IMPLEMENTING THE SUSTAINABLE DEVELOPMENT DIRECTIVE OF THE CONSTITUTION*

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I. INTRODUCTION

Six years ago it was suggested that Asia was initiating a "great revolution of environmental law."[1] It was predicted that with some effort, "a stronger basis for environmental management and environmental dispute resolution will emerge at both the regional and national levels."[2] Today, despite an array of new laws, the Philippines faces serious environmental problems including deforestation, fisheries depletion, land and water system degradation, and urban pollution.[3] Evidently, there is no revolution of environmental law in the Philippines.

In this Article I attempt to identify the institutional constraints that prevent the Philippines from taking part in this "great revolution." In particular, I will look into the Philippine judiciary's role in promoting sustainable development.[4]

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* This Article is based on a paper delivered during the Regional Symposium on the Role of the Judiciary in Promoting Sustainable Development: Case Studies from Japan and Developing Countries in East Asia, United Nations Conference Centre (UNCC), United Nations Building, Rajdamnern Nok Avenue, Bangkok, Thailand held from June 21 to 23, 2004.

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[1] Ben Boer, *The Rise of Environmental Law in the Asian Region*, 32 U. RICH. L. REV. 1503, 1552 (1999).

[2] *Ibid.*

[3] Ian Coxhead & Sisira Jayasuriya, *Environment and Natural Resources*, *in* THE PHILIPPINE ECONOMY: DEVELOPMENT, POLICIES, AND CHALLENGES 381, 413-414 (Arsenio Balisacan & Hal Hill eds., 2003).

[4] I am aware of the debates surrounding the concept and status of sustainable development. See Sumudu Atapattu, *Sustainable Development, Myth or Reality?: A Survey of Sustainable Development Under International Law and Sri Lankan Law*, 14 GEO. INT'L ENVT. L. REV. 265 (2001). For purposes of this paper, I use the definition provided by the World Commission on Environment and Development: it is "development which meets the needs of the present generation without compromising the ability of the future generations to meet theirs." See *id.* at 271.

I argue that the legal infrastructure for a revolution in environmental law already exists. The Philippine Constitution provides that "[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."[5] I argue that judges should view this provision as a license to overhaul procedure and jurisprudence in order to create a bias for the environment. I argue further that the provision is so potent it may be invoked to incorporate international law principles into the domestic legal regime.

This paper proceeds as follows: Part II explains the structure of and constraints to the implementation of environmental laws in the Philippines. Part III explains the role of the judiciary in enforcing environmental laws. Part IV discusses constraints in implementing these laws. Part V provides examples of environmental cases and initiatives in the Philippines. Part VI presents an agenda for Philippine policy makers on the improvement of the environmental law regime in the Philippines. Finally, Part VIII presents the conclusions of this Article.

II. STRUCTURE AND CONSTRAINTS TO THE IMPLEMENTATION OF ENVIRONMENTAL LAWS

Philippine environmental law is found throughout a hierarchy of laws that begins with the Constitution, and branches down to enacted statutes (Republic Acts), their implementing rules and regulations. Local governments may also enact ordinances within their territorial jurisdictions.

The Constitution is the supreme law to which all other laws must conform. All private rights must be determined and all public authority administered in accordance with the Constitution.[6]

Congress enacts laws that apply throughout the country and the Department of Environment and Natural Resources (DENR) supplements these statutes by promulgating rules and regulations. The rules and regulations, however, should be within the scope of the statutory authority granted by the legislature to the administrative agency.[7] In case of conflict, the law must prevail. A "regulation adopted pursuant to law is law." Conversely, a regulation or any portion thereof not adopted pursuant to law is no law and has neither the force nor the effect of law.[8]

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[5] CONST. art. II, sec. 16.

[6] Manila Prince Hotel v. GSIS, 335 Phil. 82, 101 (1997).

[7] SMART Communications, Inc. and Pilipino Telephone Corporation v. National Telecommunications Commission, G.R. No. 151908, August 12, 2003.

[8] Commissioner of Internal Revenue v. Central Luzon Drug Corporation, G.R. No. 159647, April 25, 2005. Regulations do not substitute for the general policy-making that Congress enacts in the form of a law and the authority to prescribe rules and regulations is not an independent source of power to make laws. Ople v. Torres, G.R. No. 127685, July 23, 1998.

Under the Local Government Code of 1991,[9] local governments may enact ordinances to protect the environment. The power of local government units to legislate and enact ordinances and resolutions is delegated by Congress[10] and ordinances cannot contravene a statute enacted by Congress.[11]

The judiciary settles controversies arising from the implementation of these laws. It is conferred with judicial power, which is "the right to determine actual controversies arising between adverse litigants."[12] "Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines."[13] The courts interpret the law but do not enact them. The sole function of our courts is to apply or interpret the laws, particularly where there are gaps or ambiguities in these laws.[14]

A. THE CONSTITUTION AND NATIONAL LAWS

At the apex of the hierarchy is the Constitution. A very significant feature of the present Constitution of the Philippines is the inclusion of a provision on what one might call the "right to a clean environment." The Constitution provides that "[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."[15]

In *Oposa v. Factoran*,[16] the Supreme Court explained the significance of this provision and explained that:

> Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation — aptly and fittingly stressed by the petitioners — the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.[17]

The Court went on to explain that the right to a balanced and healthful ecology carries with it a correlative duty to refrain from impairing the environment. The right implies the judicious management and conservation of the country's forests.[18]

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[9] Rep. Act No. 7160 (1991).
[10] Lina v. Paño, G.R. No. 129093, August 31, 2001.
[11] Tatel v. Virac, G.R. No. 40243, March 11, 1992.
[12] Allied Broadcasting Center, Inc. v. Republic of the Philippines, G.R. No. 91500, October 18, 1990.
[13] CIVIL CODE, art. 8.
[14] Pagpalain Haulers, Inc. v. Trajano, 369 Phil. 317, 626 (1999).
[15] CONST. art. II, sec. 16.
[16] G.R. No. 101083, July 30, 1993.
[17] *Ibid.*
[18] *Ibid.*

This, however, is not the first recognition of the right of future generations under Philippine law. Predating the Constitution is the Administrative Code of 1987, which provides:

> Sec. 1. *Declaration of Policy.* — (1) The State shall ensure, for the benefit of the Filipino people, the full exploration and development as well as the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources, consistent with the necessity of maintaining a sound ecological balance and protecting and enhancing the quality of the environment and the objective of making the exploration, development and utilization of such natural resources equitably accessible to the different segments of *the present as well as future generations.*
>
> (2) The State shall likewise recognize and apply a true value system that takes into account social and environmental cost implications relative to the utilization, development and conservation of our natural resources.[19] (emphasis supplied)

State policy on the protection of the environment is clear. There will be a judicious disposition of resources, which will be accessible to all segments of the present and future generations. Moreover, the Constitution creates a right to a balanced environment, which may be invoked against government and private actions. Because it is a right, it deserves protection by the state and vindication by the courts whenever the right is violated. Congress and local governments, therefore, may fashion laws and ordinances pursuant to these policies.

Environmental legislation in the Philippines, in fact, dates back to the Marcos regime. Former President Ferdinand Marcos initiated environmental legislation in the 1970s when environmental issues merged as a global concern. He promulgated the Philippine Environmental Policy,[20] which is the national blueprint for environmental protection, and the Philippine Environment Code,[21] which contains general principles dealing with the major environmental and natural resource concerns of the Philippines. These laws are very broad and general and contain few substantive provisions. At best, they establish the basic framework for laws on the environment in the Philippines.[22]

Presidential Decree No. 1586, issued in 1978, established an environmental impact statement system.[23] It is an almost complete reproduction of the United States' National Environmental Policy Act.[24] Marcos also promulgated the Revised Forestry Code of 1975,[25] and the Pollution Control Decree of 1976.[26]

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[19] Exec. Order No. 292, Title XIV, chapter 1, sec. 1.

[20] Pres. Decree No. 1151 (1977).

[21] Pres. Decree No. 1152 (1977).

[22] Alan K. Tan, *Preliminary Assessment of Philippines' Environmental Law*, Asia-Pacific Center for Environmental Law, available at < http://law.nus.edu.sg/apcel/dbase/filipino/reportp.html> April 15, 2006.

[23] The implementing rules are now found under DENR Adm. O. No. 2003-30, s. 2003, 14:3 NAR 1373-1388.

[24] 42 U.S.C. sec. 4321-4370 (2000).

[25] Pres. Decree No. 705 (1975).

[26] Pres. Decree No. 984 (1976), repealed by Rep. Act No. 9275 (2004), sec. 34.

Since the Marcos regime ended in 1986, Congress produce a string of laws that treat the environment directly or indirectly. Among these laws are the Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990,[27] the National Integrated Protected Areas System Act of 1992,[28] the Philippine Mining Act of 1995,[29] the Indigenous Peoples Rights Act of 1997,[30] the Animal Welfare Act of 1998,[31] the Philippine Fisheries Code of 1998,[32] the Philippine Clean Air Act of 1999,[33] the Ecological Solid Waste Management Act of 2000,[34] the National Caves and Cave Resources Management and Protection Act,[35] the Wildlife Resources Conservation and Protection Act,[36] the Philippine Plant Variety Protection Act of 2002,[37] and the Philippine Clean Water Act of 2004.[38]

There is no single framework which binds the environmental concerns in a comprehensive manner in the Philippines, but a set of laws and regulations which exists in relation to separate environmental issues.[39] As others have pointed out, the Philippines has arguably the most progressive, albeit piecemeal, environmental legislation in place among Southeast Asian countries. The challenge is to effectively implement the legislation which exists on paper.[40]

B. LOCAL GOVERNMENT LEGISLATION

As mentioned earlier, the Local Government Code of 1991 empowers local governments to enact measures to protect the environment.[41] These provisions have been applied and tested in court.

In *Tano v. Socrates*,[42] city and provincial ordinances protecting fish and corals were challenged on various constitutional grounds. The Court brushed aside several objections to the ordinances and pointed out that many provisions of the Local Government Code provide the legal basis for their enactment. In short, the Court held that they were valid police power measures under the General Welfare Clause.[43] The

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[27] Rep. Act No. 6969 (1990).

[28] Rep. Act No. 7586 (1992).

[29] Rep. Act No. 7942 (1995). Several parts of this law were declared unconstitutional. See La Bugal-B'laan Tribal Association, Inc., v. Ramos, G.R. No. 127882, 27 January 2004. However, the Supreme Court, on December 1, 2004 reversed its ruling and upheld the challenged provisions of the law.

[30] Rep. Act No. 8371 (1997).

[31] Rep. Act No. 8485 (1998).

[32] Rep. Act No. 8550 (1998).

[33] Rep. Act No. 8749 (1999).

[34] Rep. Act No. 9003 (2000).

[35] Rep. Act No. 9072 (2001).

[36] Rep. Act No. 9147 (2001).

[37] Rep. Act No. 9168 (2002).

[38] Rep. Act No. 9275 (2004).

[39] A. Tan, *op. cit. supra* note 22.

[40] *Ibid.*

[41] The powers of local governments over environmental issues are found in various provisions of the Code. See Rep. Act No. 7160, sec. 16-17 and scattered provisions in Book III.

[42] Tano v. Socrates, 343 Phil. 670, August 21, 1997.

[43] Rep. Act No. 7160 (1991), sec 16.

Court added that section 5(c) of the Code mandates that the general welfare provisions of the LGC "shall be liberally interpreted to give more powers to the local government units in accelerating economic development and upgrading the quality of life for the people of the community."[44]

The Court also pointed out that the Code vests municipalities with the power to grant fishery privileges in municipal waters and impose rentals, fees or charges thereto; to penalize, by appropriate ordinances, the use of explosives, noxious or poisonous substances, electricity, *muro-ami*, and other deleterious methods of fishing; and to prosecute any violation of the provisions of applicable fishery laws.

Furthermore, the Court pointed out that local legislative councils are directed to enact ordinances for the general welfare of the municipality and its inhabitants, which shall include ordinances that "[p]rotect the environment and impose appropriate penalties for acts which endanger the environment such as dynamite fishing and other forms of destructive fishing... and such other activities which result in pollution, acceleration of eutrophication of rivers and lakes, or of ecological imbalance."[45]

Tano is significant because the Court's ruling links the constitutional provision on the right to a clean environment to the power to make ordinances. The ordinances, in other words, have a solid legal basis for enactment in the Constitution. It gives local governments a concrete avenue for the protection of the environment.

Not all local governments, however, are adept at their new functions. In some cases, local officials neither profess nor possess any genuine understanding for the need to protect natural resources or the environment. Many do not invest in these areas because their failure to protect the environment does not reflect on their competence as leaders — the consequences of their inaction or neglect are not felt by their constituents.[46] More recently, it was asserted that local governments with successful environmental management and protection programs are the exception rather than the rule and that the only way to keep natural resources from being exploited is the creation of multi-sectoral groups that will work closely with the DENR.[47]

It is also important to note that local legislative councils that are insensitive to environmental rights or sustainable development may be by-passed by residents by invoking "local initiative" or the process whereby the registered voters of a local government unit may directly propose, enact, or amend any ordinance.[48]

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[44] Tano v. Socrates, *supra* at 706.

[45] *Ibid.*

[46] See Perfecto L. Padilla, *Decentralization to Enhance Sustainable and Equitable Socioeconomic Development*, 52 PHIL. J. PUB. AD. 81, 92 (1998).

[47] Miriam Grace A. Go, *Tug-of-War for Nature*, NEWSBREAK, January 31, 2005, 20-21.

[48] Rep. Act No. 7160 (1991), sec. 120.

Aside from legislation, the Local Government Code also provides for other ways to protect the environment. The Code also provides:

> Sec. 26. *Duty of National Government Agencies in the Maintenance of Ecological Balance.* — It shall be the duty of every national agency or government-owned or -controlled corporation authorizing or involved in the planning and implementation of any project or program that may cause pollution, climatic change, depletion of non-renewable resources, loss of crop land, rangeland, or forest cover, and extinction of animal or plant species, to consult with the local government units, nongovernmental organizations, and other sectors concerned and explain the goals and objectives of project or program, its impact upon the people and the community in terms of environmental or ecological balance, and the measures that will be undertaken to prevent or minimize the adverse effects thereof.
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> Sec. 27. *Prior Consultations Required.* — No project or program shall be implemented by government authorities unless the consultations mentioned in Sections 2 (c) and 26 hereof are complied with, and prior approval of the *Sanggunian* concerned is obtained: *Provided*, That occupants in areas where such projects are to be implemented shall not be evicted unless appropriate relocation sites have been provided, in accordance with the provisions of the Constitution.

C. ENFORCEMENT BY THE EXECUTIVE BRANCH

The Administrative Code of 1987 assigns responsibility for the implementation of the state policies on the environment to the DENR. The Code provides that the DENR shall, subject to law and higher authority, be in charge of carrying out the State's constitutional mandate to control and supervise the exploration, development, utilization, and conservation of the country's natural resources.[49]

Within the DENR are several bureaus including the Environmental Management Bureau (EMB), the Forest Management Board (FMB), the Land Management Bureau (LMB), the Mines and Geosciences Bureau (MGB) and the Protected Areas and Wildlife Bureau (PAWB).

The policies formulated by the DENR and its bureaus are implemented by the DENR Regional Offices, which are found in the 13 administrative regions of the country and the DENR-Provincial Environment and Natural Resources Offices

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[49] Under section 3 of the same Code, it is provided that:

> Sec. 3. *Guidelines for Implementation.* — In the discharge of its responsibility the Department shall be guided by the following objectives:
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> (1) Assure the availability and sustainability of the country's natural resources through judicious use and systematic restoration or replacement, whenever possible;
> (2) Increase the productivity of natural resources in order to meet the demands for the products from forest, mineral, land and water resources of a growing population;
> (3) Enhance the contribution of natural resources for achieving national economic and social development;
> (4) Promote equitable access to natural resources by the different sectors of the population; and
> (5) Conserve specific terrestrial and marine areas representative of the Philippine natural and cultural heritage for present and future generations.

(PENRO) within each province. The provincial governments also run their own PENROs and Community Environment and Natural Resources Offices (CENRO) in certain municipalities. The PENROs and CENROs operate within the machinery of the local governments to implement DENR functions devolved to the local governments.[50]

Special agencies are also created to address environmental issues in particular ecosystems. For example, the Laguna Lake Development Authority was organized[51] as a quasi-government agency with regulatory and proprietary functions. Its powers and functions were further strengthened to include environmental protection and jurisdiction over surface waters of the lake basin. The Authority has the exclusive jurisdiction to issue permits for the enjoyment of fishery privileges in Laguna de Bay to the exclusion of municipalities situated therein.[52]

Another special body was created through the enactment of Republic Act No. 7611 or the Strategic Environmental Plan for Palawan Act. That law created a Palawan Council for Sustainable Development, a multi-sectoral and inter-disciplinary body charged with the governance, implementation and policy direction of the SEP. The agency is directly under the Office of the President.[53]

D. ENFORCEMENT AND NON-GOVERNMENT ORGANIZATIONS

There is another key player in the sustainable development issue in the Philippines: non-governmental organizations (NGO). Most NGO activities focus on community-based resource management and the defense of environmental rights. Litigation is not generally preferred. Instead, the best solution in their view is the use of "metalegal strategies." Using this approach, organized communities participate in creative and resourceful activities, which employ the constitutional rights of freedom of assembly and expression to call public attention to their cause.[54] The variety of non-government groups and their ideological conflicts seem to keep environmental groups from coordinating their efforts to advance their advocacies.[55]

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[50] See A. Tan, *op. cit. supra* note 22.

[51] Rep. Act No. 4850 (1966).

[52] Laguna Lake Development Authority v. Court of Appeals, 321 Phil. 395 (1995). Subsequent laws retained this arrangement. *See* Rep. Act No. 8550 (1998), sec. 16-25.

[53]Rep. Act No. 7611 also converted the former Palawan Integrated Area Development Project Office (PIADPO) into the Palawan Council for Sustainable Development Staff. The Staff is tasked to provide machinery to coordinate the policy and functions, implement programs and organize such services required by the Council in the exercise of its functions. The PCSD Staff is headed by an Executive Director who directs and supervises all operations and is an ex-officio member and Secretary of the PCSD. The PCSD Staff operates under the Office of the Executive Director with two departments, namely: Planning and Technical Services Department (PTSD) and the Project Operations and Implementation Department (POID). See <http://www.pcsd.ph/about_pcsd/index.htm> April 15, 2006.

[54] A. Tan, *op. cit. supra* note 22.

[55] See Marvic M.V. F. Leonen, *NGO Influence on Environmental Policy*, in FOREST POLICY AND POLITICS IN THE PHILIPPINES: THE DYNAMICS OF PARTICIPATORY CONSERVATION 67-83 (Peter Utting ed., 2000). See also Grizelda Mayo-Anda, *Case Studies on Mining and EIA*, in LAWYERING FOR THE PUBLIC INTEREST 226-237 (2000).

III. ENFORCEMENT BY THE COURTS

Under the Philippine system of government, the Legislative department is assigned with the power to make and enact laws. The Executive department is charged with the execution or carrying out of the provisions of said laws. The interpretation and application of laws belong exclusively to the judicial department. This authority to interpret and apply the laws extends to the Constitution.[56]

The separation of powers is a fundamental principle in the Philippine system of government. Each department of the government has exclusive cognizance of matters within its jurisdiction, and is supreme within its own sphere. But it does not follow that the three departments are separate and that the Constitution intended them to be absolutely unrestrained and independent of each other. The Constitution has provided for an elaborate system of checks and balances to secure coordination in the workings of the various departments of the government.[57]

The Supreme Court represents one of the three divisions of power in our government. It is only judicial power which is exercised by the Supreme Court and it should not and cannot be required to exercise any power or to perform any trust or to assume any duty not pertaining to or connected with the administering of judicial functions.[58]

The judiciary is tasked to administer justice, to settle justiciable controversies or disputes involving enforceable and demandable rights, and to afford redress of wrongs for the violation of said rights.[59] It must be allowed to decide cases independently, free of outside influence or pressure. An independent judiciary is essential to the maintenance of democracy, as well as of peace and order in society. Maintaining the dignity of courts and enforcing the duty of citizens to respect them are necessary adjuncts to the administration of justice.[60]

The judiciary does not settle policy issues. The Court can only declare what the law is, and not what the law should be. Policy issues are within the domain of the political branches of the government, and of the people themselves as the repository of all State power.[61]

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[56] Endencia v. David, 93 Phil. 696, 700 (1953).

[57] Angara v. Electoral Commission, 63 Phil. 139, 156 (1936).

[58] Manila Electric Company v. Pasay Transportation Company, Inc., 57 Phil. 600, 605 (1932).

[59] Lopez v. Roxas, G.R. No. L-25716, July, 28, 1966.

[60] In Re: Published Alleged Threats against Members of the Court in the Plunder Law Case Hurled by Atty. Leonard De Vera, 434 Phil 503, 507-508 (2002).

[61] Valmonte v. Belmonte, G.R. No. 74930, February 13, 1989.

A. JUDICIAL POWER

Judicial power is "the right to determine actual controversies arising between adverse litigants."[62] It is the authority to settle justiciable controversies or disputes involving rights that are enforceable and demandable before the courts of justice or the redress of wrongs for violations of such rights.[63]

Under Article 8 of the Civil Code, "[j]udicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines." This does not mean, however, that courts can create law. The courts interpret the law but do not enact them. A contrary position would violate the principle of separation of powers. The sole function of our courts is to apply or interpret the laws, particularly where gaps exist or where ambiguities becloud issues.[64]

The first and fundamental duty of courts is to apply the law as they find it, not as they would like it to be. This precludes construction or interpretation unless application is impossible or inadequate without it.[65] The only function of the judiciary is to interpret the laws and, if not in disharmony with the Constitution, to apply them. Members of the judiciary may regard certain laws harsh, unwise or immoral, but as long as these laws are in force, they must apply it and give it effect as decreed by the law-making body.[66]

B. JUDICIAL REVIEW

Judicial review is an aspect of judicial power.[67] It is the power of a court to determine the constitutional validity of the acts of the other departments of the government.[68] It is the power that allows the Supreme Court every opportunity to review, revise, reverse, modify, or affirm on appeal or *certiorari*, as the law or the Rules of Court may provide, final judgments and orders of lower courts, and to determine whether or not there has been grave abuse of discretion amounting to lack of or excess of jurisdiction on the part of any branch or instrumentality of the government.[69]

The courts see to it that every law passed by Congress is not repugnant to the organic law. Courts have the inherent authority to determine whether a statute enacted by the legislature transcends the limit delineated by the fundamental law.[70]

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[62] Allied Broadcasting Center, Inc. v. Republic of the Philippines, G.R. No. 91500, October 18, 1990.

[63] Lopez v. Roxas, *supra*.

[64] Pagpalain Haulers, Inc. v. Trajano, 369 Phil. 617, 626 (1999).

[65] Resins, Incorporated v. Auditor General of the Philippines 134 Phil 697, 700 (1968).

[66] See People v. Veneracion, 319 Phil. 364, 373-374 (1995).

[67] Guingona v. Court of Appeals, G.R. No. 125532, July 10, 2003.

[68] *Ibid.*

[69] Andal v. People of the Philippines, 367 Phil 617, 626 (1999).

[70] Manalo v. Sistoza, 371 Phil 165, 172 (1999). The power of judicial review requires the concurrence of the following requisites, namely: (1) the existence of an appropriate case; (2) an interest personal and substantial by the party raising the constitutional question; (3) the plea that the function be exercised at the earliest opportunity; and (4) the necessity that the constitutional question be passed upon in order to decide the case. These requirements are

This Court's power of judicial review is conferred on the judicial branch of the government by section 1, article VIII of the 1987 Constitution:

> Sec. 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.
>
> Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and ***to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government.*** (emphasis supplied)

Often vilified as intrusion into the prerogatives of the political branches of government, the fact is that this "judicial supremacy" has been explained by the Supreme Court nearly 70 years ago in the case of *Angara v. Electoral Commission.*[71] In that case, the Supreme Court explained that there is a constitutional basis for the exercise of judicial review under the Constitution and it is less an assertion of supremacy over the other branches of government and more a duty to enforce the boundaries that should govern the relationships of these branches.

It should be pointed out that the present Constitution contains an "expanded *certiorari* jurisdiction" of the Supreme Court. The Court now has the power "to determine whether there has been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government."

This innovation in the 1987 Constitution is meant to address the problem during the Marcos regime where the Supreme Court hid behind the "political question" [72] doctrine as an excuse not to question the acts of the administration. This approach helped the Court earn a reputation as a rubberstamp of the dictator. By the time the Marcos regime ended, the Supreme Court was regarded by many Filipinos as totally subservient to the President, partial, narrow, and timid in its jurisprudence, at least where the interests of the Marcos regime were concerned.[73] The Supreme Court resolved all major legal challenges to the Marcos regime in favor of Mr. Marcos.[74] Even the Supreme Court acknowledged the "many judicial problems spawned by extended authoritarian rule which effectively eroded judicial independence and self-respect" that will require time and effort to repair.[75] Under the present formulation of the Constitution, the Supreme Court will not evade its duty and authority to uphold the

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discussed in VICENTE V. MENDOZA, JUDICIAL REVIEW OF CONSTITUTIONAL QUESTION: CASES AND MATERIALS 86-216 (2004).

[71] 63 Phil. 139 (1936).

[72] Political questions are "those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of government." See Tañada v. Cuenco, 103 Phil. 1051, 1067 (1957).

[73] C. Neal Tate & Stacia L. Haynie, *The Philippine Supreme Court under Authoritarian and Democratic Rule: The Perception of the Justices*, 22:3 ASIAN PROFILE 209-24 (1994).

[74] Stacia L. Haynie, *Paradise Lost: Politicisation of the Philippine Supreme Court in the Post Marcos Era*, 22:4 ASIAN STUDIES REVIEW 459, 61 (December 1998).

[75] Animas v. Minister of National Defense, 230 Phil. 489, 499-500 (1986).

Constitution in matters that involve grave abuse of discretion committed by any officer, agency, instrumentality or department of the government.[76]

This power, however, is not meant to give the judiciary unbridled power over the other branches of government. When political questions are involved, the Constitution limits the courts' power to the determination as to whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the official whose action is being questioned.[77]

The Supreme Court may gauge acts of the executive and legislative branches to see if they conform to the mandates of the Constitution on the right to a balanced and healthful ecology.

IV. POTENTIAL REFORMS TO ADDRESS CONSTRAINTS

Earlier studies on environmental legislation in the Philippines have pointed to several problems in the enforcement of these laws.[78]

A. OVERLAPPING JURISDICTIONS

The first of these problems pertains to conflicts of jurisdiction between the DENR and other national agencies and between the DENR and provincial governments.

While the DENR is solely responsible for issues of pollution control as well as forestry, mining and protected area management, in other areas such as fisheries and agriculture, overlapping of jurisdictions occurs with the Department of Agriculture (DAR) insofar as pesticide control and land use are concerned. The DENR has a similar problem with the Department of Agrarian Reform with regard to the conversion of agricultural land for industrial and other non-agricultural uses, and with the Philippine Coast Guard in relation to ship-source pollution of the marine environment. The Board of Investments oversees foreign investment projects but the DENR supervises industrial activities which contribute to environmental degradation.

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[76] Tañada v. Angara, 338 Phil. 546, 575 (1997).

[77] Grave abuse of discretion is "simply capricious or whimsical exercise of judgment that is patent and gross as to amount to an evasion of positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion or hostility." Integrated Bar of the Philippines v. Zamora, 392 Phil. 618, 639 (2000). Courts under this definition are without power to directly decide matters over which full discretionary authority has been delegated to other branches of government. But while the Supreme Court has no power to substitute its judgment for that of Congress or of the President, it may look into the question of whether such exercise has been made in grave abuse of discretion. The grant of power to either the executive or legislative powers will not necessarily be an impediment to judicial inquiry because the irresponsible exercise or abuse of that power may give rise to a justiciable controversy. See Integrated Bar of the Philippines v. Zamora, 392 Phil. 618 (2000).

[78] This section of this paper draws heavily from A. Tan, *op. cit. supra* note 22.

Issues regarding overlapping jurisdictions reach the Supreme Court. Some confusion arose regarding the jurisdiction of local governments over Laguna Lake. The issue arose because there was an apparent conflict with the charter of the Laguna Lake Development Authority (LLDA) and the powers of local governments under the Local Government Code of 1991,[79] which suggested that there might have been an implied repeal of the provisions of the former law. The Supreme Court held that the LLDA has exclusive jurisdiction to issue permits for the enjoyment of fishery privileges in Laguna de Bay to the exclusion of municipalities situated therein, and that the LLDA charter was a special law that could not be repealed by a general law such as the Local Government Code. [80]

The Pollution Adjudication Board has jurisdiction to determine the existence of pollution, not the local governments.[81] This ruling was based on the fact that local officials' power over the abatement of a nuisance was superseded by Presidential Decree No. 984, which created the Pollution Adjudicatory Board.

On the other hand, the overlapping functions between the DENR and local governments have lead to the failure to enforce DENR directives for the following reasons:

1. Lack of political will among local government units (LGUs) to enforce environmental laws, at times leading to differences in views between the LGUs and the central DENR over the feasibility of proposed projects. LGUs are often more concerned with the attraction of investments and the establishment of industrial zones rather than environmental protection;[82]

2. Certain matters belong to the exclusive jurisdiction of LGUs, and these impinge on matters coming under the authority of the central DENR (and vice versa), e.g. concerns over pollution from mines (DENR matter) contaminating fisheries in municipal waters (LGU matter);

3. Insufficient understanding of legislation due to LGUs' lack of trained personnel; and

4. Lack of financial resources of LGUs.[83]

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[79] Rep. Act No. 7160 (1991).

[80] Laguna Lake Development Authority v. Court of Appeals, 321 Phil. 395 (1995). See also Rep. Act No. 8550 (1998), sec. 16-25.

[81] Technology Developers, Inc. v. Court of Appeals, G.R. No. 94579, January 21, 1991; and Technology Developers, Inc. v. Court of Appeals, G.R. No. 94579, July 31, 1991.

[82] This is a recurring theme in local economic development. It was recently argued that in many areas in the Philippines, the link between public office and capital accumulation on a local level is becoming stronger. The change since the end of the Marcos regime is that it no longer seems sufficient to own a provincial backwater; local officials must sell their localities to investors both foreign and domestic. They present their localities as the best places to invest in for industrial estates, golf courses, and tourist resorts. "Local bosses now worry not just about rival politicians in their own bailiwicks, but about their counterparts elsewhere in the archipelago, and this new pattern of competition exerts, however subtly, the disciplining power of capital See John T. Sidel, *Take the Money and Run?: "Personality Politics" in the Post-Marcos Era*, II:3 PUBLIC POLICY 27, 32-33 (1998).

[83] A. Tan, *op. cit. supra* note 22.

B. LACK OF POLITICAL WILL

A second problem that has been identified is the lack of political will, both at the national and local levels, to promote environmental protection. This is due to the difficulty in reconciling long-term environmental goals with short-term developmental expectations. In the Philippines, provincial officials are pressured to showcase developmental progress in their provinces. The re-election of local officials depends on the level of development attained in the previous term of office. As such, long-term plans for environmental and natural resource management are often sacrificed in favor of short-term developmental policies. This problem is often aggravated by the vested interests of industrialists and project proponents which are not always in consonance with sound environmental practices.[84]

C. WEAKNESSES IN THE EIA SYSTEM

The Environmental Impact Statement (EIS) System in the Philippines demonstrates the above problems. First, there is a lack of capacity to fully appreciate the EIS especially in remote areas. Hence, LGUs which coordinate and appraise an Environmental Impact Assessment (EIA) review may not have sufficient expertise to carry out their responsibilities. Even at the national level, the DENR and the private sector do not always have the requisite technical expertise to commission proper EIA reports. The problem is aggravated by the costs of preparing EIAs, particularly for large infrastructural projects. In addition, the communities that are most affected by a proposed project often do not completely realize their rights under the EIS. Few were aware of the provisions on public participation and "social acceptability" of projects under the system's implementing rules and regulations.[85] As such, these innovations have failed to empower local communities.

Second, there is insufficient mapping of environmentally critical areas in the country wherein EIAs are required of developmental projects. The lack of documentation available to prepare a comprehensive EIA also leads to the tendency to circumvent the procedures under the law.[86]

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[84] *Ibid.*

[85] The implementing rules of this Decree are now embodied in DENR Adm. O. No. 2003-30, s. 2003, 14:3 NAR 1373-1388.

[86] See Republic of the Philippines v. The City of Davao, 437 Phil. 525 (2002). The case was the first case in the Philippines that directly invoked the EIA law to safeguard the environment in the construction of a development project. The case involved the construction of a Sports complex in Davao City. The DENR believed that the project needed to secure an ECC because it was in an environmentally critical area. Davao City sought a ruling from regional trial court and won. When the matter was elevated to the Supreme Court, the Court simply looked at the list of environmentally critical projects and areas and held that the project in question "does not come close to any of the projects or areas enumerated above. Neither is it analogous to any of them. It is clear, therefore, that the said project is not classified as environmentally critical, or within an environmentally critical area. Consequently, the DENR has no choice but to issue the Certificate of Non-Coverage. It becomes its ministerial duty, the performance of which can be compelled by writ of mandamus, such as that issued by the trial court in the case at bar." *Id.* at 538.

Third, there are rampant violations of the law especially in the case of smaller and less-publicized projects. The penalties under the system are insignificant and do not coerce project proponents into complying with the provisions of the law. As a result, the EIS system is often regarded as a nuisance at best.

Additionally, the DENR has been reluctant to deny environmental compliance certificates for investment projects because of the need to accelerate the flow of foreign investment into the Philippines.[87] The latest implementing rules of the EIA System has been criticized because they cater more to foreign investments than the environment.[88]

It has also been observed that the EIS system is not properly implemented because "the predominant practice" is to invoke the system late in the process of project development. In other words, it is used after a project site is determined rather than allow the system to determine the proper site. It was also noted that officials do not have the technical competence needed to implement the program properly. There are vague review procedures, an absence of environmental baseline data, and overlapping functions between government agencies.[89]

Moreover, the public consultations under the EIS system "are haphazardly conducted and poorly presented due to time constraints and the lack of skills within government to handle social issues. Documents are not freely accessible to the public due to fear, uncertainty and lack of experience in handling seemingly contentious matters."[90] It has been argued that the implementation of the "public participation" provisions of the EIS system is so badly executed that it has created a negative impact on stakeholders. The implementation does not provide adequate information to communities who may be affected by a proposed project, who now have to rely on the media for such information. This increases conflict between the project proponent and the communities involved.[91]

D. OTHER PROBLEMS

Several other issues illustrating the lack of implementation of environmental legislation are as follows:

1. mining industries and the contamination caused by mine tailings;

2. air pollution in urban areas, especially in overpopulated Metro Manila;

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[87] A. Tan, *op. cit. supra* note 22.

[88] See Ipat G. Luna, *Avenues for People's Participation in the Philippine EIA System*, Paper presented at EIA in the Philippines, Roads Taken, Lessons Learned: A Forum World Bank Office, Manila, February 11, 2005, available at <http://web.kssp.upd.edu.ph/eis/2005-02-11/luna_ngos.doc> April 15, 2006.

[89] Maya Gabriela Villaluz, *Advancing the ELA System in the Philippines*, in STUDIES OF EIA PRACTICE IN DEVELOPING COUNTRIES 257, 258 (Mary McCabe and Barry Sadler eds, n.d.).

[90] *Id.* at 259.

[91] Kanji Usmi, *Procedural Participation in the Philippine Environmental Impact Assessment System and the Population's Attitude*, *in* 17:1 KASARINLAN 75, 88 (2002).

3. water pollution, especially in overpopulated coastal areas like Manila Bay;

4. marine and coastal zone resource depletion e.g. mangrove swamps, fisheries; and

5. land use conflicts, affecting indigenous peoples and local communities.[92]

The lack of interest in implementing environmental laws continues today at both the national[93] and local levels.[94]

V. EXAMPLES OF ENVIRONMENTAL CASES AND INITIATIVES

As explained earlier, advocates of environmental protections rely on "metalegal" tactics to advance their interests. Straightforward litigation is used as a last resort. Stakeholders in the Philippines employ a variety of pressure tactics to shape legislation to compel compliance with these laws, usually by using the media to highlight local environmental concerns.

The most celebrated case involving the EIS for example, has been the US$450 million proposed Bolinao Cement Plant Project. After several years of protracted negotiations, the DENR denied the project an Environmental Compliance Certificate in 1996 due to its high environmental risks, primarily the threat to the aquatic life in the nearby Lingayen Gulf, the loss of arable land, significant air and water pollution risks and the general social unacceptability of the project to local residents. But Bolinao remains an exception due to the large publicity it attracted. In numerous other cases around the country EIS has not worked very well.[95]

In some cases, litigation can be an effective, if time-consuming tool. For example, in *Mustang Lumber Inc. v. Court of Appeals*,[96] the Court interpreted the word "timber" to include "lumber" to facilitate prosecution of those in possession of partially processed timber without the required legal documents under Revised Forestry Code.[97] In *Laguna Lake Development Authority v. Court of Appeals*,[98] the Court upheld the power of the LLDA to issue cease and desist orders, claiming that it falls within the broad powers of the Authority under its charter. In *Pollution Adjudication Board v. Court of Appeals*,[99] the Court held that the Board may issue a similar order upon motion of one party without

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[92] A. Tan, *op. cit. supra* note 22.

[93] See Leilani M. Gallardo & Ruffy L. Villanueva, *Clean Air Act Lack of political will leads to poor enforcement*, BusinessWorld, October 22, 2002; L. Gallardo & R Villanueva, *Gov't in no hurry to enforce the law*, BusinessWorld, October 23, 2002; L. Gallardo and R. Villanueva, *Environmental protection vs stable power supply?*, BusinessWorld, October 24, 2002.

[94] See Ronnie E. Calumpita, *Few LGUs comply with R.A. 9003*, Manila Times, April 23, 2004, A5.

[95] A. Tan, *op. cit. supra* note 22. See also Imer Ferrer & Emmanuel M. Luna, *Nurturing the Seeds for Action: The Bolinao Cement Plant Controversy as a Case for the Academe's Involvement in Social Issues*, in 3 PHILIPPINE DEMOCRACY AGENDA: CIVIL SOCIETY MAKING CIVIL SOCIETY 205-219 (Coronel Ferrer, ed 1997).

[96] 327 Phil 214.

[97] Pres. Decree No. 705 (1975).

[98] G.R. No. 110120, March 16, 1994.

[99] G.R. No. 93891, March 11, 1991.

notice to the opposing party. This order may be issued when there is an appearance that there are violations of allowable waste discharge standards, and there is no need to prove an immediate threat to life, public health or safety.

These cases illustrate the Supreme Court's determination to clear the way for the executive branch of government to enforce the laws on environmental protection.[100]

Even lower courts contribute to environmental law. A few years ago a Regional Trial Court ordered several government agencies to clean Manila Bay.[101] In that case, the plaintiffs sought to compel the defendants to submit "a concerted, coordinated and concrete plan of action to clean up and rehabilitate Manila Bay and its waterways, to restore its waters to Class SB classification and to revitalize its marine life." The Court issued a judgment ordering 12 government agencies to clean up Manila Bay. The Court directed DENR as the lead agency to "prepare a consolidated and coordinated action plan for the restoration of Manila Bay to make it fit for swimming and other forms of contact recreation."

The suit was based on provisions of the Philippine Environment Code,[102] particularly sections 17 and 20 thereof:

> SEC. 17. *Upgrading of Water Quality.* — Where the quality of water has deteriorated to a degree where its state will adversely affect its best usage, the government agencies concerned shall take such measures as may be necessary to upgrade the quality of such water to meet the prescribe water quality standards.
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> SEC. 20. *Clean-up Operations.* — It shall be responsibility of the polluter to contain, remove and clean up water pollution incidents at his own expense. In case of his failure to do so, the government agencies concerned shall undertake containment, removal and clean-up operations and expenses incurred in said operations shall be charged against the person and/or entities responsible for such pollution.

The defendants argued that section 20 refers to specific pollution such as oil spills, and does not cover the cleaning up of Manila Bay in general. The trial court, however, thought that interpretation to be too narrow. It pointed out that "Clean-up Operations" under the same decree "refers to activities conducted in removing the pollutants discharged or spilled in water to restore it to pre-spill condition."[103] They are different from "Accidental Spills" which are "spills of oil or other hazardous substances in water that result from accidents involving the carriers of such substance such as collisions and grounding."[104] Furthermore, Section 17, said the court, is not restricted to specific cases

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[100] I do not mean to suggest that the Supreme Court's record is all that impressive. Its more recent decisions are more hostile to the environment. See Republic of the Philippines v. The City of Davao, G.R. No. 148622, September 12, 2002, Bangus Fry Fisher Folk v. Lanzanas, G.R. No. 131442, July 10, 2003, and Otadan, et al. v. Rio Tuba Nickel Mining Corporation, G.R. No. 161436, June 23, 2004.

[101] Concerned Residents of Manila Bay v. The Philippine Government, Civil Case No. 1851-99, Regional Trial Court Branch 20, Imus, Cavite, September 13, 2002.

[102] Pres. Decree No. 1151 (1977).

[103] Pres. Decree No. 1151 (1977), sec. 62 (g).

[104] Pres. Decree No. 1151 (1977), sec. 62 (h).

of pollution. All the provisions read together shows that they cover pollutants that are discharged into the water. The trial court decision was recently upheld by the Court of Appeals.[105]

VI. AGENDA FOR ACTION

Over the years, there have been many suggestions made regarding how the judiciary can play a role in environmental protection and sustainable development. The more obvious pertains to the amendment of laws. Legislation should be pursued, for example, to address overlapping jurisdictions and to strengthen laws like the EIS system under Presidential Decree No. 1586. The problems in the implementation of our laws have been identified and it is up to Congress to make the necessary changes.

One suggestion that was raised a few years ago was the use of alternative modes of dispute resolution in environmental cases.[106] Recently, the Philippine Congress enacted the "Alternative Dispute Resolution Act of 2004,"[107] which promotes speedy and impartial justice as a means to decongest the dockets of the court. Since environmental disputes are not expressly excluded from the operation of this law,[108] it may now be argued that they may be the subject of these alternative modes of resolution.

Outside legislation, there are many things that the Courts may do to promote sustainable development. These innovations may be accomplished by the courts by instituting changes either through procedural reform or through adjudication. The former refers to the power of the court to amend its own rules, while the latter refers to its power to lay down doctrines through the resolution of cases.

A. CHANGES THROUGH PROCEDURAL REFORM

The Supreme Court promulgates rules concerning pleadings and practice.[109] I suggest here that the Supreme Court may alter the rules of court to accommodate the demands of the environment. It can relax the rules of standing, redefine "cause of action" and simplify the rules on evidence, all towards encouraging participation in the judicial resolution of environmental disputes. In general, the entire procedure must be

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[105] Concerned Residents of Manila Bay v. Metropolitan Waterworks and Sewerage System et al., CA-G.R. CV No. 76528 & CA-G.R. SP No. 74944, September 28, 2005.

[106] Hilario G. Davide Jr., *The Role of the Judiciary in Environmental Liability and Compensation Regimes*, 7 THE COURT SYSTEMS JOURNAL 17, 21 (2002).

[107] Republic Act No. 9285 (2004).

[108] The exceptions are listed in section 6 of the law:

> Sec. 6. *Exception to the Application of this Act.* — The provisions of this Act shall not apply to resolution or settlement of the following: (a) labor disputes covered by Presidential Decree No. 442, otherwise known as the Labor Code of the Philippines, as amended and its Implementing Rules and Regulations; (b) the civil status of persons; (c) the validity of a marriage; (d) any ground for legal separation; (e) the jurisdiction of courts; (f) future legitime; (g) criminal liability; and (h) those which by law cannot be compromised.

[109] See CONST. art. VIII, sec. 5(5).

simplified so that the judicial system does not become a hurdle in the resolution of these disputes. We should also factor in the reality of uncertainty in environmental law and craft our rules so as not to be obstructed by them.

There are many things that the Supreme Court may write into the Rules of Court, all of which are premised on the need to expedite cases that involve damage to the environment.

1. Courts should not be prevented from issuing injunctions against projects that injure or threaten to damage the environment. At present, there are Supreme Court circulars that prohibit judges from issuing injunctive relief. Judges have been penalized for violations of said circulars and they effectively prevent judges from protecting immediate threats to the environment. The repeal of these circulars is justified under the present state of the law. Republic Act No. 8975 was enacted in 2000 provides for an exemption in the prohibition against the issuance of injunctive relief.

> This prohibition shall apply in all cases, disputes or controversies instituted by a private party, including but not limited to cases filed by bidders or those claiming to have rights through such bidders involving such contract/project. *This prohibition shall not apply when the matter is of extreme urgency involving a constitutional issue, such that unless a temporary restraining order is issued, grave injustice and irreparable injury will arise.* The applicant shall file a bond, in an amount to be fixed by the court, which bond shall accrue in favor of the government if the court should finally decide that the applicant was not entitled to the relief sought.[110] (emphasis supplied)

The protection of the environment is a constitutional right. Applicants for injunctive remedies should couch their request by invoking this right to by-pass the statutory restrictions on the issuance of injunctive relief.

The threat of an administrative sanction against judges who restrain activities that endanger the environment must be removed if the judiciary is expected to play an important role in sustainable development.

2. In relation to the first point, it has also been suggested that the quantum of evidence needed for the issuance of such injunctive relief should be reduced to "probable cause". Probable cause is defined as "the existence of such facts and circumstances which could lead a reasonably discreet and prudent man to believe that an offense has been committed"[111] or "such facts and circumstances which would lead a reasonably discreet and prudent man to believe that an offense has been committed."[112]

In cases filed to prevent environmental trauma, the applicant for injunctive relief should only be required to show that the acts they are attempting to enjoin will

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[110] Rep. Act No. 8975 (2000), sec. 3, par. 2.

[111] Solid Triangle Sales Corporation v. The Sheriff of RTC QC, Branch 93 et al., G.R. No. 144309, November 23, 2001.

[112] Uy and Unifish Packing Corporation, v. Bureau of Internal Revenue and Hon. Mercedes Gozo-Dadole, 397 Phil 892, 910 (2000).

probably cause the environmental damage they are attempting to prevent. The danger to the environment should be the primary consideration in these cases. To require a higher standard would risk the possibility that the environment would be irreversibly damaged while the courts attempt to resolve the merits of the case.

3. Courts should also consider reducing the burden of proof required to determine liability for environmental damage. Potential plaintiffs may be discouraged by the need to show a preponderance of evidence so courts may consider requiring only "substantial evidence." Substantial evidence in Philippine law is that "amount of relevant evidence which a reasonable mind might accept as adequate to justify a conclusion."[113] It is the least demanding form in the hierarchy of evidence.[114] A shift to a lower quantum of evidence would encourage litigation to protect the environment. This proposal does not include lowering the burden of proof for criminal liability.

4. Another suggestion is to apply the rule on continuous trial[115] to environmental disputes. Again, the idea behind this suggestion is to expedite the resolution of environmental cases.

5. One of the more popular proposals from other countries is the establishment of special environmental courts.[116] In the Philippines, it was suggested that perhaps two divisions of the Court of Appeals may be designated as environmental courts. This would allow these divisions to specialize in laws concerning the environment and to hone their expertise in this field of law.

B. CHANGES THROUGH ADJUDICATION

Still, changes in the rules will not necessarily lead to the vindication of environmental rights. Both lawyers and judges may still unconsciously restrict these innovations because of decades of training under the western legal system. The legal profession could squander all these innovations if they are discouraged by precedents. They may insist on applying old doctrines to new environmental problems and subsequently inhibit, rather than promote sustainable development.

In a paper delivered six years ago, then Supreme Court Associate Justice Flerida Ruth Romero pointed to the need for courts to do more to promote the protection of the environment. She noted the following: (1) courts should not delay the resolution of the environmental cases that could result in hollow victories; (2) members of the judiciary need to be oriented in environmental law; and (3) the Court also has to keep up with the constant development of the field of environmental protection, ever attempting "to interpret traditional legal concepts in light of emerging trends in environmental

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[113] RULES of COURT, Rule 133, sec. 5.

[114] Salvador v. Philippine Mining Service Corporation, 443 Phil. 878, 888-889 (2003).

[115] The Philippines mandates "speedy trials" for criminal cases under Rep. Act No. 8493 (1998). The suggestion was that a simular framework be adopted for cases involving the environment.

[116] See <http://www.usaep.org/activities/initiatives/philippines.htm> April 15, 2005.

law."[117] Justice Romero noted that Supreme Court decisions furthering sustainable development were necessary because the lower courts made erroneous decisions that lead to delay. These cases should have been decided correctly if the judiciary was properly oriented in environmental law. Thus, the continuous training of judges becomes necessary so that the legal profession can reorient the way it resolves disputes.

Continuous training should be able to illustrate the fact that traditional approaches to the resolution of cases may be unable to address our most pressing environmental problems today. Thus, Justice Romero made the following examples:

- the Regalian doctrine—that all agricultural, timber, and mineral lands of the public domain, and other natural resources of the Philippines belong to the State—must be reconciled with the concept of native title and ancestral domain claims of our indigenous cultural communities;
- traditional concepts of property ownership should accommodate the responsibility to protect the environment;
- conventional notions of value must incorporate the concept of environmental costs; and
- in the area of international conventions, the Court must find ways of recognizing and breathing life into our environmental commitments even, as is often the case, in the absence of implementing legislation.

At first glance, it may appear as if Justice Romero's suggestions are too radical, especially for a system that is built on precedent. In fact, they are not.

For example, the Supreme Court did reconcile the Regalian doctrine with ancestral domain rights of indigenous peoples, salvaging the Indigenous People's Rights Act[118] from constitutional challenges.[119] All her other suggestions may also be accomplished, because the legal basis for this revolutionary approach to protecting the environment already exists—the Constitution.

The Supreme Court can easily temper property rights. It will be recalled that the Supreme Court in *Oposa* characterized the right to a balanced and healthful ecology as one that is not less important than the rights enumerated in the Bill of Rights.[120] However, a fair reading of *Oposa* might lead one to conclude that the right is in fact *more important* than those enumerated in the Bill of Rights. The Court there explained that the right belongs to a "different category altogether" because the advancement of that

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[117] Flerida Ruth P. Romero, *The Role of the Judiciary in Promoting the Rule of Law in the Area of Environmental Protection*, THE COURT SYSTEMS JOURNAL 94, 100 (Special Edition, April 1999).

[118] Rep. Act No. 8371 (1997).

[119] Cruz v. Secretary of Environment and Natural Resources, G.R. No. 135385 December 6, 2000. The Court denied a Motion for Reconsideration of its decision on September 21, 2001.

[120] Oposa v. Factoran, G.R. No. 101083 July 30, 1993

right predates "all governments and constitutions." The right need not be written in the Constitution because it is "assumed to exist from the inception of human kind."[121]

There is no other right that has been characterized in this manner. There is no other right that is assumed to exist from the inception of human kind. There is no other right in Philippine law that "need not be written in the Constitution." Even the right to life is listed in the Bill of Rights. If courts were to pit this right against any other right in the Bill of Rights, then any conflict between the rights should be resolved in favor of the environment. If we adopt this view, Courts may now rewrite jurisprudence on property, takings, standing to sue, extent of police power, evidence, and civil and criminal procedures to protect the environment.

I am not suggesting that we erase property rights. What I am suggesting is that the Constitution now authorizes courts to reexamine old doctrines under a new mandate to protect the environment.

Moreover, the present Constitution makes it clear that the ownership and use of property is not absolute and that they are subject to both state intervention and the common good.[122] These provisions may be read as the basis for the environmental revolution that the country needs. They may become the basis for Justice Romero's suggestions that we reconcile the responsibility to protect the environment and traditional concepts of property ownership.

Justice Romero's last suggestion is the most interesting. She suggested that courts find ways to breathe life into environmental commitments in the absence of implementing legislation. I think that her suggestion can be easily accommodated under the Constitution. Article II, Section 16 of the Constitution is so broadly written and is clearly not limited to those that are enacted by Congress. It may be argued that principles recognized by hard or soft sources of international law fall within the right recognized by the Constitution. In other words, if any right pertinent to the protection of the environment already exists under international law, then the right should be protected under the Constitution.

Under this approach, we may also invoke rights recognized by the Åarhus Agreement on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.[123] The Åarhus Agreement promulgates

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[121] *Id.* at 805.

[122] Article II, section 16 along with other new provisions like Article XII: Section 6, which provides: "The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands."

[123] Åarhus Agreement on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517.

through treaty law soft law norms contained in Principle 17 on EIA, and in Principle 10 on public participation of the Rio Declaration.[124]

Filipinos should be able to argue that the principle of sustainable development is part of both domestic[125] and international law,[126] and they should be able to challenge government actions that are inconsistent with such right.

To put this suggestion in perspective, we should recall that many significant decisions of the U.S. Supreme Court recognized rights — on custodial investigations, abortion, privacy, and school desegregation — which were not expressly recognized by the U.S. Constitution. For all its boldness, and despite the positive consequences of its decisions, the Court has had to fend of charges that these decisions constitute "judicial legislation"

Miranda v. Arizona,[127] which required specific warnings prior to custodial interrogation, is still criticized as an unprecedented form of judicial legislation. Critics claim that the ruling "may have violated constitutional separation of powers."[128] Critics of *Roe v. Wade*[129] point out that neither privacy nor abortion is mentioned anywhere in the Constitution. The Court, some say, is "constitutionalizing nonconstitutional values."[130] *Roe*, said one author, erased the constitutional text entirely and that it is judicial legislation "completely cut loose from any pretense of textual justification."[131] The Supreme Court's decision in *Brown v. Board of Education*[132] on the unconstitutionality of segregated education was criticized because it "blatantly ignored all law and precedent and usurped from the Congress and the people the power to amend the Constitution and from the Congress the authority to make the laws of the land."[133]

In other words, "judicial activism" allows those who could not bring change through legislation, to use the judiciary "to impose their vision of society by law." The courts obliged, and expanded its record of judicial legislation.[134]

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[124] See Nicholas A. Robinson, *Enforcing Environmental Norms: Diplomatic and Judicial Approaches*, 26 HASTINGS INT'L & COMP. REV. 387, 409 (2003).

[125] Exec. Order No. 292, Title XIV, chapter 1, sec. 1.

[126] The recognition of sustainable development as part of international law is debated but clearly progressing. See Marie-Claire Cordonier Segger, *Sustainable Development in the Negotiation of the FTAA*, 27 FORDHAM INT'L L.J. 1118, 1124-1126 (2004) and Vaughan Lowe, *Sustainable Development and Unsustainable Arguments*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 19 (Alan Boyle & David Freestone eds., 1999).

[127] 384 U.S. 436, 16 L.Ed 2d 694, 86 S.Ct. 1602 (1966).

[128] Timothy Brennan, *Silencing Miranda: Exploring Potential Reform to the Law of Confessions in the Wake of Dickerson v. United States*, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 253, 260 (2001).

[129] 410 U.S. 113, 35 L.Ed. 2d 147, 93 S.Ct. 705 (1973).

[130] Helen Garfield, *Privacy, Abortion, and Judicial Review; Haunted by the Ghost of Lochner*, 61 WASH. LAW REV. 293, 294 (1986).

[131] Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1014 (2003).

[132] 349 U.S. 294, 75 S.Ct. 753 (1955).

[133] See MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 25 (1998).

[134] See Stephen B. Presser, *Some Thoughts on Our Present Discontents and Duties: The Cardinal, Oliver Wendell Holmes, Jr., the Unborn, the Senate, and Us*, 1 AVE MARIA L. REV. 113, 117 (2003).

But the Philippine courts do not have to worry about straying from the text of the Constitution or disregarding precedent. The Constitution makes the courts part of the machinery to protect the environment. As the body that interprets the Constitution, it would be well within its powers to define the parameters of the "right to a balanced and healthful ecology." The Constitution, to put it bluntly, creates a bias for the environment.

The Philippine Supreme Court has been known to rewrite case law to ensure compliance with the social justice goals of the Constitution. In *Association of Small Landowners in the Philippines, Inc. v. Secretary of Agrarian Reform*,[135] the Court abandoned case law and allowed payment of just compensation in forms other than money.

The Philippine Supreme Court rewrites case law if it had a sufficient basis to do so under the Constitution. When the urgency of the matter is impressed upon the judiciary, it acts to promote the policies enshrined in the Constitution. There is rarely anything more urgent than the protection of the environment, and courts should not hesitate to rewrite its own doctrines if they appear to hinder the goals of sustainable development.

Moreover, when governing decisions are unworkable or are badly reasoned, the Supreme Court has never felt constrained to follow precedent.[136] After all *stare decisis* is not an inexorable command but "a principle of policy and not a mechanical formula of adherence to the latest decision."[137]

One other matter bears stressing. There is no need for the judiciary to wait for the Supreme Court to lead this revolution. Trial courts should have the fortitude to initiate the reorientation of jurisprudence and to tilt it in the environment's favor. This is one way to avoid hollow victories in environmental litigation.

VII. CONCLUSION

There are many things the judiciary can do to promote sustainable development. It can rewrite practice and procedure and continuously train its members in developments in environmental law. More importantly, however, is the need for the judiciary to reinvent itself.

I have suggested here that lawyers and judges alike have failed to take advantage of a constitutional provision that empowers all the branches of government to protect the environment and to promote sustainable development. Article II, section 16 of the Philippine Constitution not only creates a basis for laws and policies that protect the environment. It also creates an opportunity for the courts to rewrite jurisprudence by locating the people's right to a clean environment among the other

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[135] G.R. No. 78742 July 14, 1989.

[136] Smith v. Allwright, 321 U.S. 649, 665 (1944).

[137] Helvering v. Hallock, 309 U.S. 106, 119 (1940).

rights in the Bill of Rights. As a right that need not be written in the Constitution, courts should learn to look at it as superior to other rights. The court may revise procedural roadblocks and even temper doctrinal law on property and individual rights that have made sustainable development nothing more than rhetoric in the Philippines.

All the elements for the revolution in environmental law are in place. But judges should entertain the possibility of abandoning doctrinal law that could not have anticipated the breadth and depth of today's environmental problems.

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