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

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Greetings. Thank you for the invitation to listen and react to this year's Malcolm Lecture.

On *Oposa vs. Factoran*

When the possibility of filing this case was first broached to me by Attorney Oposa in the latter part of 1989 or the early part of 1990, I remember that we were in the midst of a full blown and emotional debate over the wisdom and legality of a total log ban in the Philippines. That until now, the debate remains unsettled, to my mind, indicates just how far we have gone in three years.

I am bothered by the fact that the campaign to refocus society on the need to preserve the forests as a backdrop to the reforestation project, and as a tactic to loosen the hold of the wood industry on policy-makers, was being too successful in the sense that a considerable number of people were already talking about the forests; yet there did not seem to be a deep understanding of the issues involved.

My earliest thought was that Attorney Oposa's case would provide a venue for the government to officially provide a history of the logging issue. My feeling was that the experts and policy-makers should indeed put on record their reasons for allowing logging in the first place, and the grounds for their fear that getting all the TLAs out, without first putting in a system for the management of the forests would be a big gamble at best; and most probably counterproductive. Hence, I welcomed its filing.

I instructed our lawyers to waive all technical objections and proceed with the trial soonest. I advised that the wood industry association should be impleaded as the real hostile party, with the Department of Natural

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Resources (DENR) taking on a role similar to *amicus curiae*. The DENR then would be in an enviable no-loss situation, and our efforts at IEC would be helped immeasurable by the media attention expected to attend the case. Most importantly, this present generation would have the opportunity to leave a testimony to history, and explain in advance to the succeeding generations the basis of the existing policy; the constraints; the economic milieu; the competing interests; and finally, the reasons why the environment that we leave to them is not any better than they find it.

As it turned out, however, our lawyers took the position that the case was really against the Government, rather than my person, and they should be wary about setting bad precedents. It is thus unfortunate, that the case focused on procedural, rather than substantive, aspects. In fact, I am not even sure how to welcome the environmental law portion of the decision. The ruling that the constitutional provision that the State should protect and advance the right of the people to a balanced and healthful ecology is self-executory might end up as the equivalent of the opening up of the proverbial "Pandora's box."

The decision on whether or not to allow logging is, to my mind, a political question. I continue to maintain that any other proposition would be fraught with danger and expected the Supreme Court to be of like mind. Apparently, I was wrong.

That is not to say that the decision should be decided exclusively by the political departments of government. Rather, what it really means is that this is an issue which must be decided by the body politic -- the society at large, with the private sector taking an active role or as phrased by Professor La Vina: operationalized by the interaction of a plurality of participants in a social decision process. For what is truly frightening is when environmental questions are to be decided by persons trained primarily in law.

This is not an abstract feat but one borne by experience.

When I left government service in July 1992, I found myself a respondent in two serious cases before the Ombudsman, both filed by TLA holders (Mact International and ATICOR). Specifically, the first one was a holder of a TLA cancelled upon the petition of the community in which they were operating. The cancellation order was elevated to the Office of the President on appeal. The appeal was granted and I was ordered by the

Office of the President to allow continued logging. I refused and continued to refuse until I left office. Thus the case.

The other was a party to an area conflict that was pending with the Supreme Court for quite some time. I won the case before the Supreme Court. In the meantime, however, the Department decided to discontinue logging in the area under conflict and to turn the same over to the community instead. I refused to heed all requests to "comply" with the Supreme Court. This precipitated the other case.

It was only after sweating it out for a while that both cases were dismissed, on the ground that the Department had power to stop logging for ecological reasons because, in essence, such decision was a political question. But it could have gone either way. It could have been decided on the basis of reverence for the law or the need to observe due process, in which case I would have been in deep trouble.

Now, if the environmentalists would require an even more recent example, perhaps all of us should focus on the legal questions brought to fore by the Hoechst case. A solitary judge of the Regional Trial Court issued an injunction against government from banning a pesticide already proven to be toxic. In the name of due process our environment was despoiled for a little bit longer.

Sometime back, the DENR was also the victim of a naughty interlocutory order. We had confiscated millions of pesos of illegally cut logs in Quezon. A Makati judge issued a restraining order against the Department, on the ground that the logger deserved a day in court. As a result, some of the logs were spirited away. We went to the Court of Appeals and were favored with a restraining order against the restraining order of the judge. When the twenty day lifetime of the CA restraining order lapsed, the lower court judge immediately issued another restraining order, enabling the illegal logger to spirit the balance out. I was so angry that I did what I have not done in all my years of practice -- I filed an administrative case against the judge concerned. I understand that as a disciplinary action, the Supreme Court transferred him from Makati to Caloocan.

On this political issue question therefore, we have *Oposa vs. Factoran* as only one side of the coin, with the dangers posed by the Hoechst and similar cases as the other. I have to join Professor La Viña in his observation that the courts of law are ill-equipped to resolve environmental

conflicts satisfactorily. I would go even further, however, in saying the the legal profession, by and large, suffers under the same inadequacy.

Perhaps this could be one of the reasons for the perceived gap between the myth system and the operational code.

On the gap between written policy and reality of implementation

I agree that many times there is a yawning gap between articulated policy and implementation. Many a law has not been implemented fully, while there are others that have been so mangled in interpretation that they have become unrecognizable. But I think that the examples of progressive environmental policies that Professor La Viña cites in juxtaposition to the daunting ecological problems are quite inappropriate. While the oldest policy that he cites is the provision on ecological security in the 1987 Constitution (with the other so-called "developments" having come after that), on the other hand, I am sure he would agree that remediating a degraded environmental takes a bit longer than just half a decade. Perhaps the more illustrative examples would be the Marcos decrees on the environment. Presidential Decree No. 1586, for instance, enacted as far back as 1978, and which requires the preparation of environmental impact assessments (EIAs), could probably be the most significant environmental statute in the Philippines today. Had this law been complied with religiously, the ecological discipline it was designed to engender would have had a chance to set in. Instead, we found ourselves saddled with such ecological monstrosities as the Bataan Nuclear Power Plant, the Calaca I coal fired power plant, and the Marcopper mines tailing problem in the Calancan bay. These, to me, best represent the veritable "yawing gap" between written policy and the reality of implementation.

This brings us to the third part of our discussion.

On the process of change in environmental law

I fully agree with Professor La Viña's central thesis that 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.

Under a mature democracy, the social decision making process is participated in by all. The will of the majority prevails but the rights of

the minority are protected. The political wisdom of a democratic system is that the majority of the citizenry can be relied upon to make the right decisions, or barring that, to suffer the consequences of their decisions gracefully. Things are not quite the same in a flawed democracy like ours.

I believe that our present predicament, whether economic or environmental, is due to the fact that for a very long time the participants in the social decision-making process were limited. It was the legislators, bureaucrats, industrialist, lawyers, politicians, loggers, miners, businessmen, and economists, who were monopolizing the social decision making process or at the very least having a disproportionate voice in making policy. The alternative groups had to resort to either bearing arms in insurgency or disruptive mass action in order to be heard, but, in classic Catch-22 fashion, they were not listened to precisely because they were bearing arms or being disruptive.

It was the Aquino administration which opened up democratic space and invited all sectors to participate in the process. In the field of environment, the President was explicit in her instructions to empower the non-governmental organizations (NGOs), the people's organizations, as well as organized communities. From day one, therefore, we sought the support and cooperation of these hitherto neglected portions of the private sector. These groups were consulted in every major policy decision. Furthermore, NGOs were recruited not only to do projects that were otherwise reserved for the bureaucracy, but likewise as monitors of government projects, and community opinion held sway in deciding controversial issues, such as logging and environmental clearance in their respective areas.

This opening up of the democratic space provided some very uneasy moments, to be sure. There were NGOs and other groups who simply would not take "no" for an answer. But on the whole, the experiment was hugely successful. Whereas, originally, it was the DENR empowering the alternative groups, the result seemed to be that it was the DENR that was further empowered.

Thus, although as a lawyer, I was trained to revere the law, and that as a member of the Executive Department, I knew that I had to implement the law as enacted, I also recognize that there are still a lot that could be done to amend or redefine environmental laws without legislative fiat.

Let me cite just a few examples.

First, in 1987, the forest charges were pegged at P30.00 per cubic meter, while premium logs were selling at between P1,500.00 to P2,500.00 per cubic meter. We asked Congress repeatedly to increase it to more reasonable levels, but to no avail. Finally, ignoring all I learned in the College of Law about the taxing power being vested exclusively in Congress, we unilaterally imposed a P500.00 environmental fee on top of the thirty peso forest charges. I had to use all my charisma, coupled with equal amounts of threat to side with the total log ban advocates, to keep the loggers from bringing my clearly invalid order to court.

Second, there was the so-called "Certificate of Ancestral Claim". Some well meaning members of the House filed a bill to give substance to the Constitutional provision on ancestral domain. We pushed it as best we could but the bill stalled for what seemed like an eternity. Instead of waiting for enabling legislation, we decided to bite the bullet. We created an instrument called the "Ancestral Domain Claim Certificate" which certified that a claim has been made by a particular indigenous community, that the area claimed has been delineated, and that as soon as an enabling law had been enacted, the matter of ownership shall be settled officially. This did not give ownership. We tried our best to clarify that. But it emboldened the indigenous communities to insist on their rights, and effectively closed the areas delineated from encroachment by Christian settlers.

The third example is in the area of environmental impact assessments. Not only did we allow a single exemption from the EIA requirements in our five year term, we also tried to institutionalize social acceptability as a requirement for the issuance of an environmental clearance certificate. The law did not require this. We just thought that we should redefine the law.

Finally, in forestry, we also paid court to the community. In areas where the community was organized; and was willing and demonstrably able to help the government protect the forests, we heeded petitions to cancel logging concessions. This is what happened in Gingoog City, in Midsalip, Zamboanga; in Angat; Bulacan; and the provinces of Mindoro; Bukidnon; and Davao. That created such a culture shock that one of the more influential members of Congress then complained to President Aquino that the DENR was abdicating its responsibility and allowing foreign priests to dictate forestry policy in his area.

None of these extra-legal initiatives would have been possible, and we could not have had the courage to risk being slapped down by the courts, had we not been confident that due to the enlarged democratic space, the plurality of the participants would have supported us.

When, therefore, you see NGOs participating in major policy decisions, and communities consulted before the initiation of major industrial activities in their area, or when environmental NGOs are strong enough to derail the appointment of a Presidential favorite as Environment Secretary and instead have one of their own appointed, please do not mistake this democratic space as curious happenstance. These are, instead, manifestations of the evolution of participation in the social decision-making process.

The foregoing is more than just a recounting of recent DENR history. Rather, I view it as pointing a way to change environmental policy without having to take our chances with the courts of law. We should all help ensure that this evolution does not backtrack but, instead, move along faster.

I could, of course, understand and fully empathize with the need of lawyers to search for continuous relevance in this world that is turning more and more environment conscious. I strongly suggest, however, that the best and most effective way for lawyers to serve the cause of environment, at least in the Philippines, is to make common cause with and serve the less privileged and more environmentally displaced sectors of society, rather than insist that environmental conflicts should be resolved by the courts of law.

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