THE CONSTITUTION AND ENVIRONMENTAL LAW: THE RELEVANCE OF THE MALCOLM ACTIVIST APPROACH*

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Our once bountiful natural resources have been depleted considerably by predatory interest, aided by the thoughtless indifference and unconcern of many, whether in or out of officialdom. The atmosphere, especially in Metro Manila, continues to be defiled by impurities so perilous to public health. There is news, not denied, that our country has earned the unsavory distinction of being dumping ground for toxic wastes. Apparently, the emphasis on the so-called imperatives of economic growth continues to be pursued at the cost of the welfare and well-being of the present and future generations.

An important development to Philippine environment Law is the recent promulgation of a unanimous decision, *Oposa v. Factoran,* Jr..[1] Its significance cannot be over-estimated. It bears all the earmarks of a landmark decision that are discussed in amplitude by the writer.

Nor is the decision's significance confined solely to its being a major contribution to Philippine Environmental Law. It has elicited - and rightly so - comments in legal quarters. The observation has been made that the activist role of the Supreme Court has once again come to the fore. The opening paragraph of the opinion penned by Justice Davide Jr. is an indication of what is involved. Thus:

In a broader sense, this petition bears upon the right of Filipinos to a balanced and healthful ecology which the petitioners dramatically associate with the twin concepts of "inter-generational responsibility" and

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[1]224 SCRA 792 (1993).

"inter-generational justice." Specifically, in touches on the issue of whether the said petitioners have a cause of action to "prevent the misappropriation or impairment" of Philippine rainforests and "arrest the unabated hemorrhage of the country's vital life-support system and continued rape of Mother Earth.[2]

It was an ambitious undertaking for the plaintiffs in the trial court - petitioners in the Supreme Court nothing less than for the then Secretary of Environment and Natural Resources Fulgencio Factoran, his agents, representatives, and other persons acting on his behalf to

> (1) Cancel all existing timber license agreements in the country; (2) Cease and desist from receiving, accepting, processing, renewing or approving new timber license agreements.[3]

There was a motion to dismiss grounded principally on the lack of a cause of action, although the issue of *locus standi* was equally raised. The trial court dismissed the suit. Hence the certiorari petition. It was granted. The order of dismissal was reversed, Supreme Court ruling that there was *locus standi* and that there was a cause of action. The Court, however, also required petitioners to amend their complaint "to implead as defendants the holders or grantees of the questioned timber license agreements".[4]

The Supreme Court, considering first the issue of *locus standi* sustained the right of petitioners to sue. Thus:

> This case, however, has a special ands novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generation can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and helpful ecology is concerned. Such a right, as hereinafter expounded, considers the "rhythm and harmony of nature." Nature means the created world in its entirely.[5]

After ruling on the question of standing, the Court addressed itself to the objection based on the lack of a cause of action. Again petitioners prevailed. Thus:

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[2]*Ibid.*, at 795-796.
[3]*Ibid.*, at 796.
[4]*Ibid.*, at 797.
[5]*Ibid.*, at 802-803.

> We do not agree with the trial court's conclusion that the plaintiffs failed to allege with sufficient definiteness a specific legal right involved or a specific legal wrong committed, and that the complaint is replete with vague assumptions and conclusions based on unverified data. A reading of the complaint itself belies these conclusion.[6]

Further:

> The complaint focuses on one specific fundamental legal right - the right to a balanced and healthful ecology which, for the first time in our nation's constitutional history, is solemnly incorporated in the fundamental law.[7]

The Court's *ratio decidendi* is impressed with more than its fair share of plausibility. According to the opinion:

> 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 state policies by the Constitutions itself, thereby highlighting their continuing importance and imposing upon the state 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, but also for those-to-come-generations which stand to inherit nothing but parched earth incapable of sustaining life.[8]

Then came this emphatic affirmation: "The right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment." It thus appears undeniable that the *Oposa* decision is a manifestation of both *institutional and policy activism.*

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[6] *Ibid.*, at 804.

[7] *Ibid.*

[8] *Ibid.*, at 804-805.

The *Oposa* decision was unanimous, with a concurring opinion from Justice Feliciano. The concurrence gave expression to perceptions deserving of further reflection. After acknowledging the "seminal principles laid down in [the] decision ... likely to influence profoundly the direction and course of the protection and management of the environment which of course embrace all the natural resources"[9] of the country, he sounded a note of caution: The Court may have gone too far in the direction of *institutional activism.*

In the words of the concurrence:

> The Court explicitly state that petitioners have the *locus standi* necessary to sustain the bringing and maintenance of this suit ... *Locus standi* is not a function of petitioners claim that their suit is properly regarded as a *class suit.* I understand *locus standi* to refer to the legal interest which a plaintiff must have in the subject matter of the suit. Because of the very broadness of the concept of "class" here involved -membership in this `class' appears to embrace everyone living in the country whether now or in the future - it appears to me that everyone who may be expected to benefit from the course of action petitioners seek public respondents to take, is vested with the necessary *locus standi.* The Court may be seen therefore to be recognizing a *beneficiaries' right of action* in the field of environmental protection, as against both the public administrative agency directly concerned and the private persons or entities operating in the field or sector of activity involved.[10]

The concurrence went on to state that while the "fundamental right" to a balanced and healthful ecology is deserving of recognition, it does not follow that it can be characterized as "specific", as held in the Court's opinion. The concurrence went on to suggest:

> that petitioners must, before the trial court, show a more specific legal right - a right cast in language of significantly lower order or generality than Article II (15) of the Constitution - that is or may be violated by the actions, or failures to act, imputed to the public respondent by petitioners so that the trial court can validly render judgement granting all or part of the relief prayed for. To my mind, the Court should be understood as simply saying that such a more specific legal right or rights may well exist in our *corpus* of law, considering the general policy principles found in the Philippine Environment Code, and that the trial court should have given

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[9] *Ibid.*, at 814.
[10] *Ibid.*, at 814-815.

> petitioners an effective opportunity so to demonstrate, instead of aborting the proceeding on a motion to dismiss.[11]

It is "important that the legal right which is an essential component of a cause of action be a specific, operable legal right, rather than a constitutional or statutory policy...."[12]

There are two reason for such a perception. The first is

> that unless the legal right claimed to have been violated or disregarded is given specification in operational terms, defendants may well be unable to defend themselves intelligently and effectively; in other words, there are due process dimensions to this matter.[13]

The second is that absence of any allegation or proof about a specific violation of law or applicable regulation, reliance of petitioners will have to be "on the expanded conception of judicial power" based on grave abuse of discretion amounting to lack or excess of jurisdiction.

Accordingly,

> When substantive standards as general as "the right to a balanced and healthy ecology" and "the right to health" are combined with remedial standards as broad ranging as a "a grave abuse of discretion amounting to lack or excess of jurisdiction", the result will be, it is respectfully submitted, to propel courts into the uncharted ocean of social and economic policy- making. At least in respect of the vast area of environmental protection and management, our courts have no claim to special technical competence and experience and professional qualification. Where no specific, operable norms and standards are shown to exist, then 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 implement them before the courts should intervene.[14]

For Justice Feliciano, that would be tantamount to *policy* activism far from desirable.

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[11] *Ibid.*, at 817.

[12] *Ibid.*

[13] *Ibid.*

[14] *Ibid.*, at 818.

It is worth recalling that the 1993 Malcolm Symposium had as its core the perceived activism of the Supreme Court. It was announced at the outset:

> The subject- the role of the Supreme Court in the discharge of the function of judicial review to assure [the] supremacy of the Constitution - is, at all times, of great interest and concern. It is of even greater interest and concern now.[15]

Then came this observation:

> The notion has gained currency especially in the business community that there is an undue participation of the judiciary in economic affairs, better left to the policy determination of the political branches, the executive and legislative departments.[16]

Thus, once again, with *Oposa*, judicial activism holds center stage. What is more, the role of the judiciary, more specifically, the Supreme Court, is even more enhanced.

It is even more worth recalling that it was the 1990 *Garcia* decision,[17] where the Supreme Court reversed the determination of the Board of Investments as to the location of a proposed petro-chemical plant, that in the words of one of the speakers of the symposium, Attorney Ricardo J. Romulo, "shocked [the] business community...".[18] For that economic sector, judicial restraint then ought to have been the rule. That was judicial to intrude into matters better left to the investors and the Board of Investments. In *Garcia*, the Court, before it decided, had the benefit of prior executive action. Here in *Oposa*, it had no such guidance except the open-ended standards of "the right to a balanced and healthy ecology" and "the right to health." Hence the fear expressed in the concurrence of courts being propelled "into the uncharted ocean of social and economic policy-making." There is reassurance in the thought, however, that *Oposa* does not go further than to give the most hospitable scope and amplitude to these constitutional mandates. With due regard to the teaching of experience and

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[15]Fernando, *The Supreme Court and the Constitution: The Function of Judicial Review*, 67 PHIL. L.J. 287 (1993).

[16]*Ibid.*

[17]Garcia v. Board of Investments, 191 SCRA 288 (1990)

[18]Romulo, *The Supreme Court and Economic Policy: A Plea for Judicial Abstinence*, 67 PHIL. L.J. 348 (1993).

the needs of the future, the present is as good a time as any to lay down the parameters of such social and economic rights. There being this opportunity, the judiciary is not to be condemned for ruling as it did. As thus viewed, this is not judicial activism running riot.

Not too long ago, American legal scholarship in constitutional law displayed a marked partiality for the judicial *activism/restraint* dichotomy in its appraisal of the proper role of the judiciary. Such an approach was most in evidence in law journal articles during the incumbencies of Chief Justice Hughes, Stone, and even more so, of Warren. In the later seventies up to the present, during the Burger and Rehnquist Courts, the terminology that appears to have gained currency is judicial *interpretivism/non-interpretivism*, which could be traced back to Ely's "Constitutional Interpretivism: Its Allure and Impossibility."[19]

Interpretivism, for Ely, is indicative of "judges deciding constitutional issues [confining] themselves to enforcing values or norms that are stated or very clearly implicit in the written Constitution,..."[20] *Non interpretivism*, on the other hand, is indicative of

> " the contrary view that courts should go beyond that set of references and enforce values or norms that cannot be discovered within the four corners of the document."[21] For the interpretivist jurist, " the Constitution is a legal document to be interpreted like other legal documents, in accord with its language and purpose. The Constitution, however, seldom suggests an intent to invalidate only a small set of historically undestood practices... more often it proceeds by briefly indicating fundamental principles whose general purpose is clear enough but whose specific inplications for each age were meant to be determined in contemporary context. What distinguishes interpretivism from its opposite it its insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premises, is fairly discoverable in the Constitution.[22]

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[19] 53 INDIANA L. J. 309-448 (1968) Cf. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1-11 (1971); Brent, *The Misconceived Quest for the Original Understanding*, 60 BOSTON U. LAW REV. 204-234 (1980); Levinson, *Law as Literature* 60 TEX. LAW REV. 373, 376-89 (1982); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles* 96 HARV. LAW REV. 781, 805-24 (1983); Schauer *Easy Cases* 58 S. CAL. LAW REV. 399, 414-423, 430-31 (1985).

[20] *Ibid.*, at 309.

[21] *Ibid.*

[22] *Ibid.*, at 310.

This is not to say that the judicial activism/restraint mode of appraisal is a spent force. March 1989 marked the appearance of a comprehensive review of American Supreme Court decisions by a Professor Levy and Glicksman entitled *Judicial Activism and Restraint in the Supreme Court Environmental Law Decisions.*[23] It is their conclusion that the

> 1960s and 1970s exercised its power broadly to ensure the realization of a pro-environment policy. This judicial activism was supported by commentators who argued that environmental interests were underrepresented in the regulatory process and that judicial intervention was necessary to counter balance the powerful interests favoring industrial development at the expense of environmental protection. [Subsequently, however,] the Supreme Court appears to have retreated from this activism by emphasizing judicial restraint in its environmental decisions. Proponents of judicial restraints assume this shift has limited the Court's power to implement its own preferences.[24]

Hallstrom V. Tillamook,[25] a 1989 decision, appears to be an affirmation of such a view. In this case the United States Supreme Court dismissed a citizen suit under the Resource Conservation and Recovery Act (RCRA) for failure to meet its requirements as to notice and the 60-day delay requirements. According to the opinion:

> The language of [the applicable provision] could not be clearer. A citizen may not commence an action under RCRA until 60 days after the citizen has notified the [Environmental Protection Agency]; the State in which the alleged violation occurred, and the alleged violator. Actions commenced prior to 60 days after notice are prohibited ... [It] acts as a specific limitation on a citizen's right to bring suit. Under a literal reading of the project, compliance with the 60-day notice provision is a mandatory, not optional, condition precedent for suit.[26]

The argument that such provision "be given a flexible or pragmatic construction" was rejected. The same fate was in store for the contention that it "be subject to equitable modification and cure." Neither was there any sympathy shown for the plea that a technical reading [thereof] would be "particularly inappropriate in a statutory scheme in which laypersons

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[23]42 VANDERBILT LAW. REV. 343-431.

[24]*Ibid.*

[25]439 U.S. 20

[26]*Ibid., at 26.*

unassisted by trained individuals initiate the process." Nor was there acceptance of the view that a "literal interpretation of the notice provision would defeat Congress' intent in enacting the Resource Conservation and Recovery Act." Instead, the Court was of the conviction "that the legislative history indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits.[27]

A few words on whether Justice George A. Malcolm, founder of the U.P. College of Law, is to be considered an *activist* or judicial *restraint* jurist. If the matter be viewed from the standpoint of *institutional/policy activism*, the needed clarification comes to light. From the *institutional* aspect, nowhere has his philosophy been better expressed than in his *ponencia* in *Manila Electric Co. v. Pasay Trans. Co.*[28]

> The Supreme Court of the Philippine Islands represents one of the three divisions of power in our government. It is judicial power and judicial power only which is exercised by the Supreme Court. Just as the Supreme Court, as the guardian of constitutional rights, should not sanction usurpations by any other department of the government, so should it as strictly confine its own sphere of influence to the powers expressly or by implication conferred on it by the Organic Act. The Supreme Court and its members should not and cannot be required to exercise any power or to perform any trust or to assume any duty not pertaining to or connected with the administering of judicial functions.[29]

His fidelity to this creed was manifested when in *Alejandrino v. Quezon*,[30] he spoke for the Supreme Court. It held that it was devoid of jurisdiction. It could not pass on the validity of the suspension of an appointive member of the then Philippine Senate. For him respect for the fundamental principle of separation of powers demanded that the judicial branch keep its hands off a distinctively political question.

As to *policy* activism, once it was shown that the judiciary was vested with jurisdiction, he could, within the permissible bounds of judicial power, give full expression to values he held dear. Even then, he was careful to ascertain that in so doing he would not go further than what the fundamental law ordains. Within those limits, he was a *policy* activist.

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[27] *Ibid.*, phrases in quotes, at 27-29.
[28] 57 Phil. 600 (1932).
[29] *Ibid.*, at 605.
[30] 46 Phil. 83 (1924).

Witness his *ponencias* in *habeas corpus* petitions,[31] intellectual freedom[32], and the rights of an accused.[33]

It must have been his commitment to *policy* activism that even when the Supreme Court lacked jurisdiction, he could in the Court opinion dismissing the case give expression to what in his considered view was the correct way of resolving the issue. Thus, in *Alejandrino*,[34] while it was held that the validity of the suspension was a political question beyond the power of the judiciary to adjudicate, it was also declared that suspension was not an appropriate penalty. That was clearly an *obiter*, but it gained acceptance. So it was until in *Vera v. Avelino*,[35] the Supreme Court, while adhering to *Alejandrino* in so far as to its political question aspect, tacitly allowed the suspension of three Senators. The 1973 Constitution provided for such a penalty.[36] So with the 1987 Constitution.[37]

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[31]Cf. Villavicencio v. Lukban, 39 Phil. 778 (1919); Ganaway v. Quilen, 42 Phil. 805 (1922).

[32]United States v. Bustos, 37 Phil. 731 (1918).

[33]United States v. Javier, 37 Phil. 449 (1918).

[34]*Vide*, note 30.

[35]77 Phil. 192 (1946) Cf. Osmeña, Jr. v. Pendaton, 109 Phil. 863 (1960).

[36]Cf. Art. VIII, sec. 2, par. (3).

[37]Cf. Art. VI, sec. 16, par. (3).