹⁷⁰ the post-independence governments simply repeated and intensified the abuses of their predecessors, often severely narrowing the distribution of political power, dismantling constraints, and undermining the already meagre incentives that economic institutions provided for investment and economic progress.¹⁷¹ Only in a few cases were critical junctures used to launch a process of political and economic change that paved the way for economic growth.¹⁷²

The transfer of legal concepts is just as problematic today without the coercive conditions fostered by colonization. The United States is one of the major donors and direct assistance providers for rule of law development — ensuring that “rule of law” thrives in countries that receive development assistance.¹⁷³ The problem, however, is that the model is applied to countries regardless of the difference in the conditions in these countries; it is “part of the development package to countries with relatively high levels of economic development, and to those with relatively low levels of economic

166. *Id.* at 275.

167. *Id.* at 276.

168. Greg Bankoff, “For the good of the barrio”: *Community associations and the State in the Rural Philippines 1935-1965*, in *BEYOND EMPIRE AND NATION: THE DECOLONIZATION OF AFRICAN AND ASIAN SOCIETIES, 1930S-1960S* 178-79 (Els Bogaerts & Remco Raben eds., 2012).

169. *Id.* at 183.

170. *Id.*

171. *Id.*

172. DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY AND POVERTY* 111-13 (2013).

173. Cynthia Alkon, *The Flawed United States Approach to Rule of Law Development*, 117 *PENN ST. L. REV.* 797, 801 (2013).

development; to countries that are politically stable and peaceful, and to those that are in the midst of armed conflict.”¹⁷⁴

The experience in Afghanistan illustrates the many challenges facing rule of law development in a nation that is suffering extreme poverty, lack of basic infrastructure, a poorly developed formal legal system, extremely low levels of literacy, and armed conflict.¹⁷⁵ The case shows that development aid should not routinely include the full package of rule of law development programs for countries facing these challenges due to serious concerns about whether providing such assistance will improve the overall level of rule of law.¹⁷⁶ It may be better to do only minimal rule of law development work in certain targeted areas or, depending on the circumstances, to do other development work first and leave the rule of law development work for later in the development process.¹⁷⁷ Delaying rule of law projects until the conditions are better might encourage more thoughtful rule of law development work that, in turn, will have a more meaningful impact. Nevertheless, the recommendation that there are times when rule of law development assistance should not be part of the larger assistance package does not preclude rule of law advocacy on a political level. In addition, legal

174. *Id.* Rule of law development assistance involves every sector of a society, including the economy, the judiciary, the education system, legal professionals, and the general public.

Rule of law requires a high level of buy-in from the local population and a certain level of development for absorption of technical aid. Rule of law development assistance programs, therefore, usually engage on multiple levels throughout a society, ranging from highly technical programs for court administration and legislative reform to training for legal professionals to programs aimed at changing the attitudes of the general public.

Id. at 806. Rule of law development assistance is premised on two assumptions: that rule of law development assistance will help build or improve rule of law; and that rule of law development assistance will not harm the development of rule of law. *Id.* at 808.

175. *Id.* at 852.

176. *Id.* at 854.

177. Alkon, *supra* note 173, at 853. Legal scholars also criticized aid providers for being overly naïve and missing key understandings, or exporting a form of imperialism. *Id.* at 862–63.

scholar Cynthia Alkon argues that it does not prevent local actors from working towards legal reform on their own.¹⁷⁸ Alkon adds that

[e]very country that receives foreign aid deserves an individualized analysis to determine what kind of aid makes sense in the particular context of that nation and at the particular stage of development. This individualized analysis must include the possibility that certain types of aid should not be part of the process.¹⁷⁹

Even when legal transfers are done in the ordinary course of business, without colonization, occupation, or failed states, success is uncertain at best. Success of legal transfers must refer in some way to changing legal behavior in the recipient country. Legal imports may appear useful for one social group but useless for another. By challenging established patterns of behavior, imported laws have the capacity to create winners and losers.¹⁸⁰

D. Folk Interpretation

Long before they were colonized, native Filipinos fell under the influence of Hindu, Buddhist, and Confucian thought.¹⁸¹ They were steeped in collectivist or communitarian philosophy. They placed social harmony above individual rights, welfare of the community over individual satisfaction, compassion above apathy, sacrifice over self-fulfillment, and spirituality above materialism.¹⁸² Pre-conquest notions of justice were markedly different from those introduced by the Americans in many respects:

First, unlike the Western concept of justice based on equality, the early Filipino concept contained inequality. There was recognition of unequal rights; those that belonged to the higher chiefly class and the lower classes who were less-than-free, the household dependents (*alipin namamahay*), the equivalent of the tenant farmer today, and the household slaves (*alipin sagigilid*) who could be bought or sold. The important thing to note is that

178. *Id.* at 864-65.

179. *Id.* at 865.

180. John Gillespie, *Towards a Discursive Analysis of Legal Transfers into Developing East Asia*, 40 N.Y.U. J. INT'L L. & POL. 657, 688 (2008).

181. See generally FERNANDO N. ZIALCITA, AUTHENTIC THOUGH NOT EXOTIC: ESSAYS ON FILIPINO IDENTITY 179-210 (2005).

182. Pacifico Agabin, *The Influence of Philippine Indigenous Law on the Development of New Concepts of Social Justice*, available at <http://lawexplores.com/the-influence-of-philippine-indigenous-law-on-the-development-of-new-concepts-of-social-justice/> (last accessed Oct. 31, 2017).

the rights or privileges of the chiefly class demanded corresponding responsibilities.

Second, the Filipino concept of justice emphasized the duties and responsibilities of each class rather than individual rights. The moral responsibility to be fair and just to the less privileged was the only *raison d'etre* of privilege.

...

Third, justice was predicated not so much of the individual as of the community. The community, not the individual, was the primary subject, object, and dispenser of justice. ... The early Filipinos kept their word to their kin and thus too to those who had been made their kin in the blood compact. It seems that the Filipino contribution to the notion of justice is that justice is not individual but *collective*.

Fourth, although the strength of the Filipino concept of justice was in its emphasis on collective responsibility, [but] its weakness lay in its very faint notion of the personal dignity or worth of the individual simply as a human being.¹⁸³

If these values survived almost 350 years of colonization, then western concepts of constitutional governance would have difficulty taking root. It would also explain the acquiescence to blatant violations of the rights of suspected criminals; Filipinos may be more concerned with the community's well-being than the rights of the dead.

On balance the United States has failed in exporting American institutions to foreign lands.¹⁸⁴ Authors write of the adoption of the American legal system without discussing difficulties generated by the colonial set-up.¹⁸⁵ People around the world may have converged on Western type formal law, but convergence has often been "confined to the law on the books."¹⁸⁶ The functioning of legal institutions and their

183. Vitaliano R. Gorospe, *Sources of Filipino Moral Consciousness*, 25 PHIL. STUD. 278, 283-84 (1977).

184. NIALL FERGUSON, *COLOSSUS: THE RISE AND FALL OF THE AMERICAN EMPIRE* 286 (2004).

185. ANNA LEAH FIDELIS T. CASTANEDA, *Spanish Structure, American Theory: The Legal Foundations of a Tropical New Deal in the Philippine Islands, 1898-1935*, in *COLONIAL CRUCIBLE: EMPIRE MAKING OF THE MODERN AMERICAN STATE* 365-66 (Alfred W. McCoy & Francisco A. Scarano eds., 2010).

186. Daniel Berkowitz, Katharina Pistor, & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 188 (2003).

effectiveness continue to differ substantially making it difficult to argue that transplant countries will eventually catch up. Rather, the data suggest that the effect of transplanting law in the 19th century has implications for the effectiveness of legal institutions today.¹⁸⁷

What happened in the Philippines challenges the “sacred assumption that transplanting [United States] institutions can produce peace and prosperity in any society at any level of development, with any pattern of social division.”¹⁸⁸ Rather, “in societies at the Philippine–Thai–Cambodian level of development, Western–style electoral democracy legitimizes, perpetuates, and often enhances ruthless exploitation, corruption, and crime.”¹⁸⁹ Historian Felipe Fernandez-Armesto explained that “[t]he curse of decolonization was the creation of states without history, extemporized for convenience, bereft of traditional elites, or colonial peacekeepers, partitioned precariously or federalized whimsically. Hurried preparation for independence rarely created an educated or economically responsible electorate, but rather fools’ democracies exploitable by demagogues, gangsters, and frauds.”¹⁹⁰

VII. SEGUE: THE UNITED STATES AND TRUMP

The events in the Philippines are in sharp contrast to those happening in the United States. In March 2017, President Donald J. Trump (Trump) approved an executive order¹⁹¹ that suspended the entry of all refugees to the United States for 120 days,¹⁹² barred Syrian refugees indefinitely, and blocked entry into the United States for citizens of seven predominantly Muslim countries — Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen — for 90 days.¹⁹³ It also barred green card holders from those countries from re-entering the United States, though the administration said exemptions could

187. *Id.* at 188–89.

188. William H. Overholt, Duterte, democracy, and defense, *available at* <https://www.brookings.edu/research/duterte-democracy-and-defense> (last accessed Oct. 31, 2017).

189. *Id.*

190. FELIPE FERNANDEZ-ARMESTO, *MILLENNIUM: A HISTORY OF THE LAST THOUSAND YEARS* 556–57 (1995).

191. Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13209 (Mar. 6, 2017) (U.S.).

192. *Id.* § 6.

193. *Id.* § 1 (b) (i).

be granted.¹⁹⁴ After the order was signed, students, visitors, and green-card-holding, legal, and permanent United States residents from the seven countries — and refugees from around the world — were stopped at airports in the United States, Cairo, and Dubai.¹⁹⁵ Some were blocked from entering the United States and were sent back overseas.¹⁹⁶ The New York Times reported that “[t]he order prompted large protests across the country. ... [A] federal judge in Brooklyn[,] [New York] blocked part of the order, saying that travelers being held at airports across the United States should not be sent back to their home countries. Federal judges in ... Massachusetts, Virginia, and Washington [] issued similar rulings.”¹⁹⁷

Lawyers from the International Refugee Assistance Project at the Urban Justice Center called for lawyers who could volunteer immediately to go to airports where refugees were scheduled to enter the United States.¹⁹⁸ Lawyers showed up at about a dozen airports around the country.¹⁹⁹ Others went to airports on their own to help. Soon, lawyers offering services and advice were at “most international airports in the United States.”²⁰⁰

194. *Id.* § 3 (c).

195. Jamie Doward, *US-bound migrants blocked from flying to JFK airport*, GUARDIAN, Jan. 28, 2017, available at <https://www.theguardian.com/us-news/2017/jan/28/rights-groups-flooded-with-calls-as-people-fear-re-entry-to-us-will-be-denied> (last accessed Oct. 31, 2017).

196. Joanna Walters & Saeed Kamali Dehghan, *US airports on frontline as Donald Trump’s travel ban causes chaos and protests*, GUARDIAN, Jan. 28, 2017, available at <https://www.theguardian.com/us-news/2017/jan/28/airports-us-immigration-ban-muslim-countries-trump> (last accessed Oct. 31, 2017).

197. See Liam Stack, *Trump’s Executive Order on Immigration: What We Know and What We Don’t*, N.Y. TIMES, Jan. 29, 2017, available at <https://www.nytimes.com/2017/01/29/us/trump-refugee-ban-muslim-executive-order.html?action=click&contentCollection=UNITED STATES&module=RelatedCoverage®ion=Marginalia&pgtype=article> (last accessed Oct. 31, 2017).

198. Jonah Engel Bromwich, *Lawyers Mobilize at Nation’s Airports After Trump’s Order*, N.Y. TIMES, Jan. 29, 2017, available at <https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html?action=click&contentCollection=Politics&module=RelatedCoverage®ion=Marginalia&pgtype=article> (last accessed Oct. 31, 2017).

199. *Id.*

200. *Id.*

With Trump in the White House and Republicans in control of Congress, Democratic legal officers at the state level stepped up as a check on the President.²⁰¹

The speed and scale of resistance to Trump's travel ban are significantly different from the response to Duterte's "war on drugs." Lawyers are at the forefront of the battle in the United States, challenging Trump's order as unconstitutional.²⁰² In contrast, more than 7,000 people had died in the Philippines before the first case challenging Duterte's acts was filed.²⁰³

Interestingly, American defiance of Trump's actions protects outsiders, not its citizens. Perhaps the difference in the way American and Filipinos responded to violations of the Constitution is a function of the peoples' histories.

The American Revolution ushered in radical changes that became all current egalitarian thinking; it brought respectability and dominance to ordinary people.²⁰⁴ The Revolution made the interest and prosperity of ordinary people the goal of society and government.²⁰⁵ The delegates who later drafted the Constitution may have been imperfect but they were committed to the creation of representative government and were guarding against the nation's descent to tyranny.²⁰⁶

The United States Constitution "is a democratic and intergenerational project [—] the product of many minds over many years[.]"²⁰⁷ It might have

201. Alexander Burns, *Legal Challenges Mount Against Trump's Travel Ban*, N.Y. TIMES, Jan. 30, 2017, available at <https://www.nytimes.com/2017/01/30/us/legal-challenges-mount-against-trumps-travel-ban.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=b-lede-package-region®ion=top-news&WT.nav=top-news> (last accessed Oct. 31, 2017).

202. See generally Bromwich, *supra* note 198.

203. Tetch Torres-Tupas, *First petition vs Duterte's 'Tokhang' filed at SC*, PHIL. DAILY INQ., Jan. 26, 2017, available at <http://newsinfo.inquirer.net/865670/first-petition-vs-dutertes-tokhang-filed-at-sc> (last accessed Oct. 31, 2017).

204. GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 7 (1993).

205. *Id.* at 8.

206. CAROL BERKIN, *A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION* 9 (2002).

207. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 476 (2012 ed.).

been an elite project but the framers managed to overcome class concerns. The historian Clinton Rossiter wrote that

[t]he Constitution of 1787 lives on today, and seems destined to live until the Republic is no more, because it was as well and truly framed as any fundamental law of any people in history. The handiwork of an elite uniquely trained to manipulate the levers of republican power in behalf of an encompassing public good, the instrument of an elite strenuously concerned to build one nation where as many as a dozen might have emerged to scramble for survival or simply to stagnate, the monument of an elite splendidly privileged to choose among political options and thus to shape the course of history, the Constitution was designed ... to serve the needs of a continental people and to hold up under the pressures of a spectacular rate of economic development and territorial expansion.²⁰⁸

The Philippine Constitution was imposed by the United States in 1935 as a condition for political independence. The 1987 Constitution was overwhelmingly ratified although scholars claim that the campaign for the ratification focused more on President Corazon C. Aquino's popularity than on the merits of the draft charter.²⁰⁹ In any case, Filipino values would have informed popular interpretation of legal concepts that the framers implanted even in 1987.

Constitutions can restrain government action when they are drafted and ratified during a period of extraordinary popular mobilization.²¹⁰ This process of "popular constitution-making," involves "irregular mechanisms of extraordinary popular mobilization, such as extra-parliamentary constitutional conventions and referendums."²¹¹ Operating outside the rules and institutions of ordinary politics, allow the people to act in their sovereign capacity as the "constituent power."²¹² In this constituent position, the people themselves become the author of constitutional rules, maximizing the democratic "legitimacy" of these rules and transforming them into a form of higher law.²¹³

208. CLINTON ROSSITER, *1787: THE GRAND CONVENTION* 332 (1987 ed.).

209. Carolina Hernandez, *The Philippines in 1987: Challenges of Redemocratization*, 28 *ASIAN SURV.* 119, 238-41 (1988).

210. William Partlett, *The Dangers of Constitution-Making*, 38 *BROOK. J. INT'L L.* 193, 194 (2012).

211. *Id.*

212. *Id.*

213. *Id.* at 194-95.

The Philippines has not experienced anything resembling a “constitutional moment,” so the values that informed the drafting of the United States Constitution could not have been imparted to the former colony. Constitutionalism cannot simply be passed on like a text message. “Constitutionalism is the end product of social, economic, cultural, and political progress; it can become a tradition only if it forms part of the shared history of a people.”²¹⁴ History constitutes an intrinsic ingredient of constitutionalism.²¹⁵ An imposed constitution is instantly diminished because the colony did not share the values that helped shape the Constitution.

VIII. CONCLUSION

A well-worn joke claims, with some truth, that of Haiti's six million people 85 percent are Catholic, 15 percent are Protestant, and 100 percent serve the [Voodoo] spirits.

— Karen McCarthy Brown²¹⁶

Historian Carl H. Lande, wrote “Filipino political leaders, intellectuals, and citizens with few exceptions, believe in the universal validity of human rights as they are defined in the West, and are proud of having restored their own liberal democracy in 1986.”²¹⁷ The 1986 ouster of Ferdinand E. Marcos, according to one study, shows that “the democratic impulse that began with decoloni[z]ation ... is finally beginning to take root in the soils of Southeast Asia.”²¹⁸ Recent developments in the Philippines put these assertions into question. Duterte continues to violate human rights and continues to enjoy popular support despite the absolute lack of due process in the execution of Filipinos.

Duterte’s war on drugs raises questions about Filipinos’ understanding of constitutionalism. The complete disregard for due process suggests that

214. Bui Ngoc Son, *Restoration Constitutionalism and Socialist Asia*, 37 LOY. L.A. INT’L & COMP. L. REV. 72 (2015) (citing W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65, 80 (Douglas Greenberg et al. eds., 1993)).

215. *Id.*

216. KAREN MCCARTHY BROWN, *MAMA LOLA: A VODOU PRIESTESS IN BROOKLYN* 5 (2001).

217. Carl H. Lande, *The Asian Values Debate: A Partisan Assessment*, PUB. POL’Y, Volume No. 2, Issue No. 3, at 54.

218. Kevin YL Tan, *The Making and Remaking of Constitutions in Southeast Asia: An Overview*, 6 SING. J. INT’L & COMP. L. 1, 41 (2002).

Filipinos have a weak understanding of the tenets of constitutionalism. The Author has shown here, however, that the constitutional deconsecration that is the hallmark of his approach to governance did not begin with his election in 2016. Deconsecration occurred the moment foreign concepts of governance were grafted onto existing legal systems. The legacy of colonialism is that the colony absorbs foreign ideas without completely obliterating its past. The legal system, like the nation that survives colonization, is a fusion, not a facsimile of the colonizer's bequest.

It is the alien origin of the Constitution that prevents Filipinos from understanding the document in the same light Americans do. Its meaning has been sapped by the process of colonization. Duterte, for his part, cites this foreign origin as a ground to ignore the Constitution.

Both manifestations of constitutional deconsecration should not be used to justify the country's drift towards a constitutional governance.²¹⁹ However else the Constitution is understood, the fact is that it is *the* Constitution and it becomes the duty of the President to ensure that all citizens abide by its commands.

219. See generally Tom Gerald Daly, Blog, *Constitutional Ignorance and Democratic Decay: Breaking the Feedback Loop*, Nov. 17, 2016, INT'L J. CONST. L. BLOG, available at <http://www.iconnectblog.com/2016/11/constitutional-ignorance-and-democratic-decay-breaking-the-feedback-loop> (last accessed Oct. 31, 2017).