THE RIGHT TO A BALANCED AND HEALTHFUL ECOLOGY: THE ODYSSEY OF A CONSTITUTIONAL POLICY*

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Earth, give me back your pure gifts, the towers of silence which rose from the solemnity of their roots. I want to go back to being what I have not been, and learn to go back from such deeps that amongst all natural things I could live or not live; it does not matter to be one stone more, the dark stone, the pure stone which the river bears away.

Pablo Neruda

Chief Justice Enrique Fernando, Trustees of the Malcolm Trust Funds, Dean Agabin, Former Secretary of the DENR Fulgencio Factoran, Atty. Oposa, Prof. Sereno, Colleagues, Students, Friends.

Before I start my lecture, I would like to acknowledge my debt to the Trustees of the Malcolm Trust Funds for the honor of choosing me to deliver this year's Malcolm Lecture. I would also like to thank them for the financial support the Malcolm Trust Funds gave me during my doctoral studies at the Yale Law School.

Let me begin with an overview of the lecture that I will deliver this afternoon. Its context is that of a comprehensive policy science study of domestic and international environmental law. For today's lecture

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however, I will focus on the constitutional policy on the environment as articulated in the 1987 Philippine Constitution. First, I will propose my central thesis on how we can understand and interpret the constitutional policy. Second, I will say a word about the methodology I am using to prove this thesis. Third, I will then apply the methodology to the constitutional policy on the environment, in particular focusing on the role of the Judiciary. And finally, I will end with some suggestions on how we can further ensure that this policy is realized and operationalized.

1. CENTRAL THESIS

The central thesis that underpins this lecture is that the constitutional policy on the environment is made and remade, interpreted and reinterpreted, or in other words, operationalized not by the Philippine judiciary principally nor even by the Philippine government but by the interaction of a plurality of participants in a social decision process. These participants include government institutions - such as the Judiciary, Congress and the Executive Branch, industry and other commercial users of natural and ecological resources, communities of direct users of said resources, nongovernmental organizations, and international entities such as multilateral financing institutions.

What is the law, including the constitutional policy, in the area of the environment at least, cannot be really fixed at any given time but is a continuing process of decision-making in forums as diverse as courts, administrative processes, the legislature, and international negotiations. Indeed, the decision process extends even to informal and unofficial forums.

All the participants bring their own perspectives, framed as interpretations of law and policy, into this process and the determining factor on what perspective prevails at a given point in time is the balance of authority and power - i.e. the balance between the text of the law as a source of authority and the economic, political and cultural resources available to the participants in the decision process. In a nutshell, the constitutional policy on the environment is not only what the Constitution says it is nor even what the Supreme Court proposes it to be but is the interpretation which prevails in a process characterized by conflict among a plurality of participants.

2. METHODOLOGY

To prove this thesis, I propose to use the policy science approach as developed by Professors Myres McDougal and Harold Lasswell and as articulated by Professor W. Michael Reisman.[1] I use this methodology without any illusion that it is the only theoretical framework that should be used to understand law. In fact, I concede that, at some points, the framework can be criticized as culturally inappropriate. However, I find the approach a very useful tool in piercing through and going beyond law as a matter mainly of rules and of logic, a task which I think is essential in all areas of law and particularly in environmental law.

Professor Reisman describes law as a social decision process.[2] By itself, there is nothing new in this proposition. At a superficial level, we can all agree that "a lawful decision is a choice made in conformity with appropriate procedural and substantive norms".[3] But Reisman points out that one does not just make a decision. Indeed, many functions or operations are concealed in the word "decision" and any one who wants to understand as well as make effective a legal norm must deconstruct, i.e. take apart, the meaning of such a term. Concretely, this means that the lawyer or legal scholar must distinguish law as myth system from law as operational code.[4]

By myth system, Reisman refers to the black-letter law, to the official legal norms recognized as such by society and by organs of the state. Thus, the constitution, statutes, administrative rules, even jurisprudence - all these form part of law as myth. But, according to Reisman:

> there are enough discrepancies between this myth system and the way things are actually done by key officials or effective·actors to force the observer to apply another name for the unofficial but nonetheless effective guidelines for behavior in those discrepant sectors: the operational code.
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> The operational code - how the legal norms are used and manipulated and enforced by the different actors in a legal system - is a "byproduct of social

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[1] *See* Myres McDougal and Harold Lasswell, "The Identification of Diverse Systems of Public Order" 53 A.J.I.L. 1 (1959); See also Myres McDougal & Associates, STUDIES IN WORLD PUBLIC ORDER (1960).

[2] W. Michael Reisman, "Law from the Policy Perspective", in Myres McDougal & W. Michael Reisman, INTERNATIONAL LAW ESSAYS (1981) 1,3.

[3] *Id.*

[4] *Id..*, at 3-4.

> complexity, generated by the increase of social divisions and specializations". In the context of power, the operational code is a "private system of law".[5]

The operational code is not totally divorced from the myth system. Indeed, it finds legitimacy in being able to invoke black-letter law. But it is distinct from the myth system. And to understand law as well as to make it more effective is to go beyond constitutional and statutory policy as myth and into policy as operational code.

Understanding the operational code of Philippine environmental policy is particularly important because staying at the level of constitutional, statutory and jurisprudential text alone is deceptive. At this level, we have some of the most progressive policies in the world. Particularly among developing countries, we are certainly one of the most if not *the* most advanced in articulated policy. The categorical right to ecological security in the 1987 Constitution[6] and our laws on protected areas[7] as well as toxic and hazardous wastes[8], and the precedent-setting case of *Oposa v. Factoran*[9] are just some examples. Yet, on the ground, we cannot deny that our environmental problems remain daunting. We cannot in any way say that we have turned the tide. Hence, it is imperative to pierce our legal text and ask why there is a gap between policy and reality, *i.e.* why the operational code is different from the myth system.

For this lecture, because of time constraints, I decided to present in detail only my analysis of the role of the Judiciary in environmental policy-making. This analysis I present in two parts: First, the role of the judiciary as articulated in the myth system; Second, this role as manifested in the operational code. In the first part which I call - *Oposa v. Factoran: Locating the Role of the Judiciary in the Myth System,* I will use predominantly legal texts - the Constitution, statutory provisions, and Philippine and U.S. jurisprudence. In the second part entitled - *The Judiciary and The Environmental Dilemma: The Operational Code,* I will make use of various social sciences, particularly economics and

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[5] *Id.*, at 26.

[6] CONST., Art. II, Sec. 16.

[7] *See* Republic Act No. 7586 - "An Act Providing for the Establishment and Management of National Integrated Protected Areas System, Defining its Scope and Coverage and for Other Purposes".

[8] *See* Republic Act No. 6969: An Act to Control Toxic Substances And Hazardous And Nuclear Wastes. Providing Penalties For Violation Thereof, And For Other Purposes.

[9] Minors Oposa et. al. v. Factoran, G.R. No. 101083, 30 July 1993.

anthropology. In this section, I will also be indicating tentative observations and conclusions I have made as regards alternative forums for environmental decision-making as well as the roles of other participants. This is necessary for a clearer overview of the operational code of environmental law and policy and also for appreciating the role and limits of the judiciary.

3. OPOSA V. FACTORAN: LOCATING THE ROLE OF THE JUDICIARY IN THE MYTH SYSTEM

The Oposa vs. Factoran case, promulgated on July 30, 1993, is a final and binding judgement of the Supreme Court. It is not, strictly speaking, the first environmental case in the Philippines. Indeed, we have a long line of decisions involving disputes in natural resources utilization - eg. cases concerning ownership of timber resources[10] and disputes over timber license agreements.[11] We have had a number of cases also concerning pollution[12] as well as a case involving nuclear power.[13] Winding its way to the Supreme Court are cases involving conversion of lands from agricultural to industrial or residential.[14] All these cases however, while certainly having environmental implications, dealt with the issue from a conflict-of-rights perspective, thus usually the *ratio decidendis* of these decisions were based on due process, property rights, the Regalian Doctrine or the law on agrarian reform.

What distinguishes *Oposa v. Factoran* however is that it is our first case which expressly interprets the constitutional right to a balanced and healthful ecology found in the 1987 Constitution. *Oposa v. Factoran* is also the first and so far the only Philippine case which deals with the issue of how to value our natural resources not only with respect to the present but also for the future generations. Hence, the Oposa case is a landmark decision for this reason. As Justice Florentino Feliciano describes it in his concurring opinion, it

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[10]*See* Santiago v. Basilan, 9 SCRA 349 and People v. CFI of Quezon, BR. VII, 206 SCRA 187.

[11]*See* Suarez v. Reyes, 7 SCRA 462, Agusmin Promotional Enterprises v. Court of Appeals 117 SCRA 369, Tan v. Director of Forestry 125 SCRA 302

[12]*See* Pollution Adjudication Board v. Court of Appeals 195 SCRA 112 and Mead v. Argel 115 SCRA 256.

[13]Tañada v. PAEC 141 SCRA 307 (1986).

[14]These cases are still at the administrativel level or in the lower courts.

> is one of the most important cases decided by this Court in the last few years. The seminal principles laid down in this decision are likely to influence profoundly the direction and course of the protection and management of the environment, which of course embraces the utilization of all the natural resources in the territorial base of our polity.[15]

At this point, I must also acknowledge my gratitude to Atty. Antonio Oposa and former DENR Secretary Fulgencio Factoran for consenting to be reactors to this lecture. Having been the main protagonists in the case, I am sure we will benefit from their insight as well as hindsight.

The Issues

The plaintiffs in this case were minors represented by their parents, and the Philippine Ecological Network, Inc., a non-stock, non-profit organization. The original defendant was Atty. Factoran, then Secretary of the Department of Environment and Natural Resources (DENR). The complaint was filed by the plaintiffs to compel the defendant to cancel all existing Timber License Agreements (TLA) and to cease and desist from granting new applications. This complaint was dismissed by the Regional Trial Court on the procedural ground that the complaint stated no cause of action against the defendant and that the granting of the relief asked would result in the impairment of contracts which is prohibited by the Constitution.

The plaintiffs in turn petitioned the Supreme Court to reverse this ruling on the ground that the trial court gravely abused its discretion in dismissing the complaint. The Supreme Court ruled in favor of the petitioners and remanded the case to the lower court for trial.

In its simplest formulation, the main issues in this case are whether or not the petitioners have a cause of action and whether or not cancellation of the TLAs constitutes impairment of contracts. It is the first issue which concerns us in this lecture as it is in resolving the issue of cause of action that the Court interprets the constitutional right to a sound environment.

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[15]Concurring Opinion of Justice Florentino Feliciano in Oposa v. Factoran, Supra note 10 at 1.

In addition to these issues, the Supreme Court also ruled on the question of whether the petitioners had standing to file this case and on whether or not the matter at hand was a political question. While arguably obiter, the Court's pronouncements on these points merit discussion.

The Decision

The argument of the respondents centered on the proposition that the petitioners failed to allege in their complaint a specific legal right violated by the former for which any relief is provided by law. They also argued that the question of whether logging should be permitted in the country is a political question which should be properly addressed to the executive or legislative branches.

In the decision rendered by the Supreme Court, written by Justice Hilarion Davide and concurred in by all the Justices except Justice Narvasa who did not take part as he was related to one of the petitioners and Justice Vitug who was not yet a member when the case was deliberated upon, the Court made the following significant statements:

First, the Supreme Court dealt with the issue of standing. Did the petitioners have standing to file this complaint? The Court said yes, stating that the civil case was properly a class suit. According to the Court:

> The subject matter of the complaint is of common and general interest not just to several, but to all citizens of the Philippines. Consequently since the parties are so numerous, it becomes impracticable, if not totally impossible, to bring all of them before the court.[16]

The Supreme Court also recognized that the children in this case correctly asserted that they represent their generation as well as generations yet unborn. Recognizing intergenerational equity and responsibility was a "special and novel element" in the case. According to the Court,

> their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.[17]

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[16]Oposa v. Factora. *Supra* note 10, at 11.
[17]*Id.*, at 12.

Second, the Supreme Court agreed with the petitioners that they had a cause of action. According to the Court,

> [T]he complaint focuses on one specific fundamental right, the right to a balanced and healthful ecology which, for the first time in our nations constitutional history, is solemnly incorporated in the fundamental law.[18]

The Court then cited Section 16, Article II of the Constitution which provides that

> The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.

It also pointed to Section 15, Article II which mandates the State "to protect and promote the right to health of the people and instill health consciousness among them".

Finally, to support its proposition that there is a right to a sound environment, the Court cited Exec. Order No. 192 (1987), the Administrative Code, and the Philippine Environmental Policy, all of which expresses a general policy of environmental protection.

In interpreting these provisions, the Supreme Court recognized the primacy and centrality of the right to ecological security and health among the many rights assured by the Constitution. It said that:

> [W]hile 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 - 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 mankind. 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 Constitution 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

[18] *Id.*, at 14.

> present generation, but also for those to come - generations which stand to inherit nothing but parched earth incapable of sustaining life.[19]

Going beyond the rhetoric and poetry of these statements, the import of the Court's statements is that the right to a sound environment is a self-executory constitutional policy. By itself, independent of specific statutory rights, this right is actionable. And it is actionable against the DENR Secretary who is tasked with carrying out the State's constitutional mandate to control and supervise the exploration, development, utilization, and conservation of the country's natural resources.

On the matter being a political question, the Court pointed out that under Article VIII, Section 1 of the 1987 Constitution, judicial power has been expanded to include:

> the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to 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.

Finally, on the issue of non-impairment of contracts, the Court ruled that TLAs are not contracts within the scope of the constitutional prohibition, but only a license which can be withdrawn when warranted by public interest or welfare. Even if It also observed that even if they were considered as contracts, the non-impairment clause cannot be invoked because there is no law involved. Besides, such a law, according to the Supreme Court, would be justified under the police power of the state.

THE LEGAL IMPLICATIONS

Coupled with the liberalization of the rule on standing, recognizing the constitutional right to a sound environment as self-executory makes *Oposa v. Factoran* a truly radical case insofar at least as to its legal implications.

Justice Feliciano, in a concurring opinion, clearly sees these implications. With all due respect to Justice Feliciano, I think that his concurring opinion does not clarify what the Court appears to be saying but in fact diverges substantially from the reasoning in the main decision.

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[19] *Id.*, at 14-15.

Indeed, a dispassionate observer could sincerely conclude that Justice Feliciano's concurrence is in part a dissent.

For example, on the issue of whether the petitioners had a cause of action, Justice Feliciano disagreed. According to him, they had not identified one specific fundamental legal right on which to base their claim. Although the right to a balanced and healthful ecology is indeed a constitutional right, nothing could be more "comprehensive in scope and generalized in character." He disagreed that Sections 15 and 16 of Article II of the Constitution were self-executing and judicially enforceable in their present form. The same is true for the other texts cited by the Court in its main decision.

As to legal standing, Justice Feliciano observed that *locus standi* "is not a function of petitioners' claim that their suit is properly regarded as a class suit" but refers to "the legal interest in which a plaintiff must have in the subject matter of the suit". He then pointed the broadness of the class involved in this suit -

> [B]ecause 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 . . . is vested with the necessary *locus standi*. The Court can 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.[20]

Justice Feliciano then concludes that whether such right of action "may be found under any and all circumstances, or whether some failure to act, in the first instance on the part of the government agency concerned must be shown" is not discussed in the decision and presumably left for future determination in a proper proceeding.[21]

On the issue of whether the cancellation of TLAs is a political question, Justice Feliciano clearly agrees, stating that

> [W]hen 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 grave abuse of discretion amounting to lack

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[20]Concurring Opinion of Justice Feliciano, *Supra* note 16 at 1-2.
[21]*Id.*

> or excess of jurisdiction," the result will be...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 to implement them before the courts should intervene.[22]

Why then did Justice Feliciano concur with the decision? From my reading, I can point out two reasons. First, he believes that such a specific right on which petitioners may base their cause of action may exist in Philippine law, and that plaintiffs should be afforded an opportunity to demonstrate this right, and that this opportunity was denied by granting the defendant's Motion to Dismiss. Second, Justice Feliciano voted to grant the petition because, in his words, "the protection of the environment, including the forest cover of our territory, is of extreme importance for the country."

In sum, what are the legal implications of *Oposa v. Factoran*?

First, the Supreme Court clearly recognizes the constitutional right to a sound and healthful ecology as a self-executory and actionable right, independent of specific legal rights. Theoretically, although probably imprudent on the part of a plaintiff or complainant, Article II Section 16 alone can be invoked to question acts or omissions by the other branches of government. It is as self-implementing as the right to free speech or freedom of religion and other rights found in the Bill of Rights.

It would however be imprudent on the part of environmentalists or communities to rely on this right alone as a basis for legal action. Difficulties in determining what evidence to present would arise if such reliance was made. An environmental case would have a much greater chance of success at the trial level if evidence, for example, of specific violations by a TLA holder of its concession agreement or of forestry laws be introduced. I venture to say that this is the specific legal right that Justice Feliciano indicated may exist on which the Oposa petitioners can anchor their claim for relief.

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[22] *Id.*, at 6-7.

Second, the case liberalizes standing - at least with respect to environmental disputes. The concept of class suit recognized in this case departs from our normal understanding of the term. The explicit recognition of the right of future generations to be represented by present generations was certainly never taught to me in my remedial law classes.

Oposa v. Factoran is precedent-setting in that it broadens the meaning of who are "proper parties" in a suit.[23] As all lawyers know, all actions must be prosecuted and defended in the name of the real party in interest.[24] The real party in interest has always been restricted to:

> ...the party who stands to be benefitted or injured by the judgment or the party entitled to the avails of the suit. "Interest" within the meaning of the rule means material interest, an interest in issue and to be affected by the decree, as distinguished from mere interest in the question involved, or a mere incidental interest. xxx[25]

The significance of *Oposa* is emphasized considering the restrictive ruling of the Supreme Court in *Lozada v. Commission on Elections*.[26] There, the Court denied a petition to review a decision of the COMELEC which refused to call an election to fill vacancies in the Batasang Pambansa. According to the Court,

> ...Petitioners' standing to sue may not be predicated upon an interest of the kind alleged here, which is held in common by all members of the public because of the necessarily abstract nature of the injury supposedly shared by all citizens. Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. When the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction...Even his plea as a voter is predicated on an interest held in common by all members of the public and does not demonstrate any injury specially directed to him in particular.[27]

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[23]*See* Dante Rene B. Gatmaytan, Unpublished Commentary on the Oposa v. Factoran Case, LRC/KSK Files.

[24]RULES OF COURT, rule 3, sec. 2.

[25]Gan Hock v. Court of Appeals 197 SCRA 223, 230 (1991). *See also* Sustiguer v. Tamayo, G.R. No. 29341, 176 SCRA 579, 587 (1989), cited in Gatmaytan, *Supra* note 24.

[26]G.R. No. 59068, 120 SCRA 337, 340 (1983), cited in Gatmaytan, *Supra* note 24.

[27]*Id.* at 341-342.

Finally, the *Oposa v. Factoran* case is precedent for the proposition that the formulation and implementation of specific environmental policies are not exclusively within the ambit of the political branches of our governmental system. Since a self-executory constitutional right is involved, our courts may intervene when there is grave of abuse of discretion in denying relief based on the assertion of such a right.

In the United States, legal standing in environment cases has long been settled. However, unlike Oposa, standing in the U.S. is always predicated on the complainant's allegation that the action will cause her injury whether economic, conservational, recreational, or aesthetic.[28] Oposa goes beyond U.S. environmental jurisprudence which requires that specific, material injury must still be alleged before an action can be filed.

In sum, our constitutional policy on the environment as interpreted by the Supreme Court in *Oposa v. Factoran* is as progressive and as strong as it can be. What more can we ask for?

It is at this point that we must look at constitutional policy as operational code. Because to stay on the level of the myth system is to delude ourselves.

For example, without minimizing the significance of the victory of the plaintiffs in the Oposa case, we must remember that the decision did not result in the cancellation of any timber license agreement and that it took the judiciary three full years (one year by the lower court and two years by the Supreme Court) to dispose of what was basically a procedural issue. In fact, it is highly improbable for the case to proceed to the trial stage since the Supreme Court, as a matter of due process, ordered that all TLA holders be impleaded as indispensable parties. The implication, it seems to me, is that evidence must be shown against each TLA holder. One can only surmise how much this will cost and how much time it will take. In the meantime, our forests continued and continues to be denuded. In fact, at an annual

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[28]U.S. v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 and Sierra Club v. Morton, 405 U.S. 727 *cited in* 61A Am Jur 2d, Pollution Control, § 35. Injury to aesthetic and environmental interest has been recognized as laying a sufficient foundation for standing. Save the Courthouse Committee v. Lynn, 408 F. Supp. 1323 *cited in* 42 U.S.C.A. 4332.

deforestation rate of 100,000 hectares per annum, three hundred thousand hectares of forests were lost while the case was pending from 1990-1993.[29]

4. THE JUDICIARY AND THE ENVIRONMENTAL DILEMMA: THE OPERATIONAL CODE

In analyzing the operational code of the Judiciary's role in environmental protection, the practical question that must be posed is whether the Judiciary is equipped to deal with environmental disputes. On a more constructive note, a better way of phrasing the question is to ask what the judiciary needs so that its involvement in such disputes would be efficient, scientifically sound and equitable.

Answering these questions require a discussion of the nature of environmental disputes.

(a) What is an environmental problem?

The classical definition of the environmental problem is that it is a "commons" question. Since the publication of Garrett Hardin's influential article[30] in 1968, the "tragedy of the commons" has become a household word among social scientists and policymakers concerned with environmental and natural resource problems. The concept has been used to explain overexploitation in fisheries, overgrazing, air and water population, abuse of public lands, population problems, extinction of species, fuelwood depletion, wildlife decline, and other problems of resource misallocation. Simply put, Hardin's paradigm is that environmental degradation results from the open access status of common goods like air, water, forests and other natural resources. Because these goods are seen as free goods by all actual and potential users, there is no attempt to internalize in their usage the costs of such consumption. The attitude of these users is "I will get my share without having to pay for it". Thus, in the free-for-all, environmental degradation and natural resources depletion becomes inevitable.

Few essays have been as influential as Hardin's, and few ideas so quickly and widely disseminated. But as one author would put it: "It would be difficult to locate another passage of comparable length and fame

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[29]*See* MASTER PLAN FOR FORESTRY DEVELOPMENT (1990), 2.
[30]Garrett Hardin, "The Tragedy of the Commons", 162 Science 1243 (1968).

containing as many errors."[31] Few questioned Hardin's assumption of individual interest unchecked by social relations, and his emphasis on competition (rather than cooperation) as the overriding relationship that shaped interactions among resource users. Under this perspective, the knee-jerk response is the immediate rejection of common property management systems as inefficient and ecologically unsound.

The "commons" paradigm however is useful for an understanding of the environmental dilemma as, to use an economic term, an "externality problem".[32] We cannot deny that in the use of natural resources, the actual cost to the whole society is usually not counted. When we allow our loggers for example to extract our timber resources while imposing ridiculously low forest charges, we fail to make them pay not only for the actual value of the extracted resources but also for the ecological damage their activities inflict on our natural resource base - including among others the loss of biological diversity, the costs of soil erosion and climate changes, and the deaths and destruction resulting from flash floods. Or when we allow an industrial firm to pollute the air or water, we do not usually count the costs to our health system and to the productivity of the affected populace.

The usual rationale behind allowing such externalities is that activities such as logging and industrial production contribute to society by way of job creation and contribution to the GNP. The problem is that in undervaluing the resources extracted or polluted and in not costing the damage or injury done we have no real basis for comparing the costs and benefits of allowing or disallowing a particular activity.

This brings us to another way of formulating the environmental dilemma - as a problem of sustainable development.

"Sustainable development" is a concept that was first articulated formally by the World Commission on Environment and Development, more popularly known as the Brundtland Commission. In OUR COMMON FUTURE, the Commission's famous document, "sustainable development" is

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[31]Partha Dasgupta, THE CONTROL OF RESOURCES (1982), in Runge, 6

[32]*See* Herman Daly and John Cobb, FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARD COMMUNITY, THE ENVIRONMENT AND A SUSTAINABLE FUTURE (1989), 37.

described as a strategy seeking "to meet the needs and aspirations of the present without compromising the ability to meet those of the future".[33]

The Commission explains why the present generation is faced with this responsibility:

> We borrow environmental capital from future generations with no intention or prospect of repaying. They may damn us for our spendthrift ways, but they can never collect on our debt to them. We act as we do because we can get away with it: future generations do not vote; they have no political or financial power; they cannot challenge our decisions.[34]

Under international law, sustainable development is now an accepted legal principle. Principle 3 of the Rio Declaration of 1992 states that

> [T]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.[35]

Under Philippine Agenda 21, sustainable development has also been articulated as a guiding norm for both economic planning and environmental regulation. In fact as early as Presidential Decree Nos. 1151 issued by former President Marcos in 1977, the concept of sustainable development was already accepted as a policy underpinning our environmental law.[36]

The problem however with the norm of sustainable development is that it is difficult to operationalize. Experience shows that even when all parties to an environmental issue agree that sustainable development is to be the goal, divergence in particular positions with regards to the issue often remain inevitable. While it is possible for Philippine society as an abstract collective entity to decide - through state organs - that an energy project is required for the development needs of the country and that the resulting environmental damage can still be absorbed by the carrying capacity of our natural resource base, the communities affected by such projects - usually economically and politically marginalized - do lose or find their resource base diminished.

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[33]World Commission on Environment and Development, OUR COMMON FUTURE (1987), 40.

[34]*Id.*, at 8.

[35]RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT (1992).

[36]*See* Section 1 of P.D. No. 1151.

For example, a visit today to the site of the Mt. Apo geothermal plant confirms that while it could be argued that the project conforms to the sustainable development norm from the national or even a Mindanao-wide perspective, it cannot be denied that the physical changes in the site has altered Mt. Apo forever and that the communities which relied on this part of Mt. Apo for their economic, cultural and religious needs could no longer do so. In other words, for almost every environmental issue, one cannot still avoid the choice of which value to prioritize - environment or development?

(b) Environmental Disputes

The preceding discussion brings us to different aspects or types of the disputes that arise from the environmental dilemma.

First, the dispute on how to measure and compare the costs and benefits of ecologically harmful activities and the costs and benefits of preventing or regulating such activities. Cost effectiveness and economic efficiency is a valid criterion in determining the proper approach to environmental issues. The problem however is that cost-benefit analysis requires the valuation of all the goods that are relevant to a particular environmental issue. Unfortunately, up to the present, economists have not really yet agreed on how to value ecological "goods" such as biodiversity or a stable climate. Complicating matters is the need to develop a valuation formula in which the proper time scale should span generations, i.e. decades, even centuries. How then can we evaluate that a particular approach is truly cost-effective from the perspective of its ultimate objective? With this difficulty, how then can we expect a participant like the Judiciary to deal rationally with environmental disputes?

A typical example of this dispute is the debate over whether we should impose a commercial logging ban or not. Knowing that such a ban may lead to among others wood supply problems and loss of jobs, the costs of such a ban are obvious and definite - but the benefits - what society saves if the ban is imposed and succeeds in helping reverse deforestation - can at the moment only be qualitative: a chance that our forest resources may recover, a hope that ten years after the ban we can resume timber extraction in a selective and sustainable way, the expectation that there will be no more deaths from flash floods resulting from deforestation twenty years from

now, and the optimism that one day we will reap economic benefits from the biological and genetic resources hidden in our forests.

Second, environmental disputes are often manifested as a conflict of specific rights between conflicting users. In forest resources, the dispute is often between commercial users such as the timber industry and forest communities, including indigenous cultural communities who have been in the forests since time immemorial. In energy disputes, communities that need to be relocated or whose quality of life is adversely affected clash with national priorities such as power supply and industrialization. In pollution disputes - involving air, water or waste - again the rights of communities conflict with the interests of commercial users and also with the industrial goals of the country.

The usual form in which this aspect of or kind of dispute arises in our legal system is through the resolution of a due process question. Should a timber license agreement be canceled? Should a project under Environment Impact Assessment (EIA) be approved? Should the DENR issue a cease and desist or closure order against a factory?

In sum, an environmental dispute involves first, a resolution of what general rights or values to prioritize in a given concrete situation - a task which requires a cost-benefit analysis, and second, which specific legal rights in a conflict should prevail. What the Judiciary often deals with is only the second aspect or type of dispute. My contention is that in both aspects, the judiciary play a necessary and indispensable role. In *Oposa v. Factoran*, when the case comes to trial, both aspects will be present. While we can predict that our courts can handle the second aspect with relative ease, I am not as certain if our judges have the necessary technical and conceptual equipment to deal with the first type of dispute.

The limitations of our judiciary also becomes obvious when we take a look at some of the perspectives that policymakers take in deciding our specific environmental policies.

DEALING WITH ENVIRONMENTAL DISPUTES: PERSPECTIVES AND STRATEGIES

I propose to discuss four perspectives that the judiciary or any other participant in the environmental decision process may adopt singly or in

combination. Most of these perspectives, I submit, can be justified under the Philippine Constitution and under our environmental laws. These are:

(1) A "command and control" strategy;

(2) A market based perspective;

(3) Community Based Resource Management (CBRM); and

(4) Pollution Prevention.

My contention is that when our courts decide on environmental disputes, they cannot escape from making a choice on which strategy to uphold. All these strategies, except probably pollution prevention, can find a legal text in the myth system that supports it and stake-holders in environmental issues - like the government, communities and industry - will directly or indirectly invoke one or more strategies.

(a) Command and Control

By "Command and Control", the strategy that is pursued is that of a superior body - the State laying down specific standards that all must follow, monitors compliance with such standards and enforces such compliance by coercive or other measures. For example: in the Philippines, the government through the DENR establishes and enforces modes of forest utilization through such measures as "annual allowable cut" and "reforestation requirements". In air pollution, the Environmental Management Bureau of the DENR lays down and enforces pollution standards, i.e. what kind and how much emissions a factory is allowed.

The justification for a "command and control" strategy in the Philippines is the Regalian Doctrine. This doctrine is also a good illustration of the limited use of a "command and control strategy".

The premise of the Regalian Doctrine is that all natural resources in the territory belong to the State and therefore private ownership or title must emanate from the State. This view is articulated in Article XII, Section 2 of the Philippine Constitution which provides that

> [A]ll *lands of the public domain*, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, *forests or timber*, wildlife, flora and fauna, and other natural resources are owned by

> the State. With the exception of agricultural lands, all other natural resources shall not be alienated.

As a consequence of this claim of ownership over all natural resources, the Philippine government has historically sought to monopolize the decision process on how to utilize these resources. This in turn has had two adverse environmental results: (a) the adoption of a short-sighted commercially biased and extractive utilization policy because the State consistently favored commercial users, and (b) an extremely insecure land tenure system within the forest zones.

For example, included also among lands of the public domain, because they are usually situated in upland forest zones, are those lands which have been occupied by indigenous cultural communities since time immemorial. By such inclusion, these forest communities have been effectively disenfranchised of their rights to their ancestral lands, resulting in their being categorized as squatters in their own lands. While there may be a trend towards giving indigenous cultural communities more access to their natural resource base, as exemplified for example by Department Administrative Order No. 2 of the DENR, Series of 1993, the DENR programs remains to be based on the premise that ancestral lands are part of the public domain.

Among the reasons that are frequently cited is the need to protect these lands, usually located in upland forest zones, from ecological misuse and degradation. The implication is that the time-immemorial occupants are incapable of utilizing upland forest resources in an ecologically sound manner. This is unfortunate as it ignores the role of upland indigenes in maintaining an ecologically sound environment. Because they have been on the land for generations, these communities possess a wealth of local knowledge and concern, including a reverent attitude toward, as well as a duty to conserve, the natural bounty around them. Furthermore, it must be pointed out that the monopolization by the government of the mandate to protect the forests has clearly not yielded satisfactory results. Forest denudation continues to escalate even as commercial users derive the most profits from upland resources.[37]

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[37]*See* La Viña, Antonio. "Recognition of Ancestral Domains: An Imperative for a Democratic Upland Resource Management", in *Our Threatened Heritage*, edited by Chip Fay, a special issue of SOLIDARITY (No. 124, October-December, 1989), published by Solidaridad Publishing House, Manila.

From the point of view therefore of both equity and ecology, there is a need to rethink the application of the Regalian Doctrine to ancestral lands in forest and other ecologically critical zones. Concretely, the first step is for the Philippine government to adopt a restrictive rather than expansive interpretation of the Regalian Doctrine, an interpretation that finds legal support in *Cariño v. Insular Government*[38] and in the constitutional provisions recognizing the rights of indigenous cultural communities to their ancestral domains.[39]

Regardless of where one stands on the Regalian Doctrine, the validity of a "command and control" strategy as the primary tool for environmental regulation is increasingly being questioned not only in the Philippines but globally as well. It has been criticized as inefficient as well as unjust. In the Philippines, it is also a valid question to ask whether the Philippine bureaucracy is in a position to enforce environmental legal norms given its dismal historical record.

Congress and the Executive Branch historically has supported a command and control strategy. However, recent policies indicate a small shift in favor of market based strategies[40] and community based resource management systems.[41] On the other hand, the Judiciary has been consistent in upholding the traditional conception of the doctrine. Unless it is willing to reexamine this, I am not so sure if it can play a positive role in operationalizing the constitutional right to a sound environment.

(b) Market Based Strategies

A market-based approach is premised on the proposition that the best way of realizing the goals of environmental policy is to use economic incentives to encourage sustainable and ecologically-friendly activities or

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[38]41 Phil. 935 (1909).

[39]This interpretation finds constitutional support in Article XII, Section 5 of the Philippine Constitution which provides that the State shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural well-being.

[40]*See* Policy Recommendations of the Policy Studies Component of the Natural Resources Management Program summarized in its ENVIRONMENTAL ASSESSMENT - FINAL SCOPING REPORT (1993). See also proposed Clean Air Act pending in Congress which borrows the concept of emissions trading from the U.S. Clean Air Act.

[41]*See* DENR Administrative Order No. 2, Series of 1993 - Rules and Regulations for the Identification, Delineation and recognition of Ancestral Land and Domain Claims. See also NIPAS Law, *supra* note 8.

economic sanctions to discourage unsustainable and pollutive actions.[42] The usual example given of this approach is the use of taxation and subsidies. You want to prevent overlogging - tax the activity heavily instead of prohibiting it, or give incentives for non-extensive use.

The other mechanism favored by those who advocate market-based environmental based strategies is that of "emissions trading". Basically, this mechanism is premised on the right of industries (or states in international environmental law) to pollute up to a certain level that the state (or the collective will of States) considers allowable. So long as this maximum level is not exceeded, the regulatory body will not intervene and will leave it to the industries or states on how to attain the standard at the lowest possible cost. Thus, among them, they can trade emission rights with each other. A firm that finds it cost-effective to install the most up-to-date technology will do so and profit because it can then sell its emission rights rather than install the best technology.

In the U.S., the market based approach found its first national legislative articulation in the Clean Air Act of 1991. In the Philippines, many policy recommendations made by the Natural Resources Management Program of the DENR such as lifting of the export ban on timber and liberalization of the forest industry follows this approach. With respect to deforestation, it is argued that the better strategy might be to use a taxation system to discourage such activity. At the very least this would ensure that the true costs of the logging industry's activities are borne by it and that the whole society benefits from the activity. On the other hand, a legal framework based on economic incentives would require that non-extractive use, particularly by forest communities, be subsidized and given financial and technical support. However, for such a framework to be put into place, a central issue must be addressed: the uncertainty and insecurity of land tenure in forest zones. Without land tenure security, no amount of economic incentives will ensure sustainable utilization.

Although intended to strengthen control, centralization of proprietary rights to forest lands and resources in the government have more often "undermined local rules governing access and use, removed local incentives for conservation, and saddled central governments with far-flung

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[42]For a summary of this development in U. S. environmental law, *see* Marshall J. Breger, Richard B. Stewart, E. Donald Elliott, and David Hawkins, "Providing Economic Incentives in Environmental Regulation", 8 Yale J. on Reg. 463 (1991).

responsibilities beyond their administrative capabilities".[43] In every country with extensive tropical rainforests, the public sector's claims on forest lands and resources far outstrip its ability to manage or to control resources. The effect is that the government has institutionalized an open access situation.[44]

In sum, the market based approach to environmental regulation requires divestment by the State of its ownership claim over most natural resources and increasing the scope of resources that may be covered by property rights. But this change or reinterpretation must be accompanied with a bias for communities of direct users as against commercial and industrial users. A market can work only when there is a level playing field. Unfortunately, because of the disparity in economic and cultural power, communities are at a disadvantage when indeed divestment occurs. As a necessary step therefore, community based resource management systems must be encouraged and supported by the state before a market based system can really work.

(c) Community Based Resource Management

Contrary to the widely-held belief that all communally-held resources are doomed to suffer from "the tragedy of the commons", it is now known that a wide variety of sustainable community resource management systems do exist.[45] This recent rediscovery of communal institutions as an effective solution to the commons problem is significant in a variety of ways. These institutions may have a valuable role to play in sustainable use planning but have usually been overlooked or underutilized in the planning process. This has happened because of over-emphasis on the kinds of resource management practices dominant in the Western industrialized world in which the significance of common property institutions have declined over time.

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[43]Roberto Repetto, THE FOREST FOR THE TREES? GOVERNMENT POLICIES AND THE MISUSE OF FOREST RESOURCES (1988), 28.

[44]C. Ford Runge, "Common Property Resources In A Global Context", Working Paper, University of Minnesota (April 1990), 18. On file at the Social Science Library, Yale University.

[45] See Robert Rhodes & S. J. Thompson, "Adaptive Strategies in Alpine Environments: Beyond Ecological Particularism", 2 American Ethnologist 535; B. S. Orlove, ALPACA, SHEEP AND MEN (1977); David Guillet, AGRARIAN REFORM AND PEASANT ECONOMY IN SOUTHERN PERU (1979); R. K. Hitchcock, "Traditional Systems of Land Tenure and Agrarian Reform in Botswana" Journal of African Law, Vol. 24 (1981); A. Legesse, GADA: THREE APPROACHES TO THE STUDY OF AFRICAN SOCIETY (1973)

Community based resource management systems can range from the right of the community to be consulted before any development project is imposed on it to actually recognizing community control and management of natural resources. Recognizing these systems would also mean developing and accepting common property regimes in our legal system.

Runge argues that common property regimes are just as viable as their individual private property counterparts in terms of efficiency and equity. In a number of cases, he says, communal property structures play "a key role in the effective management of scarce natural resources, complementing and combining with private rights to promote both equity and efficiency."[46] This can be appreciated, however, only if a communal system is distinguished from a "free and open access system" - where there are no rules regulating individual use rights.[47] Much of the negative understanding of communal property regimes emanates from such a misconception.

There are four reasons why community based resource management systems may be more economically feasible and desirable. First, such a system "can be relatively less costly to maintain and enforce, and better adapted to local conditions". Second, as a consequence of the system's institutionalization of fairness in the face of random allocation of resources, "common use rights may contribute to social stability at the same time that they promote efficient adaptation to changing resource availability over time". Third, such a system provides a "hedge" against individual failure. A communal property system, in this sense, offers more security to the individual members of the community. Fourth, and last, "the opportunity costs associated with changing established practices are high". By this, Runge refers to the tenacity of the rules under such a society. He recognizes the linkage between these rules and the natural and social situation from which such rules emerge. Thus he concludes that economic development should involve the promotion of structures which take into account and are consistent with the environment in which resource management is to occur.[48]

Increasingly both in Congress and the Executive Department, lip service is paid to community-based resource management as an important element of Philippine environmental strategy. Programs like social forestry

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[46]Runge, *Supra* note 45 at 3.
[47]*Id.*
[48]*Id.* at 20-22.

and control or resources and the community's right to monitor and enforce environmental norms is increasing. In many ways, the Local Government Code reflects this philosophy. Notwistanding this progress, in terms of actual budgetary allocation as well as emphasis in the implementation of environmental programs, this trend to recognize community based resource management is not reflected. The gap can be attributed to two reasons: first in the opposition of those vested interests who have dominated, if not monopolized, the use of our natural resources, and; second, a shift to community based resource management requires a shift in one's fundamental paradigm, a task that demands stretching one's legal imagination.

(d) Pollution Prevention

A final strategy that has been proposed in the global level is that of pollution prevention. Simply put, environmental policy should just prohibit as many forms of pollution as possible. This is justified economically under the principle that all pollution is a wasted resource and of course the ethical justification is obvious. It is however doubtful, given the poverty of our people and our development needs, if this is a realistic option for us. However, let me just observe that an environmental policy characterized by pollution prevention when coupled with an extensive program of scientific and technological development is a way by which we can leap-frog industrialization and become a post-industrial, high-technology economy.

OTHER PARTICIPANTS AND ALTERNATIVE FORUMS

At this point, let me just say a word about the other participants in the environmental decision process. Allow me also to indicate alternative forums to the judiciary for the resolution of environmental disputes.

The executive and legislative branches are of course significant players in the area of the environment. I cannot here present a full analysis of their roles. Suffice it to say that the executive branch - particularly the different bureaucracies within the DENR - are the first and primary forums of most environmental disputes. While the DENR is certainly better equipped technically to deal with these issues, I think it is fair to observe that there is much to be done by the Department to upgrade its organizational capabilities. In many cases, many environmental decisions by the DENR are made on the basis of political exigency rather than a

by the DENR are made on the basis of political exigency rather than a rigorous economic and scientific analysis of issues. While most environmental decisions must in the final analysis be political, the space for irrational external interventions such as corruption and undue political influence becomes much larger when ignorance or acceptance of the conventional characterizes a bureaucracy. This is not to condemn or criticize all DENR personnel as there are responsive and creative people in the Department. I make this comment as a statement only of what still needs to be done.

As to the legislative branch, an analysis of the environmental laws it has passed in recent years such as the law on toxic and hazardous wastes and the National Integrated Protected Areas Act illustrates its responsiveness to the environmental dilemma. Legislation on air pollution, on land management, a total commercial logging ban, a new forestry code, among others - are on the way to enactment. Whether the laws that will eventually be passed would live up to expectations remains to be seen. The budgetary allocations however to environmental programs remains inadequate. In particular, the support given to community-based resource management programs is so small that it cannot be really said that we are giving this strategy a chance.

Aside from the executive and legislative branches, another alternative forum in environmental disputes are multilateral and bilateral development assistance agencies. Whether we like it or not, institutions like the Asian Development Bank, the World Bank and the USAID are central and crucial players in environmental policy-making in the Philippines. By financing many environmental programs, these entities participate decisively in the environmental decision process. And often, more than our Congress and the DENR, these institutions are more - to use a technological term - user friendly, i.e. because of their international political vulnerability, they can be pressured to modify, suspend or cancel the financing of environmental programs or projects which have an adverse effect on the environment. This reality poses important questions and dilemmas regarding national sovereignty. It also stresses the importance of developing domestic forums as viable forums for environmental dispute resolution.

As to other stake-holders, the most important are commercial users and communities of direct users. Commercial users include logging companies, mining companies, and energy developers. To this sector, the challenge is to realize and accept the fact that the days of unrestrained

exploitation is over. My experience with many, not all but a majority, of those in industry is their refusal to believe this. Hence, many commercial users, for example loggers, always go for the jugular - *i.e.* retain as much power as they can without any willingness to compromise.

A recent example of this unwillingness to compromise is how the logging industry is dealing with the Industrial Forest Management Agreement (IFMA) - the legal instrument that is supposed to replace the TLA as the vehicle for commercial utilization of our forest resources. Under the original rules and regulations[49] governing IFMA, a substantial guarantee bond (amounting to approximately P20,000 per hectare in some cases) was required so as to ensure that the IFMA holder would comply with its obligations.

Our historical experience show that no matter what obligations we impose on our commercial users, our resources are depleted just the same. This is because our bureaucracy, for political reasons or because of corruption, cannot enforce these obligations. The political economy of our justice system has also made negligible, if not impossible, redress through the judicial system. Hence, the guarantee bond as insurance for compliance. The logging industry however lobbied to repeal this requirement and they succeeded last December 1993 when DENR Secretary Angel Alcala replaced the guarantee bond with a ridiculous performance bond amounting to P20 per hectare.[50]

This experience with IFMA is also an example of the potency of multilateral financing institutions in the Philippine environmental decision process. Since the guarantee bond was an ADB conditionality in one of its loan packages and in all probability the bank objected to its cancellation, Secretary Alcala subsequently suspended last January the cancellation of the bond pending further consultations.[51]

Fortunately, for all of us, increasingly these commercial users are confronted legally and often physically by communities of direct users,[52] supported by nongovernmental organizations, advocating community based resource management strategies. These include indigenous cultural communities protecting their ancestral domains and peasant and fisherfolk

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[49]*See* DENR Administrative Order No. 60, Series of 1993.

[50]*See* DENR Administrative Order No. 68, Series of 1993.

[51]*See* DENR Memorandum Circular No. 6, Series of 1994.

[52]Two recent examples are the anti-logging campaigns in San Fernando, Bukidnon and Cagayan Valley.

communities make use of legal strategies available to them under our system, they also often resort to self-help - in the process developing the concept of private enforcement of legal norms. All over the country today, communities, peoples organizations, and non-governmental organizations are at the forefront of environmental protection. Whether these communities acquire enough strength before environmental degradation becomes irreversible is a question that, however, remains open.

CONCLUSION

Let me now conclude this lecture with some final observations about the role of the judiciary in enforcing the right to ecological security.

I agree with Justice Feliciano that *Oposa v. Factoran,* if affirmed, will result in propelling courts "into the uncharted ocean of social and economic policy making". As I tried to illustrate in discussing the operational code of environmental policymaking, this cannot be avoided. To decide environmental disputes on the basis of conflict of rights alone, on due process issues for example, is simply inadequate in dealing with the environmental dilemma. Courts must learn the intricacies of resource valuation. In the area of environment, as in many other emerging fields such as intellectual property rights and biotechnology, logic as the main tool of legal construction and decisionmaking will simply be inadequate. Indeed, good environmental decisions are predicated on a familiarity with the relevant natural and social sciences.

The challenge to the Judiciary is how to limit its role in the decision environmental process. The first obvious tool is to recognize that primary jurisdiction of most environmental disputes belong to the proper administrative agencies. The rule on "prior exhaustion of administrative remedies" should be followed. But the Judiciary, if it wants to be a player in the environmental arena, must also begin to equip itself with the necessary technical and conceptual tools. A large dose of legal imagination would also be imperative.

A possible role of the Judiciary - particularly the Regional Trial Courts - is to serve as brokers in arriving at acceptable compromises on utilization and conservation issues. District courts in the United States have effectively played this role. A recent example is the ban on logging of old growth forests in the Pacific Northwest ordered by a federal court to

compel the U.S. Department of Interior to come up with a plan that would ensure the survival of the spotted owl.[53]

A final point about the judicial role. For the Judiciary to play an effective and useful rule in the environmental decision process, we must have good, efficient and honest judges - particularly at the level of the Regional Trial Courts. The delay, for example, which characterizes our court system militates against using this as a forum for environmental disputes. The environment, simply put, cannot wait for the long grind of justice. The tragedy is that alternative forums will be used, including those which raises sovereignty questions. Communities will also have to rely on private enforcement - even physical force, if there is no viable forum left to them. That is why I think it is so important for the Judiciary to be an attractive forum for environmental disputes.

I started writing the paper from which I extracted this lecture nearly six months ago. I was in my hometown of Cagayan de Oro at that time to visit my family and to give a lecture on environmental law in Iligan City for the U.P. Law Center's POPLAW program. During the early morning drive to Iligan, I was filled with sadness as I went through what is now known as the Cagayan-Iligan Industrial Corridor. In my mind, as I passed through the rice fields, beaches, coconut lands and fishing villages that have been so part of my life, I saw changes coming. In a few years, not much is going to be left of the beauty of this place. Perhaps many of the changes will be good - more jobs, more progress, less poverty. But many of the changes, if we are not careful, will also not be good. Pollution, urban blight, displaced communities. And I asked myself - how can law be of use in ensuring that the worst does not happen?

This lecture is an attempt to answer this very personal question. For in the end, in its deepest philosophical sense, what is the environmental question but an ethical challenge posed to all of us: What does it mean to be human? What is our relationship with nature? What is the most important value in our lives? What does it mean to be a community?

When Dean Agabin asked me for the title of my lecture, I did not hesitate to use a word from the Greek poet Homer: Odyssey. I have always been fascinated by this sequel to Iliad - it always struck me how victory over Troy did not mean the end of the journey of Odysseus.

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[53]"Logging Ban on Old-Growth Forests", Business World, 28 February 1994, 6.

In the same way, a legal recognition of a right is useless if it cannot be translated into a victory in the field. And this is really where we are right now in environmental protection: we are not sure if we can succeed; we are, as a people, at the beginnings of our journey, a mission, as it were, to make this country, in the words of former Senator Diokno, "a nation for our children".[54] Though we can, we will get lost along the way. And like Odysseus, stranded in the Island of the Winds and the Land of the Midnight Sun, we will cry out:

> My friends, we do not know east from west, we don't know where the sun rises to give light to all mankind, and where he goes down under the earth. Well then what are we to do? We must try to think of something at once, and for my part, I can't think of anything. I have just been up on the cliffs to look around. We are on some island in the middle of the sea, with no land in sight. The island is flat, and I saw smoke rising in the air above ... bushes and trees.[55]

On this note of uncertainty, and also of hope since we know that Odysseus did find his way home, I end this lecture. Thank you for your attention.

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[54]Jose W. Diokno, "A Nation for Our Children" (1984), reprinted in A NATION FOR OUR CHILDREN, Ed. Priscila S. Manalang (1987), 83.

[55]Homer, THE ODYSSEY, Tr. W.H.D. Rouse (1937), 116.