ARTICLE

VALUES, POLICIES AND CHOICE: DILEMMAS OF CRAFT AND CONSCIENCE IN THE WORK OF THE COURTS

PUBLIC LAW DECISIONS OF FLORENTINO P. FELICIANO IN THE PHILIPPINE SUPREME COURT (1986 TO 1995)

Raul C. Pangalangan

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> Where substantive standards as general as ... "the right to health" are combined with remedial standards as broad ranging as "a grave abuse of discretion," the result will be ... to propel the courts into the uncharted ocean of social and economic policy making.[1]

> [O]ur case law [has increasingly recognized] the need for a mode of judicial analysis which takes account of the differing legitimate individual and social interests, reflected in ... law, competing for ascendancy in particular disputes presented for constitutional adjudication.[2]

The work of Justice Florentino P. Feliciano in the Supreme Court of the Philippines presents us with a special opportunity to inquire into the possibility of a theory of judicial review for the Filipino lawyer. Justice Feliciano has attempted, through his judgments, to actualize norms and values through the disciplined deployment of legal doctrine and the techniques of the lawyer's craft. It is my aim to lay bare the framework of those normative commitments and the intellectual method by which he reconciles the

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[1] Minors Oposa v. Factoran, G.R. No. 101083, 30 July 1993, 224 SCRA 792 (Feliciano, J., concurring).

[2] Alliance of Concerned Teachers v. Cariño, G.R. No. 95590, 6 August 1991, 200 SCRA 323, 344 (Feliciano, J., dissenting, fn. 1).

universalizing claims of law with the particularizing function of courts, and commands justice to recognize its human face.

At the outset, a note on the limits of this study. The writings of Justice Feliciano are extensive — legal scholarship written over 44 years from his days as student editor of the *Philippine Law Journal*, his graduate years at Yale, his teaching at U.P. and lecturing at the Hague Academy of International Law, and judicial decisions during his almost ten years in the Court with jurisprudential insights strewn casually as it were amongst the mundane concerns that make for court judgments. This is but a preliminary attempt to place his work as judge within the context of scholarship and jurisprudence.

Justice Feliciano himself has mixed feelings about this enterprise of theorizing on judicial review.[3] On one hand, he finds excessive the American "anxiety" to legitimize judicial review vis-à-vis the counter-majoritarian difficulty.[4] On the other, he laments the lack of intellectually more sophisticated debates in the Philippines.[5] These debates have partly been made unnecessary because judicial review is expressly provided for in the Constitution,[6] and historically has been vested with a deliberately functional character[7] — i.e., a checking and containment function,[8] as "indispensable for maintaining some measure of democracy."[9] He calls upon "scholars [not to] retire from the search" for a guiding theory, but neither to lose sight of the "judge who must discharge a definite, non-speculative duty to act."[10]

Finally, considering my jurisprudential and methodological focus, I have excerpted extensively from his decisions. Feliciano is best encountered in his own words, and my best effort at paraphrasing cannot do him the justice he had sought to give others.

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[3] Florentino Feliciano, *The Application of Law: Some Recurring Aspects of the Process of Judicial Review and Decision Making*, 37 THE AM. J. OF JURISPRUDENCE 17 (1992).

[4] *Id.* at 20-22.

[5] *Id.* at 22-28. (He explains it too as "due simply to the relatively low level of sophistication of our law academics.")

[6] *Id.* at 23-27.

[7] *Id.* at 23.

[8] *Id.* at 26.

[9] *Id.* at 24.

[10] *Id.* at 49.

I. THE COURTS AS AN ARENA FOR THE CLASH OF THE "GOOD" AND THE "RIGHT"

Two conflicting approaches animate Philippine jurisprudence. On one hand, Filipino lawyers and law students love to employ the stock rhetoric of the profession, "the rule of law," "government of laws and not of men," "not under men but under God and the law," "*dura lex sed lex*," thus objectifying and formalizing the law. Their ideal picture is that of a law distanced from human judgment, drained of feeling, one that disavows values and lets the chips fall where they may. But in the same breath, they also say with heartfelt conviction that "law should be an instrument of the people," of "development," or be geared toward a "preferential option for the poor." They seem unquestioningly to accept that the law, in the first place, serves as an instrument to advance some public policy, some value judgment, some normative principle, some ideological agenda, something else standing outside it. These rival claims lead to the question: Is law an end in itself, or is it merely an instrument?

How do we reconcile competing impulses so ingrained in the Filipino lawyer? By posing this challenge, is it not to profane the sacred mantras mindlessly chanted by generations of what Brandeis called "men of zeal, full of passion but without understanding?"[11]

The stock response of the Filipino lawyer is that it all boils down to one question: Whose choice? Law indeed serves as an instrument for some purpose, something other than "law," and it is the lawyer's duty to fulfill that purpose neutrally and objectively. But who chooses that purpose? The answer, in a republic like ours, should be very simple: the sovereign Filipino people.

But that answer is incomplete, its moral claims unconvincing. To start with, the Constitution removes certain inalienable rights from the realm of sovereign prerogative; some things, some purposes, identities and longings, each individual alone has the liberty to choose — not the state, not the public, not some vanguard party, not the community. Next, the sovereign, thus

[11] Olmstead v. U.S., 277 U.S. 438, 479 (1927) (Brandeis, J., dissenting).

manacled, is usually unable to speak except through elected representatives, or as Recto would have it, "political ventriloquists." And worse, the power actually needed to carry out these wishes is further delegated to unelected deputies who purport merely to "execute" the substantive judgments made by those whom the people have elected. Finally, to the courts belongs the sole power to decide whether these deputies of the public power have kept their faith and have not betrayed the sovereign will or strayed from the decreed path.

The sovereign chooses, indeed. What began as a simple answer leads merely to a deeper question: In so doing, should the courts disavow all moral judgment and policy choice? Is the judge beholden to the public's choice, or should he listen to his heart as well? What is the place of law in the face of a judge's innermost intuitions of what is just and fair? The answers I will seek in the work of Feliciano as judge.

II. JUDICIAL POWER AND THE SOCIAL GOOD: CONSTRAINTS OF CRAFT ON THE PURSUIT OF CONSCIENCE

A. The concept of judicial power

Justice Feliciano acknowledged the dual character of judicial decisions: They apply abstract norms in concrete cases, but in so doing transform these norms and lay down principles of general application. In a separate opinion in *Ponce Enrile v. Judge Salazar*,[12] Justice Feliciano recognized that judicial power can partake of a norm-creating and legislative character, and that the constitutional prohibition against *ex post facto* laws can equally apply to judicial decisions that have the effect of laying down a new rule.

> [S]tatutes do not exist in the abstract but rather bear upon the lives of people with the specific form given them by judicial decisions interpreting their norms. Judicial decisions construing statutory norms give specific shape and content to such norms. In time, the statutory norms become encrusted with the glosses placed upon them by the courts and the glosses become integral with the norms.[13]

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[12] G.R. No. 92163, 5 June 1990, 186 SCRA 217, 240.

[13] Ponce Enrile v. Judge Salazar, G.R. No. 92163, 5 June 1990, 186 SCRA 217, 240, citing Caltex v.

In this case, then Senate Minority Floor Leader Ponce Enrile was arrested for rebellion with murder and multiple frustrated murder, in connection with the failed coup attempt in December 1990 against the fledgling democracy of Corazon Aquino.[14] He impugned the validity of the criminal information filed against him in a *habeas corpus* petition before the Supreme Court.

The Court found the controlling doctrine in *People v. Hernandez*,[15] and upheld Ponce Enrile's contention that the crime of murder was absorbed in the crime of rebellion. In that historic decision, the Court disallowed the "padding" of charges against the accused communist rebel, Amado Hernandez, now recognized as a leading Filipino poet, who was charged with "rebellion complexed with murders, arsons and robberies." This doctrine was abandoned during the Marcos regime through Presidential Decree No. 942, which thus made possible the application of a graver penalty. Upon the restoration of democracy in 1986, Aquino repealed Marcos' decree through Executive Order 187, effectively reinstating the *Hernandez* doctrine. This brings us to the *ex post facto* law argument. Even if the Court were now to reverse *Hernandez* once again (thereby allowing rebellion to be complexed with murder), that interpretation could not be applied retroactively to Ponce Enrile.

> The difficulty [is] that acts which, under the *Hernandez* doctrine, are absorbed into rebellion, may be characterized as separate or discrete offenses which, as a matter of law, can either be prosecuted separately from rebellion....To reach such a conclusion in the case at bar, would ... collid[e] with the fundamental non-retroactivity principle....
>
> The non-retroactivity rule applies to statutes principally. Thus, while in legal theory, judicial interpretation of a statute becomes part of the law as of the date that the law was originally enacted, I believe this theory is not to be applied rigorously where a new judicial doctrine is announced, in particular one overruling a previous existing doctrine of long standing (here, 36 years) and most specially not where the statute

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Palomar, G.R. L-19650, 29 September 1966, 18 SCRA 217, 247.

[14] Ponce Enrile was Secretary of National Defense during the Marcos regime and turned against Marcos during the EDSA Revolution of 1986.

[15] 99 Phil. 515 (1956).

> construed is criminal in nature and the new doctrine is more onerous for the accused than the pre-existing one....[16]

Through parallel reasoning, in *Tuason v. Register of Deeds*,[17] the Court, through Justice Narvasa, struck down a Marcos-era legislative decree expropriating private property as partaking of a judicial — not legislative — character. What purported to be a legislative act, the Court deemed a judicial decision, because it required the application of rules upon a concrete set of facts. Justice Feliciano concurred in a separate opinion, addressing a jurisdictional issue, i.e., that the decision in question had to be judicial in character in order for *certiorari* to issue:

> [T]he petition will be shown upon analysis to be in reality directed against an unlawful exercise of judicial power.
>
> The decree reveals that Mr. Marcos exercised an obviously judicial function. *He made a determination of facts, and applied the law to those facts,* declaring what the legal rights of the parties were in the premises. *These acts essentially constitute a judicial function, or an exercise of jurisdiction — which is the power and authority to hear or try and decide or determine a cause...* And applying the law to that situation, he made the adjudication that "title to said land has remained with the Government...."[18] (emphases supplied)

The Marcos decree was invalidated on several grounds. First, he was never vested with judicial power.

> [J]udicial power [is] vested in the Supreme Court and such inferior courts as may be established by law — the judicial acts done by [Marcos] were in the circumstances indisputably perpetrated without jurisdiction. The acts were completely alien to his office as chief executive, and utterly beyond the permissible scope of the legislative power that he had assumed as head of the martial law regime.[19]

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[16] Ponce Enrile v. Judge Salazar, G.R. No. 92163, 5 June 1990, 186 SCRA 217, 240.

[17] G.R. No. 70484. 29 January 1988, 157 SCRA 613.

[18] Tuason v. Register of Deeds, G.R. No. 70484, 29 January 1988, 157 SCRA 613, 620.

[19] Tuason v. Register of Deeds, G.R. No. 70484, 29 January 1988, 157 SCRA 613, 620-621.

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> Former President Marcos, by establishing martial law, undertook to assume legislative powers in addition to his regular powers as Chief Executive. He consolidated in his own person the powers of the Presidency and the powers of Congress. The emergence of Presidential Decree No. 293 into public light underscores the fact that Mr. Marcos also purported at times to exercise judicial prerogatives.[20]

Second, even if he had validly possessed judicial power, he improperly exercised that power, i.e., without fair trial and without respecting the party's right to due process of law. He "adjudicated" —

> without a trial at which all interested parties were accorded the opportunity to adduce evidence to furnish the basis for a determination of the facts material to the controversy. He made the finding ostensibly on the basis of "the records of the Bureau of Lands." [T]here is no indication whatever of the nature and reliability of these records and [petitioners] were never confronted with those records and afforded a chance to dispute their trustworthiness and present countervailing evidence.[21]

Finally, even assuming the decree to have been properly legislative in character, it was "fundamentally flawed as a bill of attainder."

Notice though that in *Manotok v. NHA*,[22] a similar taking was effected by a Marcos decree, which took over a piece of land on the basis of an administrative finding that it was a "blighted estate." The Court, while invalidating the taking as in violation of due process, did not go as far as characterizing the taking as an invalid exercise of judicial power or as a bill of attainder.

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[20] Tuason v. Register of Deeds, G.R. No. 70484, 29 January 1988, 157 SCRA 613, 626.

[21] Tuason v. Register of Deeds, G.R. No. 70484, 29 January 1988, 157 SCRA 613, 621.

[22] G.R. No. L-55166, 21 May 1987, 150 SCRA 89.

B. Judicial power and the regulatory state: Are constitutionalized norms directly enforceable through the courts?

1. Constitutional shift from laissez-faire to the welfare state

The place of judicial vis-à-vis political power is determined by the constitutionally-chosen concept of the state. Historically, the Philippine Supreme Court has rejected the laissez-faire state and embraced the welfare state, in the context of the following questions: whether indigenous peoples may be restricted within reservations;[23] whether maternity benefits may be legislated;[24] whether government corporations may benefit from the government's exemption from paying court fees;[25] and whether employees of a government corporation enjoy the right to collective bargaining.[26]

In *ACCFA v. CUGCO*,[27] the Court declared that agrarian reform was "beyond the capabilities of any private enterprise [and is] purely a governmental function." It also recognized that the traditional distinction between constituent[28] and ministrant[29] functions had been "rendered ...

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[23] Rubi v. Provincial Board, 39 Phil. 660 (1919) (validating the restriction on the liberty of "Non-Christian Tribes" as a valid exercise of police power).

[24] People v. Pomar, 46 Phil. 440 (1924) (invalidating legislated maternity leave benefits as impermissible intrusion into the liberty of contract between employer and employee).

[25] Bacani v. NACOCO, 100 Phil. 468 (1956) (holding that the national coconut authority performed merely ministrant and not constituent functions, and was not part of the "government," and that the petitioning court stenographers should therefore not be required to reimburse the fees already paid them).

[26] ACCFA v. CUGCO, G.R. No. L-21484, 29 November 1969, 30 SCRA 649 (holding that the agricultural credit and cooperative agency is part of the government, discarding the Bacani v. NACOCO classification of constituent and ministrant functions, and preventing its the agency's employees from collective bargaining).

[27] ACCFA v. CUGCO, G.R. No. L-21484, 29 November 1969, 30 SCRA 649.

[28] "[Tlhose which constitute the very bonds of society and are compulsory in nature, (i.e., as an attribute of sovereignty) e.g., keeping order and protecting persons and property from violence and robbery, personal status, crime, contract, justice, political rights and duties, dealings with foreign powers," popularly referred to as "nightwatchnman" functions. (Bacani v. NACOCO, 100 Phil. 468 [1956] citing MALCOLM, THE GOVERNMENT OF THE PHILIPPINE ISLANDS, 19-20 [1916]).

[29] ACCFA v. CUGCO, G.R. No. L-21484, 29 November 1969, 30 SCRA 649, 661 "[T]hose that are undertaken only by way of advancing the general interests of society and are merely optional," e.g., public works, public education, public health and safety, trade and industry regulation. The "principles" determining the exercise of "option" are: those which private capital would not naturally undertake or which government is by its nature better equipped than private individuals.

unrealistic, not to say obsolete" by the "growing complexities of modern society,"[30] and that "the ghost of the laissez-faire concept no longer stalks the juridical stage."[31] The Court drew an explicit link to a normative clause in the 1935 Constitution:

> [T]he tendency is undoubtedly towards the greater socialization of economic forces. Here of course this development was envisioned, indeed adopted as a national policy, by the Constitution itself in its declaration of principles concerning the promotion of *social justice.* (emphasis supplied)[32]

The Philippines' post-Marcos Constitution similarly does not provide merely a neutral structure through which the sovereign people can choose their representatives and, through them, make substantive political and economic choices. It embodies an entire "Declaration of Principles and State Policies," expressly setting forth the policy choices that are, as it were, written in stone, not to be changed by "shifting political majorities," insulated from the vicissitudes of politics. The authors of the Constitution apparently felt that unless these policies were written into the Charter itself, they were perpetually subject to compromise.

> The article II "Declaration of Principles and State Policies" reflects an obstinate tendency during the 1986 Constitutional Commission ... to ensure a post-EDSA reform agenda by writing it out in agonizing detail into the Constitution itself. Indeed, there were even attempts to smuggle into the Bill of Rights, and thereby reinforce, claims to "education, food, environment and health."[33] To ward these off, it was repeatedly explained that the Bill of Rights was a list of what government cannot do and that the rights therein were accordingly "self-executing." In contrast, social justice claims were "affirmative commands on the State to do something," i.e., what government *must* do.[34] These required legislative

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[30] ACCFA v. CUGCO, G.R. No. L-21484, 29 November 1969, 30 SCRA 649, 662. Ministrant functions "continue to lose their well-defined boundaries and to be absorbed within activities that the govermnent must undertake in its sovereign capacity if it is to meet the increasing social challenges of the times. [T]he tendency is undoubtedly towards the greater socialization of economic forces."

[31] ACCFA v. CUGCO, G.R. No. L-21484, 29 November 1969, 30 SCRA 649, 672-673.

[32] ACCFA v. CUGCO, G.R. No. L-21484, 29 November 1969, 30 SCRA 649, 672-673.

[33] ACCFA v. CUGCO, G.R. No. L-21484, 29 November 1969, 30 SCRA 649, 687.

[34] JOAQUIN BERNAS, THE 1987 CONSTITUTION: THE INTENT OF THE FRAMERS, 697-98 (1997) Bernas says that social justice claims were "affirmative commands [on] the State to do something" and

> implementation and were more appropriately listed in the social justice provisions[35] as eventually reflected in the final draft.[36]

What is the legal status of these "aspirational" or "programmatic" claims? Do we yield to the positivist quick fix that new rights need only be written into the Constitution?[37]

2. Framework established in case law: When norms are "self-executing"

The most widely felt impact of this phenomenon has been what a dissenting opinion referred to as "government by the Judiciary," a tendency by the Courts to "superintend" and micro-manage. Two cases form the high points of this debate. Both were said to have scared away foreign investments from the Philippines, at a time when the political branches were striving to entice these investors to generate employment and growth. Both decisions relied on normative provisions of the Constitution.

The first was in *Board of Investments v. Garcia*[38] wherein the Court reversed the decision of the Board of Investments allowing the Luzon Petrochemical Corporation to relocate its proposed plant from Bataan to Batangas, citing the duty of the State to "regulate and exercise authority over foreign investments"[39] and to "develop a self-reliant and independent national economy effectively controlled by Filipinos."[40] Justice Griño-Aquino dissented:

> [C]hoosing an appropriate site for the investor's project is a political and economic decision which, under our system of separation of powers, only the executive branch, as implementor of policy formulated by the legislature..., is empowered to make.[41]

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are not self-executory.

[35] *Id.*

[36] Raul C. Pangalangan, *Property As a "Bundle of Rights": Redistributive Takings and the Social Justice Clause*, 71 PHIL. L.J. 141 (1997).

[37] Concern expressed by Commissioner A. Padilla, II CON-COM JOURNAL 625-628.

[38] G.R. No. 92024, 9 November 1990, 191 SCRA 288 (1990).

[39] CONST. art. XII, sec. 10.

[40] CONST. art. II, sec. 19.

[41] Board of Investments v. Garcia, G.R. 92024, 9 November 1990, 191 SCRA 288, 299.

The Court, she added, "possess[ed neither the] technology [nor] scientific expertise" to make that decision. Justice Melencio-Herrera likewise dissented, saying that the majority had "transformed itself into ... a 'government by Judiciary.'"

> [The majority has] decided upon the wisdom of the transfer of the site...; the reasonableness of the feedstock to be used...; the undesirability of the capitalization aspect...; and injected its own concept of the national interest as regards a [strategic] industry.[42]

> ... By no means [does the Constitution] vest in the Courts the power to enter the realm of policy considerations under the guise of the commission of grave abuse of discretion.[43]

The second high point was the decision in *Manila Prince Hotel v. GSIS*,[44] where the Court held that the duty of the state to give "preference to qualified Filipinos" in the grant of rights, privileges and concessions gave rise to a direct right of action in courts.

The Supreme Court stopped the sale of the Manila Hotel to the winning bidder, a Malaysian corporation, and ordered the seller, a government corporation (i.e., the Government Service Insurance System, the pension fund of government employees), to accept the "matching bid" of the losing bidder, the Manila Prince Hotel corporation. The Court held that the following paragraph of the National Economy and Patrimony provisions of the Constitution were "self-executory" and "per se judicially enforceable."

> In the grant of *rights*, privileges, and concessions covering the national economy and *patrimony*, the State shall give *preference to qualified Filipinos*. (emphasis supplied)[45]

The Court ruled that the Manila Hotel belonged to the national patrimony, which encompasses both the natural resources and the cultural and

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[42] Board of Investments v. Garcia, G.R. 92024,9 November 1990, 191 SCRA 288, 301-302.
[43] Board of Investments v. Garcia, G.R. 92024, 9 November 1990, 191 SCRA 288, 302.
[44] G.R. No. 122156, 3 February 1997, 267 SCRA 408.
[45] CONST. art. XII, sec. 10, par. (2).

historical heritage of the nation.[46] Therefore, foreigners could buy the hotel "only if no Filipino qualifies [in the bidding] or if the qualified Filipino fails to match the highest bid tendered by the foreign entity."[47] The Court explained how a normative statement becomes directly enforceable:

> A provision which lays down a general principle, such as those found in [the Constitution's "Declaration of Principles and State Policies"] is usually not self-executing. *But a provision which is complete in itself and becomes operative without the aid of supplementary or enabling legislation, or that which supplies sufficient rule by means of which the right it grants may be enjoyed or protected, is self-executing.* Thus a constitutional provision is self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the constitution itself... and there is no language indicating that the subject is referred to the legislature for action. (emphasis supplied)[48]
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> x x x
>
> The mere fact that legislation may supplement or add to or prescribe a penalty for the violation of a self-executing constitutional provision does not render such a provision ineffective in the absence of such legislation.[49]
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> x x x
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> [The provision at stake] is a mandatory, positive command which is complete in itself and which needs no further guidelines or implementing laws or rules for is enforcement. From its very words the provision does not require any legislation to put it in operation. *It is per se judicially enforceable.* (emphasis supplied)[50]

Contrast this to *Tañada v. Angara*,[51] wherein the Court held that the World Trade Organization (WTO) treaty, requiring states-parties to liberalize their economies, was compatible with the "nationalist" clauses of the Constitution. The petitioners contended that the "national treatment" and

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[46] Manila Prince Hotel v. GSIS, G.R. No. 122156, 3 February 1997, 267 SCRA 408, 437-438.
[47] Manila Prince Hotel v. GSIS, G.R. No. 122156, 3 February 1997, 267 SCRA 408, 445.
[48] Manila Prince Hotel v. GSIS, G.R. No. 122156, 3 February 1997, 267 SCRA 408, 431.
[49] Manila Prince Hotel v. GSIS, G.R. No. 122156, 3 February 1997, 267 SCRA 408, 433.
[50] Manila Prince Hotel v. GSIS, G.R. No. 122156, 3 February 1997, 267 SCRA 408, 436.
[51] G.R No. 118295, 2 May 1997, 272 SCRA 18.

"parity provisions" of the WTO Agreement placed foreigners on the same footing as Filipinos, in violation of the duty of the State to "develop a self-reliant and independent national economy effectively controlled by Filipinos."[52] The Court held that the normative clauses of the Constitution were not meant to be self-executing.

> These principles in Article II are not intended to be self-executing principles ready for enforcement through the courts. They are used by the judiciary as aids or as guides in the exercise of its power of judicial review, and by the legislature in the enactment of laws.[53]

Citing *Kilosbayan v. Morato*[54] and *Tolentino v. Secretary of Finance*,[55] the Court said:

> [T]hese were "*not ... self-executing provisions*, the disregard of which can give rise to a cause of action in the courts [because t]hey do not embody judicially enforceable constitutional rights but *guidelines for legislation*." (emphasis supplied)[56]

Rejecting another challenge to state-sponsored gambling in *Basco v. PAGCOR*[57] the Court stated that the morality clauses[58] were "merely statements of principles and policies" and as such were "basically not self-executing, [requiring that] a law should be passed by Congress to clearly define and effectuate such principles."[59]

These considerations of specificity and completeness were, however, not raised in three cases.

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[52] CONST. art. II, sec. 19.

[53] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 54.

[54] G.R. No. 118910, 17 July 1995, 246 SCRA 540 (upholding a government-sponsored lottery).

[55] G.R. No. 115455, 25 August 1994, 235 SCRA 630 (upholding the Value Added Tax Law).

[56] Kilosbayan v. Morato, G.R. No. 118910, 17 July 1995, 246 SCRA 540, 564.

[57] G.R. No. 91649, 14 May 1991, 197 SCRA 52 (1991).

[58] CONST. art. II, sec. 11 (Personal Dignity), sec. 12 (Family) and sec. 13 (Youth); art. XIII, sec. 13 (Social Justice); and art. XIV, sec. 2 (Educational Values).

[59] Basco v. PAGCOR, G.R. No. 91649, 14 May 1991, 197 SCRA 52, 68.

In *Tatad v. Secretary of Energy*,[60] the Downstream Oil Industry Deregulation Law was struck down for not faithfully carrying out an anti-monopoly clause in the Constitution.[61] The Court found that the provisions of Republic Act No. 8180 on tariff differential, inventory reserves and predatory prices imposed substantial barriers to the entry and exit of new players in our downstream oil industry, and therefore inhibited the working of a truly competitive market. Note however that other implementing legislation have already "breathed life" into this constitutional policy: article 186 of the Revised Penal Code penalizing monopolization and combinations in restraint of trade, and article 28 of the Civil Code which makes any person who engages in unfair competition liable for damages. Indeed, Republic Act No. 8180 itself purports to actualize the policy.

Neither were they raised in *Villar v. Technological Institute*,[62] wherein a school was allowed to bar the enrollment of several activist students for academic delinquency but not for protest-related activities. The Court, citing on the one hand the Constitutional provision on the "right of all citizens to free public education,"[63] balanced on the other by the duty of the state to make higher education "generally available to all ... on the basis of merit,"[64] read the requirement of "merit" together with academic freedom[65] as giving the school the power to exclude students on academic grounds.

Finally, in *Del Rosario v. Bengzon*,[66] doctors challenged the constitutionality of the Generic Drugs Law,[67] which enabled poor patients to buy cheaper generic drugs containing the same therapeutic ingredients as "brand name" counterparts, required all doctors to prescribe the generic names of drugs, and prohibited them from imposing the condition "no substitution" in their prescriptions. Petitioners claimed *inter alia* that this impaired the

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[60] G.R. No. 124360, 5 November 1997, 281 SCRA 330.

[61] CONST. art. XII, sec. 19. The State shall regulate or prohibit monopolies when the public interest so requires. No combination in restraint of trade or unfair competition shall be allowed.

[62] G.R. No. L-69198, 17 April 1985, 135 SCRA 706.

[63] CONST. (1973), art. XIV, sec. 6, par. (5). CONST. art. XIV, sec. 1. of the present Constitution gives all citizens the "right to quality education."

[64] UNITED NATIONS DECLARATION ON HUMAN RIGHTS art. 26, par. (1).

[65] CONST. (1973), art. XIV, sec. 8, par. (3); CONST. art. XIV, sec. 5, par. (2).

[66] G.R. No. 88265, 21 December 1989, 180 SCRA 521.

[67] Rep. Act. No. 6675 (1988).

obligation of contract between doctor and patient. The Court held that — apart from the fact that there is no obligation for the doctor to treat a patient, or for a patient to follow the treatment — the law was a proper implementation of the constitutional mandate for the State "to protect and promote the right to health of the people"[68] and to "make essential goods, health and other social services available to all the people at affordable cost."[69]

3. Justice Feliciano's treatment of normative claims

In *Oposa v. Factoran,*[70] the right to ecology was deemed self-executing, despite its broad, open-ended formulation, namely: the "right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature,"[71] together with the people's "right to health."[72] A group of minors, represented by their parents, had filed suit asking a trial court to cancel all existing timber license agreements (TLAs), and to stop issuing new TLAs, citing the "adverse and detrimental consequences of continued deforestation." The respondent Secretary of Natural Resources contended that the suit failed to allege a "specific legal right violated ... for which any relief is provided by law," limited as it was to "nothing ... but vague and nebulous allegations concerning an 'environmental right,'" and that the question of whether logging should be permitted was a political question which should be addressed to either the Congress or the executive branch of government.

The trial court dismissed the case, but the Supreme Court overruled the dismissal, and remanded the case to the trial court for proceedings on the merits. The Court said that, on the contrary, there was a "specific fundamental legal right" at stake, namely, the "right to a balanced and healthful ecology."

> 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

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[68] CONST. art. II, sec. 15.
[69] CONST. art. XIII, sec. 11.
[70] G.R. No. 101083, 30 July 1993, 224 SCRA 792 (1993).
[71] CONST. art. II, sec. 16.
[72] CONST. art. II, sec. 15.

> and political rights enumerated in the latter. Such a right [to ecology] belongs to a different category of rights altogether for it concerns nothing less than self-preservation.[73]

The Court proceeded to state that this right "carries with it the correlative duty to refrain from impairing the environment," a duty codified in the revised charter of the Environment Department,[74] the Administrative Code,[75] and earlier decrees.[76] The right would be violated if the Government failed in its correlative duty or obligation. Finally, the case raises a justiceable and not political question.

> Policy formulation ... is not squarely put in issue. What is principally involved is the enforcement of a right vis-à-vis policies already formulated and expressed in legislation.[77]

Besides, the Court added, the political question doctrine "is no longer ... insurmountable" in light of the expanded scope of judicial power in the new Constitution which allows the courts to determine "whether or not there has been a grave abuse of discretion ... on the part of any branch or instrumentality of the Government.[78]

Feliciano wrote a separate opinion which joined the majority in the result but asked that their doctrines "be subjected to closer examination."

> The Court is, in effect, saying that [the right to a balanced and healthful ecology is] self-executing and judicially enforceable even in [its] present form.[79]

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[73] Oposa v. Factoran, G.R. No. 101083, 30 July 1993, 224 SCRA 792, 804-805.

[74] The Reorganization Act of the Department of Environment and Natural Resources, Exec. Order No. 192 (1987), sec. 4.

[75] Adm. Code of 1987, Exec. Order 292 (1987) Title XIV, Book IV, sec. 1.

[76] Philippine Environmental Policy, Pres. Dec. 1151 (1977), and Philippine Environment Code, Pres. Dec. 1152 (1977).

[77] Oposa v. Factoran, G.R. No. 101083, 30 July 1993, 224 SCRA 792, 809.

[78] CONST. art. VIII, sec. 1.

[79] Oposa v. Factoran, G.R. No. 101083, 30 July 1993, 224 SCRA 792, 817.

But he added, petitioners had to demonstrate, before the trial court, a "more specific legal right — a right cast in language of a significantly lower order of generality," containing "specific, operable norms and standards," and setting forth a "specific, operable legal right rather than a constitutional or statutory policy."[80]

Justice Feliciano found the "right to a balanced and healthful ecology" so "comprehensive in scope" and "generalized in character" that it failed to identify which particular provision of which code gave rise to a specific legal right. He raised two concerns. The first was due process, i.e., that unless the legal right claimed to have been violated is specified, the defendants are unable to defend themselves effectively. The second was the "broader-gauge consideration" about the place of judicial power vis-à-vis policy-making.

> Where substantive standards as general as "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" the result will be ... *to propel the courts into the uncharted ocean of social and economic policy making.* At least in ... [the] area of environmental protection..., 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...must be given a real and effective opportunity to fashion and promulgate those norms and standards .... before the courts should intervene. (emphasis supplied)[81]

Whereas, in *Oposa*, Feliciano asked for "specific, operable norms and standards," in the earlier case of *Tablarin v. Gutierrez*,[82] he called for a nuanced, textured reading of constitutional norms, as against the petitioners' "absolute literalness." He refused to invalidate the National Medical Admission Test (NMAT) requirement, embodied in an administrative order[83] issued pursuant to the Medical Act of 1959,[84] which was challenged for being inconsistent with the following constitutional provisions under a

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[80] Oposa v. Factoran, G.R. No. 101083, 30 July 1993, 224 SCRA 792, 817.
[81] Oposa v. Factoran, G.R. No. 101083, 30 July 1993, 224 SCRA 792, 818.
[82] G.R. No. 78164, 1 July 1987, 152 SCRA 730.
[83] MECS Order No. 52 (1985).
[84] Rep. Act No. 2382 (1959).

characteristically broad article entitled "Education, Science and Technology, Arts, Culture and Sports."[85]

> Section 1. The State shall protect and promote the right of all citizens to quality educational all levels and shall take appropriate steps to make such education accessible to all.
>
> Section 5, paragraph (3). Every citizen has a right to select a profession or course of study, subject to fair, reasonable, and equitable admission and academic requirements.

He cautioned against "absolute literalness" in reading these clauses.

> When one reads Section 1 in relation to Section 5(3) of Article XIV as one must, one cannot but note that the latter phrase of section 1 is not to be read with absolute literalness. The State is not really enjoined to take appropriate steps to make quality education "accessible to *all* ["]]who might, for any number of reasons, wish to enroll in a professional school, but rather merely to make such education accessible to all who qualify under *"fair, reasonable and equitable admission and academic requirements."*[86]

C. The legal effects of constitutionalizing norms

In the *Kilosbayan* cases,[87] the petitioners invoked constitutional principles on the "protection to life ... and promotion of the general welfare,"[88] "development of moral character"[89] promotion of the "physical, moral, spiritual, intellectual and social well-being of the youth,"[90] and "acceleration of social progress, ... human liberation and development."[91] Justice Feliciano demonstrates how constitutionalized norms are used in legal argument.

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[85] CONST. art. XIV.

[86] Tablarin v. Gutierrez, G.R. No. 78164, 31 July 1987, 152 SCRA 730, 739.

[87] Kilosbayan v. Guingona, G.R. No. 113375, 5 May 1994, 232 SCRA 110; Kilosbayan v. Morato, G.R. No. 118910, 17 July 1995, 246 SCRA 540.

[88] CONST. art. II, sec. 5.

[89] CONST. art. II, sec. 12.

[90] CONST. art. II, sec. 13.

[91] CONST. art. II, sec. 17.

1. Effect on competing constitutional concerns

National Press Club v. COMELEC[92] impugned the constitutionality of the prohibition on political advertisements (hereinafter, "political ad ban") during the presidential and congressional elections of 1992. The petitioners consisted of "representatives of the mass media," two candidates for public office, and taxpayers and voters who were prevented from selling or donating space and time for political advertisements; two individuals who were candidates for office (one for national and the other for provincial office) in the May 1992 elections; and taxpayers and voters who claimed that their right to be informed was curtailed.

The petitioners contended that the ban abridged the constitutional guarantee of free speech. First, it amounted to "censorship," because it was content-based regulation of speech.

> [It] select[ed] and single[d] out for suppression and repression, with criminal sanctions, only publications of a particular content, namely, media-based election or political propaganda during the election period of 1991.[93]

Second, it was "in derogation of media's role, function and duty to provide adequate channels of public information and public opinion relevant to election issues."[94] Third, it curtailed the speech of "candidates." Finally, it limited the "right of voters to information and opinion" because it would "substantial[ly] reduc[e] the quantity or volume of information concerning candidates and issues in the election."[95]

The statute in question was the Electoral Reforms Law of 1987,[96] which prohibited the sale or donation of print space and air time "for campaign or other political purposes" except to the Commission on Elections ("COMELEC"). It aimed to —

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[92] G.R. No. 102653, 5 March 1992, 207 SCRA 1.
[93] National Press Club v. COMELEC, G.R. No. 102653, 5 March 1992, 207 SCRA 1, 6.
[94] National Press Club v. COMELEC, G.R. No. 102653, 5 March 1992, 207 SCRA 1, 6.
[95] National Press Club v. COMELEC, G.R. No. 102653, 5 March 1992, 207 SCRA 1, 6.
[96] Rep. Act No. 6646 (1987).

> equaliz[e], as far as practicable, the situations of rich and poor candidates by preventing the former from enjoying the undue advantage offered by huge campaign "war chests."[97]
>
> At the same time, the Omnibus Election Code, specifically sections 90 and 92, required the COMELEC to procure "COMELEC space" in newspapers of general circulation in every province or city and "COMELEC time" on radio and television stations, and further commands the COMELEC to allocate "COMELEC space" and "COMELEC time" on a free of charge, equal and impartial basis among all candidates within the area served by the newspaper or radio and television station involved.[98]

Justice Feliciano recognized that under the "basic principles" regulating police power, the "essential" test is —

> whether or not the assailed legislative or administrative provisions constitute a permissible exercise of the power of supervision or regulation of the operations of communication and information enterprises during an election period, or whether such act has gone beyond permissible supervision or regulation of media operations so as to constitute unconstitutional repression of freedom of speech and freedom of the press.[99]

But he also recognized that this case involved, not an ordinary exercise of police power, but one which burdened a constitutionally protected liberty. Thus laws curtailing freedom of speech bore the imprint of invalidity.

Justice Feliciano identified, first, the competing social aims which clash in this case. On one hand is the "preferred status" of freedom of speech as indispensable to a robust democracy and especially to elections when the sovereign speaks.

> It is difficult to overemphasize the special importance of the rights of *freedom of speech* and *freedom of the press* in a democratic polity, in particular when they relate to the purity and integrity of the electoral

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[97] National Press Club v. COMELEC, G.R. No. 102653, 5 March 1992, 207 SCRA 1, 7.
[98] National Press Club v. COMELEC, G.R. No. 102653, 5 March 1992, 207 SCRA 1, 7-8.
[99] National Press Club v. COMELEC, G.R. No. 102653, 5 March 1992, 207 SCRA 1, 10.

> process itself, the process by which the people identify those who shall have governance over them. Thus, it is frequently said that these rights are accorded a preferred status in our constitutional hierarchy.[100]

On the other is the need to "level the playing field" among candidates for public office, which is of "special importance and urgency in a country which, like ours, is characterized by extreme disparity in income distribution between the economic elite and the rest of society, and by the prevalence of poverty, with the bulk of our population falling below the 'poverty line'." Feliciano thus continues:

> Withal, the rights of free speech and free press are not unlimited rights for they are not the only important and relevant values even in the most democratic of polities. In our own society, equality of *opportunity* to *proffer oneself for public office,* without regard to the level of financial resources that one may have at one's disposal, is clearly an important value. (emphasis supplied)[101]

Second, he recognized, as a consequence of the preferred status of freedom of speech in our constitutional hierarchy, that content-based regulation of this nature came to the Court with the presumption of invalidity.

Third, he noted, however, that the "egalitarian" purposes of the statute in question enjoyed "constitutional rank."

> The Commission may, during the election period, supervise or regulate the enjoyment or utilization of all franchises or permits for the operation of ... media or communication .... Such supervision or regulation shall aim to *ensure equal opportunity, time, and space, and the right to reply, including reasonable, equal rates therefor,* for public information campaigns and forums among candidates.... (emphasis supplied)[102]

> The State shall guarantee *equal access to opportunities for* public service, and prohibit political dynasties as may be defined by law. (emphasis supplied)[103]

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[100] National Press Club v. COMELEC, G.R. No. 102653, 5 March 1992, 207 SCRA 1, 9.
[101] National Press Club v. COMELEC, G.R. No. 102653, 5 March 1992, 207 SCRA 1, 9.
[102] CONST. art. IX-C, sec. 4.
[103] CONST. art. II, sec. 26.

Next, he notes that the Constitution itself has provided the "modality" by which these egalitarian aims were to be achieved. "That the ... regulation [of speech] is not, in itself a forbidden modality is made clear by the Constitution."

Then he explains that the "constitutional status" of the norms advanced by the rule has the "technical effect" of suspending, as it were, the presumption of invalidity borne by rules which burden the freedom of speech.

> The technical effect of article IX (C) (4) of the Constitution may be seen to be that *no presumption of invalidity* arises in respect of exercises of supervisory or regulatory authority on the part of the COMELEC for the purpose of securing equal opportunity among candidates for political office, although such supervision or regulation may result in some limitation of the rights of free speech and free press. For supervision or regulation of the operations of media enterprises is scarcely conceivable without such accompanying limitation.[104]

Thus, he concludes, the general rule applies — "that a statute is presumed to be constitutional and that the party asserting its unconstitutionality must discharge the burden of clearly and convincingly proving that assertion."[105] Stated otherwise, the effect of constitutionalized norms and powers is that "heightened judicial scrutiny" — which should have applied to this burden upon the freedom of speech — is suspended, and the minimum test of "rationality" — applicable in ordinary cases where no constitutional liberty is at stake — controls. Does the political ad ban pass this test? It does. "All [that accepted doctrine] requires is that the regulatory measure ... bear a reasonable nexus with the constitutionally sanctioned objective."

The "rational relationship" test chosen by Justice Feliciano offers the lowest level of protection for speech; in this case, the political ad ban does achieve some leveling. But Justice Cruz, dissenting, stated that the ban fails its stated purpose, because it creates new inequalities.

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[104] National Press Club v. COMELEC, G.R. No. 102653, 5 March 1992, 207 SCRA 1, 9-10.
[105] National Press Club v. COMELEC, G.R. No. 102653, 5 March 1992, 207 SCRA 1, 10.

> The flaw in the prohibition ... is that while the rich candidate is barred from buying mass media coverage, it nevertheless allows him to spend his funds on other campaign activities also inaccessible to his straitened rival.[106]

In effect, he invokes the more exacting standards requiring a "substantial link" between the regulation and the public purpose, which should have applied, had it not been for the constitutionalized norm.

A similar equalizing rationale was rejected by the American Supreme Court, whose constitution contains an express guarantee of free speech but without either a normative statement on equalizing access to public office or an express authority for government to regulate speech for that purpose. *Buckley v. Valeo*[107] struck down on First Amendment grounds certain provisions of the Federal Election Campaign Act of 1971. The restrictions on campaign expenditure by candidates were rejected — while the limits on individual contributions to these candidates were upheld — because these imposed "direct quantity restrictions on political communications." The main purpose of the Act was to limit electoral corruption, both in practice and appearance, because it undermined government. The U. S. Court however noted the egalitarian purpose.

> It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the[se] limitations ... But the concept that government may restrict the speech of some elements ... in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure the 'widest possible dissemination of information from diverse and antagonistic sources ...' and to '... assure unfettered exchange of ideas....'"[108]

Buckley further states:

> Moreover, the equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates but to handicap a

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[106] National Press Club v. COMELEC, G.R. No. 102653, 5 March 1992, 207 SCRA 1, 36.
[107] 424 U. S. 1 (1976).
[108] Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

> candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.[109]

Justice Cruz echoed these concerns in his dissent in *National Press Club*, and thus affirmed the power of the people, as voters and as candidates, to retain control over the quality and vigor of debate on public issues in a political campaign.[110]

The argument thus cast, the effect of constitutionalizing a norm is to negate the presumption of invalidity borne by laws that burden a constitutionally protected liberty. The normative clash between two constitutional values, liberty and equality, was resolved, in the United States, for free speech, and in the Philippines, for equality. Liberty is of constitutional rank, and any curtailment thereof triggered off the presumption of invalidity. But equality had been constitutionalized, too, in the Philippines and the Constitution itself empowered the COMELEC to regulate speech to advance equality. Accordingly, advancing the norm cannot bear that presumption of invalidity.

Strangely enough, Justice Feliciano suggests that the usual "police power" analysis is inapplicable, and would rather read the case strictly in terms of the express COMELEC power to regulate speech during elections. "[T]here appears no present necessity to fall back upon basic principles relating to the police power of the State and the requisites for constitutionally valid exercise of that power."[111] Yet, when the dissenters contended that the political ad ban excessively burdened free speech without achieving its stated purpose, Feliciano himself resorted to the police power test of rationality.

> My learned brother in the Court Cruz, J., remonstrates, however, that the [political ad ban does, not] place political candidates on *complete and perfect equality inter se* without regard to their financial affluence or lack thereof But a regulatory measure that is less than perfectly comprehensive or which does not completely obliterate the evil sought to be remedied, is not for that reason alone constitutionally infirm. *The Constitution does not, as it cannot, exact perfection in governmental*

[109] Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).
[110] National Press Club v. COMELEC, G.R. No. 102653, 5 March 1992, 207 SCRA 1, 36.
[111] National Press Club v. COMELEC, G.R. No. 102653, 5 March 1992, 207 SCRA 1, 10.

> *regulation.* All it requires ... is that the regulatory measure under challenge bear a reasonable nexus with the constitutionally sanctioned objective.[112]

The wisdom of Feliciano's opinion in *National Press Club* has been widely disputed. Several bills were filed in the Senate for its repeal but none of these were passed.[113] It was contended that the ban failed to achieve any leveling; it tended to favor high-profile movie celebrities, incumbents and political dynasties, and disfavored new challengers, political "outsiders" and dissenters. In other words, the egalitarian measure had failed to level the original inequality (rich versus poor candidates) it sought to end, while aggravating other inequalities.

The ban on political advertisements was challenged once again in *Osmeña v. COMELEC*,[114] wherein the Court, speaking through Justice Vicente Mendoza, affirmed *National Press Club.* Osmeña, a presidential candidate, contended that "events after th[at] ruling have called into question [the] validity of [its] very premises," claiming that

> experience in the last five years ... has shown the "undesirable effects" of the law because "the ban on political advertising has not only failed to level the playing field [but] actually worked to the grave disadvantage of the poor candidate[s] by depriving them of a medium which they can afford to pay for while their more affluent rivals can always resort to other means of reaching voters like airplanes, boats, rallies, parades and handbills."[115]

The Court rejected the argument outright, on the basis of *stare decisis.*

> No empirical data have been presented by petitioners to back up their claim, however. Argumentation is made at the theoretical and not the practical level ... Instead, [petitioners] make it clear that their disagreement is with the opinion of the Court and that what they seek is a reargument on the same issue already decided in that case.[116]

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[112] National Press Club v. COMELEC, G.R. No. 102653, 5 March 1992, 207 SCRA 1, 14.
[113] Osmeña v. COMELEC, G.R. No. 132231, 31 March 1998, 288 SCRA 447.
[114] G. R. No. 132231, 31 March 1998, 288 SCRA 447 (1998).
[115] Osmeña v. COMELEC, G.R. No. 132231, 31 March 1998, 288 SCRA 447, 462.
[116] Osmeña v. COMELEC, G.R. No. 132231, 31 March 1998, 288 SCRA 447, 462.

> Indeed, petitioners do not complain of any harm suffered as a result of [that] law.[117]

> What petitioners seek is not the adjudication of a case but simply the holding of an academic exercise....[118]

But the Court proceeded to "revisit" *National Press Club* in order "clarify [its] own understanding ... and set forth a theory of freedom of speech."[119]

First, Justice Mendoza stated that the political ad ban was content-neutral, merely a "time, place and manner" regulation. It did not suppress speech but only regulated the time and manner of political ads.

> The law's concern is not with the message or content of the ad but with ensuring media equality between candidates with "deep pockets," ... and those with less resources.[120]

The ban was content-neutral because it was *not absolute* and thus merely defined when, where and how candidates campaigned.

> [In *Mutuc v. COMELEC*,[121] a]n order of the COMELEC prohibiting the playing of taped campaign jingles through sound systems ... was held to be an invalid prior restraint ... as the restriction did not simply regulate time, place or manner but imposed an absolute ban on the use of the jingles. The prohibition was actually content-based ..., as inhibiting as prohibiting the candidate himself to use the loudspeaker.[122]

Second, he confronted the argument that the ban was not a reasonable means to achieve its egalitarian aims, that it does not stop rich candidates from using their superior resources and, the law, "instead of leveling the playing field[,] has abolished it." The "choice of remedies for an admitted social malady ... belongs to Congress."

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[117] Osmeña v. COMELEC, G.R. No. 132231, 31 March 1998, 288 SCRA 447, 463.
[118] Osmeña v. COMELEC, G.R. No. 132231, 31 March 1998, 288 SCRA 447, 464.
[119] Osmeña v. COMELEC, G.R. No. 132231, 31 March 1998, 288 SCRA 447, 464.
[120] Osmeña v. COMELEC, G.R. No. 132231, 31 March 1998, 288 SCRA 447, 465.
[121] G.R. No. L-28517, 21 February 1968, 36 SCRA 228.
[122] Osmeña v. COMELEC, G.R. No. 132231, 31 March 1998, 288 SCRA 447, 467.

On a final note, Feliciano's disfavor for "paid political advertisements" seems to flow from a rationalist bias against "appeal[s] to the non-intellective-faculties of [a] passive audience."

> The paid political advertisements introjected into the electronic media and repeated with *mind-deadening* frequency, are commonly intended and crafted, *not so much to inform and* educate as *to condition and manipulate,* not so much to provoke *rational and objective appraisal* of candidates qualifications or programs as to appeal to the *non-intellective faculties* of the captive and *passive audience.* The right of the general listening and viewing public to be free from such intrusions and their *subliminal effects* is at least as important as the right of candidates to advertise themselves through modern electronic media and the right of media enterprises to maximize their revenues from the marketing of "packaged" candidates. (emphases supplied)[123]

There is therefore a clear bias for the values of the Enlightenment, but whether that bias also enjoys "constitutional rank" is not explained, especially considering a Constitution whose preamble refers to "love"[124] and which mandates a right to live "in accord with the rhythm and harmony of nature."[125]

In contrast, in *Philippine Press Institute v. COMELEC,*[126] Justice Feliciano struck down a COMELEC resolution which compelled print media companies to donate space for use by the COMELEC, notwithstanding the same egalitarian aims which held sway in *National Press Club.*[127] The "COMELEC space" was to be used for candidates' campaigns, to be regulated by the COMELEC to ensure equal print-space for both rich and poor candidates for public office. The COMELEC act was found to be an unlawful "taking of private personal property for public use or purposes."

> The extent of the taking or deprivation is not insubstantial; this is not a case of a *de minimis* temporary limitation or restraint upon the use of private property. The monetary value of the compulsory

[123] National Press Club v. COMELEC, G.R. No. 102653, 5 March 1992, 207 SCRA 1, 16.
[124] CONST. preamble.
[125] CONST. art. 11, sec. 16.
[126] G.R. No. 119694, 22 May 1995, 244 SCRA 272.
[127] National Press Club v. COMELEC, G.R. No. 102653, 5 March 1992, 207 SCRA 1.

> "donation," measured by the advertising rates ordinarily charged by newspaper publishers whether in cities or in non-urban areas, may be very substantial indeed.[128]

> The threshold requisites for a lawful taking of private property for public use ... is the necessity for the taking., another is the legal authority to effect the taking. The element of necessity for the taking has not been shown by respondent COMELEC. It has not been suggested that the members of PPI are unwilling to sell print space at their normal rates to COMELEC for election purposes. Indeed, the unwillingness or reluctance of COMELEC to buy print space lies at the heart of the problem. Similarly, it has not been suggested, let alone demonstrated, that COMELEC has been granted the power of eminent domain either by the Constitution or by the legislative authority. A reasonable relationship between that power and the enforcement and administration of election laws by COMELEC must be shown; it is not casually to be assumed.[129]

The same constitutional norm underlay both the *National Press Club* and the *Philippine Press Institute* cases, i.e., leveling the playing field. Both cases implicated constitutionally protected rights. But why the apparent solicitude for proprietary aspects of speech in *Philippine Press Institute* and not for its communicative aspects in *National Press Club*? One explanation is that the power to regulate speech was expressly vested in the COMELEC, but not the power to take private property. But given the Court's deference to the COMELEC's powers in *National Press Club*, it could very well have interpreted the taking for COMELEC space as part of its limited election period powers over speech. At any rate, the COMELEC's lack of care in "commandeering" COMELEC space — failing to specify the limits of the imposition, failing to specify the mode of compensation for the print space, failing to identify the specific purposes for which the space will be used — can very well explain why the requirement of COMELEC space was struck down as an impermissible taking while the political ad ban was upheld as a permissible regulation of speech.

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[128] Philippine Press Institute, Inc. v. COMELEC, G.R. No. 119694, 22 May 1995, 244 SCRA 272, 279.

[129] Philippine Press Institute, Inc. v. COMELEC, G.R. No. 119694, 22 May 1995, 244 SCRA 272, 280.

2. Judicial deference to expanded legislative/executive prerogatives to carry out state purposes

Lina v. Secretary of Education[130] questioned the power of the Secretary to approve increases in school fees without consulting the affected students, and to exclude certain classes of students from government financial assistance (if they enrolled in schools charging higher tuition fees). The petitioner argued that the relevant statute required consultation for increasing tuition fees only (and not "other school fees"), and that the State Assistance Council was expressly authorized precisely to define entitlements to government subsidy. The petitioner impugned the proffered distinction between tuition and other school fees.

> [T]here is no basis, legal or otherwise, for the respondent Secretary to view "other fees" as separate and distinct from "tuition fee rate" for purposes of the consultation requirement of the law. To exclude the imposition of "other fees" from the consultation process would result in an anomalous situation whereby so-called "other fees" may become so burdensome that the students and parents concerned may be deprived of the right of being heard or consulted on a matter directly affecting their interest. Justice and equity demand that any increase in the tuition fee, tuition fee assessment or "other fees" which in its totality increases the cost of education, should and must be subjected to consultation, as required in section 10, Republic Act No. 6728.[131]

Justice Feliciano rejected this argument as "essentially an invocation of 'justice and equity'" which is better addressed to Congress.

> The determination of the levels of tuition and other school fees which may lawfully be charged by any private school, is clearly another matter; this task is vested in respondent Secretary...[132]

> The Court believes that *petitioner's argument — cogent though it may be as a social and economic comment — is most appropriately addressed, not to a court which must take the law as it is actually written, but rather to the legislative authority* which can, if it wishes, change the language and

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[130] G.R. No. 100127, 23 April 1993, 221 SCRA 515.

[131] Lina v. Secretary of Education, G.R. No. 100127, 23 April 1993, 221 SCRA 515, 532.

[132] Lina v. Secretary of Education, G.R. No. 100127, 23 April 1993, 221 SCRA 515, 531.

> content of the law. As section 10 of Republic Act No. 6728 now stands, we have no authority to strike down paragraph 1 (d) of DECS Order No. 30 as inconsistent with the requirements of section 10. (emphasis supplied)[133]

In *Tablarin v. Judge Gutierrez*,[134] Justice Feliciano rejected the petition by medical students challenging the validity of the National Medical Admission Test (NMAT) requirement imposed by the Secretary of Education. The NMAT aimed to "standardiz[e] medical education" in the Philippines by imposing a qualification on top of the individual admission requirements of medical schools.

> There is another reason why the petitioners' arguments must fail: the legislative and administrative provisions impugned by them constitute, to the mind of the Court, a valid exercise of the police power of the state. The police power, it is commonplace learning, is the pervasive and non-waivable power and authority of the sovereign to secure and promote all the important interests and needs — in a word, the public order — of the general community. An important component of that public order is the health and physical safety and well being of the population, the securing of which no one can deny is a legitimate objective of governmental effort and regulation.[135]

Once again, Justice Feliciano admonished the petitioners to address their policy arguments to Congress.

> [T]his Court has neither commission or competence to pass upon questions of the desirability or wisdom or utility of legislation or administrative regulation. *Those questions must be addressed to the political departments of the government not to the courts.* (emphasis supplied)[136]

Justice Feliciano has consistently deferred to the legislative branch on other matters.

> It may well be that, as a matter of administrative policy, all solicitation including solicitation for the benefit of the officers and

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[133] Lina v. Secretary of Education, G.R. No. 100127, 23 April 1993, 221 SCRA 515, 531-532.

[134] G.R. No. 78164, 3 July 1987, 152 SCRA 730.

[135] Tablarin v. Gutierrez, G.R. No. 78164, 31 July 1987, 152 SCRA 730, 741-742.

[136] Tablarin v. Gutierrez, G.R. No. 78164, 31 July 1987, 152 SCRA 730, 741.

> employees of a particular agency or government should be prohibited and perhaps criminalized. *That, however. is something for the legislative authority to consider and act, upon, not the courts and certainly not in a criminal case.* (emphasis supplied)[137]
>
> The PCSO appears sincerely convinced that the legal restrictions placed upon its operations by the actual text of Section 1 (B) of its revised charter prevent it from realizing the kinds and volume of revenues that it needs for charitable and health and welfare-oriented programs. In this situation, the *appropriate recourse is not to make of nor to conjure away those legal restrictions but rather to go to the legislative authority and there ask for further amendment of its charter. In that same forum, the petitioners may in turn ventilate their own concerns and deeply felt convictions.* (emphasis supplied)[138]

In his dissent in *Laurel v. Garcia*,[139] he rejected the majority's insistence on a specific legislative determination that property of the public dominion had been converted into patrimonial, and therefore alienable property, and considered a mere executive indication to suffice. The majority stopped the sale of real estate in Tokyo earlier given by the Japanese Government to the Philippines as war reparations, on the ground that it belonged to the public dominion and could be sold only by legislative authority.

> For purposes of this separate opinion, I assume that the piece of land located in ... Tokyo, Japan (hereinafter referred to as the "Roppongi property") may be characterized as property of public dominion, within the meaning of Article 420 (2) of the Civil Code:
>
> > "[Property] which belong[s] to the State, without being for public use, and are intended for some public service..."[140]
>
> It might not be amiss, however, to note that the appropriateness of trying to bring within the confines of the simple threefold classification

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[137] Defensor-Santiago v. Ombudsman, G.R. No. 99289-90, 13 January 1992, 205 SCRA 162, 183 (Feliciano, J., dissenting).

[138] Kilosbayan v Morato, G.R. No. 118910, 17 July 1995, 246 SCRA 540, 595.

[139] G.R. No. 92013, 25 July 1990, 187 SCRA 797.

[140] Laurel v. Garcia, G.R. No. 92013, 25 July 1990, 187 SCRA 797, 820 (Feliciano, J., dissenting).

> found in article 420 of the Civil Code ("property for public use," property "intended for some public service" and property intended "for the development of the national wealth") all property owned by the Republic of the Philippines whether found within the territorial boundaries of the Republic or located within the territory of another sovereign State, is not self-evident.[141]

In this context, why, Feliciano asks, should an executive classification not suffice?

Republic v. Gonzales[142] presented a classic police power challenge. The petitioners were occupants of government land who questioned the setting aside of their lots for parking space purposes, claiming that this did not redound to their benefit as required by section 83 of the Public Land Act. Petitioners asserted that —

> only certain privileged individuals, *i.e.*, those who have cars, can avail of the parking facility without any advantage accruing to the general public.[143]

Thus, the "benefits, if any, that [would] be derived from the proposed street-widening and parking space will be confined to people who have cars."[144] This "lack[s] the essential feature of property reserved for public use or benefit," and "would restrict property reserved for public use or benefit to include only property susceptible of being utilized by a generally unlimited number of people."[145] Said Justice Feliciano:

> The conception urged by appellants is both flawed and obsolete since the number of users is not the yardstick in determining whether property is properly reserved for public use or public benefit. In the first place, Section 83 above speaks not only of use by a local government but

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[141] He adds: "The task of examining in detail the applicability of the classification set out in Art. 420 of our Civil Code to property that the Philippines happens to own outside its own boundaries must, however, be left to academicians." Laurel v. Garcia, G.R. No. 92013, 25 July 1990, 187 SCRA 797, 821.

[142] G.R. No. 45338, 1 July 1991, 199 SCRA 788.

[143] Republic v. Gonzales, G.R. No. 45338-39, 31 July 1991, 199 SCRA 788, 792.

[144] Republic v. Gonzales, G.R. No. 45338-39, 31 July 1991, 199 SCRA 788, 793.

[145] Republic v. Gonzales, G.R. No. 45338-39, 31 July 1991, 199 SCRA 788, 793.

> also of "quasi-public uses or purposes." To constitute public use, the public in general should have equal or common rights to use the land or facility involved on the same terms, however limited in number the people who can actually avail themselves of it at a given time. There is nothing in Proclamation No. 144 which excludes non-car-owners from using a widened street or a parking area should they in fact happen to be driving cars; the opportunity to avail of the use thereof remains open to the public in general.[146]
>
> Besides, the benefits directly obtained by car-owners do not determine either the validity or invalidity of Proclamation No. 144. What is important are the long-term benefits which the proposed street widening and parking areas *make available to the public in the form of enhanced, safe and orderly transportation on land.* This is the kind of *public benefit* envisioned by the Municipal Council of Malabon, Rizal and which was sought to be promoted by the President in issuing Proclamation No. 144. (emphases supplied)[147]

This broad interpretation of the "public use" requirement has been consistently recognized even in takings cases where the requisites have traditionally been applied more strictly.[148]

In *PLDT v. Eastern Telecommunications*,[149] wherein Justice Feliciano's dissent in the original decision became the majority upon the Motion for Reconsideration, Justice Feliciano affirmed that the "requirement of interconnection between telecommunications carriers found in both legislation and administrative regulations constitutes *a legitimate exercise of the plenary police power of the* State for the securing of the general welfare." (emphasis supplied)[150]

> The fundamental point is that customers' choice and free competition among carriers are essential if reasonable prices and efficient and satisfactory service are to be achieved and maintained

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[146] Republic v. Gonzales, G.R. No. 45338-39, 31 July 1991, 199 SCRA 788, 793-794.

[147] Republic v. Gonzales, G.R. No. 45338-39, 31 July 1991, 199 SCRA 788, 794.

[148] Manotok v. NHA, G.R. No. L-55166, 21 May 1987, 150 SCRA 89; Sumulong v. Guerrero, G.R. No. L-4865, 30 September 1987, 154 SCRA 461.

[149] G.R. No. 94374, 27 August 1992, 213 SCRA 161.

[150] PLDT v. Eastern Telecommunications, G.R. No. 92374. 27 August 1992, 213 SCRA 16, 49 (Feliciano, J., dissenting).

> and the public's rapidly growing needs adequately served, in the area of telecommunications, an area so vital to national, social and economic development.[151]

3. Liberalized requirements on standing

In *Oposa v. Factoran,*[152] the majority recognized the standing of Minors Oposa and parents to assert the "right to a healthful and balanced ecology" in behalf of "generations yet unborn." This ruling is consistent with the intent of the framers of the 1987 Constitution, who recognized that the protection of the environment was intended precisely for future generations.[153] Significantly, Justice Feliciano noted that the majority had just created the equivalent of a "beneficiaries' right of action" as a separate ground for standing. He developed the framework for this doctrine in his concurring opinion in *Kilosbayan v. Guingona*[154] (hereinafter, *Lotto I*).

In *Lotto I*, the Court recognized the standing of a non-governmental organization (NGO) to challenge the legality of a state-approved lottery, and invalidated a "lotto" operation as inconsistent with the terms of the franchise given to the lottery operator. The NGO, not being privy to the operation, challenged it, as it were, as a "people's tribune." Justice Feliciano lamented the tendency to play fast and loose with the constitutional law doctrine of standing.

> [I]t is not enough for the Court simply to invoke "public interest" or even "paramount considerations of national interest," and to say that the specific requirements of such public interest can only be ascertained on a "case to case" basis. For one thing, such an approach is not intellectually satisfying. For another, such an answer appears to come too close to saying that *locus standi* exists whenever at least a majority of the Members of this Court participating in a case feels that an appropriate case for judicial intervention has arisen.[155]

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[151] PLDT v. Eastern Telecommunications, G.R. No. 92374, 27 August 1992, 213 SCRA 16, 52 (Feliciano, J., dissenting).

[152] G.R. No. 101083, 30 July 1993, 224 SCRA 792.

[153] BERNAS, THE 1987 CONSTITUTION: THE INTENT OF THE FRAMERS 131 (1995).

[154] G.R. No. 113375, 5 May 1994, 232 SCRA 110.

[155] Kilosbayan v. Guingona, G.R. No. 113375, 5 May 1994, 232 SCRA 110, 154.

He explored the normative bases for the doctrine as, on one hand, the jurisdictional expression of constitutional checks-and-balances and of the "case-and-controversy" requirement and, on the other, the need to liberalize standing when "great issues of public law" are presented by parties who have suffered no personal injury but act as "peoples' deputies."

> [T]he doctrine of *locus standi* reflects ... the principle of separation of powers ... [T]he exercise of judicial power commonly take[s] place within the context of actual cases or controversies. This, in turn, reflects the basic notion of judicial power as the power to resolve actual disputes and of the traditional business of courts as the hearing and deciding of specific, controversies brought before them ... Thus, the general proposition has been that a petitioner who assails the legal or constitutional quality of an executive or legislative act must be able to show that he has *locus standi.* Otherwise, the petition becomes vulnerable to prompt dismissal by the court.[156]

> There is, upon the other hand, little substantive dispute that the possession of *locus standi* is not, in each and every case, a rigid and absolute requirement for access to the courts. *Certainly that is the case where great issues of public law are at stake,* issues which cannot be approached in the same way that a court approaches a suit for the collection of a sum of money or a complaint for the recovery of possession of a particular piece of land. (emphasis supplied)[157]

He asks: " [I]n what types of cases, [should] the court insist on a clear showing of *locus standi* understood as a direct and personal interest in the subject matter and when [should] the court ... relax that apparently stringent requirement?"[158]

Justice Feliciano states that there is no "over-arching juridical principle or theory, waiting to be discovered, that permits a ready answer to th[is] question," and claims to have "neither the competence nor the opportunity to try to craft such principle or formula." He offers, however, "considerations of principle which, in the present case, appear ... to require an affirmative answer to the question of whether or not petitioners are properly regarded as imbued

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[156] Kilosbayan v. Guingona, G.R. No. 113375, 5 May 1994, 232 SCRA 110, 153.
[157] Kilosbayan v. Guingona, G.R. No. 113375, 5 May 1994, 232 SCRA 110, 154.
[158] Kilosbayan v. Guingona, G.R. No. 113375, 5 May 1994, 232 SCRA 110, 154.

with the standing necessary to bring and maintain the present petition." These are:

a. "[T]he character of the funds or other assets involved in the case"

The funds were public in several ways. One, the funds were to be generated from the bettors, i.e., from the population at large, "from well-nigh every town and barrio of Luzon."[159] Two, the funds would "belong to the PCSO, a government-owned or controlled corporation and an instrumentality of the government."[160] Three, the funds are "destined for utilization in social development projects which, at least in principle, are designed to benefit the general public,"[161] what Justice Feliciano in *Oposa v. Factoran* referred to as a "beneficiaries' right of action."

> It is widely known that the principal sources of funding for government operations today include, not just taxes and customs duties, but also revenues derived from activities of the Philippine Amusement Gaming Corporation (PAGCOR) ... *The interest of a private citizen in seeing to it that public funds, from-whatever source they may have been derived, go only to the uses directed and permitted by law, is as real and personal and substantial as the interest of a private tax-payer in seeing to it that tax monies are not intercepted on their way to the public treasury or otherwise diverted from uses prescribed or allowed by, law.* (emphasis supplied)[162]

And four, conversely, a successful lotto will actually "lesse[n] the pressure upon the traditional sources of public revenues, i.e., the pocket books of individual taxpayers."[163]

Two justices who voted to dismiss the petition had argued, in contrast, that there could be no taxpayer standing because no tax money was involved. Justice Feliciano found this argument "too narrow a conception of the taxpayer's suit and of the public policy that it embodies."[164]

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[159] Kilosbayan v. Guingona, G.R. No. 113375, 5 May 1994, 232 SCRA 110, 155.
[160] Kilosbayan v. Guingona, G.R. No. 113375, 5 May 1994, 232 SCRA 110, 155.
[161] Kilosbayan v. Guingona, G.R. No. 113375, 5 May 1994, 232 SCRA 110, 155.
[162] Kilosbayan v. Guingona, G.R. No. 113375, 5 May 1994, 232 SCRA 110, 155.
[163] Kilosbayan v. Guingona, G.R. No. 113375, 5 May 1994, 232 SCRA 110, 155.
[164] Kilosbayan v. Guingona, G.R. No. 113375, 5 May 1994, 232 SCRA 110, 155.

b. "[T]he presence of a clear case of disregard of a constitutional or statutory prohibition by the public respondent agency or instrumentality of the government."

Justice Feliciano explains that standing as a *procedural* requirement cannot be read apart from the substantive issues raised. Standing cannot be read in isolation from the merits of the case and the authoritative character of the laws at stake, in this case both constitutional and statutory.

> The notion of locus standi and the judge's conclusions about the merits of the case, in other words, interact with each other. Where the Court perceives a serious issue of violation of some constitutional or statutory limitation, it will be much less difficult for the Court to find locus standi in the Petitioner and to confront the legal or constitutional issue. In the present case, the majority of the Court considers that a very substantial showing has been made that the Contract of Lease between the PCSO and the PGMC flies in the face of legal limitations.[165]

c. "[T]he lack of any other party with a more direct and specific interest in raising the questions here being raised."

Justice Feliciano explained that there has appeared no party who will raise the "great issues of public law" — not the losing bidder, not the Ombudsman (to challenge the *legality* of the contract), not the National Government (who in fact is defending the contract through the Solicitor General).

> [Thus] the submission may be made that the institution, so well known in corporation law and practice, of the corporate stockholders' derivative suit furnishes an appropriate analogy and that on the basis of such an analogy, a *taxpayer's derivative suit* should be recognized as available.[166]

d. "Wide range of impact 'justifies' expenditure of judicial resources."

Finally Justice Feliciano resorts to a resource-allocation argument, stating that the Lotto's "wide range of impact, [being] nationwide in its scope

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[165] Kilosbayan v. Guingona, G.R. No. 113375, 5 May 1994, 232 SCRA 110, 156.

[166] Kilosbayan v. Guingona, G.R. No. 113375, 5 May 1994, 232 SCRA 110, 156-157.

and reach" and the substantial "amounts of money expected to be raised," are "not something that the Court may casually pass over as unimportant and as not warranting the expenditure of significant judicial resources."[167]

This reading was in large part rendered inapplicable in the subsequent Lotto case, *Kilosbayan v. Morato*[168] (hereinafter, *Lotto II*), in which the Court threw out a subsequent Kilosbayan challenge to a reformed lotto "lease agreement" precisely for lack of standing.

Justice Mendoza urged the proper constitutional law application of the standing requirement for the majority in *Lotto II*, consistently with his earlier, separate opinion in *Tatad v. Garcia*.[169] He basically agreed with Justice Feliciano's proposal that when "great issues of public law" are involved, there can be exceptions to the standing requirement of injury-in-fact. However, he found no great constitutional norm at stake in *Lotto II*, merely the terms of a legislative franchise. He explained that the debate on "standing" was a constitutional law matter, and is not relevant when no constitutional norms at all are at stake. Translated in the terms of the Feliciano proposal, *Lotto II* involved no taxpayer interest at all, implicated no constitutional norms, and accordingly entailed no weighty interest. Absent that interest, there was no need to recognize "self-appointed attorneys-general."

Lotto II affirms Feliciano's first test calling for a broad conception of taxpayer standing, to include a "beneficiaries' right of action." But it also shows the danger in Feliciano's second and third tests, i.e., the importance of the norm sought to be vindicated vis-à-vis the party seeking to vindicate it. It is vulnerable precisely to the clear distinction between constitutional and statutory norms. Norms must be seen *not* in terms of their origin (whether constitutional or statutory) but in terms of their *weight*. In other words, if Kilosbayan objects to foreign profiteering in government-sanctioned, people-financed gambling, why should it matter if Kilosbayan invokes principles found in statutes and not in the Constitution? Is the Court any less bound if the people express a moral principle through their elected representatives in

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[167] Kilosbayan v. Guingona, G.R. No. 113375, 5 May 1994, 232 SCRA 110, 157.
[168] G.R. No. 118910, 17 July 1995, 246 SCRA 540.
[169] G.R. No. 114222, 6 April 1995, 243 SCRA 436.

Congress, than if they had done it directly in the Constitution? Recall Feliciano's own position in *Laurel v. Garcia*,[170] that a mere executive action will suffice to reclassify property of the public domain.

Justice Feliciano lamented in his dissent the "doctrinal ball and chain [which the Court] had clamped on [its] own limbs,"[171] and criticized the method Justice Mendoza himself refers to as "parsing," saying that it disregards the "actual syntax" of the law.[172]

D. Judicial balancing of norms and interests

In *Ayer Productions v. Judge Capulong*,[173] then Defense Secretary Juan Ponce Enrile, one of the key historical figures in the EDSA Revolution which ousted Ferdinand E. Marcos, asked the Court to stop a movie company from making a film about the EDSA Revolution, which included a portrayal of himself which he found objectionable.

Justice Feliciano identified the competing interests — the right of freedom of expression as invoked by the movie company, "counter-balanced" by the right to privacy asserted by Ponce Enrile — and sought a "line of equilibrium" applicable in the "specific context" of the case. Neither right was absolute, he said, and both allowed for exceptions.

The right of privacy, or Brandeis' "right to be let alone"[174] allowed for "limited intrusion" into the privacy of public figures on matters of a public character.

> A limited intrusion into a person's privacy has long been regarded as permissible where that person is a public figure and the information sought to be elicited from him or to be published about him constitute matters of a public character. Succinctly put, the right of privacy cannot be invoked to resist publication and dissemination of matters of public interest. The interest sought to be protected by the right of privacy is the

[170] G.R. No. 92013, 25 July 1990, 187 SCRA 797.
[171] Kilosbayan v. Morato, G.R. No. 118910, 17 July 1995, 246 SCRA 540, 583.
[172] Kilosbayan v. Morato, G.R. No. 118910, 17 July 1995, 246 SCRA 540, 585.
[173] G.R. No. L-82380, 29 April 1988, 160 SCRA 861.
[174] Olmstead v. U.S., 277 U.S. 438, 478 (1927) (Brandeis, J., dissenting).

> right to be free from "unwarranted publicity, from the wrongful publicizing of the private affairs and activities of an individual which are outside the realm of legitimate public concern."[175]

Freedom of expression notwithstanding, the public, through the mass media, was barred from intruding into "matters of essentially private concern,"[176] and was subject to the *New York Times v. Sullivan*[177] test of "knowing or reckless disregard" for the truth.

> [T]he proposed motion picture must be fairly truthful and historical in its presentation of events. There must, in other words, be no knowing or reckless disregard of truth .... There must, further, be no presentation of the private life of the unwilling private respondent and certainly no revelation of intimate or embarrassing personal facts. [It] should not enter into .... "matters of essentially private concern." To the extent that "The Four Day Revolution" limits itself in portraying the participation of private respondent in the EDSA Revolution to those events which are directly and reasonably related to the public facts of the EDSA Revolution, the intrusion into private respondent's privacy cannot be regarded as unreasonable and actionable. Such portrayal may be carried out even without a license from private respondent.[178]

E. Interpretation

In *Umil v. Ramos*,[179] the majority opinion upheld the warrantless arrests of suspected rebels on the doctrine of "continuing crimes." Justice Feliciano, in his concurring and dissenting opinion, expressed concern that a person may thus be arrested while —

> performing ordinary acts of day-to-day life, upon the ground that the person to be arrested is, as it were, merely resting in between specific lawless and violent acts.[180]

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[175] Ayer Productions v. Judge Capulong, G.R. No. L-82380, April 29, 1988, 160 SCRA 861, 870 (1988).

[176] Lagunzad v. Vda. de Gonzales, G.R. No. L-32066, 6 August 1979, 92 SCRA 476 (1979) (Melencio-Herrera J., *ponente*), cited in Feliciano, *supra* note 3.

[177] 376 U.S. 254 (1964).

[178] G.R. No. L-82380, 29 April 1988, 160 SCRA 876.

[179] G.R. No. 81567, 3 October 1991, 202 SCRA 251.

[180] Umil v. Ramos, G.R. No. 81567, 3 October 1991, 202 SCRA 251, 292.

He traced the doctrinal history of "continuing crimes" and concluded that the doctrine served "its own legitimate function" in criminal law jurisdiction, in relation to two problems:

> the first problem is that of determination of whether or not a particular offense was committed within the territorial jurisdiction of the trial court; the second problem is that of determining whether a single crime or multiple crimes were committed where the defense of double jeopardy is raised.[181]

Next, he analyzed the practical effect of applying the doctrine in this case, namely, to "relax" and "loosen" established safeguards against warrantless arrests —

> as a substitute for the requirement under section 5(a) that the crime must have been committed in the presence of the arresting officer, and to loosen up the strict standard established in section 5(b) that the offense "has in fact just been committed" at the time the arresting officers arrived.[182]

Third, he proceeds to extract the true reason behind the relaxation of doctrine, and finds it in the logic of propensity, i.e., the doctrine is used "to dress up the pretense" that the suspect is being arrested because he is "likely" to commit the crime again.

> Moreover, the majority may be seen to be using the "continuing crime" doctrine to justify a warrantless arrest, not because an offense has been committed in the presence of the arresting officer or because an offense has in fact just been committed when the arresting officer arrived, but rather because the person to be arrested is suspected of having committed a crime in the past and will, it is conclusively presumed, commit a similar crime in the future.[183]

Finally, he concludes, that "our case law offers no reasonable basis for such use of the doctrine"[184] and that doctrine "does not dispense with the

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[181] Umil v. Ramos, G.R. No. 81567, 3 October 1991, 202 SCRA 251, 292.
[182] Umil v. Ramos, G.R. No. 81567, 3 October 1991, 202 SCRA 251, 291.
[183] Umil v. Ramos, G.R. No. 81567, 3 October 1991, 202 SCRA 251, 291.
[184] Umil v. Ramos, G.R. No. 81567, 3 October 1991, 202 SCRA 251, 292.

requirement that overt acts recognizably criminal in character must take place in the presence of the arresting officer, or must have just been committed when the arresting officer arrived."[185]

> The capacity for mischief of such a utilization of the "continuing crimes" doctrine, is infinitely increased where the crime charged does not consist of unambiguous criminal acts with a definite beginning and end in time and space (such as the killing or wounding of a person or kidnapping and illegal detention or arson) but rather of such problematic [political] offenses [wherein] the overt constitutive acts may be morally neutral in themselves, and the unlawfulness of the acts a function of the aims or objectives of the organization involved...[186]
>
> It is not our Court's function, however, and the Bill of Rights was not designed, to make life easy for police forces but rather to protect the liberties of private individuals.[187]
>
> Our police forces must simply learn to live with the requirements of the Bill of Rights, to enforce the law by modalities which themselves comply with the fundamental law. *Otherwise they are very likely to destroy whether through sheer ineptness or excess of zeal, the very freedoms which make our polity worth protecting and saving.* (emphasis supplied)[188]

III. DILEMMAS OF THE CARING STATE: MANAGERIAL LATITUDE VERSUS PUBLIC ACCOUNTABILITY

A. Complexity and expertise: The rationale for judicial deference to administrative decisions

Justice Feliciano identified the founding principles of judicial deference to the police power of the welfare state. The doctrinal basis is the delegation of powers, among them, judicial or quasi-judicial authority. In *Tablarin*, he explained why non-delegation of legislative power must be read liberally in favor of administrative bodies, and why the standards set for subordinate

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[185] Umil v. Ramos, G.R. No. 81567, 3 October 1991, 202 SCRA 251, 292.
[186] Umil v. Ramos, G.R. No. 81567, 3 October 1991, 202 SCRA 251, 294.
[187] Umil v. Ramos, G.R. No. 81567, 3 October 1991, 202 SCRA 251, 294.
[188] Umil v. Ramos, G.R. No. 81567, 3 October 1991, 202 SCRA 251, 295.

legislation, which "canalize" discretion, are "necessarily broad and highly abstract", need "not have ... be[en] spelled out specifically," and should be "implied from the policy and purpose of the act considered as a whole."[189]

> The general principle of non-delegation of legislative power, which both flows from [and] reinforces the more fundamental rule of the separation and allocation of powers among the three great departments of government, must be applied with circumspection in respect of statutes which like the Medical Act of 1959, *deal with subjects as obviously complex and technical as medical education and the practice of medicine in our present day world.* (emphasis supplied)[190]

Citing Mr. Justice Laurel in *Pangasinan Transportation Co., Inc. vs. The Public Service Commission,*[191] he stated that the principle of separation of powers (so too the maxim *delegatus non potest delegare* or *delegati potestas non potest delegare*) —

> *has been made to adapt itself to the complexities of modern Government,* giving rise to the adoption, within certain limits, of the principle of "*subordinate legislation,*" not only in the United States and England but in practically all modern governments. (People v. Rosenthal and Osmeña 68 Phil. 318, [1939]). Accordingly, *with the growing complexity of modern life,* the *multiplication of the subjects of governmental regulation,* and the *increased difficulty of administering the laws there is a constantly growing tendency toward the delegation of greater power by the legislature, and toward the approval of the practice by the courts.*[192]

In *Antipolo Realty Corporation v. National Housing Authority,*[193] Justice Feliciano coupled the expertise/complexity rationale with the public interest in relieving clogged dockets in court.

> It is by now commonplace learning that many administrative agencies exercise and perform adjudicatory powers and functions, though to a limited extent only ... [This is] basically because the need for special competence and experience has been recognized as essential in the

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[189] Tablarin v. Gutierrez, G.R. No. 78164, 31 July 1987, 152 SCRA 730, 740.
[190] Tablarin v. Gutierrez, G.R. No. 78164, 31 July 1987, 152 SCRA 730, 739.
[191] 70 Phil. 221 (1940).
[192] Tablarin v. Gutierrez, G.R. No. 78164, 31 July 1987, 152 SCRA 730, 739-740.
[193] G.R. No. L-50444, 31 August 1987, 153 SCRA 399.

> resolution of questions of complex or specialized character and because of a companion recognition that the dockets of our regular courts have remained crowded and clogged.[194]

The expertise/complexity rationale for the regulatory state lays the basis for judicial deference to administrative findings, under the rubric of "primary jurisdiction." Justice Feliciano traced its history, citing former Chief Justice Teehankee.[195]

> The Court held that under the "sense-making and expeditious doctrine of primary jurisdiction ... the courts cannot or will not determine a controversy involving a question which is within the jurisdiction of an administrative tribunal, *where the question demands the exercise of sound administrative discretion requiring the special knowledge, experience and services of the administrative tribunal to determine technical and intricate matters of fact, and a uniformity of ruling is essential* to comply with the purposes of the regulatory statute administered."(emphasis supplied)[196]

This is also affirmed in Justice Feliciano's *ponencia* in *PLDT v. National Telecommunications Commission*:[197]

> The NTC is also authorized to examine and assess the legal, technical and financial qualifications of an applicant for a CPCN and in doing so exercises the special capabilities and skills and institutional experience it has accumulated. Courts *should not intervene in that administrative process* save upon *a very clear showing of serious violation of law or of fraud, personal malice or wanton oppression.* Courts have none of the technical and economic or financial competence which specialized administrative agencies have at their disposal, and in particular must be wary of intervening in matters which are *at their core technical and economic in*

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[194] Antipolo Realty Corporation v. National Housing Authority, G.R. No. L-50444, 31 August 1987, 153 SCRA 399, 405.

[195] Spouses Abejo, et. al. v. Hon. Rafael dela Cruz, G.R. No. 63558, 19 May 1987, 149 SCRA 654, 669-670, citing Pambujan Sur United Mine Workers v. Samar Mining Co., Inc., 94 Phil. 932, 941 (1954).

[196] Antipolo Realty Corporation v. National Housing Authority, G.R. No. L-50444, 31 August 1987, 153 SCRA 399, 406.

[197] G.R. No. 94374, 21 February 1995, 241 SCRA 486.

nature but disguised, more or less artfully, in the habiliments of a "question of legal interpretation." (emphasis supplied)[198]

B. Expanding state power but not state immunities

In social justice and labor legislation cases, the Supreme Court has used the welfare state argument to support tenant and labor claims against landowners[199] and capital.[200] Significantly enough, in these cases, the claims were supported expressly by the social justice clause, and welfare state arguments were at worst superfluous, at best nice but dispensable *obiter dicta.*

But in other cases where the welfare state argument was the *ratio decidendi,* the irony is that, in each case, a poor defenseless citizen lost the case: indigenous peoples were herded into reservations, workers were barred from unionizing, all in the name of the expanded, because caring, state. The paradox, therefore, is that in actual cases, the claims of social justice prevailed abstractly, but not concretely. The triumph of the welfare state expanded the scope of state power while constricting the scope of judicial review.

The welfare state has expanded the capacity of the state to do good, but the Court has used it to allow harm. Whether laissez-faire or welfare state, the poor got the lesser end of the bargain. The Supreme Court has apparently embraced so passionately the theory of a caring, nurturing state, that it will not let poor citizens stand in its way. Justice Feliciano, in his separate opinion in *Spouses Fontanilla v. Maliaman and the National Irrigation Administration,*[201]

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[198] PLDT v. National Telecommunications Commission, G.R. No. 94374, 21 February 1995, 241 SCRA 486, 500.

[199] NHA v. Reyes, G.R. No. L-49439, 29 June 1983, 123 SCRA 245 ("under the welfare state concept [there is] an obligation cast upon the State" to address the housing problem through "urban land reform" including the power of the state to assess just compensation at the owner's declared market value when this is the lower than the assessed value of the property.) Alfanta v. Noe, G.R. No. L-32362, 19 September 1973, 53 SCRA 76 (affirming agrarian reform powers of the state); Association of Small Landowners v. Secretary of Agrarian Reform, G.R. No. 78742, 14 July 1989, 175 SCRA 366; Sumulong v. Guerrero, G.R. No. L-4865, 30 September 1987, 154 SCRA 461; Luz Farms v. Secretary of Agrarian Reform, G.R. No. 86889, 4 December 1990, 192 SCRA 51.

[200] Philippine Virginia Tobacco Administration v. CIR, G.R. No. L-32052, July 27, 1975, 65 SCRA 416 (1975). Governmental functions extend to the regulation of the tobacco industry; Ang Tibay v. CIR, 69 Phil. 635 (1940).

[201] G.R. No. 55963, 27 February 1991, 194 SCRA 486.

confronted this paradox of the regulatory state and demonstrated how the expansion of state power should not necessarily diminish the claims of individuals.

The majority ruled in *Fontanilla* that the National Irrigation Authority (NIA) is subsidiarily liable for its employees' torts and does not, for that purpose, enjoy state immunity. The Court applied strictly the distinction between governmental/constituent functions and proprietary/ministrant functions and held that the NIA did not perform governmental functions.

Feliciano, writing separately, held that this distinction was not controlling and does not determine whether or not a government corporation enjoys state immunity. He agreed categorically on the welfare state character of the Philippine State.

> [I]t is merely commonplace to note that governments in our day and age do not restrict themselves to the original basic and primitive functions of repelling invasion by a foreign enemy, maintaining peace and order in society and protecting the physical integrity or the food supplies of its citizens or inhabitants, but instead assumed and carry out all kinds of activities which they may determine to redound to the general interest and benefit of the population. Thus, the classical *laissez-faire* concept of a state, which prevailed during the 19th century, has today been replaced by the concept of the welfare state. Moreover, activities which in other states more economically advanced than our own have been undertaken by private enterprise, are here still being carried out by the Government or, more generally, the public sector in view of the inadequacy of private capital and private entrepreneurial spirit.[202]

Justice Feliciano explained that the "liability of an agency or instrumentality of the Government for the torts of its employees ... is not contingent upon the technical characterization of the functions or activities carried out by that agency or instrumentality as 'governmental,' on the one hand, or 'proprietary' upon the other." For civil service purposes, for instance, what is determinative is whether or not the corporation or entity is possessed of an "original charter," Justice Feliciano stating that "it appears ... that the framers of the 1987 Constitution had given up the notion of trying to

[202] Fontanilla v. Maliaman, G.R. No. 55963, 27 February 1991, 194 SCRA 486, 494.

distinguish between 'governmental' and 'proprietary' functions for [these] purposes."

For the purpose of subsidiary liability for employees' tort, the "state" does not include agencies, instrumentalities or other entities which their enabling laws have invested with juridical personality separate and distinct from that of the Republic of the Philippines, based on a careful reading of article 2180 of the Civil Code in relation to section 2 of the Revised Administrative Code of 1987. The term "state" refers to the "juridical person that is constituted by the Government of the Republic of the Philippines," which is defined in the Administrative Code as the "corporate governmental entity through which the functions of government are exercised [including] the various arms through which political authority is made effective in the Philippines," and "logically does not include agencies, instrumentalities or other entities which their enabling laws have invested with juridical personality separate and distinct from that of the Republic of the Philippines."[203]

Justice Feliciano traced the development of state immunity doctrine all the way to *Merritt v. Government of the Philippine Islands*[204] and to the cited decision of the Supreme Court of Spain dated 7 January 1898,[205] interpreting the immunity clause in the Spanish Civil Code of 1889 which explained that a person is obligated to indemnify a third party when —

> by his own fault or negligence, [he] takes part in the act or omission of the third party who caused the damage. It follows therefrom that the State, by virtue of such provisions of law, is not responsible for the damages suffered by [a] private individual [as] a consequence of acts performed by its employees in the discharge of the functions pertaining to their office, *because neither fault or even negligence can be presumed on the part of the State* in the organization of branches of the public service and in the appointment of its agents; *on the contrary, we must presuppose all foresight humanly possible on its part in order that each branch of service serves the general welfare and that of private persons interested in its operation.* Between these latter and the State, therefore, no relations of a

[203] Fontanilla v. Maliaman, G.R. No. 55963, 27 February 1991, 194 SCRA 486, 495-496.
[204] 34 Phil. 311 (1916).
[205] 83 Jurisprudencia Civil 36 (1898).

> private nature governed by the civil law can arise *except in a case where the State acts as a [juridical] person capable of acquiring rights and contracting obligations.*[206] (emphases supplied)

He explains that the American Justice who wrote *Merritt* must have mistranslated ("plain error") the term *persona juridica* as "judicial" rather than "juridical person."

> Thus, the decision of the Supreme Court of Spain itself recognized that between private persons and the State, relations of a private nature governed by the Civil Code can arise where the State acts as or through the medium of a separate juridical person that is capable of acquiring rights and entering into obligations.[207]

The Court concluded that the NIA possessed a separate and distinct juridical personality, and that it was not part of the State for the purposes of state immunity from subsidiary tort liability.

The Feliciano opinion in *Fontanilla* demonstrates the success of an intellectual method which sought to read specific rules in terms of their normative origins, or vice-versa, to treat broad normative claims in the texture of specific rules.

C. The regulatory state and judicial review of quasi-judicial acts

Another legal consequence of the regulatory state is that both quasi-legislative and quasi-judicial powers are merged in the same agencies. As Justice Regalado distinguished in *PHILCOMSAT v. Alcuaz*,[208] for instance, the rate-setting activities of regulatory agencies are quasi-legislative in character, in contrast to quasi-judicial functions which are thus subject to procedural due process requirements.

In *Citizens Alliance For Consumer Protection v. Energy Regulatory Board*,[209] a non-governmental group challenged both the validity of the Oil

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[206] Fontanilla v. Maliaman, G.R. No. 55963, 27 February 1991, 194 SCRA 486, 496.
[207] Fontanilla v. Maliaman, G.R. No. 55963, 27 February 1991, 194 SCRA 486, 497.
[208] G.R. No. 84818, 18 December 1989, 180 SCRA 218.
[209] G.R. No. L-78888-90, 23 June 1988, 162 SCRA 521.

Price Stabilization Fund (or OPSF) as well as a provisional increase in petroleum prices approved by the Board, allegedly without due notice and consultation with interested parties. The Court, through Justice Feliciano, validated the Fund as a "*buffer mechanism* through which the domestic consumer prices of oil and petroleum products are stabilized, instead of fluctuating every so often" or more specifically, a "*pocket* ... into which a portion of the purchase price of oil and petroleum products paid by consumers as well as some tax revenues are inputted and from which amounts are drawn from time to time to reimburse oil companies and oil companies are allowed to recover those portions of their costs which they would not otherwise recover given the level of domestic prices existing at any given time."[210]

> It appears to the Court that the establishment and maintenance of the OPSF is well within that *pervasive and non-waivable power and responsibility of the government* to secure the physical and economic survival and well being of the community, *that comprehensive sovereign authority we designate as the police power of the State.* The stabilization and subsidy of domestic prices of petroleum products and fuel oil are appropriately regarded as *public purposes.*[211] (emphases supplied)

Just as significant is the procedural due process implication of characterizing the Board decision as police power. The Court upheld the authority of the Board to grant provisional increases without need of a formal hearing. Justice Feliciano relied on express authorization in the Board's enabling charter, Executive Order No. 172.[212] But why the deference to an administrative act? While that can be explained away neatly by the notion of presumptive validity, it must be rooted in the character of the act in question. The creation of the OPSF and the setting of oil prices were clearly quasi-legislative and therefore did not require notice and hearing.

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[210] Citizens Alliance for Consumer Protection v. Energy Regulatory Board, G.R. No. L-78888-90, 23 June 1988, 162 SCRA 521, 539.

[211] Citizens Alliance for Consumer Protection v. Energy Regulatory Board, G.R. No. L-78888-90, 23 June 1988, 162 SCRA 521, 539.

[212] Exec. Order No. 172 (1987) sec. 8.

D. The regulatory state: Implications for ethics in public office

One consequence of the expanded, regulatory state is that public officers are called upon to perform functions hitherto considered "patrimonial" and non-governmental, and which necessarily entail the exercise of discretion in economic and social matters. At the same time, the rules for ethics in public office have been conceived with the traditional, governmental functions in mind, where the "principle of legality" is deeply entrenched and wherein culpable breaches are easier to detect. But these traditional ethical rules have been "transplanted" and made to apply to public officers performing non-traditional governance, and public officers have found themselves threatened with jail terms for mistakes that previously would have warranted merely loss of face, of work or fortune, but certainly not of liberty or life. Reforms have been stunted, reformers frustrated, and would-be reformers scared away from public service. The people power origins of the Constitution has led to the "due process" revolution, and to the application of strict procedural requirements that paralyze the work of government.

In *Defensor Santiago v. Ombudsman*[213] Justice Feliciano, dissenting, attempted to craft the balance between the need to ensure ethics in public office, and the need for managerial elbow-room for public officers to actually do their jobs. Then Immigration Commissioner Miriam Defensor-Santiago (now Senator and past presidential candidate) was charged by the Ombudsman for soliciting funds for an office Christmas party. Justice Feliciano said:

> One may, of course, debate the wisdom of the measures so adopted or tolerated by petitioner in connection with that 1988 CID Christmas party. Petitioner hardly invented the employees' Christmas party, a practice widely observed in both the public and the private sectors. *Petitioner's special contribution consisted of making sure that the solicitation, receipt and distribution of gifts were all done in an organized and public manner, in full view of all the officer and employees of the CID and the general public,* doubtless to emphasize for whose benefit such solicitation has been conducted, to minimize private or secret solicitation by individual CID officers or employees, and to preclude any charge of

[213] G.R. No. 99289-90, 13 January 1992, 205 SCRA 162.

> secret personal benefit on her part and of those who signed the solicitation letters. (emphasis supplied)[214]

Justice Feliciano offers the following formula:

> [T]o impose liability upon the public officer who has so acted, something far graver than error of law or error of judgment must be clearly shown and that is corrupt personal intentions, personal malice or bad faith.[215]

He explains that public officers are called upon to interpret rules, and the Courts have deferred to those interpretations. "But even if an administrative interpretation be ultimately found to be incorrect as a matter of law by this Court, the official responsible for such interpretation *is not, for that reason alone, to be held liable personally*, whether civilly or criminally or administratively." (emphasis supplied) He concludes:

> [T]he acts charged do not, as a matter of law, constitute a crime. Indeed, if the acts which petitioner admits having done constitute a criminal offense, very serious consequences would follow for the administration of law and government rules and regulations in general. *For the thrust of the criminal information here would appear to be that public officers interpret and apply statutory and regulatory provisions at their own peril and at the risk of criminal liability, notwithstanding the absence of any corrupt intent to profit personally by any such interpretation and application.* (emphasis supplied)[216]

This matter reached the Court twice, first, to stop the preliminary investigation and, next, to quash the information filed. At the outset, Justice Feliciano argued that the Court should resolve the "legal question" presented in the petitioner's challenge.

> My submission, with respect, is that whether the acts admittedly done by petitioner were criminal in nature, is a legal question, on which

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[214] Defensor-Santiago v. Ombudsman, G.R. No. 99289-90, 13 January 1992, 205 SCRA 162, 182 (1992).

[215] Defensor-Santiago v. Ombudsman, G.R. No. 99289-90, 13 January 1992, 205 SCRA 162, 179 (1992).

[216] Defensor-Santiago v. Ombudsman, G.R. No. 99289-90, 13 January 1992, 205 SCRA 162, 179-180 (1992).

> petitioner in effect asks us to rule in this Petition. I believe, further, that there is nothing to prevent this Court from addressing and ruling on this legal issue. There is no real need for proof of any additional essential facts apart from those already admitted by petitioner. *It seems to me that a public officer is entitled to have legal questions like that before this Court resolved at the earliest possible opportunity, that a public officer should not be compelled to go through the aggravation, humiliation and expense of the whole process of criminal trial,* if the legal characterization of the acts charged as criminal is the very issue at stake. (emphasis supplied)[217]

IV. THE COURTS AND SOCIAL VISION

Justice Feliciano, in an academic paper, referred to the article II Declaration of Principles and State Policies as a "constitutional inventory of fundamental community values and interests"[218] saying that the judges' burden to identify these values is thereby lightened and made simpler. But the framers of our charter, in constitutionalizing norms, may have thus unwittingly shifted back to the courts two other burdens. The first is the challenge of translating these good intentions into "language of a significantly lower order of generality," distinguishable from "constitutional or statutory *policy*"[219] (the "principle of legality"[220] versus the "uncharted ocean of social and economic policy making"[221]). The second is the need to reconcile these often clashing good intentions with one another ("differing legitimate individual and social interests ... competing for ascendancy").[222]

The judge confronts these challenges in his courtroom. In that usually solitary task, he can draw guidance from the following persistent themes.

First, justice in the *concrete* case must create *general* principles that are equally just and viable, lest one forget that each episode gives rise to precedent,

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[217] Defensor-Santiago v. Ombudsman, G.R. No. 99289-90, 13 January 1992, 205 SCRA 162, 179 (1992).

[218] Feliciano, *supra* note 3, at 46.

[219] Minors Oposa v. Factoran, G.R. No. 101083, 30 July 1993, 224 SCRA 792, 817.

[220] Tañada v. Tuvera, G.R. No. 63915, 29 December 1996, 146 SCRA 446, 458.

[221] Minors Oposa v. Factoran, G.R. No. 101083, 30 July 1993, 224 SCRA 792, 818.

[222] Alliance of Concerned Teachers v. Carino, G.R. 95590, 6 August 1991, 200 SCRA 323, 344 (Feliciano, J., dissenting)

and that a faceless public is silently but equally at stake in each judicial encounter. Norms "become encrusted with the glosses placed upon them by the courts and the glosses become integral with the norms."[223]

Second, conversely, that "Justice Writ Large," in epic scale, must be made to yield equally just results, by resisting the temptation to apply rules mechanically and to rest content with justice *in abstracto.* Feliciano warns against "absolute literalness"[224] in reading constitutionalized norms and has exposed the use of doctrine to "dress up ... pretense,"[225] and to "overlook the actual syntax"[226] of the law.

Third, that the "modalities"[227] by which we pursue the social good are as important as the good itself, and that the professional demands of the lawyers' craft themselves are the conduits of conscience. Hence Feliciano's search for "specific, operable legal norms"[228] and his warning about "disguis[ing policy] , more or less artfully, in the habiliments of [law],"[229] lest we "destroy, whether through sheer ineptness or excess of zeal, the very freedoms which make our polity worth protecting and saving."[230]

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[223] Ponce Enrile v. Judge Salazar, G.R. No. 92163, 5 June 1990, 186 SCRA 217, 240.

[224] Tablarin v. Gutierrez, G.R. No. 78164, 31 July 1987, 152 SCRA 730, 739.

[225] Umil v. Ramos, G.R. No. 81567, 3 October 1991, 202 SCRA 251, 293.

[226] Kilosbayan v. Morato, G.R. No. 118910, 17 July 1995, 246 SCRA 540, 585.

[227] Umil v. Ramos, G.R. No. 81567, 3 October 1991, 202 SCRA 251, 295 and National Press Club v. Comelec, G.R. No. 102653, 5 March 1992, 207 SCRA 1, 14.

[228] Minors Oposa v. Factoran, G.R. No. 101083, 30 July 1993, 224 SCRA 792, 817.

[229] PLDT v. National Telecomunications Comission, G.R. No. 94374, 21 February 1995, 241 SCRA 486, 500.

[230] Umil v. Ramos, G.R. No. 81567, October 3, 1991, 202 SCRA 251, 295 (1991).