THE PROBLEM OF STANDING*

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INTRODUCTION

Law is like a virtual machine.[1] Its parts consist of rules, principles, policies, doctrines, and other constructs that cannot be seen, touched, tasted, heard or smelled because they exist in the mind. Nevertheless, despite its mental nature, law is not without 'real world' effects. For instance, the separate personality of a corporation may be a legal fiction, but it is a fiction that facilitated the tremendous concentration of wealth that in part fuelled the Industrial Revolution.[2]

Like other machines, the law can also be dysfunctional. For example, its parts may not fit or, even if they do, the law still does not achieve the desired real world effects. During these times, it may become necessary to create new parts, modify or discard existing ones, or overhaul the law entirely. Such is the case with Philippine law of standing.

This law revolves around four concepts - *injury-in-fact*, *public right*, *transcendental importance*, and *grave abuse of discretion*. It is dysfunctional for three reasons. First, these concepts do not fit, or at least not in the manner the Supreme Court has tried to relate them. This simply means that the law is a mishmash of disparate elements which, when taken in its totality, has no rhyme, logic or reason. In other words, it is incoherent. Second, the law cannot achieve the arguably desirable real world effect of sufficiently constraining judges in their decision-making, for how can anyone be constrained by a law that no one understands. As a result, standing decisions can come out either way, which is to say that they are too arbitrary. Thus, one's standing primarily depends on who is sitting. Third, the law

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[1] *Cf.* David Gelernter, *Truth, Beauty, and the Virtual Machine*, DISCOVER, September 1997; available at http://discovermagazine.com/1997/sep/truthbeautyandth1217 (May 15, 2009). The author compared software to a virtual machine whose beauty lies in a happy marriage of simplicity and power.

[2] *E.g.* Alvin Toffler, THE THIRD WAVE, 30 (Bantam Books, 1981)

cannot achieve the arguably desirable real world effect of being a meaningful guide to the community because, again, how can the law be a guide when no one understands it.

This paper has four objectives. The first is to propose one framework which will relate the following concepts in a coherent manner – *standing, interests, rights of action, public actions, private actions, civil actions, criminal actions, legal injury, injury-in-fact, cause of action, citizen's suits, class suits* and *derivative suits*. The second is to use this framework to analyze the Philippine law of standing and propose modifications thereto so that its elements fit, but more importantly, so that the law will tend to achieve the arguably desirable real world effect of allowing the People to participate more fully in government in a manner that is very much theoretically justifiable and administratively feasible, but without undermining the republican checks against mob rule. The modifications will, among others, discard injury-in-fact, taxpayer's suits, transcendental importance, and one interpretation of the Grave Abuse of Discretion clause. The third is to address three concerns that are usually raised when discussing standing law. These are: (a) the practical concern that the courts might be swamped with actions against the executive and legislative branches, overwhelming its resources and resulting in a degradation or breakdown of the judicial system; (b) the constitutional concern that by ruling upon the validity of executive and legislative acts, the courts become effectively supreme over the executive and legislative branches with which they are supposedly co-equal under the Constitution;[3] and (c) the prudential concern that even if courts can constitutionally rule upon the validity of executive and legislative acts, they should exercise judicial self-restraint and do so only as a last resort.[4] The last objective is to test the efficacy of the modified law by applying it to some decided cases in the Philippines and the United States.[5]

It is customary to think of the law of standing in the context of the proper relationship between the courts and the other branches of government. However, it might be more evolved to think of it in the context of the proper relationship between the People and all the branches of government. This is because standing law is really about People and how

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[3] See Lujan vs. Defenders of Wildlife, 504 U.S. 555 (1992)

[4] See Valley Forge vs. Americans United, 454 U.S. 464 (1982)

[5] Since a significant portion of Philippine standing law is borrowed from the United States, the efficacy of the modified law will be tested against some landmark cases in both countries.

they want to participate in government.[6] When a private person files a case against the executive and legislative branches, what he is really trying to do is to participate in government through the medium of the courts instead of the normal political processes. On the other hand, the manner in which courts craft standing law represents their normative judgment as to what extent such participation should be allowed.

The proposed modifications to Philippine standing law will tend to have the real world effect of allowing the People to participate more fully in government. Whether this will eventually redound to a social good is both hard to predict and something each of us will have to decide for ourselves because it involves a subjective judgment based on an identification and analysis of causal factors within the Philippine context that are continuously evolving over time. Nevertheless, sometimes we have to take chances as individuals and as a community. It is not unreasonable to suppose that such fuller participation might lead to a more empowered citizenry that, in turn, might also lead to a more responsive and accountable government. Measured against the purposes for which the People ordained their Constitution – "to build a just and humane society and **establish a Government that shall embody our ideals and aspirations, promote the common good**, conserve and develop our patrimony, and **secure to ourselves and our posterity the blessings of independence and democracy** under the rule of law and a regime of truth, justice, freedom, love, equality, and peace,"[7] then such fuller participation is not bad at all.

ONE FRAMEWORK

The Philippine legal system recognizes a variety of interests that give a private person a *right of action*, i.e., the right to bring a specific case to court.[8] Typically, these interests involve legal rights and legal duties. The most familiar interest would be *legal injury* or *injury-in-law*,[9] also known in the Philippines as a *cause of action*.[10] A legal injury is an invasion of a legal right.

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[6] *Cf.* Louis L. Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033, April 1968

[7] 1987 Constitution, Preamble

[8] Blackstone's Law Dictionary, Bryan A. Garner, ed., West Group, 7th Ed. (1999)

[9] As explained in Heirs of Nala v Cabansag, G.R. No. 161188, June 13, 2008: "Injury is the legal invasion of a legal right while damage is the hurt, loss or harm which results from the injury. Thus, there can be damage without injury in those instances in which the loss or harm was not the result of a violation of a legal duty. In such cases, the consequences must be borne by the injured person alone; the law affords no remedy for damages resulting from an act which does not amount to a legal injury or wrong. These situations are often called damnum absque injuria."

[10] Rules of Court, Rule 2, Sec. 2. In Philippine American General Insurance v. Sweet Lines, G.R. No. 87434, August 5, 1992, the Supreme Court explained the relationship between a right of action and a cause of

It is irrelevant whether the person whose legal right was invaded suffered an *injury-in-fact*. It suffices that his legal right was invaded in order to give him a right of action. If he also suffered an injury-in-fact, he may be awarded actual,[11] moral,[12] temperate,[13] liquidated[14] or exemplary damages.[15] But even without an injury-in-fact, he would still be awarded nominal damages, if only to acknowledge the invasion of his legal right.[16]

A legal right may by itself, without an invasion thereof, also give a person a right of action. For instance, co-owners have a legal right to demand partition of co-owned property.[17] On this basis, co-owners are entitled to file a special civil action for partition.[18] A legal duty, when asserted against an obligor by conflicting claimants, may also give a person a right of action. On this basis, the obligor is entitled to file a special civil action for interpleader to compel the claimants to litigate their conflicting claims among themselves.[19] An uncertainty in legal rights or legal duties under an ambiguous or potentially invalid contract or law may also give a person a right of action. On this basis, a person is entitled to file an action for declaratory relief to ask for a declaration of his legal rights and duties under the contract or law.[20]

Sometimes, the recognized interest does not involve legal rights and legal duties but also power. For instance, a court may try to exercise a power it does not lawfully have, either because it has no jurisdiction or acts with grave abuse of discretion amounting to lack or excess of jurisdiction. On this basis, the party against whom the power is being asserted is entitled

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action: "It bears restating that a right of action is the right to presently enforce a cause of action, while a cause of action consists of the operative facts which give rise to such right of action. The right of action does not arise until the performance of all conditions precedent to the action and may be taken away by the running of the statute of limitations, through estoppel, or by other circumstances which do not affect the cause of action."

[11] NEW CIVIL CODE, ART. 2199

[12] NEW CIVIL CODE, ART. 2217

[13] NEW CIVIL CODE, ART. 2224

[14] NEW CIVIL CODE, ART. 2226

[15] NEW CIVIL CODE, ART. 2229

[16] NEW CIVIL CODE, ART. 2221

[17] NEW CIVIL CODE, ART. 494

[18] RULES OF COURT, RULE 69

[19] RULES OF COURT, RULE 62

[20] RULES OF COURT, RULE 63

to file a petition for *certiorari* or prohibition to set aside or prevent the unlawful exercise of that power.[21]

The above interests are *private interests* because private persons hold them in their capacity as private individuals. Opposite them are *public interests* or those that are held by persons as members of a political community. These would include an interest in disturbances of public order arising from crimes or an interest in violations of law by the government.

For clarity, while an interest may be 'public', it does not mean that it belongs to the public in some corporate capacity; it still belongs to a person but in his individual capacity as a member of the political community.[22] Moreover, even when a lot of people share a common interest, this does not necessarily mean that the interest is public.[23] For instance, if everyone co-owns a piece of property which is misappropriated by another co-owner, then the other co-owners will share a private interest based on legal injury. But the fact that they all share the interest does not make the interest any less private, because it is not the number who shares the interest but the capacity in which it is held which determines whether it is public or private.

Traditionally, the primary purpose of civil actions is to vindicate private interests. Hence, these traditional civil actions are called *private actions*. On the flipside, the primary purpose of criminal actions is to vindicate a public interest in disturbances of public order arising from crimes. Nevertheless, to have a private interest, is not to be equated with having the right to file a private action. Similarly, to have a public interest in disturbances of public order arising from crimes is not to be equated with having a right to file a criminal action. The reason is that there is a no necessary relationship between the nature of the action (civil or criminal) and who can bring it. The former depends on the purpose of the action while the latter depends on which interest the legal system will recognize. Because of this disconnect, it is entirely possible for a legal system to limit criminal actions to those in possession of a private interest or civil actions to those in possession of a public interest, or to disallow any such actions altogether.

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[21] RULES OF COURT, RULE 65.

[22] The distinction is material because public actions, which will be discussed later, should not be conflated with derivative suits. In a derivative suit, the plaintiff sues to vindicate the interest of another. A common example of a derivative suit is a stockholder action to vindicate the interest of a corporation. In a public action, the plaintiff sues to vindicate his own public interest that happens to be the same as everyone else's.

[23] The distinction is material to avoid mischaracterizing class suits as public actions.

To illustrate, if A commits a crime against B, then B has a private interest based on legal injury, while B and everyone else has a public interest in the disturbance of public order. For crimes within the jurisdiction of the Regional Trial Court, the Philippine legal system does not recognize any of these interests. Accordingly, private persons cannot file a criminal action.[24] For crimes within the jurisdiction of the Municipal Trial Court, the legal system recognizes B's private interest based on legal injury. Accordingly, only B can file a criminal action.[25] Similarly, in the crimes of concubinage and adultery, only the offended spouse can file a criminal action[26] because the legal system recognizes only their private interests.

The recognition or non-recognition of an interest is a policy choice that the actors in a legal system make. Sometimes, the actor is the political community and the policy choice is expressed in a written constitution. For instance, under the Philippine Constitution, the President may proclaim martial law in cases of invasion or rebellion when the public safety requires it.[27] Suppose that the President unlawfully declares martial law and imposes a curfew pursuant to his martial law powers. Suppose further that A is arrested for violating the curfew. Under these circumstances, A will have at least three interests. The first is a private interest arising from his arrest, as the martial law powers are being exercised against him particularly. The second is a private interest like everyone else arising from the imposition of a curfew, as the martial law powers are being exercised against him and everyone else. The third is a public interest arising from a violation by the government of the law.

This last interest has a historical context based on mankind's experience with governmental tyranny. To prevent such tyranny, there evolved the notion of the *rule of law* whose broadest interpretation is that even government must follow the law.[28] Therefore, a violation by the government of the law is equivalent to a breach of the rule of law; the public interest in violations by the government of the law is equivalent to the public interest in a breach of the rule of law. In the Philippines, this public interest

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[24] RULES OF COURT, RULE 110, SECTION 1(B). A private person has to file a criminal complaint with the executive branch which will determine whether to file a criminal action in court.

[25] *Id.*

[26] RULES OF COURT, RULE 110, SECTION 5.

[27] CONSTITUTION, ARTICLE VII, SECTION 18

[28] *See* Brian Z. Tamanaha, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY, 114-115 (Cambridge University Press, 2005).

is called a *public right.*[29] The public action to vindicate a public right is called a *citizen's suit.*

Given these three interests, the political community has made a policy choice expressed in the Constitution to give a *constitutional right of action* to any citizen to enable them to challenge the sufficiency of the factual basis of a proclamation of martial law.[30] It is not unreasonable to suppose that this right of action is based on a recognition by the political community of a public right whenever an unlawful declaration of martial law is involved.

Sometimes, the actor is a law-making body or person and the policy choice is expressed in a statute. For instance, then Philippine President Aquino, in the exercise of her law-making powers, promulgated the Administrative Code of 1987 which granted a *statutory right of action* to "any party aggrieved or adversely affected by an agency decision."[31]

Sometimes, the actors are the courts and the policy choice is expressed in decisions. As a background, the 20th century has seen the growth in the Philippines of civil actions against the executive and legislative branches filed by private persons who have none of the interests that would entitle them to bring a private action. They occupy a sort of middle ground between traditional civil actions and criminal actions because while they are still civil actions, they partake of the nature of criminal actions insofar as their primary purpose is to vindicate a public interest. Hence, they are called *public actions* or *public interest actions.* Their growth has compelled courts to make a policy choice whether to recognize other kinds of interests just to entitle private persons to bring these kinds of actions.

To illustrate the nature of this compulsion, suppose that the law prohibits public buildings from being named after living persons. Suppose further that the government unlawfully names a public building after a living person. Suppose finally that A files a civil action to challenge said unlawful act.[32] The court before which the action is brought may dismiss it because A has none of the interests that would entitle him to bring a private action.

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[29] To quote the Court in *Kilosbayan vs. Guingona*, G.R. No. 113375, May 5, 1994: "Then there is the attack on the standing of petitioners, as vindicating at most what they consider a *public right* and not protecting their rights as individuals. This is to conjure the specter of the *public right dogma* as an inhibition to parties intent on keeping public officials staying, the path of constitutionalism." Whatever the Court meant in using the term 'public right', the proposed framework treats it as functionally equivalent to the public interest in a breach of the rule of law.

[30] CONSTITUTION, ARTICLE VII, SECTION 18

[31] BOOK VII, CHAPTER 4, SECTION 25

[32] The hypothetical facts are based on the case of Miguel vs. Zulueta, GRN L-19869, April 30, 1966.

However, to dismiss the action on this basis would effectively mean that no private person will ever have the right to go to the courts to challenge said unlawful government act and others of a similar character. A court which believes in the notion that the rule of law also requires that governments can be held accountable by private persons before the courts[33] might find this result unpalatable or even dangerous. To avoid it, the court might opt to recognize new interests just to entitle private persons to bring public actions. This right of action of private persons to bring public actions is what is referred to in this paper as *standing*.[34]

MODIFYING PHILIPPINE STANDING LAW

The interests that give private persons standing.

The Philippine Supreme Court has made a policy choice to recognize the standing of private persons who are in possession of certain interests. The first of these interests is a *public right*. Probably the earliest decision in which this choice was articulated was *Severino vs. Governor General*. The Supreme Court rationalized its choice as follows:

> "[W]hen the relief is sought merely for the protection of private rights, the relator must show some personal or special interest in the subject-matter, since he is regarded as the real party in interest and his right must clearly appear. Upon the other hand, when the question is one of public right and the object of the mandamus is to **procure the enforcement of a public duty**, the people are regarded as the real party in interest, and the relator at whose instigation the proceedings are instituted need not show that he has any legal or special interest in the result, **it being sufficient to show that he is a citizen and as such interested in the execution of the laws.** [35] (Emphasis supplied)

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[33] *Cf.* Tamanaha, supra note 26, 117

[34] Standing is used in different contexts within and among different legal systems. *Cf.* Thomas A. Cromwell, Locus Standi: A Commentary on the Law of Standing in Canada, 1 (Carswell 1986). In this paper, it is considered a subset of a right of action - a right of action in public actions. In Kilosbayan v Morato, G.R. 118910, July 17, 1995, Justice Feliciano in his dissenting opinion stated that "the right of action is the right of standing to enforce a cause of action."

[35] G.R. No. 6250, August 3, 1910. Severino enunciated the public right doctrine. See also Costas v Aldanese, G.R. No. 21042, October 25, 1923, Miguel v Zulueta, G.R. No. L-19869, April 30, 1966, De La Llana v Alba, G.R. No. 57883, March 12, 1982, Tanada v Tuvera, G.R. No. 63915, April 24, 1985, Legaspi v Civil Service Commission, G.R. No. 72119, May 29, 1987, Albano v Reyes, G.R. No. 83561, July 11, 1989, Garcia v Board of Investments, G.R. No. 88637, September 7, 1989, Chavez v PEA (2002), G.R. No. 133250, July 9, 2002 and Senate v Ermita, G.R. No. 169777, April 20, 2006.

The second is the private interest based on an *injury-in-fact.* The choice was articulated in its seminal form in *Abendan vs. Llorente.*[36] One of the earliest decisions in which it was articulated in its modern form was *People vs. Vera* where the Court held that the "unchallenged rule is that the person who impugns the validity of a statute must have a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement."[37]

The recognition of injury-in-fact represents a conscious effort by the Court to uncouple the determination of standing from the merits of the case. In private actions, a plaintiff's right of action cannot be determined without going into the merits. For instance, if A alleges that B committed a tort against him, then A's right of action would depend on whether B actually committed a tort against him. Without this tort, there would be no legal injury and, hence, no right of action. The same is true for public actions based on a public right. For instance, if A alleges that the government violated the law, A's standing would depend on whether the government actually violated the law which requires going into the merits. If the government did not violate a law, then private persons do not have standing.

However, in public actions based on injury-in-fact, a plaintiff's standing can be determined without going into the merits.[38] For instance, if A alleges that the government violated the law, A's standing will only depend on whether he suffered an injury-in-fact and not whether the

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[36] G.R. No. L-4512, February 25, 1908. The decision relates to an election dispute. Court held that the "only allegation in the complaint in this action which can be claimed to show any right upon the part of this plaintiff to have the judgment in that proceeding reviewed is the allegation that he is a duly qualified elector of the municipality of Cebu. In our opinion, this fact does not give him any standing in this court to ask for the review of that judgment. There is nothing in the complaint to show whether or not he voted at the election, in question, or if he did so vote, whether he voted for Llorente, Sotto, or Timoteo de Castro."

[37] G.R. No. 45685, November 16, 1937; emphasis supplied. See also Tan v Macapagal, G.R. No. L-34161, February 29, 1972, Dumlao v COMELEC, G.R. No. 52245, January 22, 1980, De La Llana v Alba, G.R. No. 57883, March 12, 1982, NEPA v Ongpin, G.R. No. 67752, April 10, 1989, Association of Small Land Owners v Secretary, G.R. No. 78742, July 13, 1989, Garcia v Board of Investments, G.R. No. 100883, December 2, 1991, Basco v PAGCOR, G.R. No. 91649, May 14, 1991, De Guia v COMELEC, G.R. No. 1044712, May 6, 1992, Kilosbayan v Morato, G.R. No. 118910, July 17, 1995, Gonzales v Narvasa, G.R. No. 140835, August 14, 2000, Soriano v Estrada, G.R. No. 146528, February 6, 2001, AIWA v Romulo, G.R. No. 157509, January 18, 2005, Domingo v Carague, G.R. No. 161065, April 15, 2005, Pimentel v Executive Secretary, G.R. 158088, July 6, 2005, Jumamil v Cafe, G.R. No. 144579, September 21, 2005, Didipio v Gozun, G.R. No. 157882, March 30, 2006, Senate v Ermita, G.R. No. 169777, April 20, 2006 and Abaya v Ebdane, G.R. No. 167919, February 14, 2007. Some decisions also require that the injury also be redressible in order to be an injury-in-fact. Thus, in Kilusang Mayo Uno v Garcia, the Court, borrowing from a U.S. Federal Supreme Court decision,37 held that the "rule therefore requires that a party must show a personal stake in the outcome of the case or an injury to himself that can be redressed by a favorable decision so as to warrant an invocation of the court's jurisdiction and to justify the exercise of the court's remedial powers in his behalf."

[38] See Data Processing Service v Camp, 397 U.S. 150 (1970).

government actually violated the law. If a court finds that he did not suffer an injury-in-fact, then he has no standing and the action will be dismissed without going into the merits.

Public right and injury-in-fact do not fit.

One of the primary reasons why Philippine standing law is dysfunctional is because the Court recognizes injury-in-fact and a public right at the same time. This cannot logically be done since the two are fundamentally incompatible with each other. Injury-in-fact restrains courts from going into the merits to determine standing; a public right requires courts to go into the merits to determine standing. More tellingly, in a legal system where standing is based on a public right, injury-in-fact becomes irrelevant since, once the government violates the law, everyone will have standing whether or not they have suffered an injury-in-fact. On the other hand, in a legal system where standing is based on an injury-in-fact, a public right becomes irrelevant since, even if the government violates the law, no one will have standing though they have a public right unless they have also suffered an injury-in-fact. One solution for the dysfunctionality is to discard one in favor of the other. The question is which one.

Discarding injury-in-fact.

Courts have put forward a variety of explanations for recognizing injury-in-fact. According to the U.S. Federal Supreme Court in *Data Processing v Camp*, it is required by the Case or Controversy clause of the U.S. Federal Constitution to ensure that the "dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."[39] According to the Philippine Supreme Court in *Integrated Bar v Zamora*, it is required by the Case or Controversy clause of the Philippine Constitution[40] to "assure that concrete adverseness which sharpens the presentation of issues upon which the court depends for illumination of difficult constitutional questions."[41] Essentially, what both Courts are saying is that a plaintiff who suffered an injury-in-fact has a sufficient incentive to present his case in a form that can win in court, i.e., in

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[39] *Cf.* note 38

[40] ARTICLE VIII SECTION 1. Philippine case law usually refers to it as the Case *and* Controversy clause. However, it will be referred to in this paper as the Case *or* Controversy clause.

[41] *Cf.* G.R. No. 141284, August 15, 2000

a 'legal manner'.[42] Otherwise, courts will be converted into a "judicial version of college debating forums."[43]

If this is the only explanation, then there is no material difference between injury-in-fact and the public right, and it cannot be the basis for privileging one over the other. Why? Because while the sufficiency of a public right to provide such an incentive is, in the United States, a matter of theoretical assertion,[44] in the Philippines, it is an empirically verifiable fact established through ninety-nine years of experience with citizen's suits.[45]

Another explanation put forward is that the courts must exercise judicial self-restraint by going into the merits only as a last resort in order to avoid ruling upon the validity of acts of the other co-equal branches of government. As stated in *Data Processing vs. Camp*, "problems of standing, as resolved by this Court for its own governance, have involved a 'rule of self-restraint.'"[46] The rationale for judicial self-restraint was explained by the U.S. Federal Supreme Court in *Valley Forge vs. Americans United*:

> The exercise of the judicial power also affects relationships between the coequal arms of the National Government. The effect is, of course, most vivid when a federal court declares unconstitutional an act of the Legislative or Executive Branch. While the exercise of that "ultimate and supreme function," (Chicago & Grand Trunk R. Co. v. Wellman, supra, at 345), is a formidable means of vindicating individual rights, when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of the federal courts in performing that role. While the propriety of such action by a federal court has been recognized since [454 U.S. 464, 474] Marbury v. Madison, 1 Cranch 137 (1803), it has been recognized as a **tool of last resort** on the part of the federal judiciary throughout its nearly 200 years of existence:
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> "[R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise **self-restraint** in the utilization of our

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[42] *See* Jaffe, supra note 6. This interpretation of the Case or Controversy clause is the reason why a citizen's general interest in his government is not considered sufficient to give him standing. While everyone may or ought to be, in a layman's sense 'interested' in their government, it is the violation of the law by the government which gives him an interest in the legal sense sufficient for standing purposes.

[43] *Supra* note 4

[44] *E.g.* Jaffe, *supra* note 6

[45] *See* cases in note 35

[46] *Supra* note 38

> power to negative the actions of the other branches." United States v. Richardson, 418 U.S., at 188 (POWELL, J., concurring).[47]

Standing and judicial self-restraint are two different things although this may not always be apparent. Standing is one of the requirements of the Case or Controversy clause[48] while judicial self-restraint is a matter of judicial governance. As explained in *Barrows vs. Jackson*:

> **The requirement of standing is often used to describe the constitutional limitation on the jurisdiction of this Court to "cases" and "controversies."** See Coleman v. Miller, 307 U.S. 433, 464 (concurring opinion). **Apart from the jurisdictional requirement, this Court has developed a complementary rule of self-restraint for its own governance (not always clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others.** See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 - 348 (concurring opinion). **The common thread underlying both requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation.[49]**

Public actions based on an injury-in-fact hit two birds with one stone. While public actions based on an injury-in-fact or a public right both incentivize plaintiffs to present their case in a legal manner, it is the former alone which allows the courts to determine standing without going into the merits, thus allowing courts to pass upon the validity of acts of the other co-equal branches of government only as a last resort.

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[47] *Supra* note 4; emphasis supplied

[48] The Case or Controversy clause also requires that the case is, among others, ripe for adjudication, is not moot, does not ask the court to render advisory opinions or settle political questions. While standing focuses on the plaintiff, these other requirements focus on the issues. As explained in Flast vs. Cohen, 392 U.S. 83 (1968): "Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine . . . Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action . . . The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated . . . Thus, a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question."

[49] 346 U.S. 249 (1953)

Nevertheless, while the propriety of judicial self-restraint as a matter of principle is not denied, it is doubtful whether the particular kind of self-restraint advocated by the Philippine Supreme Court can stand in light of the express provisions of the Philippine Constitution which makes it the *duty* of the courts 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."[50] The cited constitutional provision actually consists of two parts – the Case or Controversy clause and the Grave Abuse of Discretion clause. The Case or Controversy clause requires that a plaintiff in a public action have standing. As explained in *Sanlakas vs Reyes*:

> These provisions have not changed the traditional rule that only real parties in interest or those with **standing**, as the case may be, may invoke the judicial power. The jurisdiction of this Court, even in cases involving constitutional questions, is limited by **the "case and controversy" requirement** of Art. VIII, §5. **This requirement lies at the very heart of the judicial function**. It is what differentiates decision-making in the courts from decision-making in the political departments of the government and bars the bringing of suits by just any party.[51]

In turn, the Grave Abuse of Discretion clause makes it the duty of the courts to determine whether any branch of the government has committed a grave abuse of discretion. As held in *Tanada vs. Angara*:

> The jurisdiction of this Court to adjudicate the matters raised in the petition is clearly set out in the 1987 Constitution, as follows: "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." **The foregoing text emphasizes the judicial department's duty and power to strike down grave abuse of discretion on the part of any branch or instrumentality, of government including Congress**. It is an innovation in our political law. As explained by former Chief Justice Roberto Concepcion, "the judiciary is the final arbiter on the question of whether or not a branch of government or any of its officials has acted without jurisdiction or in excess of jurisdiction or so capriciously, as to constitute an abuse of discretion amounting to excess of jurisdiction. **This is not only a judicial**

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[50] Constitution, Article VIII, Section 1

[51] G.R. Nos. 159085, 159103, 159185, 159196, February 3, 2004; emphasis supplied

> **power but a duty to pass judgment on matters of this nature.**" As this Court has repeatedly and firmly emphasized in many cases, it will not shirk, digress from or abandon its sacred duty and authority to uphold the Constitution in matters that involve grave abuse of discretion brought before it in appropriate cases, committed by any officer, agency, instrumentality or department of the government.[52]

The Grave Abuse of Discretion clause and the Case or Controversy clause can be related in either of two ways. First, the former can be construed as an exception to the latter. This simply means that courts have the duty to determine whether the various branches of government committed a grave abuse of discretion even though the plaintiff does not have standing. Second, the former can be construed to be an extension of the latter. This simply means that courts have the duty to determine whether the various branches of government committed a grave abuse of discretion provided that the plaintiff has standing.

If we take the first construction to be correct, then courts cannot restrain themselves from going into the merits regardless of whether the plaintiff suffered an injury-in-fact since it is their constitutional duty to determine whether the various branches of government committed a grave abuse of discretion. If we take the second construction to be correct, then courts still cannot restrain themselves from going into the merits even if the plaintiff did not suffer an injury-in-fact. Why? Because a plaintiff who did not suffer an injury-in-fact may still have standing based on a public right.[53] But since the existence of a public right cannot be determined without going into the merits, then courts have no choice but to do so. Thus, either way construed, the Case or Controversy and Grave Abuse of Discretion clauses will always require the courts to go into the merits. Therefore, injury-in-fact, insofar as it restrains courts from doing so, will have to be discarded for being arguably unconstitutional.

Discarding taxpayer's suits.

A taxpayer's suit is an action filed by a taxpayer to challenge an unlawful disbursement of funds raised by taxation. In *Frothingham vs. Mellon*, the U.S. Federal Supreme Court held that a taxpayer has no standing to

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[52] G.R. No. 118295, May 2, 1997; emphasis supplied

[53] Recall that the Philippine's ninety-nine years of experience with citizen's suits have empirically established that a public right is sufficient to incentivize plaintiffs to present their cases in a legal manner, which is all that is required for standing under the Case or Controversy clause.

make such a challenge because "[t]he relation of a taxpayer of the United States to the federal government is very different. His interest in the moneys of the treasury- partly realized from taxation and partly from other sources- is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, (is) so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity."[54]

In *Pascual vs. Secretary*,[55] the Philippine Supreme Court ruled differently. It held that *Frothingham* cannot apply in the Philippines because the relation between a Filipino taxpayer and the national government is not the same as the relation between an American taxpayer and the Federal Government.

Despite the difference in rulings, both Courts appear to have applied a common criterion to determine a taxpayer's standing – injury-in-fact. This is because a taxpayer suffers economic damage when money paid by him to the government to be used for lawful purposes is used in an unlawful way. To recall, injury-in-fact requires that the injury be personal, substantial and direct.[56] Although *Frothingham* did not consider a taxpayer's economic damage as sufficiently personal, substantial and direct as to constitute an injury-in-fact, *Pascual* did so. Accordingly, a taxpayer's suit can be said to be a subset of those public actions that require a showing of injury-in-fact for standing purposes.

Since this paper proposes discarding injury-in-fact, it necessarily proposes discarding these public actions, including taxpayer's suits. This does not mean that taxpayers can no longer challenge an unlawful disbursement of funds raised by taxation. What it means is that they will have to do so by filing a citizen's suit.

The Grave Abuse of Discretion clause; discarding one interpretation.

In *Kapatiran vs. Tan*, the Supreme Court held:

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[54] 262 U.S. 447 (1923)

[55] G.R. L-10405, December 29, 1960. See also PHILCONSA v Mathay, G.R. No. L-25554, October 4, 1966, Tan v Macapagal, G.R. No. L-34161, February 29, 1972, Dumlao v COMELEC, G.R. No. L-52245, January 22, 1980, De La Llana v Alba, G.R. No. 57883, March 12, 1982, Demetria v Alba, G.R. No. L-71977, February 27, 1987, Macalintal v COMELEC, G.R. 157013, July 10, 2003, Information Technology v COMELEC, G.R. No. 159139, January 13, 2004, Constantino v Cuisia, G.R. No. 106064, October 13, 2005, and Abaya v Ebdane, G.R. No. 167919, February 14, 2007.

[56] See note 37

> "Objections to taxpayers' suit for lack of sufficient personality standing, or interest are, however, in the main procedural matters. Considering the importance to the public of the cases at bar, and **in keeping with the Court's duty, under the 1987 Constitution, to determine whether or not the other branches of government have kept themselves within the limits of the Constitution and the laws and that they have not abused the discretion given to them,** the Court has brushed aside technicalities of procedure and has taken cognizance of these petitions."[57]

Essentially, the Court interpreted the Grave Abuse of Discretion clause as an exception to the Case and Controversy clause. This means that courts have the duty to decide an action to determine if the government committed a grave abuse of discretion even though the plaintiff has no standing. However, the Grave Abuse of Discretion clause was never intended to be such an exception. As held in *Sanlakas vs. Reyes*:

> "These provisions have not changed the traditional rule that only real parties in interest or those with standing, as the case may be, may invoke the judicial power. The jurisdiction of this Court, even in cases involving constitutional questions, is limited by the "case and controversy" requirement of Art. VIII, §5. This requirement lies at the very heart of the judicial function. It is what differentiates decision-making in the courts from decision-making in the political departments of the government and bars the bringing of suits by just any party."[58]

Instead, the clause was intended to allow courts to pass upon political questions. As explained in *Oposa vs. Factoran*:

> "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. The second paragraph of section 1, Article VIII of the Constitution states that: "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." Commenting on this provision in his book, Philippine Political Law, Mr. Justice Isagani A. Cruz, a distinguished member of this Court,

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[57] G.R. L-81311, June 30, 1988; emphasis supplied
[58] Supra note 57

> says: "The first part of the authority represents the traditional concept of judicial power, involving the settlement of conflicting rights as conferred by law. The second part of the authority represents a broadening of judicial power to enable the courts of justice to review what was before forbidden territory, to wit, the discretion of the political departments of the government. As worded, the new provision vests in the judiciary, and particularly the Supreme Court, the power to rule upon even the wisdom of the decisions of the executive and the legislature and to declare their acts invalid for lack or excess of jurisdiction because tainted with grave abuse of discretion..."[59]

This was a response to the inability of courts during the Marcos years to strike down abuses of power because they were precluded from passing upon such questions under the previous Constitutions. As explained in *Marcos vs. Manglapus*:

> "The framers of the Constitution believed that the free use of the political question doctrine allowed the Court during the Marcos years to fall back on prudence, institutional difficulties, complexity of issues, momentousness of consequences or a fear that it was extravagantly extending judicial power in the cases where it refused to examine and strike down an exercise of authoritarian power. Parenthetically, at least two of the respondents and their counsel were among the most vigorous critics of Mr. Marcos (the main petitioner) and his use of the political question doctrine. The Constitution was accordingly amended. We are now precluded by its mandate from refusing to invalidate a political use of power through a convenient resort to the political question doctrine. We are compelled to decide what would have been non-justiceable under our decisions interpreting earlier fundamental charters."[60]

For these reasons, the *Kapatiran* interpretation should be discarded. The Grave Abuse of Discretion clause is not an exception to, but an extension of the Case or Controversy clause. This simply means that courts have the duty to determine whether the various branches of government committed a grave abuse of discretion provided that the plaintiff has the standing required by the Case or Controversy clause.

Discarding transcendental importance.

Transcendental importance is a concept invented by the courts to allow them to decide a case even though the plaintiff has no standing,

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[59] G.R. No. 101083, July 30, 1993; emphasis supplied

[60] G.R. No. 88211, September 15, 1989; emphasis supplied

provided that the issues raised are, in their estimation, of transcendental importance. As held in *Araneta vs. Dinglasan*:

> "[W]e will pass up the objection to the personality or sufficiency of interest of the petitioners . . No practical benefit can be gained from a discussion of these procedural matters, since the decision in the cases wherein the petitioners' cause of action or the propriety of the procedure followed is not in dispute, will be controlling authority on the others. Above all, the transcendental importance to the public of these cases demands that they be settled promptly and definitely, brushing aside, if we must, technicalities of procedure.[61]"

Transcendental importance should be discarded for being arguably unconstitutional. As already discussed, the Case or Controversy clause requires that a plaintiff in a public action must have standing. In the words of the Court, "this requirement lies at the very heart of the judicial function. It is what differentiates decision-making in the political departments of the government and bars the bringing of suits by just any party."[62] Thus, courts have no power to decide cases filed by plaintiffs without standing.

5 basic rules.

Having discarded injury-in-fact, taxpayer's suits and transcendental importance leaves us with only a public right and grave abuse of discretion to serve as foundations for a modified law on standing. However, in order for this law to be workable, these elements will have to be fitted together and this will be done using five basic rules.

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[61] G.R. L-2044, August 26, 1949. See also Barredo v COMELEC, G.R. L-3055-3056, August 26, 1949, Kapatiran v Tan, G.R. L-81311, June 30, 1988, Association of Small Land Owners v Secretary, G.R. No. 78742, July 13, 1989, Bugnay v Development Corporation, G.R. No. 79983, August 10, 1989, Basco v PAGCOR, G.R. No. 91649, May 14, 1991, Osmena v COMELEC, G.R. No. 100318, July 30, 1991, De Guia v COMELEC, G.R. No. 1044712, May 6, 1992, Tatad v Secretary, G.R. 124360, November 5, 1997, Bayan v Zamora, G.R. 138570, October 10, 2000, Del Mar v PAGCOR, G.R. 138298, November 29, 2000, Lim v Executive Secretary, G.R. 151445, April 11, 2002, Macalintal v COMELEC, G.R. 157013, July 10, 2003, Information Technology v COMELEC, G.R. No. 159139, January 3, 2004, Jaworski v Philippine Gaming Corporation, G.R. No. 144463, January 14, 2004, Velarde v SJS, G.R. No. 159357, April 28, 2004, Disomangcop v Secretary, G.R. No. 149848, November 25, 2004, AIWA v Romulo, G.R. No. 157509, January 18, 2005, Jumamil v Cafe, G.R. No. 144579, September 21, 2005, Didipio v Gozun, G.R. No. 157882, March 30, 2006 and Abaya v Ebdane, G.R. No. 167919, February 14, 2007.

[62] Supra note 51

First, every violation by the government of the law creates a public right. Second, a plaintiff must have a public right in order to have standing to file a public action. Third, a plaintiff is only entitled to file a public action if there is no private action available arising from the violation by the government of the law. This simply means that if there is someone who has a private action arising from the violation by the government of the law, then he and only he can file the action, which action must be a private action and not a public one. For example, if the government commits a tort against A, then A has a private interest based on legal injury and a public right together with everyone else based on the tort committed by the government. However, it is only A who can file an action, which action must be a private one. Fourth, consistent with Rule 65, the public action should usually take the form of a petition for *certiorari* or prohibition if the challenged government act is discretionary, or a petition for mandamus if it is ministerial. Fifth, courts have a constitutional duty under the Case or Controversy clause and the Grave Abuse of Discretion clause to go into the merits. However, going into the merits is a matter of degree. Courts are not constitutionally bound to give a full-blown decision either affirming or negating the acts of the other branches of government. All that is required under Rule 65 is for the courts to make a *prima facie* determination if the petition is "patently without merit, prosecuted manifestly for delay, or that the questions raised therein are too insubstantial to require consideration".[63] If so, the petition should not be given due course and should be summarily dismissed. This summary dismissal should not be taken as an affirmation of the challenged act but of the insufficiency of the allegations in the petition, akin to a 'failure to state a cause of action' dismissal in private actions.[64] Thus, courts can still exercise judicial self-restraint by affirming or negating the actions of the other co-equal branches only as a last resort.

ADDRESSING THREE CONCERNS

There are three concerns that are usually raised when discussing standing law. First is the practical concern that the judiciary might be swamped with public actions against the executive and legislative departments, overwhelming its resources and resulting in a degradation or breakdown of the judicial system. In reality, this is a concern that is not unique to public actions but to private actions, as well. Anyone can swamp the courts by instituting baseless suits against anybody. In private actions, this behavior is disincentivized by, among others, the effort it takes to

[63] Rule 65 Section 8
[64] Rule 16 Section 1(g)

prosecute the case, the knowledge that it will probably be dismissed anyway, the payment of filing fees, and making the plaintiff pay damages to the defendant. This experience with private actions suggests that one possible way to address the concern is to adopt similar mechanisms in public actions so that plaintiffs who file baseless suits will internalize its costs.

Another way is to create *standing courts* in order to centralize public actions in certain courts, in the same way that the Court has designated special courts for other types of cases, e.g., environmental courts[65] and small claims courts.[66] Courts may also require plaintiffs in public actions to give sufficient notice to the whole world so that everyone who is so inclined may intervene and participate in the action. The purpose of these two measures is to prevent public actions from being filed in and decided by courts all over the Philippines, even though they involve substantially the same questions of law and/or fact.

The second concern is the constitutional problem that by passing upon executive and legislative acts, the judiciary becomes supreme over the other co-equal branches of government. Suffice it to state that, when courts negate the acts of the other co-equal branches of government, it is not exercising supremacy but merely performing their constitutional duty. This was already explained more than half a century ago in *Angara vs. Electoral Commission*:

> "The Constitution is a definition of the powers of government. Who is to determine the nature, scope and extent of such powers? The Constitution itself has provided for the instrumentality of the judiciary as the rational way. And when 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 to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them. This is in truth all that is involved in what is termed "judicial supremacy" which properly is the power of judicial review under the Constitution."[67]

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[65] Supreme Court Administrative Order No. 23-2008

[66] Supreme Court Administrative Order No. 141-2008

[67] G.R. No. 45081, July 15, 1936

Third is the prudential concern that even if courts can constitutionally rule upon the validity of executive and legislative acts, they should exercise judicial self-restraint by doing so only as a last resort. As already explained, under Rule 65, courts can go into the merits and still exercise judicial self-restraint by not affirming or negating the acts of the other co-equal branches of government.

APPLICATIONS

Public vs. private actions.

Kilosbayan vs. Morato is a petition for prohibition to prevent the government and a private corporation from carrying out a contract to operate of an on-line lottery system. The contract was tendered out and awarded to the private corporation. Allegedly, the contract violates a law prohibiting the privatization of such operation. The Court held that since the action was for annulment of a contract, it is only the contracting parties who can file the case since it is only they who can suffer legal injury. Essentially, the Court was saying that a private action, not a public one, was proper. To quote:

> "Thus, while constitutional policies are invoked, this case involves basically questions of contract law. More specifically, **the question is whether petitioners have legal right which has been violated**.
>
> **In action for annulment of contracts such as this action, the real parties are those who are parties to the agreement** or are bound either principally or subsidiarily or are prejudiced in their rights with respect to one of the contracting parties and can show the detriment which would positively result to them from the contract even though they did no intervene in it (Ibañez v. Hongkong & Shanghai Bank, 22 Phil. 572 (1912),), or who claim a right to take part in a public bidding but have been illegally excluded from it. (See De la Lara Co., Inc. v. Secretary of Public Works and Communications, G.R. No. L-13460, Nov. 28, 1958)".[68]

The analysis in *Kilosbayan* is upside down since it assumes as true what is being challenged. This is to say that it takes as its premise the existence of a right-duty correlative between the parties to the government contract when such right-duty correlative cannot exist if the government

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[68] G.R. 118910, July 17, 1995; emphasis supplied

contract is void,[69] which is what the petitioners are asserting. Without such right duty-correlative, the parties could not have suffered legal injury and would therefore have no right of action to challenge the contract.[70] Therefore, under the 3rd rule, a public action and not a private one would be proper. Hence, what the Court should have done under the 5th rule is to make a *prima facie* determination if the government committed a grave abuse of discretion. If so, then a public action is proper and the petition should have been given due course.

Chavez vs. PCGG delved into an action to compel the government to make public all negotiations and agreement relating to the recovery of the Marcos wealth. The Court held that the person who instituted the action had standing based on his constitutional right to information. Thus:

> "The instant petition is anchored on the right of the people to information and access to official records, documents and papers — a right guaranteed under Section 7, Article III of the 1987 Constitution. Petitioner, a former solicitor general, is a Filipino citizen. Because of the satisfaction of the two basic requisites laid down by decisional law to sustain petitioner's legal standing, i.e. (1) the enforcement of a public right (2) espoused by a Filipino citizen, we rule that the petition at bar should be allowed."[71]

The Court treated *Chavez* as a public action and held that the petitioner had standing based on a public right. However, following the 3rd rule, it would be a private action since the petitioner was asserting a legal injury arising from the breach by the government of his constitutional right to information. In any event, whether treated as a public or private action, the result would have been the same because the government had the legal duty to provide the information. Nevertheless, the distinction is still material since it precludes everyone from having standing to institute a public action just because the government refused to give information to someone who requested it. In such instances, it is only the person who was refused the information who can file the private action because it is only he who suffered legal injury.

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[69] NEW CIVIL CODE, ARTICLE 1409

[70] The New Civil Code allows, in certain circumstances, the parties to a void contract to recover from the other party what they have given under the contract. However, this is a right-duty correlative arising from law and not from the contract. *See* NEW CIVIL CODE, ARTICLES 1411, 1412

[71] G.R. No. 130716, December 9, 1998

Linda R.S. vs. Richard D. decided by the U.S. Federal Supreme Court involved a Texas statute criminally penalizing fathers for failure to provide support to their children. The district attorney interpreted the statute as penalizing only fathers of legitimate children, and thus refused to file actions against fathers of illegitimate children. A mother of an illegitimate child whose father failed to give support filed an action to challenge this interpretation alleging that it discriminated against illegitimate children in violation of the Equal Protection clause of the Constitution. The Federal Supreme Court dismissed the action because the mother did not suffer an injury-in-fact. She failed to show that the failure of the district attorney to prosecute the father is the direct cause of his failure to give support. Thus:

> "Applying this test to the facts of this case, we hold that, in the unique context of a challenge to a criminal statute, appellant has failed to allege a sufficient nexus [410 U.S. 614, 618] between her injury and the government action which she attacks to justify judicial intervention. To be sure, appellant no doubt suffered an injury stemming from the failure of her child's father to contribute support payments. But the bare existence of an abstract injury meets only the first half of the standing requirement. "The party who invokes [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as the result of [a statute's] enforcement." Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) (emphasis added). See also Ex parte Levitt, 302 U.S. 633, 634 (1937). As this Court made plain in Flast v. Cohen, supra, a plaintiff must show "a logical nexus between the status asserted and the claim sought to be adjudicated. . . . Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power." Id., at 102. [72]

Like *Chavez*, the Court treated *Linda* as a public action and denied plaintiff's standing for lack of injury-in-fact. However, following the 3rd rule, it would be a private action since the petitioner was asserting a legal injury arising from the breach by the government of her constitutional right to equal protection. But even treated as a private action, the action would still be dismissed for lack of legal injury because the mother did not establish that the failure of the district attorney to prosecute the father is the direct cause of the failure of the father to give support to her. This is similar to a dismissal of a tort case if a plaintiff fails to establish that the act of the defendant is the proximate cause of his damage.

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[72] 410 U.S. 614 (1973)

Lujan vs. Defenders of Wildlife involved a law requiring that any action authorized, funded, or carried out by federal agencies is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. The law was initially interpreted to also apply to actions carried out in foreign countries. However, it was subsequently interpreted to apply only to actions in the United States and on the high seas. Such interpretation was challenged by the plaintiff. The U.S. Federal Supreme Court dismissed the action because the plaintiffs had no standing because they did not suffer an injury-in-fact. It held that:

> "Respondents' other theories are called, alas, the "animal nexus" approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the "vocational nexus" approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of Agency for International Development did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason. Standing is not "an ingenious academic exercise in the conceivable," . . . United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688 (1973), but, as we have said, requires, at the summary judgment stage, a factual showing of perceptible harm. It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible - though it goes to the outermost limit of plausibility - to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that [504 U.S. 555, 567] might have been the subject of his interest will no longer exist, see Japan Whaling Assn. v. American Cetacean Society, 478 U.S. 221, 231 , n. (1986). It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection. [504 U.S. 555, 568]"[73]

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[73] *Supra* note 3

Following the 3rd rule, *Lujan* would properly be a public action since no one had a private interest that can give rise to a private action. Following the 5th rule, the action could still have been summarily dismissed because the interpretation of the government agency was not a *prima facie* grave abuse of discretion, applying the *Chevron* two-step test, as follows:

> "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[74]

On the requirement that a constitutional question must be raised, as a precondition for public actions.

In *Kilosbayan vs. Morato*, the Court held that "[n]ot only is petitioners' standing a legal issue that may be determined again in this case. It is, strictly speaking, not even the issue in this case, since standing is a concept in constitutional law and here, no constitutional question is actually involved."[75] Essentially, what the Court was saying was that a proper public action requires that constitutional issues be raised.

This view is unempirical because it totally ignores the fact that the political community and the legislature have the power to provide for constitutional and statutory rights of action regardless of whether constitutional questions are raised. For instance, some of the landmark standing decisions of the United States Federal Supreme Court such as *Data Processing Service vs. Camp*,[76] *Lujan vs. Defenders of Wildlife*,[77] *Sierra Club vs. Morton*[78] and *Simon vs. Eastern*[79] do not raise constitutional questions but

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[74] Chevron v Natural Resources Defense Council, 467 U.S. 387 (1984)

[75] G.R. 118910, July 17, 1995. *See also* Anti-Graft League v San Juan, G.R. 97787, August 1, 1996, Jumamil v Cafe, G.R. No. 144579, September 21, 2005, Didipidio v Gozun, G.R. No. 157882, March 30, 2006 and Abaya v Ebdane, G.R. No. 167919, February 14, 2007.

[76] *Supra* note 38

[77] *Supra* note 3

[78] 405 U.S. 727 (1972)

involve a statutory right of action under the U.S. Administrative Procedure Act. While *Kilosbayan* is correct in saying that standing is a concept in constitutional law, this is true not only because it streamlines the requirement for raising constitutional issues. *Standing* is a constitutional law concept because it involves an interpretation of the Case and Controversy clause, among other essential and contentious provisions in the Constitution.

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[79] 426 U.S. 26 (1976)

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