FEATURE:

CHIEF JUSTICE HILARIO G. DAVIDE JR.: A STUDY IN JUDICIAL PHILOSOPHY, TRANSFORMATIVE POLITICS AND JUDICIAL ACTIVISM *

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I. NOTE ON METHOD: JUDICIAL THEORIES AS HISTORICAL ARTIFACT.

Today I propose not the traditional legal analysis that focuses solely on hard doctrine, the stuff that lawyers and judges do, day in, day out. I refer to the analysis of rules, contained in the Constitution or in statutes, how these rules are applied in actual cases and controversies, and all the technical ways by which Judges bring these rules to life.

Rather I will step back and look at what courts do through the eyes of history, and situate judicial doctrine as nothing more than the courts' response to what Oliver Wendell Holmes Jr. called the "felt necessities of the time."[1]

A. THRESHOLD DISTINCTION BETWEEN *ACTIVISM*, COMMONLY UNDERSTOOD, VIS-À-VIS *JUDICIAL ACTIVISM*, LEGALLY CONSTRUED.

In Philippine discourse, activism (or to be more precise, referring to its adherents, the *aktibista*) has come to be identified with progressive social causes — ideologically standing to the left — they who I will describe amorphously as those who wish to see equality, where now we have the concentration of wealth and power in the elite; they who will empower the community to guide private profit-making toward communal goals; they who will nurture our planet and act not as masters of the earth, but as its stewards for the coming generations.

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[1] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

Such notions of activism are one thing. Judicial activism is a completely different matter.

Judicial activism, rather, refers to a judge's readiness to use his court, his judicial decisions, or to use, in a more precise legal term, the power of judicial review, to advance substantive social or political causes. (Now, those social and political agenda are not necessarily "progressive", as I will show later.) In one of the most famous aphorisms in law, the great Oliver Wendell Holmes Jr. said:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[2]

Another great judicial writer, Benjamin Cardozo, acknowledges the place of moral judgment in the work of the judge.

> Every one of us has in truth an underlying philosophy of life, even those of us to whom the names and the notions of philosophy are unknown or anathema. There is in each of us a stream of tendency ...which gives coherence and direction to thought and action.... For judges, all their lives, forces which they do not recognize and cannot name, have been tugging at them — inherited instincts, traditional beliefs, acquired convictions; ...[resulting in what the philosopher William James called] "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where the choice shall fall."[3]

Why, one may ask, is there a problem if judges follow their conscience? Shouldn't judges be in "sympathy with the spirit of their times?"[4] Isn't that what judges are supposed to do in the first place? Is there anything necessarily wrong with judges who actually embody their activism in their decisions? They become truly democratic and receptive to the majority. They become more egalitarian and altruistic and sympathetic to the poor. They become more caring of our fragile planet, and rejoice at what our Constitution poetically calls the "rhythm and harmony of nature"?[5] Isn't that the ideal?

Not exactly. The power of judicial review is the power of the courts to strike down decisions by the political branches of government. It is the supreme power of the courts to invalidate laws or orders issued by the elected representatives of the people; they who are directly accountable to the people; they who are tasked to carry out the sovereign will. For the courts to exercise that paramount power, there is only one permissible ground: that the law in question be repugnant to the Constitution, the highest law of the land.

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[2] *Ibid.*

[3] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 11-12 (1921).

[4] *Id.* at 174.

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

Therein lies the "growing cult of constitution-worship" with its "mystic overtones" responding to those "heady calls for an imperial judiciary."[6]

Therein too lies what the legal profession today calls the "counter-majoritarian dilemma" — that judicial review is inherently undemocratic, because it allows un-elected judges to override the will of the elected deputies of the sovereign.

> The root difficulty is that judicial review is a counter-majoritarian force in our system.... When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now.... That, without mystic overtones, is what actually happens.... It is the reason the charge can be made that *judicial review is undemocratic.*[7] (emphasis supplied)

B. ALL JUDICIAL DECISIONS ADVANCE A SOCIAL AGENDA. BEHIND THE "LOGICAL FORM" IS A CHOICE SUPPORTING OR OPPOSING A "BURNING ISSUE."

The result is that court decisions disavow any social or political content, and purport merely to carry out the letter of the Constitution, taking what Holmes called "the fallacy of logical form."

> The training of lawyers is a training in logic. The processes of analogy, discrimination and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind.[8]

Indeed, judges usually disavow any philosophy, saying that the "language of craftsmen is unintelligible to those untutored in the craft."[9] Holmes continues:

> But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You can always imply a condition in a contract. But why do you imply it? It is because of some belief... some opinion as to policy... some attitude that embodies the preference of a given body in a given time and place.[10]

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[6] Florentino P. Feliciano, *The Application of Law: Some Recurring Aspects of the Process of Judicial Review and Decision Making*, 37 AM. J. JUR. 17, 19-34 (1992).

[7] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-17 (1962).

[8] O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465-466 (1897).

[9] B. CARDOZO, *op. cit. supra* note 3 at 9.

[10] O.W. Holmes, *op. cit. supra* note 8 at 466.

Elsewhere, he writes,

> [W]henever a doubtful case arises... what really is before us is a conflict between two social desires, each of which seeks to extend its domination over the case.... When there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious the judges are called on to exercise the sovereign prerogative of choice.[11]

Finally,

> [J]udges themselves have failed adequately to recognize their duty of weighing *considerations of social advantage*. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious.[12]

When a majority of his fellow justices voted to strike down new laws to protect workers, Holmes dissented, saying that the court's decision "depends upon a judgment or intuition more subtle than any articulate major premise,"[13] namely, their laissez-faire attitudes that would leave the worker to the mercy of the market vis-à-vis the paternalistic move by Congress to step in.

II. HISTORICAL CONTEXT OF PHILIPPINE DEBATES ON JUDICIAL REVIEW

A. BASIC U.S. AND PHILIPPINE DOCTRINE.

Philippine doctrine on the reach and limits of judicial review derives from the American legal tradition. As every Filipino law student knows, it draws from the classic decision by U.S. Chief Justice John Marshall, ranked by many as the finest Chief Justice in American history. In *Marbury v. Madison*,[14] Marshall asserted the power of the Supreme Court — a power found nowhere in the U.S. Constitution — to strike down as invalid an act by Congress.[15] Marshall's words are now famous:

> It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act.
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> Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts....

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[11] O.W. Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).

[12] O.W. Holmes, *The Path of the Law*, *op. cit. supra* note 8 at 467.

[13] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes J., *dissenting opinion*).

[14] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[15] The political context was just as touchy: Marshall in the end avoided a showdown with Congress and the President. He affirmed his power merely in principle but not in fact.

> It is emphatically the province and duty of the judicial department to say what the law is.[16]

That principle was no sooner exported to the Philippines. By the time Claro M. Recto led the drafting of the 1935 Constitution, the principle was well entrenched in Philippine law. It fell upon Justice Jose P. Laurel to write the Philippine version of *Marbury*.

> [T]he Constitution has blocked out with deft strokes and in bold lines, allotment of power [to the three departments of government. But i]n times of disquietude or political excitement, the great landmarks of the Constitution are apt to be forgotten or marred, if not entirely obliterated. In [those] cases, the judicial department is the only constitutional organ which can be called upon to determination the proper allocation of powers....

He articulates further,

> [W]hen the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution .... That is in truth all that is involved in ... *"judicial supremacy."*[17] (emphasis supplied)

B. THE CONTRAST BETWEEN ACTIVISM VIS-À-VIS JUDICIAL ACTIVISM: EXAMPLES FROM U.S. LEGAL HISTORY.

1. Judicial Resistance to the Welfare State. The Conservative U.S. Supreme Court usage of judicial review to strike down progressive legislation by Roosevelt's New Deal (laws protecting workers and women) and Roosevelt's proposed controversial "Court Packing" to "save the Constitution from the Court, and the Court from itself."

Following the Great Depression in 1929, Franklin Delano Roosevelt ("FDR") responded to the economic and social tragedy with "bold [legislative] experimentation,"[18] building a welfare state to save his people from hunger and destitution. The Supreme Court initially upheld his emergency legislation in *Home Building and Loan Association v. Blaisdell*[19] (validating a mortgage moratorium law to protect borrowers) and in *Nebbia v. New York*[20] (validating price controls to protect wheat farmers). Soon however the Supreme Court began to strike down one welfare law after another: *Panama Refining v. Ryan*[21] (invalidating portions of the National Industry Recovery Act for undue delegation of legislation power); *Schechter Poultry Corp.*

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[16] Marbury v. Madison, *supra* at 177.

[17] Angara v. Electoral Commission, 63 Phil. 139, 157-158 (1936).

[18] Franklin Delano Roosevelt, *On the Reorganization of the Judiciary*, quoted in PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT (1999).

[19] 290 U.S. 398 (1934).

[20] 291 U.S. 502 (1934).

[21] 293 U.S. 388 (1935).

v. United States[22] (invalidating federal authority to regulate the poultry business); *United States v. Butler*[23] (invalidating a law to help farmers through voluntary cutbacks on farming coupled with incentive payments funded by taxes); *Morehead v. Tipaldo*[24] (invalidating minimum wage legislation). In so doing, the Court re-affirmed established doctrine in *Lochner v. New York*[25] (invalidating legislated hours of work in bakeries) and *Adkins v. Children's Hospital*[26] (invalidating minimum wage legislation).

FDR complained that the Court had "improperly set itself up as a third House of the Congress — a super legislature."[27]

> The chief lawmakers in our country... are the judges, because they are the final seat of authority.... *The decisions of the courts on economic and social questions depend upon their economic and social philosophy*, and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions.[28]

As FDR put it in *On the Reorganization of the Judiciary*, "We have reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself."[29]

The nine-man Court had three liberals sympathetic to FDR (Harlan Fiske Stone, Benjamin Cardozo and Louis Brandeis, called the Three Musketeers); four conservatives (James McReynolds, Van Devanter, Sutherland and Butler, or as the liberals called them, the Four Horsemen of the Apocalypse); and two swing votes (the Chief Justice Charles Evans Hughes and Owen Roberts). In order to strike down a law, all it took was one swing vote toward the Horsemen; to uphold such law two swing votes were required by the Musketeers.

Justice Harlan Fiske Stone criticized the majority's "tortured construction of the Constitution" that substituted "judicial fiat" for the judgment of Congress.[30] "Courts are not the only agency of government that must be assumed to have capacity to govern."[31] Chief Justice Charles Evan Hughes, voting with the liberals, complained:

> We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum.... When

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[22] 295 U.S. 495 (1935).
[23] 297 U.S. 1 (1936).
[24] 298 U.S. 587 (1936).
[25] 198 U.S. 45 (1905).
[26] 261 U.S. 525 (1923).
[27] Franklin Delano Roosevelt, *On the Reorganization of the Judiciary*, quoted in PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT (1999).
[28] F.D. Roosevelt, Message to Congress of 8 December 1908, quoted in B. CARDOZO, *op. cit. supra* note 3 at 171.
[29] F.D. Roosevelt, *On the Reorganization of the Judiciary,"* quoted in P. IRONS, *op. cit. supra* note 26 at 315.
[30] U.S. v. Butler, 297 U.S. 1, 87 (1936).
[31] *Ibid.*

> industries organize themselves on a national scale... how can it be maintained that their industrial labor relations are [not inter-state in character and therefore] forbidden field into which Congress may not enter [to avoid] the paralyzing consequences of industrial war?[32]

Thus was born FDR's now infamous "court packing" plan of March 1937. No sooner did the tide turn, and in what is now called the "Constitutional Revolution of 1937", the Court adopted a more deferential attitude to legislative reforms, demolishing laissez-faire, and embracing the welfare state. In *West Coast Hotel v. Parrish*[33] (upholding minimum wage laws for women) and *National Labor Relations Board v. Jones & Laughlin Steel Company*[34] (upholding the right to self-organization and to collective bargaining).

2. The Warren Court. Progressive judges used judicial review to advance racial and social equality.

Earl Warren became Chief Justice in 1953 and had barely warmed his seat when his Court rendered the historic decision in *Brown v. Board of Education*[35] (1954), which struck down racial segregation in public schools, overruling the "separate but equal"[36] doctrine in the infamous *Plessy v. Ferguson*.

But what we now know was the Warren Court emerged only from 1962 (when Warren gained a 5-man majority) until 1969 (when he retired). His most liberal colleague William Brennan is quoted to have said: "With five votes, you can do anything around here."[37]

From then on the Warren Court used its power of judicial review to protect racial minorities and the socially disadvantaged: *Heart of Atlanta Motel v. United States*[38] (disallowed racial discrimination in hotel accommodations); *Miranda v. Arizona*[39] (disallowed uncounselled interrogation by police); *United States v. O'Brien*[40] (protected freedom of speech in draft-card burning); *Baker v. Carr*[41] (protected the one person, one vote principle and pushing electoral reform); *Goldberg v. Kelly*[42] (protected welfare recipients from arbitrary denial of benefits); *New York Times v. Sullivan*[43] (protecting free speech from vindictive libel suits by public officers); *Griswold v. Connecticut*[44] (protected

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[32] NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1, 41 (1937)
[33] 300 U.S. 379 (1937).
[34] 301 U.S. 1 (1937).
[35] 347 US 483 (1954)
[36] 163 U.S. 537, 552 (1896).
[37] *See* P. IRONS, *op. cit. supra* note 26 at 416.
[38] 379 U.S. 241 (1964).
[39] 384 U.S. 436 (1966).
[40] 391 U.S. 367 (1968).
[41] 369 U.S. 186 (1962).
[42] 397 U.S. 254 (1970).
[43] 376 U.S. 254 (1964).
[44] 381 U.S. 479 (1965).

reproductive rights as part of the right to privacy); *Gideon* v. *Wainwright* (required counsel for indigent defendants); *Mapp* v. *Ohio*[45] (barred illegally seized evidence).

How was this over-reaching exercise of judicial review justified? It was feared that over-expansive judicial review will "dwarf the political capacity of the people."

> There has long been a school of thought here that the less the judiciary does, the better... since it is "always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors"; that the effect of participation by the judiciary in these processes is "to dwarf the political capacity of the people, and to deaden its sense of moral responsibility."[46]

In response, the power of judicial review was justified as *merely* correcting the political process, namely, that the courts step in only when the democratic process fails and there is need to restore principled decision to a process attuned only to power. Harvard law professor Lawrence Tribe called this the "puzzling persistence of process-based arguments."[47] This argument was embraced by the Court in the famous Footnote 4 in *United States v. Carolene Products*.[48] There is a "narrower scope for... the presumption of constitutionality when the legislation appears on its face to be within a specific prohibition of the Constitution."[49] Then it proceeds to say: "[Normally] legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation [can be] subjected to more exacting judicial scrutiny...."[50] The Court then proceeds to explain that "prejudice against discrete and insular minorities... [may tend] seriously to curtail the operation of those political processes ordinarily... relied upon to protect minorities, and may call for a correspondingly more searching judicial inquiry."[51]

That corrective function is assumed by the courts because the political branches are attuned to "immediate results" when "emotions ride high enough", and "men will ordinarily prefer to act on expediency rather than take the long view."[52] In contrast, courts have the "capacity to appeal to men's better nature, to call forth their aspirations, which may have been forgotten in the moment's hue and cry" and are better suited to "support and maintain enduring general values."[53]

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[45] 367 U.S. 643 (1961).

[46] Flast v. Cohen, 392 U.S. 83, 120 (1968) (Douglas J., *concurring opinion*, quoting J. Thayer, John Marshall 106, 107 (1901).

[47] *See* LAWRENCE H. TRIBE, CONSTITUTIONAL CHOICES (1986).

[48] United States v. Carolene Products, 304 U.S. 144 (1938).

[49] *Id.* at 153.

[50] *Id.* at 153.

[51] *Ib.* at 153.

[52] A. BICKEL, *op. cit. supra* note 7 at 24-25.

[53] ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT (1976), quoted in VICENTE V. MENDOZA, JUDICIAL REVIEW OF CONSTITUTIONAL QUESTIONS: CASES AND MATERIALS 243 (2004).

> [The Court's] opinions may... sometimes be the voice of the spirit, reminding us of our better selves.... [I]t provides a stimulus and quickens moral education [f]or the power of the great constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will and upon the court's ability... ultimately to command a consensus.[54]

3. Backlash. *Popular Constitutionalism.* "Bring the power of constitutional interpretation back to the people where it belongs."

Recent constitutional theory has confronted the counter-majoritarian dilemma and has sought to restore a constitutionalism more attuned to the public temper. Harvard Law professor Richard D. Parker distinguishes between what he calls the Anti-Populist reading of the constitution (e.g., counter-majoritarianism) vis-à-vis the Populist sensibility. In *Here the People Rule: A Constitutional Populist Manifesto*,[55] Parker says that today, we have distinguished *constitutional* democracy as opposed to *populist* democracy. It results in the idea that constitutional law is a "higher law", superior to "ordinary law," and that its goal is stand above the fray, to protect individuals and minorities against the ruling "majority."[56] It looks "with disdain — it 'look[s] down' — on the political energy of ordinary people, who are then seen as ignorant, emotional and simple-minded vis-à-vis intelligent, sober and broad-minded discourse that we identify with judicial review. Hence the notion that judicial review is "meant to contain or to retard, to tame or to manipulate" the raw power of the people. The goal is to "transcend ordinary politics" and go for the "sober second thought," connect with our "better selves," in the "exalted realm" of a higher-minded constitutional law that we find only in the Supreme Court.[57] In other words, "[we have] inflat[ed] constitutional law, its grandiose puffing as law imagined to be 'higher' — because 'better' — than ordinary law made by ordinary people.... [W]e constitutional lawyers have fed on disdain for the political energy of ordinary people."[58] The result is what he calls a "chronic fetishism of the Constitution" — the "extravagant if not obsessive reverence for the icons, liturgies and orthodoxies of Our Constitutionalism to which quasi-supernatural powers, beyond human agency, are commonly attributed"[59]

Contrast this to what he calls the Populist sensibility: the purpose of constitutional law is to promote majority rule (not to limit it); to "nurture, galvanize and release" popular political energy (not contain or tame it).[60] It celebrates the "romance of the ordinary", sees ordinary folk as reasonable, public-spirited and respectful, and elites as emotional, self-centered and abusive.[61]

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[54] *Ibid.*
[55] RICHARD PARKER, HERE THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO (1994).
[56] *Id.* at 3-4.
[57] *Id.* at 60.
[58] *Id.* at 66.
[59] *Id.* at 79.
[60] *Id.* at 3.
[61] *Id.* at 60.

The current Law Dean of Stanford, Larry Kramer, provides the historical warrant for a "popular constitutionalism." In *The Supreme Court 2000 Term Foreword: We the Court*,[62] Kramer looks to the Founding generation of the American republic, who celebrated the "wonder of popular government."[63] For them, when they invoked "the people," they "were not conjuring an empty abstraction"[64] but "the people" they knew had fought and won a revolution. Recall that as far back as Holmes, it had already been recognized that "legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[65] Kramer has characterized the Rehnquist Court has having adopted the "seeming naturalness of the Court's power to interpret [and its] own apparent sense that interpretation by non-judicial [political] actors is somehow unnatural."[66] "The last, faint traces of popular constitutionalism are fading.... Judicial supremacy is becoming judicial sovereignty."[67] He concludes: "To nudge popular institutions out of the life of the Constitution is to impoverish both the Constitution and the republican system it is meant to establish."[68]

Here in the Philippines, the popular power to read the constitution was long ago recognized by Jose P. Laurel. The courts must accord due respect to the acts of the political branches of government "because the judiciary... must reflect the wisdom and justice of the people as expressed through their [elected] representatives...."[69] He quoted the same authorities upon which Kramer would rely, citing James Madison who said: "[T]he people who are authors of this blessing must also be its guardians... their eyes must be ever ready to mark, their voice to pronounce... aggression on the authority of their constitution."[70]

Laurel concluded way back in *Angara v. Electoral Commission* that the "success of our government in the unfolding years to come [will] be tested in the crucible of Filipino minds and hearts than in consultation rooms and court chambers."[71] Laurel thus anticipated what the modern "popular constitutionalists" today say, that the constitution belongs as much to elite jurists — the legal philosopher Roberto Mangabeira Unger calls them the "adepts and notables" of the profession[72] — as much as it belongs to the common folk.

The Supreme Court followed this wisdom when, called upon to strike down the Philippine ratification of the WTO Agreement, deferred to the political branches to interpret the economic protectionism that the Con-Com had frozen into the Constitution.

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[62] Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).
[63] *Id.* at 10.
[64] *Id.* at 11.
[65] *Missouri, Kansas & Texas Ry Co. v. May*, 194 U.S. 270 (1904).
[66] L. Kramer, *op. cit. supra* note 62 at 14.
[67] *Id.* at 14.
[68] *Id.* at 16.
[69] Angara v. Electoral Commission, 63 Phil. 139, 158-159 (1936).
[70] *Id.* at 159.
[71] *Id.* at 159.
[72] I looked all-over for this...I have to inquire from Dean

> [W]hether [Philippine ratification of the WTO Agreement] was wise, beneficial or viable is outside the realm of judicial inquiry.... That is a matter between the elected policy makers and the people. As to whether the nation should join the worldwide march toward trade liberalization and economic globalization is a matter that our people should determine in electing their policy makers....
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> ...Let the people, through their duly authorized elected officers, make their free choice.[73]

Rather than supplant the political process and short-circuit the constitutional set-up, the Court declined to exercise its power to strike down the Senate's ratification.

C. OFFICIAL CREED ADOPTED IN THE 1987 CONSTITUTION: BOTH ACTIVISM AND JUDICIAL ACTIVISM ARE CODIFIED INTO THE CHARTER.

The drafters of the 1987 Constitution were conscious of their mission to carry out the socio-economic agenda of the People Power revolution of February 1986. Commissioner J. Bernas pointed, for instance, explained,

> We have been called to this Commission by a revolutionary government to the extent that it is a government that is a product of the February revolution. And very much in the air nowadays are phrases like "people power", revolutionary Constitution", "social justice", and "those who have less in life should have more in law." Therefore, what we are trying to formulate here is a constitution that will set up structures capable of continuing the goals of the revolution... It is commonly said that the revolution of February was primarily a *political revolution.* It was a revolution that released from the political oppressions that were institutionalized under the old regime...But is also said that we still have to complete a social revolution...
>
> And if we look at the Bill of Rights ..., we find guarantees which by themselves are self-executory. But when it comes to guarantees of social and economic rights, the farthest we can go is to set goals for future legislatures to attain... because we, as a Constitutional Commission, cannot legislate fully effective means for attaining these social and economic goals.[74]

In concluding his statement, Bernas emphasizes that, "What we need today is the completion of a peaceful social and economic revolution."[75]

Commissioner Nieva similarly pointed out that, "[o]ur February 1986 Revolution was not merely against the dictatorship nor was it merely for the realization of human rights; rather, this popular revolution was also a clamor for a more equitable share of the nation's resources and power...."[76]

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[73] Tañada v. Angara, 338 Phil. 546, 606 (1997).
[74] 2 CON-COM RECORD 35, July 21, 1986, at 57, (Comm. J. Bernas).
[75] *Id.* at 58, (Comm. J. Bernas).
[76] 1 CON-COM RECORD 46, August 2, 1986, at 606 (Comm. T. Nieva).

This "activist" mission was enacted through "directive principles"[77] which are now contained in three sections of the 1987 Constitution: article II containing the *Declaration of Principles and State Policies* in article II; article XII on the *National Economy and Patrimony*, and article XIII on *Social Justice and Human Rights*.

The Declaration of Principles and State Policies has been referred to as "a constitutional inventory of fundamental community values and interests."[78] It contains broad normative statements and sets forth affirmative duties of the state, e.g., what the state must do (in contrast to the Bill of Rights, which sets forth the negative duties of the state *vis-à-vis* individuals, e.g., what the state may not do). The Declaration referred to "new" rights, e.g., to education, food, environment and health.

The social justice clause is considered the "centerpiece of the 1986 Constitution" because it provides the "material and social infrastructure for the realization of basic human rights, the enhancement of human dignity and effective participation in democratic processes," without which "rights, dignity and participation remain[ed] illusory."[79]

Finally, the Constitution contains persistent reminders of the power of the state to regulate private property and diffuse property ownership.[80] It contained express provisions to carry out economic protectionism and paternalism.[81]

Having codified their "activist" purposes in the Constitution, the drafters then proceeded to ensure that the people can demand them through the courts, by expanding judicial power. Until then, the "political question doctrine" barred the courts from reviewing the discretion exercised by the President or Congress, a doctrine that can be traced all the way back to *Marbury*.

Chief Justice Marshall in *Marbury* recognized that certain acts are "only politically examinable"[82] when they are left entirely to the discretion of an officer who is then "accountable only to his county in his political character and to his own conscience."[83] However, "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."[84]

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[77] 5 CON-COM RECORD 92, September 25, 1986, at 69 (Comm. H. Davide); & 5 CON-COM RECORD 91, September 24, 1986, at 23 (Comm. B. Ople).

[78] F. Feliciano, *op. cit. supra* note 6 at 19-34.

[79] 1 CON-COM RECORD 46, August 2, 1986, at 606 (Comm. T. Nieva).

[80] 5 CON-COM RECORD 92, September 25, 1986, at 67 (Comm. H. Davide).

[81] See Raul C. Pangalangan, *Law and Economic Choice in Philippine Constitutional Law, in Law, Development and Socio-Economic Changes in Asia* (Tokyo, 2003).

[82] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).

[83] *Ibid.*

[84] *Ibid.*

However, Chief Justice Roberto Concepcion, one of the authors of the 1987 Constitution, noted that when the Philippines was under martial law, judicial timidity and its submissiveness to Marcos was excused through wide-sweeping recourse to the political question doctrine.[85] In order to prevent a repeat of that farce, he proposed what we now have as the expanded judicial power clause. He refers to "the *duty* [and not just the power] of the courts of justice" to settle not just traditional disputes but as well as any "grave abuse of discretion" by any government agency.[86]

Although the grave abuse standard had always been part of established doctrine (through Rule 65 on *Certiorari* under the Rules of Court), it had hitherto been applied solely to judicial discretion, which to start with, was already circumscribed by law. By 1987, the grave abuse standard was extended even to the open-ended discretion by political bodies.

III. DAVIDE AS SOCIAL ACTIVIST. INTELLECTUAL MILIEU OF THE U.P. LAW CLASS OF 1959. PUBLIC CAREER.

If in the 1987 Constitution we find both social activism and judicial activism, in Chief Justice Hilario Davide we find both a social activist and a judicial activist.

To start with, his own intellectual roots at the University of the Philippines can only guarantee a radical ideological streak. During his stay in campus, Diliman was gripped by a fierce battle between religious and secular groups: on one hand, Fr. John Patrick Delaney, Jesuit chaplain of the Diliman Campus *versus*, on the other, the secular power embodied by the fraternities who raised the "legality of [giving] University recognition to sectarian organizations" and demanded that he be expelled as an "undesirable alien."[87] U.P.'s official history has it that Law Dean Vicente Sinco wrote rules of discipline to govern the rising power of the fraternities, but in doing so likewise outlawed organizations that "foster[ed] racial or sectarian prejudices," which Fr. Delaney saw as aimed at U.P. Student Catholic Action (UPSCA), threatening the domination of fraternities.[88]

During that same period, a parallel battle raged against the philosophy department, whose chair espoused logical positivism, a school of thought considered to be godless and, if you believe the MacCarthyist witch hunt led by the House Committee on Anti-Filipino Activities, also made the classroom "receptive to communist indoctrination." Outside the University, the nationalist movement was inspired by Jose P. Laurel and Claro M. Recto.

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[85] 1 CON-COM RECORD 46, July 10, 1986, at 434 (Comm. R. Concepcion).

[86] *Ibid.*

[87] LEOPOLDO Y. YABES, FIRST AND FOREMOST: A HISTORY OF THE U.P. COLLEGE OF LAW, 202-203 (1982).

[88] OSCAR ALFONSO AND RAUL INGLES, UNIVERSITY OF THE PHILIPPINES: THE FIRST 75 YEARS (1908-1983) (1985).

Vicente G. Sinco was law dean for most of the Chief Justice Davide's student days. Dean Sinco served from 1953 until 1958 when he became U.P. President. He added legal history and legal philosophy as new subjects, explaining that law must be taught as an intellectual discipline and not as a vocational course.[89] Dean Sinco said that law teaching must be "richer in public law content... develop proper awareness of the social objectives of law and neutralize the narrowing effect of the lawyer-client relationship arising from over concentration on private law courses."[90]

Davide's career certainly exemplifies Sinco's ideal of the lawyer as a public man. Having begun as a law practitioner, he embarked on a public career as Constitutional Convention Delegate in 1971, as Opposition Assemblyman (Pusyon Bisaya) in Batasang Pambansa, as a member of the Constitutional Commission that drafted the 1987 Constitution, as COMELEC Chairman, and as chairman of the December 1989 Coup Fact-Finding Commission, the first step toward healing a nation divided by relentless coup attempts against our fledgling democracy.

IV. DAVIDE AS JUDICIAL ACTIVIST. TRANSLATING SOCIAL ACTIVISM INTO COURT DECISIONS. DAVIDE'S EXPANSION OF JUDICIAL POWER.

In 1918, Holmes wrote a letter to Laski, saying that he had warned Louis Brandeis about "letting partisanship disturb his judicial attitude." Just like Brandeis, Davide's partisanship for activist causes is clear and unabashed. He expressed it as an Opposition parliamentarian when he went up against the Marcos machinery. He expressed it when he spoke for the broader claims for the environment, health and social justice when they were drafting the 1987 Constitution. Did his activism affect his judicial attitude?

Justice Camilo D. Quiason has recognized that "[i]t is always difficult, and may not always be possible to categorize a [judge] as belonging to a particular school of jurisprudence or as the votary of a particular legal theory."[91] and that no judge "nurses a conscious effort [to] promot[e] any theory of law."[92]

Indeed, more particularly, Justice Panganiban has recognized "the perils of trying to catch the jurisprudential philosophy of the Chief", who himself says that jurists "have neither need nor reason to [adopt] at least publicly, one school of thought at the expense of another. This is the price of judicial office [which is] ideally divorced from policy formulation to maintain impartiality at all costs."[93]

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[89] LEOPOLDO Y. YABES, *op. cit. supra* note 89 at 196.

[90] *Id.* at 201

[91] Artemio V. Panganiban, *The Davide Standard: Juridical Thought of Chief Justice Davide*, in A. PANGANIBAN, LEADERSHIP BY EXAMPLE 59-60 (1999).

[92] *Id.* at 63.

[93] *Id.* at 60.

A. LIBERALIZED RULES OF "STANDING". TRADITIONAL REQUIREMENT OF ACTUAL INJURY OR TAXPAYER STANDING. DAVIDE MAJORITY OPINION IN *OPOSA V. FACTORAN*: EVEN THOSE YET TO BE BORN HAVE STANDING TO OBJECT TO DEFORESTATION PERMITS. CONTRAST WITH "REAL PARTY IN INTEREST" REQUIREMENT. DAVIDE DISSENTING OPINION IN *KILOSBAYAN 2*

Laurel identified constraints on judicial review that still stand firm today. Courts may not act on abstract questions, only on "actual cases and controversies" in order to "avoid barren legal questions" and "sterile conclusions." They must wait until "after full opportunity of argument by the parties" and even then must rule on constitutional questions only when that is at the heart of the issue. [94]

By these constraints, the courts express their institutional respect for the acts of the co-equal political branches of government. These "rules of avoidance" are therefore seen as part of the separation of powers scheme that underlies our Constitution.

> By declining to give advisory opinions, the Court refrains from intrusion into the lawmaking process. By requiring a concrete case with litigants adversely affected, the Court helps itself to avoid premature, abstract, ill-informed judgments. By placing a decision on a non-constitutional ground whenever possible, the Court gives the legislature an opportunity for sober second thought, ... a chance to exercise that spirit of self-scrutiny and self-correction which is the essence of a successful democratic system.[95]

The 1987 Constitution itself says that judicial power "includes the duty of the courts of justice to settle actual controversies"[96] The "case or controversy" rule results in one technical requirement: standing, which says that a suit must be brought by parties who have been personally injured, or in the case of taxpayers who sue in the public interest. They must "allege such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[97] Thus the concern for "self-appointed Attorneys General" with a "roving commission" to right all wrongs.

This requirement was "a frank acknowledgement that there is not under our Constitution a judicial remedy for every political mischief."[98] Standing doctrine guards against the danger of converting the courts into "forums for the airing of generalized grievances which are more appropriately presented in the political forums."[99]

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[94] Angara v. Electoral Commission, *supra*, at 158.

[95] Paul A. Freund, *The Role of the Supreme Court*, 81- 94 (Rev. Ed. 1972) in V. MENDOZA, *op. cit. supra* note 53 at 251.

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

[97] Baker v. Carr, 369 U.S. 186, 204 (1962).

[98] *Id.* at 270 (Frankfurter J., *dissenting opinion*)

[99] V. MENDOZA, *op. cit. supra* note 53 at 137.

Chief Justice Davide has expressed the most liberal position on standing, which would enable the courts to welcome crusaders to bring before it the pressing issues of the day.

Kilosbayan — a group of "civic spirited citizens, pastors, priests, nuns and lay leaders who are committed to the cause of truth, justice and national renewal"[100] but who nonetheless were not parties to the contested contracts — questioned the validity of the government-operated on-line gambling or "lotto." Then Associate Justice Davide wrote for the majority in *Kilosbayan v. Guingona*,[101] (or *Kilosbayan 1*) and held that the Philippine Charity Sweepstakes Office had violated its franchise when it entered into a joint venture with a Malaysian company. On whether Kilosbayan had standing in that case, Justice Davide said:

> A party's standing... is a procedural technicality which it may, in the exercise of its discretion, set aside in view of the importance of the issues raised. In the landmark Emergency Powers Cases [of 1949], this Court brushed aside this technicality because "the transcendental importance to the public of these cases demands that they be settled promptly and definitely...."[102]

In the Emergency Powers Cases, ordinary citizens and taxpayers were allowed to question the constitutionality of several executive orders issued by President Quirino although they were invoking only an indirect and general interest shared in common with the public.

Justice Davide thus referred to the "liberal policy of this Court on *locus standi*, [which allows] ordinary taxpayers, members of Congress and even... non-profit civic organizations... to initiate and prosecute actions before this Court to question the constitutionality [of laws or actions by government agencies]."[103] He concluded:

> We find the instant petition to be of transcendental importance to the public. The issues it raised are of paramount public interest and of a category even higher than those involved in [other] cases.... The legal standing then of the petitioners deserves recognition and, in the exercise of sound discretion, this Court hereby brushes aside the procedural barrier which the respondents tried to take advantage of.[104]

After the PCSO accordingly revised the contract into a *bona fide* lease, Kilosbayan challenged it again, in *Kilosbayan v. Morato*,[105] (or *Kilosbayan 2*). The Court reversed itself, and Justice Davide wrote a dissenting opinion. The majority in *Kilosbayan 2* found that Kilosbayan had no standing to sue. Because they had not properly raised any constitutional challenge against the contract, the majority would apply, not the

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[100] Kilosbayan v. Guingona, G.R. No. 113375, May 5, 1994.
[101] *Ibid.*
[102] *Ibid.* citing Avelino vs. Cuenco, 83 Phil. 17 (1949)
[103] *Ibid.*
[104] *Ibid.*
[105] 316 Phil. 652 (1995)

liberal rules on standing but rather the rules on real party in interest. However, Kilosbayan was impugning the validity of a contract though it was therefore not the real party in interest.

The majority, speaking through Justice Vicente Mendoza, contrasted the rule on standing, which is a constitutional requirement, to the rule on "real party in interest," which is a procedural requirement. Standing has constitutional and public policy underpinnings, and is very different from the issue of whether a plaintiff is the real party-in-interest or has capacity to sue.

> Standing is a special concern in constitutional law because in some cases suits are brought not by parties who, have been personally injured by the operation of a law or by official action taken, but by concerned citizens, taxpayers or voters who actually sue in the public interest. Hence the question in standing is whether such parties have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." [citing *Baker v. Carr*, 369 U.S. 7 L. Ed. 2d, 633 (1962)][106]

He thus, distinguishes this from the concept of a real party-in-interest,

> On the other hand, the question as to "real party-in-interest" is whether he is "the party who would be benefited or injured by the judgment, or the party entitled to the avails of the suit" [citing *Salonga v. Warner Barnes & Co., Ltd.*, 88 Phil 125, 131 (1951)].[107]

Davide dissented vigorously. The majority view would restrict access to the courts of crusaders for the public good and would clip the Court's power to act. If the real-parties-in-interest connive amongst themselves, there will be no one available to impugn contracts in fraud of the public.

> Only a very limited few may qualify, under the real-party-in-interest rule, to bring actions to question acts or contracts tainted with such vice. Where, because of fear of reprisal, undue pressure, or even connivance with the parties benefited by the contracts or transactions, the so-called real-party-in-interest chooses not to sue, the patently unconstitutional and illegal contracts or transactions will be placed beyond the scrutiny of this Court, to the irreparable damage of the Government, and prejudice to public interest and the general welfare.[108]

Indeed, Davide was concerned that the majority had posed a "bar to taxpayer's suits or cases invested with public interest by requiring strict compliance with the rule on real-party-in-interest in ordinary civil action, thereby effectively subordinating to that rule the doctrine of *locus standi*."[109] This he believes "resurrects the abandoned

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[106] *Id.* at 695-696.
[107] *Id.* at 697.
[108] *Id.* at 762 (Davide J., *dissenting opinion*).
[109] *Id.* at 759 (Davide J., *dissenting opinion*).

restrictive interpretation of *locus standi*."[110] Returning to such an interpretation of *locus standi* is "to speak the language of a bygone era,"[111] citing Chief Justice Fernando in his concurring opinion *in Aquino vs. Commission on Elections.*

> Such attempt directly or indirectly restricts the exercise of the judicial authority of this Court in an original action — and there had been many in the past — to determine whether or not 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.[112]

Yet the strongest and most liberal Davide statement on standing was still to come in what is now internationally the single most famous Philippine Supreme Court decision, *Oposa v. Factoran.*[113]

The case was filed to stop the Department of Natural Resources and Environment from issuing timber license permits and to cancel existing permits. Significantly, the case was filed by minors who asserted that they represented their generation as well as "generations yet unborn."[114] Justice Davide wrote for a unanimous Court, and recognized their standing.

> We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.... Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.[115]

I am myself rather more conservative on standing and will more readily apply constitutional constraints. I take judicial review to be one of the most special weapons in the activist's arsenal, because it draws its power not from arms but from reason — and draws the enemy to high moral ground where he is weak and the activist is strong. Judicial review must then be reserved only for the most crucial battles, and choosing those battles will entail not the weighing alone of competing theories of judicial activism, but as well of warring activist causes and strategies.

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[110] *Id.* at 761 (Davide J., *dissenting opinion*) citing Chief Justice Fernando, *Aquino v. Commission on Election*, 62 SCRA 275, 308 (1975).

[111] *Id.* at 762 (Davide J., *dissenting opinion*).

[112] *Id.* at 762 (Davide J., *dissenting opinion*).

[113] Oposa v. Factoran, GR No. 101083, July 30, 1993.

[114] *Ibid.*

[115] *Ibid.*

B. DIRECT JUDICIAL ENFORCEMENT OF THE ACTIVIST AGENDA.

Justice Davide has demonstrated masterfully the full reach of a powerful combination: first, the social and welfare rights that we have constitutionalized in the directive clauses; and second, the expanded definition of judicial power that empowers citizens to enforce these claims directly through the courts.

At the outset, inherited judicial wisdom demands that a judge must find "neutral principles" upon which to ground his substantive causes, lest the "constitution, instead of embodying only relatively fundamental rules of right... would become the partisan of a particular set of ethical or economical opinions."[116] The Warren Court made this task more urgent because it asserted social and moral claims against prevailing political majorities, and without recourse to neutral principles, courts were "bound to function [as nothing more] than as a naked power organ."[117] "A principled decision ... is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."[118]

For the Philippine Supreme Court today, those "neutral principles" were handed on a silver platter by the drafters of the 1987 Constitution, who as stated above codified into the charter the various activist causes of many of its members, including Chief Justice Davide.

In its turn, the Supreme Court has demonstrated time and again its readiness to elevate constitutional norms into judicially enforceable rights. In *Garcia v. Board of Investments*,[119] the Court cited the duty of the state to "develop a self-reliant and independent national economy effectively controlled by Filipinos,"[120] and reversed a petrochemical plant investor's decision to relocate a proposed plant. Strong dissenting opinions argued for judicial restraint, citing the dangers of "government by the judiciary." Justice Grino-Aquino note that, "choosing 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.[121] Justice Melencio-Herrera, on the other hand, pointed out that the majority "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...."[122] She continued, "[b]y 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."[123]

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[116] Otis v. Parker, 187 U.S. 505, 609 (1903).
[117] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959)
[118] *Ibid.*
[119] Garcia v. Board of Investments, G.R. No. 92024, November 9, 1990.
[120] CONST. art. II, section 19.
[121] Garcia v. Board of Investments *supra* (Griño-Aquino, J., *dissenting opinion*).
[122] *Ibid.* (Melencio-Herrera, J., *dissenting opinion*).
[123] *Ibid.* (Melencio-Herrera, J., *dissenting opinion*).

In *Manila Prince Hotel*,[124] the petitioners challenged the decision of the government to sell its shares, and thus privatize the Manila Hotel. The Court cited the constitutional provision giving "preference to *qualified* Filipinos" in the "grant of rights, privileges and concessions,"[125] and awarded the Hotel to the losing bidder, a Filipino company, by granting it the right to match *post hoc* the winning bid of a Malaysian company. The Court held that the Filipino First preference was "self-executory"[126] and "*per se* judicially enforceable."[127]

> A provision which lays down a general principle ... 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.[128]

He further iterates that,

> [This provision] is a mandatory, positive command which is complete in itself and which needs no further guidelines or implementing laws or rules for its enforcement... It is *per se* judicially enforceable.[129]

In *Kilosbayan 2*, in which Justice Davide dissented, the majority ruled that the "good morals" clauses cannot bar the government-run on-line gambling. They were not self-executing provisions, the disregard of which can give rise to a cause of action in the courts, and they did not embody judicially enforceable constitutional rights but mere guidelines for legislation.

Once again, it is in *Oposa v. Factoran* that we find the classic Davide approach to how citizens' environmental activism can be pursued through activist courts. You will recall that the petitioners had asked the trial court in effect to ban logging, citing a rather poetic clause in the Constitution: "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."[130] The lower court threw out the case for "failure to state a cause of action," having found the environmental claims vague and nebulous. It found that the matter "impressed with political color and involving a matter of public policy, may not be taken cognizance of by this Court without doing violence to the sacred principle of "Separation of Powers" of the three co-equal branches of the Government."[131]

Davide reversed the lower court and ordered it to hear the case. In effect, he said, the lower court would tell the petitioners that their "recourse [was] not to file an

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[124] 335 Phil. 82 (1997).
[125] CONST. art. XII, section 10, par. 2.
[126] Manila Prince Hotel v. GSIS, 335 Phil. 82, 112 (1997).
[127] *Id.* at 107.
[128] *Id.* at 102.
[129] *Id.* at 107.
[130] CONST. art. II, sec. 16.
[131] Oposa v. Factoran, GR No. 101083, July 30, 1993.

action in court, but to lobby before Congress for the passage of a bill that would ban logging totally."[132]

Davide disagreed. When the Constitution used the words "right to a balanced and healthful ecology," it intended for those words to be actionable in court. "The complaint focuses on one specific fundamental legal right — the right to a balanced and healthful ecology which, for the first time in our nation's constitutional history, is solemnly incorporated in the fundamental law."[133] The mere fact, he said, that the right was included in the directive clause rather than as part of the more traditional Bill of Rights does not make it any less enforceable.

> While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation — aptly and fittingly stressed by the petitioners — the advancement of which may even be said to predate all governments and constitutions.[134]

Davide explained that the enforcement of a "right to a balanced and healthful ecology" cannot be a "political question."

> Policy formulation or determination by the executive or legislative branches of Government is not squarely put in issue. What is principally involved is the enforcement of a right vis-a-vis policies already formulated and expressed in legislation. It must, nonetheless, be emphasized that the political question doctrine is no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable shield that protects executive and legislative actions from judicial inquiry or review.[135]

C. CLEAR-CUT AND POSITIVISTIC TREATMENT OF HIGHLY POLITICAL CASES. APPLYING THE LETTER OF LAW WHILE HARKENING "THE SPIRIT THAT GIVETH LIFE". THE PIRMA ATTEMPT TO LIFT TERM-LIMITS IN THE CONSTITUTION. THE QUINTESSENTIAL DAVIDE *PONENCIA* IN PIRMA CASES.

The quintessential Davide *ponencia* is his decision in the PIRMA cases, as it were, meeting head-on the Holmesian challenge to judges to lay bare their social and ideological commitments. In 1997, toward the end of the term of President Fidel V. Ramos, there was suddenly a supposed clamor to change the Constitution and lift term-limits for elective officials, to include not surprisingly lifting the ban on the re-election of the President and thus enabling a sitting President to remain in Malacanang.

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[132] *Ibid.*
[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*

The Constitution had incorporated "people power" by providing for a "direct people's initiative" to propose or reject laws, recall local government officials, or propose amendments in the Constitution. The Congress implemented these clauses through the Initiative and Referendum Law. The Court, speaking through then Associate Justice Davide, rejected the two attempts by an NGO, the People's Initiative for Reforms, Modernization and Action (PIRMA), to foist a bogus "peoples' initiative" to amend the Constitution.

In the first attempt (*PIRMA 1*),[136] the Court, through Justice Davide, stopped the COMELEC from hearing the petition because what had been filed with the COMELEC, was not the proper pleading to begin the "initiative" — it should have borne the requisite signatures but instead, merely asked the COMELEC to set up the signing centers for gathering the signatures.[137] The Court also held, though not unanimously, that the Initiative Law was "inadequate" in that it failed to provide fully for amending constitutions, in contrast to ordinary statutes.[138]

A few months later, the PIRMA group returned to the COMELEC, this time armed with almost six million signatures. The COMELEC refused to act on their petition, and PIRMA turned once more to the Supreme Court.

In *PIRMA v. COMELEC*[139] (or *PIRMA 2*), Davide called the petition a "brazen insult to the intelligence of the Members of the Court."[140] This time, he confronted the true intent of PIRMA, saw it as a threat to our newly restored democracy, and stopped PIRMA dead on its tracks.

> For this Court to now yield to petitioners' antics and stratagems is to inflict upon itself dishonor, if not shame, to allow itself to be the unwitting villain in the farce surrounding a demand, disguised as that of the people.... Never again should [this Court] allow itself to be used as a legitimizing tool for those who wish to perpetuate themselves in power...
>
> No amount of semantics may then shield [PIRMA] from the operation of the principle of *res judicata*.[141]

Justice Davide carried forth this candor on what Holmes called "considerations of social advantage,"[142] and confronted the anti-dynastic purpose of term limits.

> There can be no doubt that [term limits were meant] first, to promote equal access... to public service; and second, to discourage... concentration of political and economic power....

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[136] Defensor-Santiago v. COMELEC, 336 Phil. 848, 899 (1997).
[137] *Id.* at 899
[138] *Id.* at 880.
[139] PIRMA v. COMELEC, G.R. 129754, (September 23, 1997).
[140] *Ibid.*
[141] *Ibid.*
[142] *Ibid*

> Hence it should be clear that political dynasties thrive well in a society with a feudal socio-economic structure.... [The Constitution was] evidently concerned with the evils of this immutable linkage between political dynasties and a feudal socio-economic structure....[143]

IV. WHY JUDICIAL REVIEW IN THE PHILIPPINES TODAY NEEDS EVEN MORE TO MAINTAIN THE FAÇADE OF THE "LOGICAL FORM"

In the infamous U.S. Supreme Court decision *Plessy v. Ferguson*,[144] the majority validated the railroad practice of reserving separate coaches for whites and for blacks, saying this was merely "separate but equal." In a pained dissent, Justice John Harlan said: "Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons."[145]

In the PIRMA cases, everybody knew the sinister purpose of what purported to be a people's initiative and its potential threat to our democracy. Yet the burden fell upon Justice Davide to strike down the initiative strictly on legal grounds. In *PIRMA 1*, Justice Davide maintained "judicial reticence" about the politics behind PIRMA's sham initiative and kept to the purely legal grounds that would happily satisfy Holmes' "logical form." Indeed, in order to sustain a purely legal analysis, he had to find every possible defect in the Initiative Law implementing the "direct initiative" clauses of the Constitution — a move that many other Justices found as a "tortured reading"[146] of the law that belittled the handiwork of a co-equal branch of government. Yet it was precisely that ruling that enabled the Court in *PIRMA 2* to reject cleanly what by then was already a brazen act of political manipulation.

The Davide opinion in *PIRMA 1* used the "logical method and form that flatter our longing for certainty and for repose."[147] No language other than that of hard doctrine and plain logic could have withstood a well-engineered political momentum "cloaked in sanctimonious populist garb."[148]

By the time *PIRMA 2* came around, Justice Davide had sufficiently laid out the traditional grounds to strike down the PIRMA initiative anew, and could now make more articulate the erstwhile subtle "intuition" that is the "root and nerve of the entire proceeding."[149] This was not "counter-majoritarianism" that undermined the direct initiative clauses that codified People Power into the Constitution. Rather *PIRMA 2* merely heeded Recto's warning about the perils of "political ventriloquism" and asked whether indeed it was genuinely the people's voice being heard.

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[143] *Ibid.*
[144] Plessy v. Ferguson, 163 U.S. 537 (1896).
[145] *Id.* at 557 (Harlan J., *dissenting opinion*).
[146] Defensor-Santiago v. Comelec, *supra*, at 909-910.
[147] O.W. Holmes, *op. cit. supra* note 8 at 466.
[148] PIRMA v. COMELEC, *supra* (Kapunan J., *separate opinion*).
[149] *Ibid.*

On a larger point, the traditional deference that courts have paid to elective bodies as deputies of the sovereign — they who are blessed with the gift for a "sober second thought," of "self-scrutiny and self-correction" — commands no credence hereabouts and *PIRMA 2* sought the popular will not in the formal devices of a "direct initiative" but in the public temper expressed in rallies and protests.

Indeed, Justice Davide has consistently challenged on a similar point the power of local politicians to initiate "recall elections" of public officials. The drafters of the Constitution empowered the sovereign voter directly to "recall" an elected public official. Whereas officials can be unseated *judicially* for crimes and disqualifications, the charter said they can be ousted by the people *politically* for losing their trust and confidence. Yet Congress, in writing the implementing law, empowered as well the local officials to exercise the people's power to initiate recall.

> Indubitably, the power of recall is exclusively vested in the electorate. [If the recall can be initiated] by another body, such as the Preparatory Recall Assembly [or PRA, consisting of politicians], the exclusiveness or indivisibility of the power is necessarily impaired.... [If the recall is initiated, t]he electorate would in effect be compelled to participate in a political exercise it neither called for nor decided to have....[150]

Justice Davide was equally candid about his true misgivings: this would return the power to the politicians, they whose power direct initiatives were meant to cuff and curtail.

> [This] is subtly designed to negate, if not altogether defeat, the power of the electorate and to substitute the will of a very small group for the will of the electorate.... [I]t is far too easy, and at times politically convenient and expedient, to get a majority [of the PRA] to initiate a recall proceeding.... [This] besmirches the sanctity of the recall process.[151]

In Philippine legal discourse today, there is a gap between the formal legal debates about principles and the actual, raging, bare-knuckles contest over power and wealth.

What we have is exactly what the legal philosopher Roberto Mangabeira Unger has described as a typical circumstance of Third World democracies. There is a confusion, he says, in the people's "social imagination," a "particular incongruity between the spiritual ideals they had accepted as properly governing the life of the society and the vision of social life they in fact live out."[152]

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[150] Garcia v. COMELEC, G.R. No. 111511, October 5, 1993 (Davide J., *separate opinion*). See Socrates v. COMELEC, G.R. No. 154512, November 12, 2002 (Davide J., *dissenting opinion*).

[151] Garcia v. COMELEC, *supra*, (Davide J., *separate opinion*).

[152] ROBERTO M. UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK. A CRITICAL INTRODUCTION TO POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY 68 (1987).

> In their professed beliefs... they had embraced a liberal view of social relations as well as of governmental organization.... The official political dogmas of this ruling and possessing class enshrined the equality of right, the cult of consent, and the idea that power had to be ennobled by sentiment in the family, controlled by... legal rule in the state, and justified by voluntary agreement [in economics].
>
> But their actual social life was another story.... There they treated each other as patrons and clients and traded in favors and dependencies. There they showed their almost complete disbelief in all institutions not founded on blood, property, or power. There they acted as if a moment of personal presence were worth a thousand promises and as if any exercise of power could be tolerated so long as the veil of sentiment covered it.[153]

Our liberal democratic institutions have served for decades as a "mere façade for... unreconstructed [elites]," the classic liberal fiction that the "law, in its majestic equality, forbids rich and poor alike, to sleep under the bridges, beg in the streets and steal bread."[154] Yet these same institutions have suddenly become the "vehicle for social demands more radical than those habitually pressed on the [old] home ground of liberal democracy."[155] That was the hope that inspired the drafters of the 1987 Constitution to codify into law their vision for a caring state. But that same hope comes with the institutional and rhetorical constraints against which social activists like Chief Justice Davide must struggle.

Today in the Philippines, judges of conscience like Hilario G. Davide Jr. are called upon to exercise the power of judicial review at two different levels: first, the doctrinal/logical, which is articulate, and second, the intuitive/political, which is by and large kept subtle. In the first, they must speak and act as proper lawyers, straight-jacketed in the traditions of the craft. In the second, they live out their consciences fully, ever-careful not to stray too far from law's gray forms however radical the crimson dreams in their hearts. Hilario G. Davide Jr. has kept the faith as a social activist and has re-read the lawyer's liturgy afresh as an activist judge enmeshed in his nation's life. The lawyer's calling beckoned with universal virtues, and a noble Filipino answered.

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[153] *Ibid.*
[154] *Ibid.*
[155] *Ibid.*

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