

Legal Perspectives on a Human Rights-Based Approach to Energy Access in the Philippines

Manuel P.S. Solis*

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I. INTRODUCTION

Access to modern energy services,¹ that is, electricity and clean cooking facilities,² is indispensable to providing basic needs, eradicating poverty, and

* '15 Ph.D., University of Adelaide; '11 M.Sc. in Public Policy & Management, Carnegie Mellon University; & '04 Master's Degree in Environmental Law, University of Sydney. The Author has served as legal and policy adviser for development institutions such as the World Bank and United Nations Development Programme. He is currently a Lecturer in Law at the University of Adelaide, Australia.

This Article is an abridged version of the Author's Ph.D. Thesis. A copy of the latter is available online, pursuant to the University of Adelaide's open access policy for the scholarly works of its faculty and students. The Article was also presented at the

meeting sustainable development goals.³ This is because access to modern energy services affects a variety of critical outcomes involving “productivity,

14th International Union for Conservation of Nature Academy of Environmental Law Colloquium in the University of Oslo on 24 June 2016.

Cite as 62 ATENEO L.J. 669 (2018).

1. “The term ‘energy services’ refers to the benefits derived from the use of efficient energy sources, over and above that derived from basic biomass, which is the fuel of the poor in developing countries.” Yinka Omorogbe, *Policy, Law, and the Actualization of the Right to Access to Energy Services*, in RESEARCH HANDBOOK ON INTERNATIONAL ENERGY LAW 371 (Kim Talus ed., 2014). On the other hand, the International Energy Agency defines “modern energy access” as “a household having reliable and affordable access to clean cooking facilities, a first connection to electricity[,] and then an increasing level of electricity consumption over time to reach the regional average.” International Energy Agency, *World Energy Outlook 2011* at 473, *available at* https://www.iea.org/publications/freepublications/publication/WEO2011_WEB.pdf (last accessed Jan. 26, 2018).
2. BENJAMIN K. SOVACOO & IRA MARTINA DRUPADY, *ENERGY ACCESS, POVERTY, AND DEVELOPMENT: THE GOVERNANCE OF SMALL-SCALE RENEWABLE ENERGY IN DEVELOPING ASIA* 4-5 (2012).
3. Promotion of new and renewable sources of energy, G.A. Res. 67/215, ¶ 13, U.N. Doc. A/RES/67/215 (December 21, 2012). The World Commission on Environment and Development defines “sustainable development” as
 - (1) [D]evelopment that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:
 - (a) the concept of ‘needs[,]’ in particular the essential needs of the world’s poor, to which overriding priority should be given; and
 - (b) the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.

World Commission on Environment and Development, Report of the World Commission on Environment and Development: Our Common Future (Report of the World Commission on Environment and Development transmitted to the United Nations General Assembly as an Annex to U.N. Doc. A/42/427) at 41, *available at* <http://www.un-documents.net/our-common-future.pdf> (last accessed Jan. 26, 2018).

health, education, safe water[,] and communication services[,]”⁴ among others. Yet 1.6 billion people remain without access to electricity⁵ and 2.5 billion people are still using traditional biomass fuels⁶ — firewood, charcoal, crop residues, and animal dung — for their cooking needs with deleterious health consequences.⁷ In the Philippines, there are still 21 million people without access to electricity and 53 million still rely on traditional biomass fuels for cooking.⁸ Unfortunately, these twin deficits add another significant dimension to poverty called “energy poverty,” which refers to the “inability to cook with modern cooking fuels and the lack of a bare minimum of electric lighting [for reading] or for other household and productive activities at sunset[.]”⁹ In its expanded version, however, energy poverty encompasses “lack of access to resources [and] denial of opportunities and choice[s] in energy that [are] adequate, safe, and reliable for economic and human development.”¹⁰

While the legal response is still being formulated, the lack of universal access to affordable, reliable, and modern energy services continues to drive the widening gap between the haves and have-nots, resulting in the

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4. Amie Gaye, *Access to Energy and Human Development* (Paper commissioned by the United Nations Development Programme for the Human Development Report 2007/2008) at 1, available at http://hdr.undp.org/sites/default/files/gaye_amie.pdf (last accessed Jan. 26, 2018).
 5. *Id.* at 2 (citing Vijay Modi, et al., *Energy Services for the Millennium Development Goals: Achieving the Millennium Development Goals* (Report commissioned by the United Nations Development Programme, the United Nations Millennium Project, and the World Bank) at 13, available at <http://lutw.org/wp-content/uploads/Energy-services-for-the-millennium-development-goals.pdf> (last accessed Jan. 26, 2018)).
 6. Gaye, *supra* note 4, at 2.
 7. *Id.* at 6-7.
 8. International Energy Agency, *Southeast Asia Energy Outlook 2015: World Energy Outlook Special Report* at 119, available at https://www.iea.org/publications/freepublications/publication/WEO2015_SouthEastAsia.pdf (last accessed Jan. 26, 2018).
 9. Gaye, *supra* note 4, at 4.
 10. UNITED NATIONS DEVELOPMENT PROGRAMME, *TOWARDS AN ‘ENERGY PLUS’ APPROACH FOR THE POOR: A REVIEW OF GOOD PRACTICES AND LESSONS LEARNED FROM ASIA AND THE PACIFIC*, at 19 (2012).

marginalization of a significant segment of society such as the rural poor.¹¹ With this marginalization, the human rights dimension of poverty due to the lack of universal access to modern energy services comes into the fore in view of revealing findings that such a situation amounts to deprivation of basic needs,¹² entails disempowerment,¹³ and gives rise to inequities.¹⁴ Intuitively, these are matters that typically fall within the purview of human rights conversations, thus, the compelling reason to revisit the human rights-based approach as a framework for analysis.

While the International Bill of Human Rights has received global assent, Jack Donnelly¹⁵ asserts that its “implementation, however, remains almost exclusively national.”¹⁶ This strongly applies in the sphere of socioeconomic rights and development where the “need for an active [S]tate has always been especially clear”¹⁷ with its emergence “as both the principal threat to the enjoyment of human rights and the essential institution for their effective implementation and enforcement.”¹⁸ In essence, a human rights-based approach operates with both result and procedure orientations in which the State and its organs — the executive, legislative, and judiciary — play a central role. Along this line, the guarantee of access to affordable, reliable, sustainable, and modern energy services for all, which is Goal 7 under the

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11. THE WORLD BANK, ONE GOAL, TWO PATHS: ACHIEVING UNIVERSAL ACCESS TO MODERN ENERGY IN EAST ASIA AND THE PACIFIC, at 17-19 (2011).
 12. See Sudhir Anand & Amartya Sen, *Human Development and Economic Sustainability*, 28 WORLD DEV. 2029, 2030 (2000).
 13. UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, CLAIMING THE MILLENNIUM DEVELOPMENT GOALS: A HUMAN RIGHTS APPROACH, at 2 (2008). In the World Bank’s “Voices of the Poor” interviews, the poor defined poverty as disempowerment. *Id.*
 14. Shonali Pachauri, et al., *Pathways to Achieve Universal Household Access to Modern Energy by 2030*, 8 ENVTL. RES. LETT. 1, 1 (2013).
 15. Jack Donnelly is professor of human rights and international relations. He has a Ph.D. in Political Science from the University of California, Berkley, and is currently teaching at the University of Denver. University of Denver, Faculty, available at <https://www.du.edu/korbel/politicaltheory/faculty/index.html> (last accessed Jan. 26, 2018).
 16. JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 34 (2d ed. 2013).
 17. *Id.* at 36.
 18. *Id.* at 35.

Sustainable Development Goals (SDG),¹⁹ represents the result aspect of the human rights-based approach; while the legal, policy, and regulatory framework under which State action occurs embodies the procedural part.²⁰ In turn, a human rights-based approach looks into the State's implementation — through its constitution or national legislation, or both — of its international human rights regime commitments, particularly those relating to socioeconomic rights,²¹ in order to examine the challenge and the nature of the change sought to achieve universal access to affordable, reliable, and modern energy services in the domestic context. This also entails an examination of institutions, practices, and norms as targets for change, including the key role that the judiciary plays, to achieve the SDGs. As Patricia W. Birnie²² and Alan E. Boyle²³ write, “the degree and form of national implementation will largely determine how successful the treaty [or international agreement] is as an instrument of change, assuming its objectives are realistic, and [] the parties intend to make more than symbolic gestures, which is not always the case.”²⁴

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19. U.N. Econ. & Soc. Council, *Report of the Secretary-General, Progress towards the Sustainable Development Goals*, at 11, U.N. Doc. E/2016/75 (June 3, 2016).
 20. See KNUT BOURQUAIN, *FRESHWATER ACCESS FROM A HUMAN RIGHTS PERSPECTIVE: A CHALLENGE TO INTERNATIONAL WATER AND HUMAN RIGHTS LAW* 59 (2008).
 21. Shareen Hertel & Alanson Minkler, *Economic Rights: The Terrain*, in *ECONOMIC RIGHTS: CONCEPTUAL, MEASUREMENT, AND POLICY ISSUES* 25–26 (Shareen Hertel & Alanson Minkler eds., 2007).
 22. The late Patricia W. Birnie was one of the premiere international environmental law experts of her time. She taught international law in different law schools in the United Kingdom before becoming the founding director of the International Maritime Law Institute in 1988. Alan Boyle, *Patricia Birnie obituary*, *GUARDIAN*, Mar. 14, 2013, available at <https://www.theguardian.com/law/2013/mar/14/patricia-birnie> (last accessed Jan. 26, 2018).
 23. Alan Boyle is a Professor Emeritus of public international law at the University of Edinburgh. He specializes in international law, international environmental law, and the international law of the sea. Edinburgh Law School, Professor Alan Boyle, available at <http://www.law.ed.ac.uk/people/alanboyle> (last accessed Jan. 26, 2018).
 24. PATRICIA W. BIRNIE & ALAN E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 8 (2d ed. 2002).

Having this in mind, this Article embarks with a brief description of the legal, policy, and institutional framework in the Philippines that pertains to the implementation of socioeconomic rights relevant to universal access to affordable, reliable, and modern energy services. In doing so, this Article will be able to identify the legal, regulatory, and policy opportunities and challenges in relation to the attainment of SDG 7 in the Philippines. Next, it examines the practical implications of a human rights-based approach to achieving universal access to affordable, reliable, and modern energy services, in order to demonstrate the transition from theory to practice in the domestic legal regime. Accordingly, the proposition of couching universal access to affordable, reliable, and modern energy services in the human rights language is analyzed in the Philippines for the first time as a scholarly exercise. It argues that as long as energy poverty and inequality persist, a human rights-based approach to access affordable, reliable, and modern energy services remains significant and relevant where the highest domestic court, the Supreme Court, is envisioned to play a vital role in catalyzing legal reforms for a better Philippines.

II. LEGAL, POLICY, AND INSTITUTIONAL FRAMEWORK

As previously mentioned, the socioeconomic rights enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁵ can be institutionalized within the State through its basic law or constitution. This law can be directive in nature; that is, expressed as policy goals or as “an actual listing of enforceable rights.”²⁶ This constitutionalization of socioeconomic rights is not new, as demonstrated by the incorporation of such rights into the basic law of a number of countries, albeit varied in expression, interpretation, and effect.²⁷ Such rights can also be implemented through the acts of the legislature as part of a State’s legal and regulatory framework.²⁸ Whether the implementation route is through the constitutional or legislative approach, Virginia B. Dandan²⁹ remarks that

25. International Covenant on Economic, Social and Cultural Rights, *entered into force* Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR].

26. Hertel & Minkler, *supra* note 21.

27. See WIKTOR OSIATYŃSKI, HUMAN RIGHTS AND THEIR LIMITS 121–25 (2009). These countries include Italy, Ireland, India, Portugal, Spain, and South Africa, among others. *Id.*

28. Hertel & Minkler, *supra* note 21.

“renewed and [vigorous] efforts to integrate [economic, social, and cultural] rights into laws and policies at the national and international levels” are needed.³⁰

A. *The 1987 Philippine Constitution*

After over a decade of martial rule, the Philippines adopted a new fundamental law in 1987 as a product of the people’s democratic struggle and their quest for deep-seated good governance reforms.³¹ Against this backdrop, the 1987 Philippine Constitution features progressive policies and provisions designed to strengthen the various pillars of democracy, promote social justice, and protect the basic rights of the citizenry.³² Under Section 2, Article II on the Declaration of Principles and State Policies, the Philippines adopts generally accepted principles of international law as part of the law of the land.³³ Also, the State is mandated to “promote a just and dynamic social order [...] and free the people from poverty through policies that provide adequate social services, promote full employment, a rising standard of living, and an improved quality of life for all.”³⁴ Moreover, it provides that the State shall “promote social justice in all phases of national development.”³⁵ Further, the State “values the dignity of every human

29. Virginia B. Dandan is an “internationally recognized expert in economic, social and cultural rights[.]” She was a former independent expert on international solidarity for the Office of the United Nations High Commissioner for Human Rights, as well as the former Chairperson of the United Nations Committee on Economic, Social, and Cultural Rights. Office of the United Nations High Commissioner for Human Rights, Bio of Ms. Virginia Dandan, *available at* <http://www.ohchr.org/EN/Issues/Solidarity/Pages/VirginiaDandan.aspx> (last accessed Jan. 26, 2018).

30. Virginia B. Dandan, *Foreword* to ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A LEGAL RESOURCE GUIDE x (Scott Leckie & Anne Gallagher eds., 2006).

31. JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 48-52 (2009 ed.).

32. *See* PHIL. CONST. arts. II, III, V, XIII, & XIV.

33. PHIL. CONST. art. II, § 2.

34. PHIL. CONST. art. II, § 9.

35. PHIL. CONST. art. II, § 10.

person and guarantees full respect for human rights[,]”³⁶ and is mandated to “promote comprehensive rural development[.]”³⁷

The 1987 Philippine Constitution places such a high premium on social justice and human rights that it devotes one whole article on the subject matter.³⁸ To reduce economic, social, and political inequalities, the fundamental law mandates the legislature to give the highest priority to enacting measures that “protect and enhance the right of all the people to human dignity,”³⁹ and a commitment on the part of the State “to create economic opportunities based on freedom of initiative and self-reliance.”⁴⁰ Moreover, the State “shall endeavor to make essential goods, health[,] and other social services available to all the people at affordable cost”⁴¹ and give “priority for the needs of the underprivileged[,] sick, elderly, disabled, women, and children.”⁴² Other constitutional provisions on education, women, and labor, among others, are provided in the fundamental law.⁴³ Clearly, the 1987 Philippine Constitution echoes and reiterates the socioeconomic rights enshrined in the ICESCR.

B. National Legislation

To implement the above constitutional statements and policies, however, subsequent legislative action is needed to give flesh to many of these constitutional provisions.⁴⁴ As the Supreme Court elucidates, “the provisions of Article II of the 1987 Philippine Constitution, the declarations of principles and [S]tate policies[,] are not self-executing.”⁴⁵ It adds that “[l]egislative failure to pursue such policies cannot give rise to a cause of action in the courts.”⁴⁶ Similarly, the social justice provisions of the 1987

36. PHIL. CONST. art. II, § 11.

37. PHIL. CONST. art. II, § 21.

38. See PHIL. CONST. art. XIII.

39. PHIL. CONST. art. XIII, § 1.

40. PHIL. CONST. art. XIII, § 2.

41. PHIL. CONST. art. XIII, § 11.

42. PHIL. CONST. art. XIII, § 11.

43. See PHIL. CONST. arts. XIII–XIV.

44. *Basco v. Phil. Amusements and Gaming Corporation*, 197 SCRA 52, 68 (1991).

45. *Espina v. Zamora, Jr.*, 631 SCRA 17, 26 (2010) (citing *Tañada v. Angara*, 272 SCRA 18, 54 (1997)).

46. *Id.*

Philippine Constitution “are not self-executing principles ready for enforcement through the courts[.]”⁴⁷ and, therefore, “legislative enactment is required.”⁴⁸ In brief, these constitutional provisions are “but guidelines for legislation.”⁴⁹ The critical role of the Supreme Court in relation to the interpretation of Article II and related constitutional provisions will be further discussed in the next part of this Article.

Essentially, universal access to affordable, reliable, and modern energy services is embedded in legislative measures on climate change, environmental protection, renewable energy, and rural electrification, among others. Specifically, the institutions mandated to oversee the electricity sector also pursue the achievement of these goals. It must be noted that achieving universal access to affordable, reliable, and modern energy services requires “a powerful political consensus and [must be] supported by legal institutions.”⁵⁰ Pertinently, the Energy Regulatory Commission (ERC), as the independent regulator for the electricity industry in the Philippines, promulgated the Magna Carta for Residential Electricity Consumers (Magna Carta) in 2004, which expressly recognizes that a residential consumer has the right to electricity service.⁵¹ In addition, a residential consumer has the following basic rights:

- (a) To have quality, reliable, affordable, safe, and regular supply of electric power;
- (b) To be accorded courteous, prompt[,], and non-discriminatory service by the electric service provider;
- (c) To be given a transparent, non-discriminatory[,], and reasonable price of electricity consistent with the provisions of [Republic Act] No. 9136;
- (d) To be an informed electric consumer and given adequate access to information on matters affecting the electric service of the consumer concerned;

47. Bureau of Fisheries and Aquatic Resources (BFAR) Employees Union, Regional Office No. VII, Cebu City v. Commission on Audit, 562 SCRA 134, 138 (2008).

48. *Id.* at 138–39.

49. *Id.* at 139.

50. See Richard Barnett, *Human Rights Implications of Corporate Food Policies*, in *THE POLITICS OF HUMAN RIGHTS* 148 (Paula R. Newberg ed., 1980).

51. Energy Regulatory Commission, Magna Carta for Residential Electricity Consumers, art. 4 (June 17, 2004).

- (e) To be accorded prompt and speedy resolution of complaints by both the distribution utility and/or the ERC;
- (f) To know and choose the electric service retailer upon the implementation of Retail Competition; and[.]
- (g) To organize themselves as a consumer organization in the franchise area where they belong and where they are served by the distribution utility or as a network of organizations.⁵²

Notably, any violation of any of the basic rights recognized under the Magna Carta carries a corresponding penalty, which the ERC may impose in accordance with law.⁵³ This means that a residential consumer has an actionable or operable right that can be redressed before the ERC.

Other socioeconomic rights are expressed and pursued through various pieces of legislation and government programs, including, but not limited to, the implementation of mass housing projects,⁵⁴ the establishment of financial schemes that “will make available, at affordable cost, decent housing and basic services to underprivileged and homeless citizens[.]”⁵⁵ and continuous support to “the government’s programs for urban and rural housing, resettlement, [and] the development of sites and services[.]”⁵⁶ Undeniably, there is manifest legislative intent to give effect to the socioeconomic rights and human rights standards enshrined in the 1987 Philippine Constitution, such rights acting as overarching themes to the initiatives from which coherence and consistency can be drawn. Also, this intent is reflected in the “provisioning role” of the legislature with respect to the allocation of public

52. *Id.*

53. *Id.* at 14.

54. *See* Creating the National Housing Authority and Dissolving the Existing Housing Agencies, Defining its Powers and Functions, Providing Funds Therefor, and for Other Purposes, Presidential Decree No. 757 (1975).

55. An Act Providing for a Comprehensive and Integrated Shelter and Urban Development Financing Program by Increasing and Regularizing the Yearly Appropriation of the Major Components of the National Shelter Program, Including the Abot-Kaya Pabahay Fund Under Republic Act No. 6846, Augmenting the Authorized Capital Stock and Paid-Up Capital of the National Home Mortgage Finance Corporation (NHMFC) and the Home Insurance and Guaranty Corporation (HIGC), Identifying Other Sources of Funding and Appropriating Funds for the Purposes [Comprehensive and Integrated Shelter Financing Act of 1994], Republic Act No. 7835, § 2 (1994).

56. *Id.* § 3 (a).

funds or resources as captured in the national budget process.⁵⁷ At times, such provisioning comes in the form of government subsidies to accelerate household electrification in off-grid areas, or to support rural electrification programs using solar power systems implemented by public agencies such as the Department of Energy.⁵⁸ However, this kind of provisioning is vulnerable to the politics and dynamics of the national budget process.⁵⁹ As Andrew Norton⁶⁰ and Diane Elson⁶¹ aptly describe, “[t]he process of allocation of resources to different institutions and purposes is essentially a political, rather than purely technocratic one.”⁶² Therefore, how to insulate key policy and development priorities from “politicized attack” and “creat[ing] safeguards for the weakest” members of society poses significant challenges in giving effect to socioeconomic rights in the domestic realm,⁶³ including access to affordable, reliable, and modern energy services, especially in the countryside.

57. Hertel & Minkler, *supra* note 21, at 26.

58. See Department of Energy, Accelerating Household Electrification in Off-Grid and Isolated Areas Through Electricity Supply by Regulated Solar Home Systems, Department Circular No. DC2014-07-0012 [DOE Dept. Circ. No. 2014-07-0012] (July 3, 2014).

59. ANDREW NORTON & DIANE ELSON, WHAT’S BEHIND THE BUDGET? POLITICS, RIGHTS AND ACCOUNTABILITY IN THE BUDGET PROCESS 6 (2002).

60. Andrew Norton is an applied anthropologist whose expertise includes natural resource governance, social policy, social inclusion, human rights, and urban social change, among others. He is currently a director of the International Institute for Environment and Development. International Institute for Environment and Development, Andrew Norton, *available at* <https://www.iied.org/users/andrew-norton> (last accessed Jan. 26, 2018).

61. Dianne Elson is a sociologist and a Professor Emeritus at the University of Essex. She is an expert on gender inequality and economic policy, and has served as adviser for several United Nations and international bodies. Historical Materialism, Diane Elson, *available at* <http://www.historicalmaterialism.org/news/diane-elson-economic-inequality-and-gender-inequality-21-february-soas> (last accessed Jan. 26, 2018).

62. NORTON & ELSON, *supra* note 59, at 6.

63. Hertel & Minkler, *supra* note 21, at 26.

C. *The Supreme Court, Environmental Constitutionalism, and Energy Access*

So far, the vital role of the executive and legislative branches of government can readily be seen in the promotion of socioeconomic rights,⁶⁴ including those actions and measures undertaken that have implications on access to affordable, reliable, and modern energy services. While notionally described as taking a passive role, the Supreme Court plays an equally significant function in giving effect to the various constitutional provisions for the promotion, protection, and fulfilment of human rights, particularly socioeconomic rights.⁶⁵ As mentioned earlier, the Supreme Court has reaffirmed in numerous instances the directive nature of the Declaration of Principles and State Policies and the social justice provisions of the 1987 Philippine Constitution.⁶⁶ However, the idea that the 1987 Philippine Constitution may immediately protect socioeconomic rights, including the guarantee of access to affordable, reliable, and modern energy services, has its genesis in one landmark case — *Oposa v. Factoran, Jr.*⁶⁷ In this case, which was a taxpayers' class suit seeking the cancellation of all timber license agreements in the Philippines,⁶⁸ the Supreme Court pronounced the following legal precedent —

While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation [—] aptly and fittingly stressed by the petitioners [—] the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as [S]tate policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the [S]tate a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation,

64. BERNAS, *supra* note 31, at 35-38.

65. See *Kilosbayan, Incorporated v. Morato*, 246 SCRA 540, 564 (1995).

66. BERNAS, *supra* note 31, at 35-38.

67. *Oposa v. Factoran, Jr.*, 224 SCRA 792 (1993).

68. *Id.* at 796 (citing 1997 RULES OF CIVIL PROCEDURE, rule 3, § 12).

but also for those to come [—] generations which stand to inherit nothing but parched earth incapable of sustaining life.⁶⁹

In arriving at this conclusion, the Supreme Court cited the duty of a government agency to protect and advance the right to a balanced and healthful ecology pursuant to its statutory mandate under various legislative enactments.⁷⁰ In a separate concurring opinion, however, Justice Florentino P. Feliciano cautioned that the “result will [...] propel courts into the uncharted ocean of social and economic policy[-]making[.]”⁷¹ considering that “no specific, operable norms and standards are shown to exist[.]”⁷² In effect, concerns are raised regarding the application of the doctrine of separation of powers entrenched in the 1987 Philippine Constitution, that is, “the policy[-]making departments [—] the legislative and executive departments [—] must be given a real and effective opportunity to fashion and promulgate those norms and standards, and to implement them before the courts should intervene.”⁷³ As Richard A. Posner, former chief judge of the United States Court of Appeals for the Seventh Circuit, observes, “[t]he more [courts are] seen as preoccupied with ‘hot-button’ constitutional cases, the more it looks like a political body exercising discretion comparable in breadth to that of a legislature.”⁷⁴

Dante B. Gatmaytan⁷⁵ expresses some other reservations and shortcomings about the case⁷⁶ and, with a tinge of sarcasm, opines that there is still occasion to “celebrate *Oposa*”⁷⁷ for holding that “the constitutional provision on the right to a balanced and healthful ecology is an actionable

69. *Oposa*, 224 SCRA at 804-05 (emphases supplied).

70. *Id.* at 808.

71. *Oposa*, 224 SCRA at 818 (J. Feliciano, concurring opinion).

72. *Id.*

73. *Id.*

74. RICHARD A. POSNER, *HOW JUDGES THINK* 271 (2008).

75. Dante B. Gatmaytan is a professor of law at the University of the Philippines College of Law. He is a prolific scholar and author on constitutional law. University of the Philippines College of Law, Dante B. Gatmaytan, *available at* <http://law.upd.edu.ph/dante-gatmaytan/dbgpublications> (last accessed Jan. 26, 2018).

76. Dante B. Gatmaytan, *The Illusion of Intergenerational Equity: Oposa v. Factoran as Pyrrhic Victory*, 15 GEO. INT'L ENVTL. L. REV. 457, 459-60 (2003).

77. *Id.* at 480.

right that is superior to the Bill of Rights.”⁷⁸ On the other hand, Ma. Socorro Z. Manguiat and Vicente Paolo B. Yu, III⁷⁹ contend that the ultimate value of this case “lies in the extent to which the decision advances the state of the law in pursuit of the public welfare[,]”⁸⁰ even “where the law itself is unclear or ambiguous so as to arrive at a decision and thereby clarify the meaning of the law as enacted by the legislature.”⁸¹ This resonates in Duncan Kennedy’s⁸² observation regarding adjudication —

At a minimum, judges often have the job of resolving gaps, conflicts, or ambiguities in the system of legal norms. In some cases, no amount of reformulation based on the underlying definitions of the words composing the arguably applicable rules produces a deductively valid resolution. When it is agreed there is a gap, conflict, or ambiguity in this sense, then it is also

78. *Id.* at 460.

79. Ma. Socorro Z. Manguiat (Atty. Manguiat) and Vicente Paolo B. Yu, III (Atty. Yu) are Filipino lawyers who specialize in international environmental law. Atty. Manguiat has worked for several different international organizations concerned with nature conservation, such the Law Division of the United Nations Environment, as Head of the Law Unit; and the Climate Change Secretariat, as part of the Legal Affairs Programme. University of Edinburgh, Global environmental law practitioners share insights with LLM students, *available at* http://www.law.ed.ac.uk/other_areas_of_interest/news/all_news/global_environmental_law_practitioners_share_insights_with_llm_students (last accessed Jan. 26, 2018) & Climate Law and Governance Initiative, Maria Socorro Manguiat, Programme Committee, *available at* <http://www.climatelawgovernance.org/ourteam/maria-manguiat> (last accessed Jan. 26, 2018).

Atty. Yu is a Programme Coordinator for the South Centre’s Global Governance for Development Program. He has also worked for the World Trade Organization, Friends of the Earth International, and the Legal Rights and Natural Resources Center (Philippines), as an expert in international trade law and international environment law. International Centre for Trade and Sustainable Development, Vicente Paolo Yu, *available at* <https://www.ictsd.org/about-us/vicente-paolo-yu> (last accessed Jan. 26, 2018).

80. Ma. Socorro Z. Manguiat & Vicente Paolo B. Yu, III, *Maximizing the Value of Oposa v. Factoran*, 15 GEO. INT’L ENVTL. L. REV. 487, 488 (2003).

81. *Id.*

82. Duncan Kennedy is the Carter Professor of General Jurisprudence at Harvard Law School, and regularly publishes on topics such as legal theory, legal thought, and legal history, among others. Harvard Law School, Duncan Kennedy, *available at* <http://hls.harvard.edu/faculty/directory/10469/Kennedy> (last accessed Jan. 26, 2018).

agreed that the judge who resolves it ‘makes’ a new rule and then applies it to the facts, rather than merely applying a pre[-]existing rule.⁸³

Thus, the judiciary is expected to fill the gap, especially when the law is ambiguous and when conflicts need to be resolved.

Speaking of the value and potential of jurisprudential pronouncements, the words of Albert Louis “Albie” Sachs, former judge of the Constitutional Court of South Africa, come to mind. Regarding fundamental rights, the role of the Constitutional Court of South Africa, and what is needed in jurisprudence for the implementation of socioeconomic rights in South Africa in light of the cases of *The Government of the Republic of South Africa v. Grootboom*,⁸⁴ *Soobramoney v. Minister of Health (Kwazulu-Natal)*,⁸⁵ and *Minister of Health v. Treatment Action Campaign*⁸⁶ —

The fact that we are not up for election is an advantage. We are not running for office; we are not doling money to people who are going to vote for us, or trying to be seen to do that. We are simply sticking to the principles, the deep principles of what makes a society basically decent and politically moral, when attempting to adhere to fundamental rights. The fact that we are not up for election is a strength, not a weakness.

Each of the fundamental rights [—] the dignity rights, material rights, bread rights, litigation rights, voting rights, [and] freedom rights [—] might in a particular case come to the fore, but they are interrelated. They are all part and parcel of the character of the society in which we live [...] The phrase that all human rights are universal, interrelated, and indivisible[] sounds good, but it does not only sound good, it is actually needed in jurisprudence.⁸⁷

Similar to human rights, many of the rights under the 1987 Philippine Constitution require access to affordable, reliable, and modern energy services in order to be respected, protected, and fulfilled. At the very least,

83. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 28 (1997).

84. *The Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC) (2001) (S. Afr.).

85. *Soobramoney v. Minister of Health (Kwazulu-Natal)*, 1998 (1) SA 765 (CC) (1998) (S. Afr.).

86. *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 703 (CC) (2002) (S. Afr.).

87. Albie Sachs, *Enforcement of Social and Economic Rights*, 22 AM. U. INT’L L. REV. 673, 694 (2007).

access to these services (e.g., electricity) is arguably part of Philippine society's constitutive commitment, which Cass R. Sunstein and Randy E. Barnett⁸⁸ describe as helping "to create, or to constitute, a society's basic values[.]"⁸⁹ the denial of which "would amount to a kind of breach [—] a violation of a trust."⁹⁰ For this reason, it is very tempting to analogize and explore the approach taken in *Oposa* in considering whether access to affordable, reliable, and modern energy services is guaranteed, by way of derivation and centrality,⁹¹ under the various laws enacted by the legislature which seek to implement the socioeconomic provisions of the 1987 Philippine Constitution and the Philippines' international human rights commitments. Accordingly, universal access to affordable, reliable, and modern energy services as a "judicialized matter"⁹² is a fascinating but controversial proposition that adds scope for further research. As Michael D. Kirby, former Justice of the High Court of Australia, remarks, the challenge to the modern judiciary "is to find where the line lies in a particular case, at a particular time and place."⁹³ To find where this line falls in the context of

88. Cass R. Sunstein is the Robert Walmsley University Professor at Harvard Law School, and has authored several books and articles on constitutional law, environmental law and policy, and law and economics. Harvard Law School, Cass R. Sunstein, *available at* <http://hls.harvard.edu/faculty/directory/10871/Sunstein> (last accessed Jan. 26, 2018).

Randy E. Barnett is the Carmack Waterhouse Professor of Legal Theory at the Georgetown University Law Center, and has authored several books and articles on constitutional law. Randy E. Barnett, *Biography*, *available at* <http://www.randybarnett.com/biography> (last accessed Jan. 26, 2018).

89. Randy E. Barnett & Cass R. Sunstein, *Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue*, 53 *DRAKE L. REV.* 205, 217 (2005).

90. *Id.*

91. This pertains to the use of analytical and interpretative techniques that seek to derive an implied right from existing rights, including indispensability considerations in realizing other rights. See Salman M.A. Salman, *The Human Right to Water—Challenges of Implementation*, 106 *AM. SOC'Y INT'L L.* 44 (2012).

92. PAUL O. CARRESE, *THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM* 261 (2003). Paul O. Carrese refers to the tendency to "[judicialize] matters that, while in need of moral principle and order, nonetheless properly lie either largely or completely outside the competence of courts of law, in the domains of legislative and executive power." *Id.*

93. Michael D. Kirby, *Judicial Activism*, 27 *W. AUSTRAL. L. REV.* 1, 19 (1997).

achieving universal access to modern energy services in the Philippines today is a scholarly exercise worthy of exploration.

D. The Commission on Human Rights

The Philippines has constitutionally mandated the creation of an independent constitutional commission on human rights, as a significant inroad to institutionalizing human rights into the legal, policy, and regulatory framework of the country.⁹⁴ To carry out its mandate, the Commission on Human Rights (CHR) is empowered by the 1987 Philippine Constitution to do the following, among others⁹⁵:

- (1) “Investigate, on its own or on complaint by any party, all forms of human rights violations involving civil and political rights;”⁹⁶
- (2) “Provide appropriate legal measures for the protection of human rights of all persons within the Philippines, as well as Filipinos residing abroad, and provide for preventive measures and legal aid services to the underprivileged whose human rights have been violated or need protection;”⁹⁷
- (3) “Recommend to the Congress effective measures to promote human rights and to provide for compensation to victims of violations of human rights, or their families;”⁹⁸
- (4) “Monitor the Philippine [g]overnment’s compliance with international treaty obligations on human rights;”⁹⁹ and
- (5) “Grant immunity from prosecution to any person whose testimony or whose possession of documents or other evidence is necessary or convenient to determine the truth in any investigation conducted by it or under its authority[.]”¹⁰⁰

94. PHIL. CONST. art. XIII, § 17.

95. PHIL. CONST. art. XIII, § 18. This can include socioeconomic and cultural rights under the ICESCR.

96. PHIL. CONST. art. XIII, § 18, ¶ 1.

97. PHIL. CONST. art. XIII, § 18, ¶ 3.

98. PHIL. CONST. art. XIII, § 18, ¶ 6.

99. PHIL. CONST. art. XIII, § 18, ¶ 7.

100. PHIL. CONST. art. XIII, § 18, ¶ 8.

By virtue of Executive Order No. 163, Series of 1987,¹⁰¹ the CHR was formally constituted.¹⁰² In 1991, the Supreme Court elucidated in the case of *Cariño v. Commission on Human Rights*¹⁰³ that the CHR primarily exercises only investigatory power; that is, the power to “receive evidence and make findings of fact as regards claimed human rights violations involving civil and political rights.”¹⁰⁴ It does not, however, possess adjudicatory power similar to a court of justice or a quasi-judicial agency that calls for “applying the law to those factual conclusions to the end that the controversy may be decided or determined authoritatively, finally[,] and definitively, subject to such appeals or modes of review as may be provided by law.”¹⁰⁵

However, Congress has the prerogative to expand the mandate and authority of the CHR.¹⁰⁶ In 2011, some legislators initiated bills to empower the CHR, not only to investigate all forms of human rights violations, including economic, social, and cultural rights violations, but also to prosecute such violations and provide corresponding legal and preventive measures for the protection of human rights.¹⁰⁷ Unfortunately, the legislative process can be very slow and tedious. Lacking political pressure and urgency, the bills were not enacted into law, although they can be re-filed depending on the legislative priorities of current and future administrations.

Despite its limited functions,¹⁰⁸ the CHR has come out with significant findings that touch on the application of international and national laws on human rights in the Philippines. In one instance, the Catholic Bishops’

101. Declaring the Effectivity of the Creation of the Commission on Human Rights as Provided for in the 1987 Constitution, Providing Guidelines for the Operation Thereof, and for Other Purposes, Executive Order No. 163 [E.O. No. 163, s. 1987], § 1 (May 5, 1987).

102. *Id.* § 1.

103. *Cariño v. Commission on Human Rights*, 204 SCRA 483 (1991).

104. *Id.* at 492.

105. *Id.*

106. *See* PHIL. CONST. art. XIII, § 19. The said provision states that “[t]he Congress may provide for other cases of violations of human rights that should fall within the authority of the Commission, taking into account its recommendations.” PHIL. CONST. art. XIII, § 19.

107. *See* An Act Strengthening the Functional and Structural Organization of the Commission on Human Rights, and for Other Purposes, S.B. No. 2818, 15th Cong., 1st Reg. Sess. (2011).

108. PHIL. CONST. art. XIII, § 18.

Conference of the Philippines (CBCP), the National Secretariat for Social Action - Justice and Peace (NASSA), and the Caritas Philippines (CP) sought a human rights advisory from the CHR, alleging that the Purchased Power Adjustments (PPA) — a cost adjustment mechanism to reflect changes in the cost of power bought from State-owned and private power producers — imposed by a private power utility company on consumers involved onerous contracts that violated human rights.¹⁰⁹ Specifically, CBCP, NASSA, and CP relied on Section 9, Article II of the 1987 Philippine Constitution.¹¹⁰ The groups also alleged that the PPA violated Section 25 (1) of the Universal Declaration of Human Rights (UDHR),¹¹¹ which emphasizes every individual's right "to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing[,] [] medical care[,] and necessary social services[.]"¹¹² In responding to the request for advisory, the CHR took into consideration the social implications of the PPA on the lives of the citizenry, including the impact on the government, the private sector, and the general public.¹¹³ The CHR then came out with the following conclusion, which demonstrates the type of rationalization that is expected from applying a human rights-based approach to the matter —

For the past seven [] or eight [] years of its imposition, the PPA has been the cause of deprivation to Filipinos, not only because they were not consulted in its ordination in the statements of accounts of electric consumption, but more so because the rights enshrined in the Constitution and [the UDHR] have been curtailed when the amount paid for the PPA may have been the same amount that may be utilized to alleviate the lot of the Filipinos for the period past.

These are pressing issues that need to be responded to and revisited by the [g]overnment and the entities charged with the distribution of power supply, since it is a [S]tate obligation to [to] regulate non-[S]tate actors in their impositions that affect the lives of the ordinary people.

109. Commission on Human Rights, *On Purchased Power Adjustments*, CHR (III) – A002 – 2002 (Dec. 10, 2002).

110. *Id.* (citing PHIL. CONST. art. II, § 9).

111. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

112. Commission on Human Rights, *supra* note 109 (citing UDHR, *supra* note 111, art. 25 (1)).

113. Commission on Human Rights, *supra* note 109.

In the meantime, more deprivation may occur and the long years of PPA imposition may reach to a decade prolonging the Filipino's suffering. This should somehow be tempered by the suspension of the PPA imposition in the meantime that other measures are being resorted to ensure sustained and efficient delivery of the electricity.¹¹⁴

Another significant human rights dimension that the CHR had the occasion to explain was the relevance of the Rights-Based Approach (RBA) to development and governance in the Philippines.¹¹⁵ The advisory begins by noting that the country is a signatory to at least 23 international human rights instruments under the auspices of the United Nations (UN).¹¹⁶ According to the CHR, these instruments contain the human rights standards to be observed in the development process, which can be achieved by purposely "mainstreaming human right standards in development and governance."¹¹⁷ The CHR clarifies that

[t]he realization of human rights is the goal of all development efforts. Governance manages development. This brings to the fore the importance of consciously and deliberately mainstreaming human rights standards in development and governance.

The [RBA] is a mainstreaming process to link human rights to development. As an approach to development, it essentially integrates the norms, standards[,] and principles of the international human rights system into plans, policies[,] and processes of development.

114. *Id.*

115. Commission on Human Rights, On Applying the Rights Based Approach (RBA) to Development and Governance, CHR (III) – A2004 – 003 (June 23, 2004). The Philippines has ratified or is a party to, among others, the UDHR, International Covenant on Civil and Political Rights, ICESCR, Convention on the Rights of the Child, Convention Against Torture, Convention on the Elimination of Discrimination Against Women, Convention on the Elimination of Racial Discrimination, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and United Nations Declaration on the Right to Development. See University of Minnesota Human Rights Library, Ratification of International Human Rights Treaties – Philippines, available at <http://hrlibrary.umn.edu/research/ratification-philippines.html> (last accessed Jan. 26, 2018).

116. Commission on Human Rights, *supra* note 109.

117. *Id.*

The RBA is founded on the [UN] Declaration on the Right to Development and on the various international human rights instruments to which the Philippines is a [S]tate party. Being a [S]tate party means that the Philippine government has the primary responsibility, duty[,] or obligation to comply with all the obligations in the ratified or signed treaties/instruments. The Philippine government and all its branches, agencies, instrumentalities[,] and institutions will be able to comply with its obligations as it applies the RBA in governance and development.¹¹⁸

Accordingly, the CHR, as the primary and constitutional authority on human rights matters and issues in the country, has unequivocally affirmed the relevance and applicability of using a human rights-based approach and the need to mainstream human rights standards into the development process and governance framework of the Philippines.¹¹⁹

III. THE SIGNIFICANCE OF A HUMAN RIGHTS-BASED APPROACH TO ACCESS AFFORDABLE, RELIABLE, AND MODERN ENERGY SERVICES IN THE PHILIPPINES

A. Operationalizing the Concept of Equality and Non-Discrimination

The persistent poverty and pronounced socioeconomic inequality that has dogged Philippine society for decades are two of the unwanted by-products of uneven and non-inclusive economic growth in the past.¹²⁰ Additionally, discrimination creeps in as a result, which is incompatible with the ideal of inclusive growth in the country.¹²¹ The UN's Committee on Economic, Social and Cultural Rights (CESCR) elucidates that an individual or group's socioeconomic situation in tandem with poverty may give rise to "pervasive

118. *Id.* (citing Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986)).

119. BERNAS, *supra* note 31, at 1275-77.

120. See National Economic and Development Authority, Philippine Development Plan 2011-2016 at 18-21, available at <http://www.neda.gov.ph/wp-content/uploads/2013/09/CHAPTER-1.pdf> (last accessed Jan. 26, 2018).

121. *Id.* at 18. The National Economic and Development Authority defines "inclusive growth" as, "first of all, growth that is rapid enough to matter, given the country's large population, geographical differences, and social complexity." *Id.* Furthermore, "[i]t is sustained growth that creates jobs, draws the majority into the economic and social mainstream, and continuously reduces mass poverty." *Id.*

discrimination, stigmatization[,] and negative stereotyping,”¹²² which can spawn unequal access to the same quality of basic social services available to others.¹²³ Stephen R. Tully (Tully)¹²⁴ points to the example of Bolivia, a country that reformed its electric power industry set-up by unbundling generation, transmission, and distribution into separate functions.¹²⁵ Also, Tully notes that “[a]lthough electricity became more accessible to urban residents, rural households enjoyed no discern[.]ble improvement after more than a decade, and coverage for the poor declined.”¹²⁶ Accordingly, this constrains the government to directly confront issues of discrimination and inequality, including the elimination of the formal and de facto discrimination¹²⁷ of those who particularly suffer from “historical or persistent prejudice[,]”¹²⁸ such as the poverty-stricken and off-grid rural populace.

Interestingly, socioeconomic inequality and discrimination is manifested in the phenomena called “regulatory capture,”¹²⁹ which Michael A. Livermore and Richard L. Revesz¹³⁰ describe as occurring in “situations

122. U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 35, U.N. Doc. E/C.12/GC/20 (July 2, 2009) [hereinafter General Comment No. 20].

123. *Id.*

124. Stephen R. Tully is a post doctorate fellow from the London School of Economics, Economic and Social Research Council Centre for Analysis of Risk and Regulation. RESEARCH HANDBOOK ON CORPORATE LEGAL RESPONSIBILITY xi (Stephen R. Tully ed., 2005).

125. Stephen R. Tully, *The Contribution of Human Rights to Universal Energy Access*, 4 NW. J. INT'L HUM. RTS. 518, 520 (2006).

126. *Id.*

127. General Comment No. 20, *supra* note 122, ¶ 8.

128. *Id.*

129. Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1340 (2013).

130. Michael A. Livermore is a professor of law at the University of Virginia School of Law. He specializes in regulatory law and policy, as well as environmental law. University of Virginia School of Law, Michael A. Livermore, *available at* <https://content.law.virginia.edu/faculty/profile/mal5un/2457619> (last accessed Jan. 26, 2018).

Richard L. Revesz is the Lawrence King Professor and Dean Emeritus at New York University School of Law. He is “one of the nation’s leading voices in the

where organized interest groups successfully act to vindicate their goals through government policy at the expense of the public interest.”¹³¹ Apparently, the massive financial, political, and structural support to conventional power technologies over a substantial period of time had not only distorted electricity markets, but also made the electricity industry vulnerable to regulatory capture.¹³² This has spawned inequality and discrimination on who should have access to electricity services, as can be gleaned from the prolonged inability of the government to extend electricity access to the rural poor in remote areas on oft-cited socioeconomic grounds.¹³³ With historical support and preference for conventional power technologies, the rural poor will remain at a relative disadvantage and systemically discriminated against,¹³⁴ unless all appropriate measures and means are adopted by government to ensure that access to electricity services is available to everyone, regardless of socioeconomic status and location.

The CESCR explains that an active and comprehensive approach is required to overcome systemic discrimination, behavior, attitudes, and practices in relation to vulnerable and disadvantaged individuals and groups such as the rural poor.¹³⁵ This entails a range of laws, policies, and programs, including temporary measures, to eliminate inequality and systemic discrimination.¹³⁶ Since Renewable Energy (RE) technology is

fields of environmental and regulatory law and policy.” New York University Law, Richard L. Revesz, *available at* <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=20228> (last accessed Jan. 26, 2018).

131. *Id.*

132. Richard Javad Heydarian, PHL electricity crisis: How regulatory capture undermines emerging markets, *available at* <http://www.gmanetwork.com/news/opinion/content/341534/phl-electricity-crisis-how-regulatory-capture-undermines-emerging-markets/story> (last accessed Jan. 26, 2018).

133. *Id.*

134. General Comment No. 20, *supra* note 122, ¶ 9. The Committee on Economic, Social and Cultural Rights (CESCR) notes that “systemic discrimination” can be understood in terms of “legal rules, policies, practices[,] or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.” *Id.* ¶ 12.

135. *Id.* ¶ 39.

136. *Id.*

acknowledged as the default technology for less costly¹³⁷ and more environment-friendly electrification of off-grid rural areas,¹³⁸ a human rights-based approach to access to affordable, reliable, and modern energy services opens the door for RE technologies to overcome cost-related and technological impediments consistent with the equality, non-discrimination, and adequacy norms under the international human rights legal regime. This lineal human rights-based approach has what Ellen Wiles (Wiles)¹³⁹ describes as “an ameliorative effect on the process of policy development, by increasing the precision of diagnosing problems and prescribing future developments.”¹⁴⁰ Also, a human rights-based approach to access affordable, reliable, and modern energy services gives effect to the constitutional mandate of the government to promote a balanced and healthful ecology and rural development, to reduce social and economic inequalities, and to demonstrate a firm commitment on its part to create economic opportunities for all Filipinos.¹⁴¹ Therefore, guaranteeing access to affordable, reliable, and modern energy services not only satisfies the fulfilment of the State’s obligation to effectively implement Article 11, Paragraph 1 of the ICESCR in the domestic context,¹⁴² but also gives life to the constitutional rights, aspirations, and directives enshrined in the 1987 Philippine Constitution.

B. Shifting the Accountability from Private Franchisee/Contractor to the State

While the government remained at the forefront of policy-making, regulating, and monitoring national electrification programs, several modes such as privatization, deregulation, and franchising have been resorted to as the anchor for electricity industry reform in order to attain energy efficiency

137. International Renewable Energy Agency, Renewable Power Generation Costs in 2014 at 17, available at https://www.irena.org/documentdownloads/publications/irena_re_power_costs_2014_report.pdf (last accessed Jan. 26, 2018).

138. *Id.* at 14.

139. Ellen Wiles practiced law in the United Kingdom for seven years, specializing in human rights law. She helped develop a justice system in a refugee camp in Thailand before focusing on literature, research, and writing. University of Stirling, Ellen Wiles, available at <https://www.stir.ac.uk/arts-humanities/research/phdstudents/ellenwiles> (last accessed Jan. 26, 2018).

140. Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT’L L. REV. 35, 44 (2006).

141. See PHIL. CONST. art. II, §§ 16 & 21 & art. XIII, §§ 1-2.

142. ICESCR, *supra* note 25, art. 11, ¶ 1.

and complete the electrification of the entire country, among others.¹⁴³ The figures indicate that the number of impoverished families and individuals, mostly in rural areas, who are still without access to electricity services remain alarmingly significant.¹⁴⁴ While private sector participation was anticipated to provide better electricity service to consumers, it did not necessarily result in the expansion of access to electricity services in rural areas, particularly for the poor.¹⁴⁵ Aside from systemic discrimination and possible State capture, another plausible explanation that prolongs the total electrification process, especially of off-grid areas, is the inherent compliance weakness of shifting to private contractors or franchisees an obligation that is clearly reposed in the government.¹⁴⁶ Tully notes that “governments have historically made little effort to improve electricity access, particularly for the poor.”¹⁴⁷ Under a monopolistic arrangement in the provision of electricity services, the energy sector efficiency and liberalization model had not been equally up to the task in improving electricity access by disadvantaged socioeconomic groups.¹⁴⁸ Worse, the lack of political commitment at the national level and the overwhelming concern for financial viability seem to ensure that “market reforms would not support greater access” to electricity services by impoverished rural households.¹⁴⁹

In the Philippines, a private franchised utility can justify the non-delivery of electricity services to unviable areas and, in turn, exclude such areas from its service coverage.¹⁵⁰ The current regulatory weakness in

143. Heydarian, *supra* note 132.

144. International Energy Agency, *supra* note 8.

145. Tully, *supra* note 125, at 519.

146. See Department of Energy, Prescribing the Guidelines for Participation of Qualified Third Parties (QTPs) for Provision of Electric Service in Remote and Unviable Areas, Pursuant to Sections 59 and 70 of “The Electric Power Industry Reform Act of 2001,” and its Implementing Rules and Regulations (IRR), Department Circular No. 2005-12-011 [DOE Dept. Circ. No. 2005-12-011], § 3 (e) (Dec. 12, 2005).

147. Tully, *supra* note 125, at 518.

148. *Id.* at 518-19.

149. *Id.* at 519.

150. An Act Ordaining Reforms in the Electric Power Industry, Amending for the Purpose Certain Laws and for Other Purposes [Electric Power Industry Reform Act of 2001], Republic Act No. 9136, § 59 (2001). Section 59 of Electric Power Industry Reform Act of 2001 provides that “[t]he provision of electric service in

ensuring access to electricity services by the rural poor is reflected in the remedial measure that seeks to authorize entry by qualified third parties into remote and unviable villages covered by a franchised utility's obligation.¹⁵¹ The scheme does not only guarantee that there will be qualified third-party applicants for the declared unviable areas, but also arguably provides a justification to exclude non-profitable areas from a franchisee's responsibility.¹⁵² In the absence of qualified third parties, the unviable areas are included in the government's missionary electrification program, thereby effectively shifting back the obligation to provide such service to the government.¹⁵³ Until this shift happens, the service vacuum is further prolonged.

From the foregoing, applying a human rights-based approach to access to electricity services becomes an attractive proposition when a weak private party compliance regime is unable to extend access to the basic service, particularly for the rural poor. As David Bilchitz¹⁵⁴ asserts, "[s]ince people live within societies, it is likely that they will be unable to live well, achieve their goals[,] and have positive experiences if they are forced to live below standards that are regarded as acceptable by those communities."¹⁵⁵

By applying such an approach, the obligation is imposed on the government, not only in light of its commitments under the ICESCR, but also pursuant to positive declarations embodied in the 1987 Philippine Constitution — without going through the bureaucratic rigmarole of the qualified third-party scheme. Dinah L. Shelton¹⁵⁶ explains that a human

remote and unviable villages that the franchised utility is unable to service for any reason shall be opened to other qualified third parties." *Id.*

151. See Electric Power Industry Reform Act of 2001, § 59.

152. See DOE Department Circular No. 2005-12-011, § 3, ¶ e.

153. *Id.*

154. David Bilchitz is a professor of law at the University of Johannesburg. He is also the Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law and Secretary-General of the International Association of Constitutional Law.

155. DAVID BILCHITZ, *POLITICAL PHILOSOPHY IN ACTION: DEVELOPING THE MINIMUM CORE APPROACH TO SOCIO-ECONOMIC RIGHTS* 193 (2007).

156. Dinah L. Shelton was a professor of international law and international human rights law in Notre Dame Law School before becoming Professor Emeritus for international law at George Washington University Law School. She was also President of the Inter-American Commission on Human Rights and legal counsel to several other international bodies concerned with human rights and

rights-based approach is preferable over a legal approach that puts a premium on responsibility, since “human rights are maximum claims on society”¹⁵⁷ which enhance the “compliance pull.”¹⁵⁸ The existing emphasis on contractual responsibility in the Philippines, where a franchisee commits to deliver electricity services within its coverage areas until the concern on financial viability overtakes such a commitment, demonstrates the shortcoming of a private sector-driven and responsibility-focused approach. Moreover, a human rights-based approach elevates the provision of electricity services, particularly in off-grid areas, to a direct government obligation under international and national law, instead of being relegated to the level of a changeable policy choice or program for the government, or left to the “genius” of the market when the same is failing in the first place. This allows room to argue for more lenient rules on legal standing when seeking redress from the courts. As the Supreme Court explains in the case of *Land Bank of the Philippines v. Rivera*¹⁵⁹ by reiterating and quoting an earlier decision —

Justice Isagani A. Cruz avers[,] “[I]t is now obligatory upon the State itself to promote social justice, to provide adequate social services[,] to promote a rising standard of living, to afford protection to labor[, and] to formulate and implement urban and agrarian reform programs [...] These functions, while traditionally regarded as merely ministrant and optional, have been made compulsory by the Constitution.”¹⁶⁰

It is important to stress that the direct obligation of government to ensure access to affordable, reliable, and modern energy services to everyone

the environment. She specializes in international law, human rights, and international environmental law, among others. George Washington University Law School, Dinah L. Shelton, *available at* <https://www.law.gwu.edu/dinah-l-shelton> (last accessed Jan. 26, 2018).

157. Dinah L. Shelton, Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration (Draft presented at a High Level Expert Meeting on the New Future of Human Rights and Environment, organized by the United Nations Office of the High Commissioner for Human Rights and the United Nations Environment Programme) at 3, *available at* <https://jak.ppke.hu/uploads/articles/719134/file/Shelton%20paper.PDF> (last accessed Jan. 26, 2018).

158. *Id.*

159. *Land Bank of the Philippines v. Rivera*, 635 SCRA 285 (2010).

160. *Id.* at 296 (citing *Badillo v. Tayag*, 400 SCRA 494, 502–03 (2003)) (emphasis supplied).

admittedly cannot be realized in a short period of time. For this reason, the concept of progressive realization is recognized under the ICESCR.¹⁶¹ Although progressive realization is considered a flexibility device for compliance to reflect realities and difficulties involved in ensuring the full realization of the rights under the ICESCR, it remains incumbent upon governments to ensure that “minimum core obligation[s]” are satisfied even at “minimum essential levels[.]”¹⁶² This is interpreted by the CESCR as the exertion of every effort using all available resources by the government to satisfy its minimum core obligations.¹⁶³ In effect, the presumption is that the government cannot easily excuse itself from failing to discharge its obligations on the convenient ground of resource constraints. As Karin Lehmann¹⁶⁴ contends, “[u]rgent interests need to be prioritized.”¹⁶⁵ Also, there must be a sense of urgency to “address those in a condition where their minimal interests cannot be satisfied[.]”¹⁶⁶ such as those still anachronistically lacking access to affordable, reliable, and modern energy services.

Significantly, the CESCR underscores the importance of ensuring that vulnerable and disadvantaged groups in society are protected by espousing “relatively low-cost targeted [programs.]”¹⁶⁷ even under trying “times of severe resources constraints[,] whether caused by a process of adjustment, of economic recession, or by other factors[.]”¹⁶⁸ Clearly, accountability

161. U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, ¶ 1, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter General Comment No. 3].

162. *Id.* ¶¶ 9–10.

163. *Id.* ¶ 10.

164. Karin Lehmann is a professor of business law and international economic law at the University of Cape Town. She is a regular contributor to the fields of indigenous rights, socio-economic rights, and environmental law, among others. University of Cape Town Department of Commercial Law, Karin Lehmann, available at <http://www.commerciallaw.uct.ac.za/claw/staff/academic/klehmann> (last accessed Jan. 26, 2018).

165. Karin Lehmann, *In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core*, 22 AM. U. INT'L L. REV. 163, 185 (2006).

166. BILCHITZ, *supra* note 155, at 208.

167. General Comment No. 3, *supra* note 161, ¶ 12.

168. *Id.*

squarely falls upon the Philippine government's shoulders to ensure that access to affordable, reliable, and modern energy services is available to all Filipinos by whatever means and resources at its disposal in meeting minimum core obligations under the ICESCR and the 1987 Philippine Constitution. This is a legal mechanism that is preferable to attain total electrification, particularly in off-grid areas, given the inadequacy of the existing franchising scheme that is primarily reliant on market-driven private sector initiatives.

C. Ensuring the Availability of Effective Legal Redress and Judicial Review

A key feature that works in favor of a human rights-based approach to access to affordable, reliable, and modern services in the Philippines is the creation of the CHR to give effect to the provisions of the 1987 Philippine Constitution on social justice and human rights. This explicitly institutionalizes the role of legal remedies in the implementation of the fundamental law, including the international legal framework on human rights in the country. The CECSR explains that an effective legal remedy is not necessarily one that is equated with judicial remedy or requires the involvement of the courts at the first instance.¹⁶⁹ It also emphasizes that an administrative remedy is adequate as long as there is “a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the [ICESCR] in their decision-making.”¹⁷⁰ However, ultimate resort to the courts from administrative decisions may be proper especially if judicial review is indispensable in giving full effect to a right recognized or recognizable under the ICESCR.¹⁷¹

Judicial remedy to effectively vindicate economic, social, and cultural rights raises one important benchmark — “justiciability,” or the ability of courts to provide effective relief or remedy to a claimed violation of rights under the ICESCR, which observers contend as ultimately defining what a “real” human right is.¹⁷² The ICESCR has been receiving mixed treatment

169. U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The domestic application of the Covenant*, ¶ 9, U.N. Doc. E/1998/24 (Dec. 3, 1998) [hereinafter General Comment No. 9].

170. *Id.*

171. *Id.*

172. HENRY J. STEINER, ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS* 313 (3d ed. 2008).

in the domestic courts of various jurisdictions, ranging from directly applying the ICESCR, to using it as an interpretative standard, to refusing to give it legal effect at all.¹⁷³

In the Philippines, the CHR was established as an investigatory and fact-finding body without the power of adjudication.¹⁷⁴ This lessens the efficacy of its workings to being persuasive, in contrast to being binding or authoritative. As a result, it falls short of the standard that the administrative remedy must be “effective” in the sense that it satisfies the requirements of the ICESCR, including accessibility, affordability, and timeliness.¹⁷⁵ Nevertheless, while this may be the prevailing situation, the CHR’s power to monitor, report, and recommend measures to promote human rights and to ensure compliance with international human rights obligations remains compelling and relevant. As an example, the CHR showed a glimpse of what could have been when it issued edifying advisories on the domestic interplay of the constitutional directives, the international human rights framework on the delivery of electricity services, and the application of a human rights-based approach to governance and development. It is, thus, as Aryeh Neier¹⁷⁶ describes, a national human rights body that can be the “trustworthy and knowledgeable” link between national and “global efforts to promote human rights[.]”¹⁷⁷ In the alternative, as pointed out earlier, the availability of seeking redress before the ERC for violations of the Magna Carta is an interesting pathway for ultimately seeking judicial pronouncement and clarification all the way to the Supreme Court, particularly on the meaning and extent of the right to electricity service recognized in it the same.¹⁷⁸

173. *Id.*

174. BERNAS, *supra* note 31, at 1275-77.

175. General Comment No. 9, *supra* note 169, ¶ 9.

176. Aryeh Neier was a professor of law at the New York University School of Law. He founded and served as executive director of the Human Rights Watch, worked for the American Civil Liberties Union, and is the President Emeritus of the Open Society Institute. Huffington Post, Aryeh Neier, *available at* <https://www.huffingtonpost.com/author/aryeh-neier> (last accessed Jan. 26, 2018).

177. ARYEH NEIER, *THE INTERNATIONAL HUMAN RIGHTS MOVEMENT: A HISTORY* 12-13 (2012).

178. *See* Magna Carta for Residential Electricity Consumers, art. 37.

Notably, the 1987 Philippine Constitution expressly grants Congress the prerogative to expand the authority of the CHR.¹⁷⁹ The impetus for this can be found by importing the salience of the right to adequate housing and standard of living in Article 11, Paragraph 1 of the ICESCR¹⁸⁰ and giving effect to the constitutional directives of: (1) freeing the people from poverty through policies promoting adequate social services and rising stand of living;¹⁸¹ (2) guaranteeing the full protection of human rights;¹⁸² and, (3) promoting and enhancing the right to human dignity.¹⁸³ Indubitably, there are sound constitutional and international human rights law bases underpinning the proposition for the enactment of national legislation explicitly guaranteeing access to affordable, reliable, and modern energy services in relation to Article 11, Paragraph 1 of the ICESCR and the 1987 Philippine Constitution.

Since access to affordable, reliable, and modern energy services is derivable from the ICESCR, and underpins the enjoyment of other rights embedded in the 1987 Philippine Constitution, coherence and consistency are achievable by incorporating all the innate elements and norms of the ICESCR into a domestic law by way of legislation. To preclude any doubts, a human right to access affordable, reliable, and modern energy services enshrined in legislation makes it legally demandable and enforceable. As Kenneth Roth¹⁸⁴ asserts, “[i]t is clearly in the interest of those who believe in [economic, social, and cultural] rights that these rights be codified in enforceable national law.”¹⁸⁵ One meaningful consequence of such recognition is, in the words of Mary Robinson,¹⁸⁶ where “those who are

179. See PHIL. CONST. art. XIII, § 19.

180. ICESCR, *supra* note 25, art. 11, ¶ 1.

181. PHIL. CONST. art. II, § 9.

182. PHIL. CONST. art. II, § 11.

183. PHIL. CONST. art. XIII, § 1.

184. Kenneth Roth is the executive director of the Human Rights Watch. He served as a federal prosecutor in New York, and writes extensively on human rights issues and international justice. Human Rights Watch, Kenneth Roth, available at <https://www.hrw.org/about/people/kenneth-roth> (last accessed Jan. 26, 2018).

185. Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63, 66 (2004).

186. Mary Robinson was the President of Ireland for seven years, and the United Nations High Commissioner for Human Rights for five years. She is considered

poor and marginalized are empowered, and their participation rendered effective.”¹⁸⁷ This is seen, for instance, in the availability of an effective legal remedy to enforce legal obligations, which the CESCR notes is usually “reinforced or complemented by judicial remedies[.]”¹⁸⁸ unless it can be shown that such remedies are not the “appropriate means” contemplated by the ICESCR in the domestic legal order.¹⁸⁹

Having that in mind, the CHR’s narrow powers can be expanded to not only investigate, but also to adjudicate, all human rights violations (civil, political, economic, social, and cultural),¹⁹⁰ including the power to issue and enforce legal measures appropriate to address such transgressions. Once transformed into a quasi-judicial constitutional body, the CHR will be able to provide the effective legal remedy called for under the ICESCR at the first instance. With experience and expertise on human rights matters institutionally built for over three decades, the CHR is ideally placed to competently adjudicate human rights cases. This extenuates the apprehension that the judiciary is not competent to adjudicate socioeconomic rights.¹⁹¹ In addition, judicial appeal or review becomes available considering that the 1987 Philippine Constitution explicitly grants judicial power to the Supreme Court, including the lower courts, to

“one of the most important voices — and doers — in the world for human rights[.]” and recently received the Stockholm Human Rights Award for 2016. International Bar Association, *Mary Robinson receives 2016 Stockholm Human Rights Award and talks about the world today*, available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUId=163ae98a-7c9a-4c67-8b40-68dff2be4c26> (last accessed Jan. 26, 2018) & The Elders, *Mary Robinson*, available at <https://theelders.org/mary-robinson> (last accessed Jan. 26, 2018).

187. Mary Robinson, *Where Rights Can Add to Good Development Practices*, in *HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT* 39 (Philip Alston & Mary Robinson eds., 2005).

188. General Comment No. 9, *supra* note 169, ¶ 3.

189. *Id.*

190. U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights*, ¶¶ 1-2, U.N. Doc. E/C.12/1998/25 (Dec. 10, 1998). The CESCR explains that “national institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights.” *Id.* ¶ 3.

191. See Cécile Fabre, *Constitutionalising Social Rights*, 6 J. POL. PHIL. 263, 280 (1998).

determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government,¹⁹² which includes a quasi-judicial CHR. This puts a check-and-balance system that seamlessly fits into the constitutional and legal regime availing in the Philippines. As Wiles argues, “unless rights are made legally enforceable, rather than remaining aspirational, they cannot truly be considered to constitute law at all, and will remain a pipe dream for those who need them most.”¹⁹³

IV. CONCLUSION

In this Article, it is shown that the Philippines has constitutionalized and enacted various legislative measures to respect, protect, and fulfill the various human rights embodied under the International Bill of Human Rights,¹⁹⁴ particularly socioeconomic rights. Also, the three branches of government — the executive, legislative, and judiciary — have a critical role in their respective spheres in giving meaning and effect to human rights in the domestic context. Having said this, access to affordable, reliable, and modern energy services is not explicitly guaranteed in, albeit inferred or derived from, the commitments of the Philippines under the ICESCR, the 1987 Philippine Constitution, and the different legislative enactments that give flesh to the aspirations and goals of the country for inclusive growth. To a reasonable degree, there is a manifest and serious intention to pursue the realization of the aforementioned commitments in the domestic context. Unfortunately, these are not enough in the face of millions of Filipinos who are still lacking access to affordable, reliable, and modern energy services deemed so basic for human development and progress in today’s world. For this reason — and to preclude any doubts — a human rights-based approach to access to affordable, reliable, and modern energy services enshrined in various legislation is the preferred implementation path. This Article, thus, highlights the significance of a human rights-based approach to provide universal access to affordable, reliable, and modern energy services in three important areas: (1) operationalizing the concept of equality and non-discrimination; (2) shifting the accountability from private franchisees/contractors to the State in off-grid areas; and, (3) ensuring the availability of effective legal redress to citizens. In all these dimensions, the

192. PHIL. CONST. art. VIII, § 1, para. 2.

193. Wiles, *supra* note 140, at 64.

194. International Bill of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

Supreme Court plays a vital role in catalyzing reforms in the law, particularly when called upon to exercise its power to adjudicate cases and to interpret the 1987 Philippine Constitution. As long as energy poverty and inequality persist, a human rights-based approach to access to affordable, reliable, and modern energy services remains significant and relevant in seeking changes to national institutions, practices, and norms for a better Philippines, where the struggles, concerns, and basic needs of those who have less — in some instances, none — become the clamor and claim of all.