Demystifying Philippine Statutory Law

Thoughts on Democratic Lawmaking in the Twenty-First Century

by Lance D. Collins, PhD[1]

"The Constitution did not engage in mystical teaching when it proclaimed in solemn tone that 'sovereignty resides in the people and all government authority emanates from them.'"[2]

Several years ago, I was asked to make a comparison between Hawai'i environmental law and Philippine environmental law. I assumed it would be fairly straight-forward. I would review judicial decisions interpreting the substantive laws of the area in the two jurisdictions and compare. Yet, determining what the current statutory law was on the subject turned out to be a task I'm not sure I'll ever know that I successfully completed. For example, Philippine laws regarding environmental impact assessments are nominally found in five different laws, none of which were ever considered or approved by an elected legislative body (Presidential Decrees Nos. 1151 and 1586, Proclamations Nos. 803 and 2146, and Executive Order No. 291). Several steps in the process of an environmental impact assessment refer to government offices that no longer exist. Researching which government office now has jurisdiction over the matter and how it got that jurisdiction became yet another separate research project. Ultimately, problems in the determining the current state of statutory law stem from the fact that there has never been an official compilation or revision of the general laws in the Philippines.

The state of Philippine statutory law is mystical. It is mystical in the sense that it is remote from ordinary knowledge or comprehension. It has developed since the end of the Spanish period without any real thought or effort directed towards its existence as a whole. In fact, it may be inaccurate or misleading to refer to the state of Philippine statutory law in the singular at all. They

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[2] Subayco v. Sandiganbayan, G.R. Nos. 117267-117310. August 22, 1996

are unreachable and unintelligible to the mass of Filipinos and therefore inaccessible because of the byzantine nature of the current state of statutory law. Some may argue that one of the problems is that the law is written in English. That is certainly a problem, but it is secondary and amplifies the difficulty of ascertaining the current state of Philippine law if that is at all possible.

Sources of Authority

Legal scholars generally have divide the law into two groups: legislation and legal writing. The difference between the two has to do with the basis of their authority. Legislation assumes authority by means of political domination whereas legal writing assumes authority by means of its reasoning. And while modern observers have come to equate law with the state, that has not always been the case. "Earlier legal systems were essentially pluralistic in that there was no clear hierarchy between different subsystems and sources of law; and similar features … can be observed in present law, as well." Nils Jansen. The Making of Legal Authority (2010) 3 This is certainly true of Philippine law in general and statutory law in particular. This paper focuses on the statutory law which has been enacted by a variety of state organs over the course of the last century.

It is generally understood that all law in the Philippine derives from the adoption of the 1987 Constitution. Therefore, statutory law is supposed to be democratic in nature because it derives its authority from a democratically adopted constitution. The level of its democratic authority is tied to judgments regarding the democratic basis for the 1987 Constitution. Statutory law and judicial law adopted prior to the 1987 Constitution were expressly adopted by the transitory provisions of the 1987 Constitution: Sections 3 and 10 of Article 18.

Many of the "existing laws, decrees, executive orders, proclamations, letters of instructions, and other executive issuances" were adopted by Ferdinand Marcos during his time as dictator

exercising absolute control over the state. The constitutional transitory provisions were intended for the immediate convenience of the democratic government focused more on rebuilding institutions after years of Marcos' rule. As stated by the Constitution Commission Committee on Amendments and Transitory Provisions Chair Jose Suarez: "The transitory provisions in a constitution are intended principally to cover the transition from the old to the new government in order to pave the way for an orderly change. By their very nature and characteristics, transitory provisions have temporary or transient application. They are of a passing nature, designed at times to qualify permanent provisions or to limit their operation to a specific period. They do not possess permanent or enduring quality... The social and political ferment which brought about this Commission also brought about a situation that required the imposition of provisional measures. The transitory provisions ... would facilitate the stabilization of the political structure." Record of the 1986 Constitutional Commission, Volume 5, October 1, 1986, R.C.C. No. 97. Yet, these provisions continue to give effect and lawfulness to whole areas of law codified during the Marcos period.

Statutory and judicial law derive their authority from the 1987 Constitution either through the transitory provisions or by the constitutional exercise of legislative (statutes) or judicial (court decisions) power. To date, over 18,000 statutes have been adopted since 1900 from various state organs exercising de facto or de jure legislative power (e.g. territorial assembly, Commonwealth assembly, Congress, Interim Batasang Pambansa, Ferdinand Marcos).

The Right to Information

Several private publishers who work with legal academics offer unofficial compilations of all statutory laws. As one such publisher states its "basic objective is to facilitate legal research in the

Philippines essentially by addressing the confusion and contradictions in Philippine statutes and other legal issuances." Prices for these unofficial compilations amount to one tenth to twenty five percent of Philippine per capita GDP (CIA – World Factbook accessed on August 5, 2012 www.cia.gov/library/publications/the-world-factbook/geos/rp.html) or one hundred times the daily minimum wage for non-agricultural workers in Manila. "DAILY MINIMUM WAGE RATES National Capital Region (NCR)" Wage Order No. NCR-17 (effective June 3, 2012) The currency of the unofficial compilations must be regularly updated as Congress enacts new law and the government creates new rules. The updating costs currently amount to up to five percent of per capita GDP per year. In sum, the current state of statutory law, as compiled by moonlighting academics and researchers for hire, is not accessible to the common person who hasn't the money to access private, unofficial compilations and otherwise lacks the time or skill to conduct extensive, non-conclusive legislative historical research. Some may argue that there are much less expensive alternatives such as mass produced, printed volumes available at local bookstores which are reasonably priced.

Yet, the ease of access is quite deceptive in such cases. Almost every National Bookstore offers the AVB Printing Press' 2005 printing of Republic Act No. 386, the New Civil Code. This printing of the New Civil Code is fairly straight-forward in its organization with a clear table of contents and so long as the reader can understand written English, it is accessible. That is, of course, if you want to access the state of the law in 1950. As described below, whole sections of the New Civil Code have been repealed, amended, superseded and modified – none of these changes are mentioned in the 2005 private printing of the New Civil Code. There is no obligation on the part of the printing press, who is printing the material for the purpose of making a profit, to ensure that the purchaser understands that half of what he or she has purchased is only of historical value and has

no present currency with respect to statutory law.

Even if the barriers to discovering the current state of the law were overcome, an ordinary individual would also be required to be literate in written English well enough to understand legal and administratively technical jargon. While the 2000 Census states that approximately six in ten Filipinos self-reported that they spoke English to census takers, that provides no information regarding the number of individuals who can read statutory text in English and comprehend what is being regulated. Even assuming that everyone who self-reports that they speak English to census takers can read and comprehend statutory texts, that still leaves half the population without any direct access to the law. Because the current state of the law is not readily ascertainable, it becomes impossible for there to be meaningful translations into Tagalog or other regional mother languages.

James Madison, the drafter of the U.S. Constitution, wrote: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Selected Writing of James Madison (2006) 308

This idea is part of what today is understood to be the right to information. Shortly after World War II, the United Nations General Assembly adopted, during its first session, "Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated[.]" G.A. Res. 59, U.N. GAOR, 1st Sess., p 95 U.N. Doc. A/59 (1946) This important right was also recognized and adopted in the International Covenant on Civil and Political Rights in 1967: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds[.]" Article 19, Section 2, International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6

I.L.M. 368 (1967), 999 U.N.T.S. 171.

"There exists an almost inexhaustible series of cases in which the right to obtain information is necessary for the exercise of other political and human rights." Roy Peled and Yoram Rabin "Constitutional Right to Information" in 42 Columbia Human Rights Law Review 357 (2011) The 1973 Constitution incorporated this right to information in the Bill of Rights although, because of martial law, it remained a theoretical right. It was reaffirmed in the 1987 Constitution as Section 7, Article III which provides, in part: "The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions... shall be afforded the citizen[.]" The importance of this right was also strengthened by two state policies enshrined in Article II. Section 24 which states: "The State recognizes the vital role of communication and information in nation-building[,]" and Section 28 which states: "the State adopts and implements a policy of full public disclosure of all its transactions involving public interest."

Almost as soon as the 1987 Constitution had been adopted, the Supreme Court rendered its first decision interpreting Article III, Section 7 in Legaspi v. Civil Service Commission, G.R. No. G.R. No. 72119. May 29, 1987 There, Legaspi had requested information related to the civil service qualifications of two Health department employees in Cebu City. Marites Danguilan Vitug and Criselda Yabes Our Rights, Our Victories (2011) 33-41. In interpreting Article III, Section 7, the Legaspi Court unanimously ruled: "These constitutional provisions are self-executing."

But the right to information is not just the government's requirement to provide information when asked. Rather, the right to information includes the government furnishing information and giving access as a matter of practice. The former Article 2 of the New Civil Code required that laws passed be published in the Official Gazette before they become law. Executive Order No. 200

augmented that requirement by requiring that laws passed must be published "in the Official Gazette or in a newspaper of general circulation in the Philippines." In explaining the purpose of this requirement, the Supreme Court stated that: "The clear object of the above quoted provision is to give the general public adequate notice of the various laws which are to regulate their actions and conduct as citizens. Without such notice and publication, there would be no basis for the application of the maxim "ignorantia legis non excusat." [ignorance of the law is no excuse] It would be the height of injustice to punish or otherwise burden a citizen for the transgression of a law of which he had no notice whatsoever, not even a constructive one." SEC vs. GMA Network, Inc., G.R. No. 164026, December 23, 2008

"The right of the people to information on matters of public concern is recognized under Sec. 7, Art. III of the 1987 Constitution[.]" Berdin, et al. vs. Eufracio A. Mascariñas, et al., G.R. No. 135928, July 6, 2007 Because of this, the "right to information" as enumerated in Section 7, Article III ought to include within its command that the permanent statutory laws of the Republic now in force be compiled and organized in such a way so as to inform an ordinary person of regular intelligence what the laws of the Republic are. That is, in such a way that they may be found immediately without resort to extensive legislative historical research or consulting an attorney and which is immediately susceptible to translation into Tagalog and the other regional mother languages.

In discussing the right to information during the 1986 Constitutional Commission, Commissioner Rosario Braid noted, "These rights … have been rights and demands of the many developing countries particularly in a situation where most of the information resources are concentrated in the center, where it is not spread throughout the country so that there is very little information in the peripheral areas. So we talk of 'information rich' areas, such as the urban areas

and 'information poor' areas which are in the poorer rural areas." Record of the 1986 Constitutional Commission (Volume 4, September 23, 1986 R.C.C. No. 90)

"The policy of full public disclosure enunciated in … Section 28 complements the right of access to information on matters of public concern found in the Bill of Rights. The right to information guarantees the right of the people to demand information, while Section 28 recognizes the duty of officialdom to give information even if nobody demands it. The policy of public disclosure establishes a concrete ethical principle for the conduct of public affairs in a genuinely open democracy, with the people's right to know as the centerpiece. It is a mandate of the State to be accountable by following such policy. These provisions are vital to the exercise of the freedom of expression and essential to hold public officials at all times accountable to the people." Justice Sereno dissenting in Briaogo v. The Philippine Truth Commission of 2010, G.R. Nos. 192953 & 193036, December 7, 2010, footnote no. 80 citing Province of North Cotabato v. GRP Peace Panel on Ancestral Domain, G.R. Nos. 183591, 183752, 183893, 183951 & 183962, 14 October 2008

"These twin provisions of the Constitution seek to promote transparency in policy-making and in the operations of the government, as well as provide the people sufficient information to exercise effectively other constitutional rights. These twin provisions are essential to the exercise of freedom of expression. If the government does not disclose its official acts, transactions and decisions to citizens, whatever citizens say, even if expressed without any restraint, will be speculative and amount to nothing. These twin provisions are also essential to hold public officials at all times accountable to the people, for unless citizens have the proper information, they cannot hold public officials accountable for anything. Armed with the right information, citizens can participate in public discussions leading to the formulation of government policies and their effective implementation. An informed citizenry is essential to the existence and proper functioning

of any democracy." Chavez v. Public Estates Authority, G.R. No. 133250, July 9, 2002 (internal quotations and citations omitted)

A general revision of "all the existing substantive laws of the Philippines, and 'the modification of' the same in conformity with the customs, traditions, and idiosyncracies of the Filipino people and with the progressive principles of the law" is compelled by an ordinary construction of the constitutional provision on the right to information in light of the constitutional state policy on access to information. There is no doubt that the policy objectives of many substantive areas of the law have changed and certainly need to be reviewed. But a general revision should not be delayed on account of that substantive review. By first completing a general revision and providing access to the current state of the law, the substantive law in any given area of it can then be systematically reviewed and revised substantively.

A History of Statutes in the Philippines

Statutory lawmaking did not occur during the Spanish period in the Philippines. Instead, the Spanish crown either expressly or by implication extended Spanish codes and compilations to the governance of the Philippines. For much of Spain's colonial occupation of the Philippines, Spanish law was chaotic and not unified as was the state of medieval European law in general. The Church asserted universal jurisdiction over spiritual matters including family law, succession and contracts made under oath. Princes and emperors also were recognized law makers. Justinian's Corpus Juris Civilis was the single most important secular legal text in medieval Europe. Jansen 29 "[T]he legal position of noblemen was determined by feudal law, craftsmen were subject to the statutes of their guilds and cities and merchants did business according to the rules of the lex mercatoria." Jansen 30

The legal science movement which sought to codify all law eventually moved the Cortes of

Cadiz to order the codification of all important branches of Spanish law. At the end of the Spanish period, there were twelve special laws of Spain in force in the Philippines: the Codigo Penal de 1870; the Ley Provisional para la Aplicaciones de las Disposiciones del Codigo Penal en las Islas Filipinas in 1888; the Ley de Enjuiciamiento Criminal of 1872; Ley de Enjuiciamiento Civil of 1856 ; Codigo de Comercio of 1886; Codigo Civil de 1889; the Marriage Law of 1870; the Ley Hipotecaria of 1861; the Ley de Minas of 1859; the Ley Notarial de 1862; the Railway Law of 1877; the Law of Foreigners for Ultramarine Provinces of 1870; and the Code of Military Justice. Melquiades Gamboa An Introduction to Philippine Law (1969) 71

After the ratification of the Treaty of Paris, the U.S. government began a war against the Philippine people to secure the Philippine territory for its colonial occupation. The administration of government was conducted first by the U.S. military. President McKinley subsequently appointed a joint civilian and military commission chaired by Jacob Schurman, president of Cornell University, to investigate and determine the type of civilian government the U.S. should create to replace direct military rule. Military rule was replaced by a civilian commission chaired by William Howard Taft who became the civil governor-general of the Philippines. The Commission form of governance was just emerging at the time as a Progressive intervention into machine-based local politics in the U.S. After a devastating hurricane in Galveston, Texas in September, 1900, a group of Progressive businessmen, fearful local party bosses who dominated the elected city council would prevent a quick rebuilding of the town, sought the Texas governor's intervention to appoint a commission to oversee the rebuilding and running of the city. The commissioners served as legislators and also as administrators of various municipal offices. After a court challenge, the Texas legislature made the commission members a fully elected body. The Galveston Plan and its commission form of governance then spread across the United States. Bradley R. Rice "The Galveston Plan of City

Government by Commission: The Birth of a Progressive Idea" in The Southwest Historical Quarterly Vol. 78, No 4 (April, 1975) 365-408[3] Daniel Williams, who was the Secretary of the Philippine Commission, wrote that the Philippine Commission saw itself as "building a modern commonwealth on a foundation of medievalism[.]" cited in Julian Go "Introduction" in Julian Go and Anne Foster eds. American Colonial State in the Philippines (2005) 1 Although beyond the scope of this paper, it is likely that the experimentation of Progressive ideas in the Philippines actually were transported back to the United States and considered in part by political insiders for the Galveston plan and the spread of the Commission form of government. The point to keep in mind was that Progressive Republicans came to the Philippines with Progressive ideas about modern government and sought to implement them with a free hand. As this history will show, as part of a larger failure of Progressive ideas in the Philippines, an official compilation of the statutory law failed to occur.

The Philippine Commission, as a legislative body, built upon the existing Spanish law and previous U.S. military orders that modified Spanish law. In 1902, the U.S. Congress passed an organic act which authorized the Philippine Commission to formally take over the administration of government and, after major military operations were concluded, allowed for the popular election of a territorial assembly. The elected assembly, which was seated in 1907, and with the Philippine Commission, constituted a bicameral legislative body, known as the Philippine Legislature. This existed until the legislative design was subsequently modified by the Jones Act of 1916. The Jones Act made the bicameral legislative body fully elected.

In 1927, the Philippine Legislature organized a commission to revise the substantive penal

[3] Consider the 1904 article by Henry J. Ford "Principles of Municipal Organization" in Annals of the American Academy of Political and Social Science , Vol. 23 (Mar., 1904) 1-28 for a better understanding of the general critique of "Tammany Hall" or machine-based politics in the United States at the time

laws of the territory which were found in the Codigo Penal de 1870 adopted by the Spanish government. The Commission, chaired by the Ilokano Judge Anacleto Diaz, produced a draft that was eventually adopted by the territorial legislature as Act No. 3815 in 1930.

The elected bicameral legislative structure was again modified by the Tydings-MacDuffie Act of 1934 which established the Commonwealth framework towards independence. In 1941, the Commonwealth legislature passed Commonwealth Act No. 628 which created a Code Committee that was supposed to "revise all the existing substantive laws of the Philippines, and to modify the same in conformity with the customs, traditions, and idiosyncracies of the Filipino people and with the progressive principles of the science of law." The Committee was given two years to complete its work. Diaz, who by this time, was an associate justice of the Philippine Supreme Court, was appointed as one of the members of the Committee.

Because of World War II, the committee never really convened and any preliminary work was halted. The Japanese imperial army also established a government with legislative functions but, according to Gamboa, such laws were declared void. Gamboa 73 None of the justices on the Supreme Court were retained by the Imperial Japanese Army in the reconstituted court and Diaz was subsequently executed in 1945 during the Battle of Manila at the corner of Taft Avenue and Padre Faura in Manila. Alfonso Aluit By Sword and Fire (1994) 254-255

In 1947, President Manuel Roxas issued Executive Order No. 48 to create a Code Commission to revise "all existing substantive laws of the Philippines and of codifying them in conformity with the customs, traditions, and idiosyncrasies of the Filipino people and with modern trends in legislation and the progressive principles of law[.]"

Although the Code Commission was charged with revising "all existing substantive laws of the Philippines and of codifying them," the result of the Code Commission was the revision and

recodification of the Codigo Civil de 1889 since the Revised Penal Code had been just recently revised and recodified. However, the New Civil Code was not a codification or recodification of "all existing substantive laws of the Philippines" even if one excludes consideration of the penal laws.

In the sixty five years that have passed since the Code Commission, statutes have continued to be adopted, amended, repealed and whole areas of the law have been developed and amended. The New Civil Code, for example, has been supplanted, in part, by whole new statutory regimes. The Child and Youth Welfare Code, enacted by Presidential Decree No. 603 repealed Articles 334 to 348 of the New Civil Code. Nevertheless, in promulgating the Family Code of 1987, enacted by Executive Order No. 209, the Family Code expressly repealed nine separate titles within the New Civil Code, including the one that had been Articles 334 to 348. Parts of the Family Code have subsequently been amended by a number of even newer laws (including those related to illegitimate children, the role of women in society, and the establishment of family courts).

An even more perplexing example has been the lawmaking involving the regulation of the ownership and use of water. In the mid and late 1970s, the Marcos regime set about to codify or recodify a number of areas of law. The ownership, use and regulation of water being one of them. The Water Code of 1976, enacted by Presidential Decree No. 1067, simply stated at Article 52 that anything related to water that is not regulated by the Water Code is governed by the New Civil Code. This type of provision reflects the uncertainty of the drafter of the state of the positive law. It implies that the potential for conflict exists or that something may have been overlooked in the establishment of the new Water Code regime and therefore a "catch-all" provision is necessary. But then at Article 100, the Water Code expressly repeals "provisions of the Spanish Law on Waters of August 3, 1866, the Civil Code of Spain of 1889, and the Civil Code of the Philippines (R.A. 386) [sic] [relating to water]..." and a number of others laws including the Irrigation Act of 1912 that

related to the regulation of the use of water.

The lack of clarity regarding the state of the statutory law is such that new laws include catch-all clauses that repeal any laws, decrees, or orders that are inconsistent with the newly adopted law. Consider Republic Act No. 9048. The title of the law indicates that it was amending articles 376 and 412 of the New Civil Code. Yet, only the title actually uses the word amending. Section 13 of Republic Act. No. 9048 then states: "All laws, decrees, orders, rules and regulations, other issuances, or parts thereof inconsistent with the provisions of this Act are hereby repealed or modified accordingly." While this catch-all type provision makes it clear that the drafter intended it to give this statute precedence and supremacy over all other laws to the contrary, it's not clear precisely which unnamed laws those are, that should be subordinate or repealed.

Another example involving the New Civil Code is Republic Act No. 9858. The Family Code, which repealed specific titles within the New Civil Code, was amended by Republic Act No. 9858. Specifically, two sections were amended. But, in what highlights the insecurity legislative drafters confront in making their intended law become the law, a catch-all repealing clause was added in Section 3: "All laws, presidential decrees, executive orders, proclamations and/or administrative regulations which are inconsistent with the provisions of this Act are hereby amended, modified, superseded or repealed accordingly."

The vague and ambiguous nature of these catch-all clauses has been addressed by the Supreme Court. In GSIS et al v. Commission on Audit, et al, G.R. No. 162372. October 19, 2011, general catch-all repealing provisions are given very limited effect if any at all. As the Supreme Court held, a general repealing clause "is not an express repealing clause because it fails to identify or designate the statutes that are intended to be repealed. It is actually a clause, which predicated the intended repeal upon the condition that a substantial conflict must be found in existing and prior

laws." Id. The judicial view of catch-all repealing clauses is an extension of the well-known canon of statutory interpretation that the repeal of a law by implication is disfavored. "Repeal of laws should be made clear and expressed. Repeals by implication are not favored as laws are presumed to be passed with deliberation and full knowledge of all laws existing on the subject. Such repeals are not favored for a law cannot be deemed repealed unless it is clearly manifest that the legislature so intended it[.]" Id citing Recaña, Jr. v. Court of Appeals, 402 Phil. 26 (2001). In finding that the Administrative Code of 1987 did not repeal the older Revised Administrative Code, the Supreme Court held in another case: "A declaration in the statute, usually in its repealing clause, that a particular and specific law, identified by its number or title, is repealed is an express repeal; all other repeals are implied repeals....The presumption [against implied repeals] is against inconsistency and repugnancy for the legislature is presumed to know the existing laws on the subject and not to have enacted inconsistent or conflicting statutes. " Mecano v. Commission on Audit, G.R. No. 103982 December 11, 1992 This abstention by the judicial branch in assisting the legislative branch in any way at clarifying the law only makes the state of statutory law even more unsettled and leaves the resolution as to what the actual law is to the final judgment of a judge or a panel of justices or resignation by an individual who hasn't the means to wager a favorable ruling. This does not imply that, if there were an official compilation and unified code of positive statutory law, that the meaning of the law would itself be self-revealed and the need for attorneys and judges wholly removed. Reasonable people can and do differ. Differences would not center around the threshold existential questions of the law, but rather on its interpretation and construction.

"The cornerstone of this republican system of government is delegation of power by the people to the State. In this system, governmental agencies and institutions operate within the limits of the authority conferred by the people. Denied access to information on the inner workings of

government, the citizenry can become prey to the whims and caprices of those to whom the power had been delegated. The postulate of public office is a public trust, institutionalized in the Constitution to protect the people from abuse of governmental power, would certainly be mere empty words if access to such information of public concern is denied . . . The right to information goes hand-in-hand with the constitutional policies of full public disclosure and honesty in the public service. It is meant to enhance the widening role of the citizenry in governmental decision-making as well as in checking abuse in government." Teofisto Guingona Jr et al. v. COMELEC, G.R. No. 191846, May 6, 2010 citing Valmonte v. Belmonte, Jr., 252 Phil. 264, 271-272 (1989)

When Marcos enacted statutory law during the martial law interregnum, he did so in myriad ways and did so, some times lacking even the most fundamental requirements of "rule of law" for statutory enactment. In Tañada v. Tuvera, G.R. No. 63915, April 24, 1985, the Supreme Court ruled that hundreds of unpublished Presidential Decrees, Letters of Instruction, General Orders, Proclamations, Executive Orders, Letters of Implementation and Administrative Orders of general application "be published in the Official Gazette... and unless so published, they shall have no binding force and effect." quoting Justice Claudio Teehankee's dissenting opinion in Peralta v. COMELEC, G.R. No. L-47771, March 11, 1978. The Tañada court wrote: "In a time of proliferating decrees, orders and letters of instructions which all form part of the law of the land, the requirement of due process and the Rule of Law demand that the Official Gazette as the official government repository promulgate and publish the texts of all such decrees, orders and instructions so that the people may know where to obtain their official and specific contents."

There was significant disagreement among the Court then regarding the applicability of Article 2 of the New Civil Code which required and requires"law...[only] take effect after fifteen days following the completion of their publication in the Official Gazette," yet the holding was clear, "It

is a rule of law that before a person may be bound by law, he must first be officially and specifically informed of its contents." Tañada, supra. This particular rule of law is traditionally understood as a fundamental requirement of due process. Connally v. General Construction Co. 269 U.S. 385, 391 (1926)

Official compilation and codification is an extensive use of the right to information. The Administrative Code of 1987, enacted by Executive Order No. 292, requires that the University of the Philippines Law Center "[k]eep an up-to-date codification of all rules thus published and remaining in effect, together with a complete index and appropriate tables." Section 5(2), Chapter 2, Book VII, Administrative Code of 1987. This is/was intended to be a compilation and codification of the present state of administrative rules – that is implementing laws adopted by government agencies after following the procedure established for rule-making. Twenty-five years later, the Law Center has not produced a complete codification and compilation of the present state of administrative rules. One reason may be because the UP Law Center's Office of the National Administrative Register has had "no budgetary appropriations and the full costs of its services, including the cost of supplies and materials, salaries and wages of its personnel and the depreciation cost of equipment used, are borne by the UP Law Center[.]" UP Law Center. Memorandum Order on Sharing Fee, effective January 2, 2004. Unfunded mandates are not unique to the Philippine government past or present.

At the time of the American conquest of the Philippines, there had been lively and robust discussion whether "it is possible for a community, from time to time, to take an account of stock, so to speak, of its statute law; to summarize, classify and reprint it, and then, at least for purposes of most practical occasions, to cast off the statute-books of prior fate, and let them go." Heman Chaplin "Statutory Revision" in 3 Harvard Law Review (1889) 74 Many American lawyers doubted

whether "it is possible for a legislative body at a given time to present the whole existing statutory law, in a clear and symmetrical statement which will explain itself to the reader, and will, unless in exceptional cases capable of being distinguished and known, and of which one may have fair warning, dispense with the necessity of going back to the original statutes." Id at 75

With this prevailing view of official compilations and statutory revision opposing Progressive values in mind, let us now turn to another American colony dominated by Progressive ideas about government that simultaneously as the second Philippine Commission.

A Comparative History of Statutes in Hawai'i

In 1893, the Kingdom of Hawai'i was overthrown by a small group of American and European businessmen with the military assistance of the U.S. minister to Hawai'i and the U.S. marines. When annexation did not promptly occur as expected, the group which had formed a 'provisional government' declared a Republic of Hawai'i. From 1894 until 1898, the Republic of Hawai'i unsuccessfully sought agreement with the United States on a Treaty of Annexation. However, in 1898, within two months of the U.S. declaring war on Spain, the so-called "Newlands Resolution" was passed by a simple majority in both houses of the U.S. Congress purporting to annex Hawai'i.[4] At the time, Republicans commanded simple majorities in both Houses and President McKinley was a Republican.

Section 2 of the Newslands Resolution called for a five member commission to be established to "recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper." Two Senators and one Congressman were appointed along with the

[4] For purposes of narrative simplification, I will refer to this as annexation. The U.S. Supreme Court, in dicta, has stated: "Hawaii has been a territory of the United States since the Joint Resolution of Annexation of July 7, 1898" United States v. Fullard-Leo, 331 US 256 , 265 (1947) although the legality of a domestic U.S. law acquiring sovereignty over an independent and sovereign nation is contested by a variety of Native Hawaiian political groups and has never directly come before the U.S. Supreme Court

last Republic President and first territorial Governor, Republican Sanford Dole, and then associate justice of the Hawai'i Supreme Court, Walter F. Frear. Dole, Frear and two of its other members were Republican. After a year, the Commission presented a draft of what became the Organic Act establishing a territorial government in Hawai'i. After the death of his predecessor, Frear was elevated to Chief Justice where he immediately called for revision and recodification of the all laws of the territory. Report of the Chief Justice of the Supreme Court of the Territory of Hawaii for the Years 1901 and 1902 2-5 (1903)

Frear was a Progressive Republican who "favored strengthening national-state formation by modifying and making more efficient the agencies of the central state[.]" Patricio Abinales "Progressive-Machine Conflict in Early Twentieth-Century U.S. Politics and Colonial-State Building in the Philippines" in Go and Foster eds. 150 Much of the American and European descended elite that favored the overthrow of the Hawaiian Kingdom and supported the provisional and Republic governments referred to the overthrow as a "revolution" and saw their acts as part of a progressive (and natural) political program to move Hawai'i from "feudal" monarchy to liberal democracy. Kerry Howe The Quest for Origins (2003) 37 Frear had published a history of Hawaiian law in 1894 for the Hawaiian Historical Society. Walter Frear "The Evolution of the Hawaiian Judiciary" in Papers of the Hawaiian Historical Society, No .7 (1894) 1-25 His conclusion that the "evolution" of the Hawaiian Judiciary, which began in the pre-European, Austronesian times was that "[t]his development has been gradual and has been the result of natural causes, the system by degrees having been adapted to the changing conditions." Frear (1894) 25 Consistent with the evolutionary justification for American colonial expansion (and theoretically, not contradictory to the principles of Progressivism), Frear wrote, "[t]he fundamental causes of this development have been the introduction of foreign peoples, ideas and customs, the gradual civilization of the native race, and

the general political, social and industrial growth of the country." Id.

Like the Philippines and most other places with written law, statutory laws in Hawai'i were adopted by the various entities with legislative power in a chronological order. In 1859 and in 1869, revisions were undertaken to revise and codify these laws. Yet, like the Philippines, subsequent amendments and repealing, were never revised into an official text. The result is that laws conflicted and overlapped with one another. Laws referred to other laws that had been subsequently repealed. Laws referred to public officials during the Kingdom period that did not exist in the Republic or Territorial period. Some laws appeared to have been repealed by implication through subsequent enactments. As Frear noted, "For these and other reasons it is in many instances extremely difficult for even an attorney to ascertain what the law is expressed to be on a given subject, to say nothing of its construction." Frear (1903) 4.

"Although a more cohesive state eventually evolved in the United States, the colonial state in the Philippines did not follow suit." Abinales 173 Abinales demonstrates that while American colonial officials brought Progressive ideals with them to the Philippines, both native elite resistance to the government generally along with U.S. Congressional obstructionism over progressive revenue generating schemes eventually manifested as "patronage and machine-like dealings with Filipinos" by colonial officials who perhaps felt that machine-like dealings were the only alternative to Progressive forms of government. Abinales 155

In Hawai'i, the events turned out differently as in 1888, a book published under King Kalakaua's official authorship, stated: "the Hawaiian Islands with the echoes of their songs and sweets of their green fields will pass into the political, as they are now firmly with the commercial, system of the great American Republic." Kalakaua. The Legends and Myths of Hawaii 65 (1888) Unlike the the Philippines, the Progressive Republican Americans had already firmly entrenched and

intertwined themselves into the ruling native elite in Hawai'i and had a significant role in helping to structure a political system that was much more receptive and welcoming of Progressive reforms.[5]

Even though the political and economic system had had a trial run at American institutions for some time, it was Frear's single-pointed focus, diligence and advocacy for a general revision and official codification of all the existing substantive laws of Hawai'i and the modification of the same in conformity with the U.S. Constitution and the Organic Act and with the Progressive principles of the law that saw the actual revision and official compilation occur. His single-pointed focus was aided, no less, by his unique position within the colonial government and the social milieu of the Kingdom, then Republic, then Territorial elite. The 1903 Hawai'i territorial legislature approved Act 45. It

(1) established a Code Commission which included three members;
(2) required any law inconsistent with the Constitution be removed or modified;
(3) required that only the last enacted statute when two or more statutes conflict or repugnant be included;
(4) required that when a statute refers to another statute which has been repealed and another statute has been enacted to cover the same subject matter, that the statute be modified to refer to the new statute;
(5) required that where mistakes, omission or includes of erroneous references exist, that the statute be corrected;
(6) required statutes be modified to express the intention manifested in later statutes either expressly or by implication;
(7) required the omission of any statute or part that is obviously obsolete or redundant;
(8) required a complete index;
(9) required the Constitution and other historical documents regarding the structure of government be included as a prefix;
(10) notes in each section stating the date of the original enactment of each section and amendments thereof;
(11) citation to decisions by the Supreme Court construing or relating to the subject matter

[5] Consider Lilikala Kame'eleihiwa Native Land and Foreign Desires (1992), Sally Merry Colonizing Hawai'i: The Cultural Power of Law (2000), Jonathon Osorio Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002); Juri Mykkanen Inventing Politics (2003); Robert Stauffer Kahana: How the Land was Lost (2004) Noenoe Silva Aloha Betrayed (2004), Jon Van Dyke Who Owns the Crown Lands of Hawai'i? (2007) or Sydney Iaukea The Queen and I (2012). Keanu Sai disputes this discourse in his dissertation and in his other writings deriding it as the Kingdom of Hawai'i being "portrayed in contemporary scholarship as a vanquished aspirant that ultimately succumbed to United States power through colonization and superior force." Keanu Sai The American Occupation of the Hawaiian Kingdom (2008) 3

of each section; and

(12) required that any departure or change in the letter of existing law by alteration or omission be noted.

Frear was joined by fellow Yale Law School graduates and recently licensed attorneys, Arthur A. Wilder and Albert F. Judd, Jr along with the Commission's secretary, attorney Charles Clemons, also a Yale graduate. Wilder was a Native Hawaiian attorney, who like other native elite, had supported the annexation.

The Commission did significantly revise and compile all of the substantive laws of Hawai'i and provided a comprehensive code that embraced all areas of the law entitled the "Revised Laws of Hawai'i." This compilation included the U.S. Constitution and governing federal laws related to the structure of the territorial government, the entire permanent statutory law of Hawai'i, and an appendix of some 70 Kingdom and Republic era laws that had retrospective legal significance but were not included in the compilation for various reasons.

The Commission recommended a proposed bill that

(1) enacted their 1500 page compilation entitled "Revised Laws of Hawai'i;
(2) that all statutes in force immediately prior to the approval of the bill be repealed;
(3) that said repeal have no legal significance to any right or liability under any statute as though the previous laws and the Revised Laws of Hawai'i were the same including statutes of limitation;
(4) the repeal not affect any offense committed or any punishment, penalty or forfeiture incurred or the prosecution thereof; and the
(5) the provisions of the Revised Laws be understood as continuations or amendments of all applicable previous laws.

The transitional provisions of (2) to (5) are identical in purpose and similar in wording, if only written in more general language, to the transitional provisions of the New Civil Code, Art. 2252 – 2270.

Frear's compilation was adopted and became the entire permanent statutory law of Hawai'i. He celebrated his feat and contextualized it as part of the racialized progress from Hawaiian

primitiveness toward American civilized statehood. Walter Frear "Hawaiian Statute Law" in Thirteen Annual Report of the Hawaiian Historical Society (1906) 15-61

Nevertheless, all subsequent laws adopted by the territorial legislature, which were permanent in character, were amendments to the Revised Laws of Hawai'i and regular, periodic supplements were provided to track changes. This unified compilation has been revised and recodified several times, in the 1920s, the 1950s, the 1970s and the 1990s. It has expanded from one volume in 1903 to fourteen volumes today and is now called the Hawai'i Revised Statutes. It still includes an annotation of all legislative history for the enactment of every section and its amendments and it includes annotations for Supreme Court decision and Attorney General's opinion interpreting each section. These annotations appear with the annual cumulative supplement. To answer the skeptical legal minds at the end of the nineteenth century, a century of Hawai'i statutory law demonstrates that "it is possible for a legislative body at a given time to present the whole existing statutory law, in a clear and symmetrical statement which explains itself to the reader[.]" Chaplin 75

This does not exist in the Philippines although the same type of Progressive Republicans were the main American architects of the territorial Philippine government. As mentioned previously, there were differences that ought to be recognized. First, the Progressive Republicans that went to Hawai'i from the U.S. at the time of annexation did not find themselves in a totally foreign political landscape. New England American missionaries had guided the Hawaiian monarchy in establishing a New England style form of government after spending two decades converting native Hawaiians to Protestant Christianity. The legal system at the end of the Hawaiian kingdom period and the interregnum before U.S. occupation had borrowed heavily from New England and U.S. west coast legal sources. The native population was no longer the majority population by the

time of the overthrow and even less so by 1898. Given this, Queen Lili'uokalani engaged in a legal/political strategy to remedy the U.S. overthrow of her sovereign kingdom as opposed to armed struggle and this strategy was subsequently followed by the mass of native Hawaiians signing the Ku'e Petitions submitted to the U.S. Senate shortly before annexation and through participation in the colonial system after annexation. Except for the failed and short-lived Wilcox-led insurrection in 1895, armed struggle was not used as a method of contesting American domination in Hawai'i. With the second administration of Grover Cleveland, a Democrat and friend of Queen Lili'uokalani, there was a five year period between the U.S. overthrow of the sovereign kingdom and the annexation, in which the interregnum government was run by Americans and descendants of American missionaries. Second, Progressive Republicans found a socio-economic landscape in Hawai'i where much of the population was in a state of unofficial servitude as plantation laborers and an economy controlled by their fellow Republicans. For example, in 1900, there were three times as many plantation workers than there were Native Hawaiians and non-Portuguese Caucasians in Hawai'i. Eleanor Nordyke The Peopling of Hawai'i (1977) 143-144

The situation was much different in the Philippines. Spain had lost the Philippines by the time the Treaty of Paris had been signed. While the Malolos Republic was declared, its legitimacy was not recognized internationally nor by even closer areas within the Philippines. Filipinos spent the next decade in armed struggle against the U.S. occupation. Segments of the native elite were co-opted by the Progressive Republicans who arrived in the Philippines. "Taft was one who sought to implement a cohesive colonial policy in the Philippines, addressing foremost political stability and economic development drive by trade and American capital[.]" Abinales in Go 154. While Taft and others advocated Progressive ideals in the new colony, these same practical politicians resorted to machine-based politics by accommodating native elites, in part to obtain acceptance of American

authority. Renato Constantino The Philippines: A Past Revisited (1975) 244 "One of the earliest dilemmas of the Taft Commission was how to devise an effective means of filling the critical positions in the new colonial government with qualified men while at the same time rewarding loyal Americanists." Michael Cullinane Ilustrado Politics (2003) Rationalizing and unifying statutory law simply was not a priority and it had no well-positioned legal advocate with the single pointed focus of Frear nor anyone who was in the position of persuading anybody of the need for it.

In Hawai'i, over one hundred years after Frear's project, every permanent statutory law, in every area of law, adopted and in force in Hawai'i appears in the Hawai'i Revised Statutes. An individual need only go to the Hawaii state legislature's website, the public library, the municipal clerk's office or the court library and consult the official index or table of contents to discover the location of laws governing any area of life (local government law, government procurement law, family law, election law, banking law, real property, etc.,). The law is coherent and intelligible to the common person without the need for resorting to extensive legislative historical research or the consultation of an attorney. The common person has direct access to the most important government information – the permanent statutory laws.

A Comparison to Statutes in the United States

The Philippines is certainly not unique or exceptional in the kind of disorganized and conflicting state of its statutory law. It is simply an extreme outlier for national governments around the world. For example, the United States, which is a model for the present Philippine government, also lacks an officially adopted compilation of its entire statutes. In 1975, the Office of Law Revision Counsel was established within the U.S. House of Representatives "to develop and keep current an official and positive codification of the laws of the United States." 2 USC Sec. 285A, Pub.

L. 93-554, title I, ch. III, Sec. 101, Dec. 27, 1974, 88 Stat. 1777 The office is required to be impartial in its work. It publishes an official compilation of the law called the United States Code. It is also tasked to review the law, revise and codify each title of its compilation as positive law. That is, separate from the unofficial compilation that exists, it is also tasked with proposing legislation which would turn a particular title of the United States Code into the actual permanent law (as opposed to an unofficial compilation thereof). Currently half of the titles of the US Code have been positively adopted by the U.S. Congress. Those positive codified titles are the law. No further inquiry is necessary at all to determine what the state of the law is with these titles. For most purposes, the official compilations of the remaining law are sufficient to give an individual immediate access to the current state of the statutory law with annotations to give a legal researcher tools to find the original statute. The U.S. Code is available online and available in many public libraries throughout the United States. There are no costs other than transportation costs associated with accessing the U.S. Code. The United States Code is approximately a quarter of a million pages in length which compiles and consolidates many more pages of statutes at large.

Current Efforts in the Philippines

Gamboa said it eloquently: "The most important benefit derived from the codification of the law are, first, it renders the law more clear and certain; and second, it tends to make less necessary, resort to the ever-increasing court reports of which there is already a stupendous volume. And someone has remarked, the codification of a subject, if well done, 'sets the legal house in order. It sweeps the rubbish into the dustbin and makes that portion of the law coherent and modern.'" Gamboa 12 Others have noted that "[m]odern codifications provide for comprehensive and therefore systematic legislation over a substantial part of the law." Jansen 86

During the present Fifteenth Congress, several bills have been filed proposing codification of different forms. A complete codification has been proposed in HB700 and HB 4138. A recodification of the penal code has been proposed in HB 2019 and HB 3344. A recodification of the civil code has been proposed in HB 2020 and HB 3345. A codification of commercial laws has been proposed in HB 2433 and HB 3346. These have all been responses to Aquino's 2010 State of the Nation speech where he said, "Kailangang repasuhin ang ating mga batas. Nanawagan po akong umpisahan na ang rekodipikasyon ng ating mga batas, upang siguruhing magkakatugma sila at hindi salu-salungat. Ito pong mga batas na ito ang batayan ng kaayusan, ngunit ang pundasyon ng lahat ng ginagawa natin ay ang prinsipyong wala tayong mararating kung walang kapayapaan at katahimikan. [There is a need to review our laws. I call on our lawmakers to begin a re-codification of our laws to ensure harmony in legislation and eliminate contradictions. These laws serve as the basis of order in our land, but the foundation of all rests on the principle that we cannot grow without peace and order.]" Benigno S. Aquino III, First State of the Nation Address, Official Gazette July 26, 2010

Not waiting for the passage of any laws, Justice Secretary Leila de Lima formed the Criminal Code Committee "to make [the Penal Code] more comprehensive and attuned to modern times...Over the years, there have been dramatic changes in the nature and types of crimes and there is an urgent need to craft a truly organic, Filipino criminal code attuned to our values and norms." Jerome Aning "De Lima forms panel to review penal code" in Daily Inquirer, April 25, 2011

Compilation and codification efforts are not a magic bullet for anything. When Justinian promulgated his Corpus Juris Civilis, he intended to abolish all prior law. However certain aspects of pre-Justinian law were included in the Corpus Juris Civilis and were therefore preserved. "Similarly, the French, when they codified their law, repealed all prior law in the areas covered by the codes. Any principle of prior law that were incorporated in the codes received their validity not from the

previous existence, but from their incorporation and reenactment in codified form." John Henry Merryman The Civil Law Tradition (1985) 27

The goal of compilation and unified codification is to make statutory law accessible and intelligible to the majority who are subject to it. It would clearly and unambiguously give notice of the current law and do so in an organized and comprehensive manner. The authority of an official compilation of the current statutory law would be expressly based upon the affirmative act of the "democratic representatives of the people" and not, in accidental fashion, on the transitory provisions of the 1987 Constitution ratifying the enactments of dictators and colonial governments. Moreover, an official compilation would be immediately available to translate into Tagalog and the other regional mother languages.

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