THE COURT AND THE RIGHT TO ENVIRONMENT: DUTY, POWERS, AND LIMITS*

Troy John G. Butac[**]
Katrina Kaye N. Estrada[***]
Amer M. Madcasim, Jr.[****]
Ray Lemuel D. Molabola[*****]

I. INTRODUCTION

The 1987 Constitution introduced new developments in relation to the powers of the Judiciary: the expanded scope of judicial review[1] and the Supreme Court's rule-making power.[2] The deliberations of the 1986 Constitutional Commission reveal that the expansion of the Judiciary's powers is a response to the country's experience during martial law,[3] where political departments—most notably, the Executive—abused the limitations of judicial power to frustrate the enforcement of constitutional rights, in effect curtailing judicial independence.

In introducing these two powers, the new Constitution has undoubtedly created an "even stronger and more independent Judiciary."[4] First, the political question doctrine, which significantly limited the courts' power of judicial review, is no longer an "insurmountable obstacle" or "impenetrable shield that protects executive and legislative actions from

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** Editorial Intern, PHILIPPINE LAW JOURNAL (Volume 93); J.D., University of the Philippines (2023, expected); B.A. Political Science, *magna cum laude*, University of the Philippines (2019).

*** Editorial Intern, PHILIPPINE LAW JOURNAL (Volume 93); J.D., University of the Philippines (2023, expected); B.A. Philosophy, *magna cum laude*, University of the Philippines (2019).

**** Editor, PHILIPPINE LAW JOURNAL (Volume 93); J.D., University of the Philippines (2022, expected); M.A. Political Science, University of the Philippines (2018); B.A. Political Science, *magna cum laude*, University of the Philippines (2017).

***** Editorial Intern, PHILIPPINE LAW JOURNAL (Volume 93); J.D., University of the Philippines (2020); B.S. Statistics, University of the Philippines (2014).

1 CONST. art. VIII, § 1.

2 Art. VIII, § 5(5).

3 I RECORD CONST. COMM'N 434-36 (July 10, 1986).

4 Echegaray v. Sec'y of Justice [hereinafter "Echegaray"], G.R. No. 132601, 301 SCRA 96, 111, Jan. 19, 1999.

judicial inquiry."[5] Instead, courts are now expressly empowered to determine whether any branch of the government, including the political departments, committed grave abuse of discretion. [6] Similarly, the Constitution strengthened the Court's rule-making power by broadening its scope to include the "protection and enforcement of constitutional rights."[7] For the first time in the country's constitutional history, the Court's rule-making power is no longer limited to "pleading, practice, and procedure," and the admission to the practice of law.

In 1993, the Court, in *Oposa v. Factoran*,[8] used its expanded power of judicial review to breathe life into the constitutional right to a balanced and healthful ecology. Once understood as a mere constitutional policy, the said right is now recognized as actionable and self-executory.[9] In 2010, 27 years after *Oposa*, the Court exercised its expanded rule-making power to promulgate the Rules of Procedure for Environmental Cases ("RPEC").[10] The RPEC introduced newly-crafted remedies, such as the writs of *kalikasan* and continuing mandamus, and included guiding principles that directly address the peculiarities of environmental cases (e.g. relaxed standing and the precautionary principle).

This Note reviews and assesses how the Court has exercised these two powers in the context of the right to a balanced and healthful ecology. To do this, it explains the nature of these powers, as well as their application to recent environmental cases. Part II introduces this theory using the case of *Oposa*, which recognized the self-executory nature of the right to a balanced and healthful ecology, which in turn served as the impetus for the creation of the RPEC. Parts III and IV discuss the scope and limitations of the power of judicial review and rule-making, respectively, including their application to environmental cases and the issues that may arise—and have indeed arisen—therein.

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

[6] CONST. art. VIII, § 5(5).

[7] Art. VIII, § 5(5).

[8] *Oposa*, 224 SCRA 792, 804.

[9] *Id.* at 805.

[10] A.M. No. 09-6-8-SC (2010).

II. *OPOSA* AND THE INTERPLAY OF JUDICIAL REVIEW AND RULE-MAKING

The 1993 case of *Oposa v. Factoran*[11] has been hailed as one of the most consequential cases in the recent history of the Philippine Supreme Court under the 1987 Constitution. [12] Its primary contribution—that the constitutional right to a balanced and healthful ecology is actionable and self-executory—has been cited by the Court on numerous occasions.[13]

The principal petitioners in *Oposa* were all minors who were represented and joined by their parents. They instituted a "taxpayers' class suit," praying for the Regional Trial Court (RTC) to order the respondent, the Department of Environment and Natural Resources (DENR), to refrain from accepting new applications for timber license agreements ("TLAs") and to cancel all existing TLAs. They put forward several arguments, including: *first*, that the issuance of the TLAs violated their constitutional right to a balanced and healthful ecology and their right to a sound environment; and *second*, that there was a violation of the DENR's statutory duty to "safeguard the people's right to a healthful environment," as stipulated in Section 3 of Presidential Decree (P.D.) No. 1151[14] and Section 4 of Executive Order (E.O.) No. 192.[15] The RTC denied the petition for the petitioners' failure to state a cause of action. It also agreed with the DENR that the issuance of TLAs is a "political question which properly pertains to the legislative or executive branches of Government."[16]

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[11] 224 SCRA 792.

[12] In his Separate Opinion, Justice Florentino Feliciano described the case as "one of the most important cases decided by the Court in the last few years." *See Oposa*, 224 SCRA 792, 814 (Feliciano, *J., concurring*).

[13] *See* Zabal v. Duterte, G.R. No. 238467, Feb. 12, 2019; Knights of Rizal v. DMCI Homes, Inc., G.R. No. 213948, 824 SCRA 327, Apr. 25, 2017; Arigo v. Swift, G.R. No. 206510, 735 SCRA 102, Sept. 16, 2014.

[14] Pres. Dec. No. 1151 (1979), § 3. Right to a Healthy Environment. In furtherance of these goals and policies, the Government recognizes the right of the people to a healthful environment. It shall be the duty and responsibility of each individual to contribute to the preservation and enhancement of the Philippine environment.

[15] Exec. Order No. 192 (1987), § 4. Mandate. The Department shall be the primary government agency responsible for the conservation, management, development and proper use of the country's environment and natural resources, specifically forest and grazing lands, mineral resources, including those in reservation and watershed areas, and lands of the public domain, as well as the licensing and regulation of all natural resources as may be provided for by law in order to ensure equitable sharing of the benefits derived therefrom for the welfare of the present and future generations of Filipinos.

[16] *Oposa*, 224 SCRA 792, 800.

The Court, however, held that the petition sufficiently stated a cause of action: the alleged violation and denial of their right to a balanced and healthful ecology.[17] Speaking for the Court, then Associate Justice (later Chief Justice) Hilario Davide, Jr. described the said right as a "specific fundamental legal right,"[18] which is no "less important than any of the civil and political rights."[19] The Court noted that "[s]uch a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation [...] the advancement of which may even be said to predate all governments and constitutions."[20] Moreover, citing the deliberations of the 1986 Constitutional Commission, the Court pointed out that the right to a balanced and healthful ecology also gives rise to a "correlative duty to refrain from impairing the environment."[21] This duty has likewise been enunciated and "[given] flesh"[22] in the environmental statutes cited by the petitioners.

Oposa illustrates how the Court used judicial power, particularly judicial review, in "giving life" to the right to a balanced and healthful ecology. In resolving the controversy between the parties, the Court explained that such right is "no longer merely a policy declaration,"[23] but instead, a "self-executory and actionable right, independent of specific legal rights."[24] While certain issues remain unclear, *Oposa* has undoubtedly created a precedent which binds the Court and inferior courts in resolving similar cases.[25]

However, as observed by Associate Justice Florentino Feliciano in his Separate Opinion, the Court's exercise of judicial review does not come without complications. While conceding that the said right is "fundamental," Justice Feliciano said that "it cannot be characterized as 'specific,' without doing excessive violence to language."[26] The same can be said with the environmental statutes cited by the petitioners, which were mere policy

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[17] The Court in *Oposa* also resolved other issues, such as whether the petitioners had *locus standi* in filing the petition and whether the said cancellation may violate the Non-Impairment of Contracts Clause.

[18] *Oposa*, 224 SCRA 792, 804.

[19] *Id.* at 805.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 808.

[23] Dante Gatmaytan, *The Illusion of Intergenerational Equity: Oposa v. Factoran as Pyrrhic Victory*, 15 GEO. INT'L ENVTL. L. REV. 457, 480 (2003).

[24] Antonio La Viña, *The Right to a Balanced and Healthful Ecology: The Odyssey of a Constitutional Policy*, 69 PHIL. L. J. 127, 137 (1994).

[25] What is contested is the extent of the precedent. *See* Gatmaytan, *supra* note 23; La Viña, *supra* note 24.

[26] *Oposa*, 224 SCRA 792, 815 (Feliciano, *J.*, *concurring*).

declarations.[27] Underscoring the generality of the cited provisions, Justice Feliciano further explained that pairing broadly-worded standards (such as the constitutional right to a balanced and healthful ecology) with the Court's expanded judicial review may prevent defendants from effectively defending themselves.[28] Worse, this may also "propel the Court into the uncharted ocean of social and economic policy making,"[29] which in turn may offend the traditional notion of separation of powers.

Oposa also illustrates the scope and limitations of the Court's exercise of judicial review in vitalizing the right to a balanced and healthful ecology. While the said right has been acknowledged as an actionable one, the Court cannot add or modify its substance.[30] In effect, the mere invocation of the right to a balanced and healthful ecology may be inadequate, and consequently may result in the dismissal of the case.[31] Other issues, such as legal standing and the Judiciary's lack of scientific expertise,[32] also pose serious barriers to environmental litigants.

In relation to these limitations, the Court promulgated the Rules of Procedure for Environmental Case (RPEC).[33] The RPEC not only provided more specific remedies, it also established principles unique to environmental cases (such as relaxed standing and the precautionary principle). As observed by a commentator, these new rules "recognize[ ] that the nature of environmental cases makes traditional methodologies ineffective at times[.]"[34]

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[27] *Id.* at 815-16. "It is in fact very difficult to fashion language more comprehensive in scope and generalized in character than a right to 'a balanced and healthful ecology.' The list of particular claims which can be subsumed under this rubric appears to be entirely open-ended [...] The other statements pointed out by the Court [...] all appear to be formulations of policy, as general and abstract as the constitutional statements of basic policy in Article II, Sections 16 ('the right to a balanced and healthful ecology') and 15 ('the right to health')."

[28] *Id.* at 817.

[29] *Id.* at 818. "[U]nless the legal right claimed to have been violated or disregarded is given specification in operational terms, defendants may well be unable to defend themselves intelligently and effectively."

[30] This is more commonly known as judicial legislation, which is prohibited under a system of separation of powers. *See* Silverio v. Republic [hereinafter "Silverio"], G.R. No. 174689, 537 SCRA 373, Oct. 19, 2007.

[31] *See infra,* Part III.B. It must be noted, however, that the said cases involve a petition for writ of mandamus, which requires the plaintiff to show a clear legal duty defined by law.

[32] This does not discount, however, the Court's capacity-building initiatives for judges in environmental courts. *See* Ameurfina Melencio-Herrera, *Strengthening Court Capacity on Environmental Adjudication*, 28 PHILJA JUD. J. 152 (2007).

[33] A.M. No. 09-6-8-SC (2010).

[34] Rommel Casis, *Green Rules: Gray Areas and Red Flags*, 86 PHIL. L. J. 765, 768 (2012).

The promulgation thereof was "intend[ed] to make the judicial process a partner in obtaining environmental justice."[35]

As shown in *Oposa*, two judicial powers—judicial review and rule-making—went hand in hand in giving life to the right to a balanced and healthful ecology: without recognizing the right as an actionable one, and leaving such right as a mere declaration of policy, the Court would not have been able to wield its rule-making powers in promulgating the RPEC.[36]

III. JUDICIAL REVIEW AND THE RIGHT TO A BALANCED AND HEALTHFUL ECOLOGY

A. Judicial review in the Philippines

Judicial review is commonly understood as the power of the courts to examine whether an act of the political departments is within the confines allowed by the Constitution and, if warranted, to "strike down"[37] the constitutionally infirm act.[38] In wielding its power of judicial review, a court only declares whether the political branches have "transcended" the "restrictions and limitations" placed upon it by the Constitution.[39] In theory, the Judiciary does not render judgment on the wisdom and policy considerations behind the impugned acts. As stated in *Angara v. Electoral Commission*:

> The Constitution sets forth in no uncertain language the restrictions and limitations upon governmental powers and agencies. If these restrictions and limitations are transcended it would be inconceivable if the Constitution had not provided for a mechanism by which to direct the course of government along constitutional channels, [. . .] [w]ho is to determine the nature, scope

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[35] *Id.* at 768, *citing* Leonen & Casis, The Green Rule Book: Notes and Cases on the Rules of Procedure for Environmental Cases, Environmental Laws and Provisions iv (2010) (unpublished manuscript).

[36] Contemporary examples of the Court's expanded rule-making power protect and enforces self-executory constitutional rights (e.g. right to life, liberty, and security). *See infra* Part IV.

[37] In reality, however, a court does not "strike down" a law or act, but only disregards or ignores the enactment as if it had not been enacted at all—the effect of a declaration as void *ab initio*. *See* Massachusetts v. Mellon, 262 U.S. 446, 488 (1923).

[38] Villanueva v. Jud. & Bar Council, G.R. No. 211833, 755 SCRA 182, 211, 216, Apr. 7, 2015 (Brion, *J.*, *concurring*).

[39] Angara v. Electoral Comm'n [hereinafter, "Angara"], 63 Phil. 139 (1936).

> and extent of such powers? The Constitution itself has provided for the instrumentality of the judiciary as the rational way.[40]

The concept of judicial review is founded on the twin concepts of separation of powers and checks and balances.[41] As explained in *Angara*, while each department has "exclusive cognizance of matters within its jurisdiction, and is supreme within its own sphere,"[42] the demarcation of these powers is not absolute and often unclear. It is sometimes "hard to say just where the one leaves off and the other begins."[43] For this reason, the political branches engage in an "elaborate system of checks and balances to secure coordination in the workings of the various departments of the government."[44] For the Judiciary, this is manifested in the power of judicial review, i.e. by "effectively check[ing] the other departments in the exercise of its power to determine the law, and hence to declare executive and legislative acts void if violative of the Constitution."[45] For Associate Justice Feliciano, this is the "chief, indeed the only, medium of participation – or instrument of intervention – of the [J]udiciary in that balancing operation."[46] The Court explained this further in *Angara*:

> But in the main, the Constitution has blocked out with deft strokes and in bold lines, allotment of power to the executive, the legislative and the judicial departments of the government. The overlapping and interlacing of functions and duties between the several departments, however, sometimes makes it hard to say just where the one leaves off and the other begins. *In times of social disquietude or political excitement, the great landmarks of the Constitution are apt to be forgotten or marred, if not entirely obliterated. In cases of conflict, the judicial department is the only constitutional organ which can be called upon to determine the proper allocation of powers between the several departments and among the integral or constituent units thereof.*[47]

While this "moderating power" is "inherent in all courts as a necessary consequence of the judicial power itself,"[48] the 1987 Constitution

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[40] *Id.* at 157-58.

[41] *Id.*

[42] *Id.* at 156.

[43] *Id.* at 157.

[44] *Id.* at 156.

[45] *Id.* at 156-57.

[46] Francisco v. Nagmamalasakit na mga Mananganggol ng mga Manggagawang Pilipino, Inc. [hereinafter, "Francisco"], G.R. No. 160261, 415 SCRA 44, 124, Nov. 10, 2003, *citing* Florentino Feliciano, *The Application of Law: Some Recurring Aspects of The Process of Judicial Review and Decision Making,* 37 AM. J. JUR. 23 (1992).

[47] *Angara*, 63 Phil. 139, 157. (Emphasis supplied.)

[48] *Francisco*, 415 SCRA 44, 122. (Citations omitted.)

expressly includes judicial review among the Judiciary's expanded powers. Not only does it have the power to "settle actual controversies involving rights which are legally demandable and enforceable," the Judiciary also has the power 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."[49] The second clause is often referred to as the "expanded *certiorari* jurisdiction."[50] Former Chief Justice Roberto Concepcion, one of the drafters of the Constitution, explained that

> [T]his is actually a product of our experience during martial law [wherein] the role of the judiciary during the deposed regime was marred considerably by the circumstance that in a number of cases against the government, which then had no legal defense at all, the solicitor general set up the defense of political questions and got away with it.[51]

It is also worth noting that judicial review is a duty.[52] As explained by the Court in *Francisco v. House of Representatives*, the "exercise of judicial restraint over justiciable issues is not an option before this Court. [...] In the august words of *amicus curiae* Father Joaquin Bernas, 'jurisdiction is not just a power; it is a solemn duty which may not be renounced. To renounce it, even if it is vexatious, would be a dereliction of duty.'"[53]

Nevertheless, the Court's exercise of judicial review is not unlimited or boundless. The power of judicial review is inherently limited by the following requisites: (1) there must be an actual case or controversy calling for the exercise of judicial power;[54] (2) the person challenging the act must have *locus standi* or "standing" to challenge, i.e. he must have a personal and substantial interest in the case such that he has sustained, or will sustain, direct

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[49] CONST. art. VIII, § 1.

[50] *Id.*

[51] *Francisco*, 415 SCRA 44, 124-26, *citing* I RECORD CONST. COMM'N 434-36 (July 10, 1986).

[52] This is expressed in the provision itself, as well as in the 1986 Constitutional Commission deliberations. This is the background of paragraph 2 of Section 1, which means that the courts cannot hereafter evade the duty to settle matters of this nature by claiming that such matters constitute a political question.

[53] *Francisco*, 415 SCRA 44, 158.

[54] *See, generally,* PACU v. Sec'y of Educ., 97 Phil. 806 (1955); Mariano v. COMELEC, G.R. No. 118577, 242 SCRA 211, Mar. 7, 1995; Philippine Const. Auth. v. Phil. Gov't, G.R. No. 218406, 811 SCRA 284, Nov. 29, 2016; Lacson v. Perez, G.R. No. 147780, 357 SCRA 746, May 10, 2001; Sanlakas v. Exec. Sec'y, G.R. No. 159085, 421 SCRA 656, Feb. 3, 2004; Atlas Fertilizer v. Sec'y of Agrarian Reform, G.R. No. 93100, 274 SCRA 30, June 19, 1997.

injury as a result of its enforcement;[55] (3) the question of constitutionality must be raised at the earliest possible opportunity;[56] and (4) the issue of constitutionality must be the very *lis mota* of the case.[57]

These requisites, especially the "actual case and controversy" requirement, may make it more difficult for environmental litigants, especially if their cause of action primarily rests upon the right to a balanced and healthful ecology in general, as was the case in *Oposa*. It is in this context that the Note assesses how the Court has exercised its power of judicial review in relation to this right.

B. Application in environmental cases and its limitations

The application of judicial review in environmental cases is more straightforward in cases where a specific legal right has been provided in statute. This is in relation to Justice Feliciano's suggestion to the petitioners in *Oposa*: to invoke a right which is "cast in language of a significantly lower order of generality"[58] than mere constitutional policy, such as the right to a balanced and healthful ecology. Otherwise, the parties will face difficulty in litigation—especially the defendants who, given such lack of clarity, "may well be unable to defend themselves intelligently and effectively."[59]

As illustrated in the cases discussed in this section, the Court has mostly granted the petitioners' relief upon the successful invocation of a specific legal right. For instance, in *Metropolitan Manila Development Authority (MMDA) v. Concerned Residents of Manila Bay*,[60] the "Concerned Residents of Manila Bay" filed a complaint, praying for the lower court to order the

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[55] *See, generally, Oposa*, 224 SCRA 792; Tolentino v. COMELEC, G.R. No. 148334, 420 SCRA 438, Jan. 21, 2004; Resident Marine Mammals of the Protected Seascape Tañon Strait v. Sec'y Reyes [hereinafter "Resident Marine Mammals"], G.R. No. 180771, 756 SCRA 513, Apr. 21, 2015; Joya v. PCGG, G.R. No. 96541, 225 SCRA 568, Aug. 24, 1993; CHR Emp. Assoc. v. CHR, G.R. No. 155336, 444 SCRA 300, Nov. 25, 2004; GMA Network, Inc. v. COMELEC, G.R. No. 205357, 734 SCRA 88, Sept. 2, 2014.

[56] *See* Arceta v. Mangrobang, G.R. No. 152895, 432 SCRA 136, June 15, 2004.

[57] *See, generally,* Boy Scouts of the Phil. v. COA, G.R. No. 177131, 651 SCRA 146, June 17, 2011; Liberty Broad. Network, Inc. v. Atlocom Wireless Sys., Inc., G.R. No. 205875, 760 SCRA 625, June 30, 2015.

[58] *Oposa*, 224 SCRA 792, 817.

[59] *Id.*

[60] Metropolitan Manila Dev. Auth. v. Concerned Residents of Manila Bay [hereinafter "MMDA"], G.R. No. 171947, 574 SCRA 661, Dec. 18, 2008.

petitioners-government agencies[61] to clean, rehabilitate, and protect the Manila Bay. The respondents alleged that such duty is found in several environmental laws, such as the Ecological Solid Waste Management Act and the Philippine Environmental Code, and the constitutional right to a balanced and healthful ecology. In response, the petitioners alleged that cleaning the Manila Bay is a discretionary act; thus, the writ of mandamus does not lie. In particular, while they acknowledged their duty to assess and maintain waste disposal, the duty "necessarily involves policy evaluation and the exercise of judgment on the part of the agency concerned."[62] Ruling in favor of the respondents, the Court explained that the cited statutes clearly define a duty for the MMDA to "establish[ ] and operat[e] sanitary land fill and related facilities,"[63] and provide minimum operating standards for such facilities.

In this case, it is clear that the Court granted the relief sought in the petition, which later came to be known as the writ of continuing mandamus, on the basis of specific legal duties provided in statutes. However, as noted by the Court:

> Even assuming the absence of a categorical legal provision specifically enjoining petitioners to clean up the bay, they, as well as the men and women representing them, cannot escape their obligation to future generations of Filipinos to keep the waters of the Manila Bay clean and clear as humanly as possible.[64]

This appears to imply that even in the absence of a clear and explicit legal duty, the writ of continuing mandamus may still be available. But as the Court has clarified in succeeding cases, the right to a balanced and healthful ecology is not the "right" contemplated in a writ of mandamus; it is inadequate to sustain the issuance of the writ by itself.

This lesson is also illustrated in *Boracay Foundation v. Province of Aklan*,[65] which involved the proposed reclamation of the foreshore areas near Boracay Island for the expansion of its existing jetty port. While the Province of Aklan initially obtained the required Environment Compliance Certificate ("ECC")

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[61] These include the Metropolitan Manila Development Authority (MMDA), Department of Environment and Natural Resources (DENR), Department of Education, Culture and Sports (now Department of Education), Department of Health, Department of Agriculture, Department of Public Works and Highways, Department of Budget and Management, Philippine Coast Guard, Philippine National Police Maritime Group, and Department of the Interior and Local Government.

[62] *MMDA*, 574 SCRA 661, 671.

[63] *Id.* at 672, *citing* Rep. Act. No. 7924 (1995), § 3(c).

[64] *Id.* at 692.

[65] G.R. No. 196870, 674 SCRA 555, June 26, 2012.

and the authorization of the Philippine Reclamation Authority (PRA), its *Sangguniang Panlalawigan* expanded the proposed reclamation—from 2.64 hectares to 40 hectares—to cover not only Barangay Caticlan, but Barangay Manoc-Manoc as well, both located in the Municipality of Malay. Because of this, Boracay Foundation filed a petition for an Environment Protection Order ("EPO") and the issuance of a writ of continuing mandamus, asserting that the province ought to classify the proposal as a "co-located project within environmentally critical areas." [66] Thus, as required by pertinent environmental regulations, the respondent should submit a more comprehensive environmental impact assessment, pertaining to *both* Barangay Caticlan and Barangay Manoc-Manoc.

In granting the petition for a writ of continuing mandamus, the Court discussed the province's duties in relation to environmental quality as found in the Local Government Code and P.D. No. 1586. In acknowledging the province's duty to "ensure the quality of the environment" under P.D. No. 1586, the Court ordered the respondent to complete its Environmental Impact Statement report in accordance with the proposal's new specifications. Similarly, the Court also identified the duty of national government agencies to conduct consultations for national projects that "may cause pollution, climatic change, depletion of non-renewable resources, loss of crop land, rangeland, or forest cover, and extinction of animal or plant species."[67]

The cases of *Concerned Residents of Manila Bay* and *Boracay Foundation* illustrate the importance of identifying a specific statutory provision that presents a general constitutional policy, such as the right to a balanced and healthful ecology, in more operable terms. As clarified by the Court in a later case, the presence of a specific legal right is essential in a writ of mandamus since, "in the performance of an official duty or act involving discretion, the corresponding official can only be directed by mandamus to act, *but not to act one way or the other*."[68] In other words, neither the Court nor the plaintiffs may "supplant the executive department's discretion with their own through [a] petition for the issuance of writs of *kalikasan* and continuing *mandamus*."[69]

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[66] *Id.* at 573-74.

[67] *Id.* at 616, *citing* LOCAL GOV'T CODE, §§ 26-27.

[68] Segovia v. Climate Change Comm'n [hereinafter, "Segovia"], G.R. No. 211010, 819 SCRA 543, 567, Mar. 7, 2017. (Emphasis supplied.)

[69] *Id.* at 568.

1. Lack of a specific legal right

What happens, however, when plaintiffs fail to identify a specific legal duty other than the general "correlative duty to refrain from impairing the environment" found in the constitutional right to a balanced and healthful ecology? *Henares v. Land Transporation Franchising and Regulatory Board*[70] and *Segovia v. Climate Change Commission*[71] are illustrative cases.

In *Henares*, the petitioners filed a petition for a writ of mandamus and sought to compel the respondents—the Land Transportation *Franchising* and Regulatory Board (LTFRB) and the Department of Transportation and Communications (DOTC)—to prescribe the use of Compressed Natural Gas ("CNG") for public utility vehicles ("PUV"). They alleged that particulate matter produced in engine combustion violates their "right to clean air," allegedly found in the constitutional right to a balanced and healthful ecology and the Philippine Clean Air Act.[72] As explained by the petitioners, adopting CNG as an "alternative fuel" considerably reduces carbon emissions, Nitrogen Oxide (NOx) emissions, and pollutants (such as particulate matter).

The Court dismissed the petition for lack of merit, explaining that the petitioners failed to identify a *specific law* that exacts an "indubitable legal duty"[73] to warrant the grant of the writ of mandamus. As pointed out by the Court, the writ of mandamus cannot lie since the petitioners failed to identify a "clear legal right" and, correspondingly, an "imperative duty" identified in law. It also clarified that the writ of mandamus "neither confers powers nor imposes duties," but simply "command[s] [the defendant] to exercise a power already possessed and to perform a duty already imposed."[74] Applying that rationale in this case, the Court determined that neither the Constitution nor the Clean Air Act specifically mandated the respondents to order PUVs to adopt CNG. On the contrary, the Court held that the promulgation of E.O. No. 290, which recognized natural gas as a "clean burning alternative fuel" and contemplated a "gradual shift to CNG fuel utilization in PUVs [...] in Metro Manila and Luzon," rendered the petition moot.[75]

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[70] G.R. No. 158290, 505 SCRA 104, Oct. 23, 2006.

[71] *Segovia*, 819 SCRA 543.

[72] Rep. Act No. 8749 (1999), § 4. Recognition of Rights. - Pursuant to the above-declared principles, the following rights of citizens are hereby sought to be recognized and the State shall seek to guarantee their enjoyment: (a) The right to breathe clean air[.]

[73] Henares v. LTFRB [hereinafter "Henares"], 505 SCRA 104, 118.

[74] *Id.* at 115, *citing* University of San Agustin v. Ct. of Appeals, G.R. No. 100588, 230 SCRA 761, 771-72, Mar. 7, 1994.

[75] *Id.* at 117.

Moreover, the Court suggested that it would be more proper for the Legislature to "provide first the specific statutory remedy to the complex environmental problems bared by herein petitioners before any judicial recourse by mandamus is taken."[76] In other words, while the Court has acknowledged the constitutional "duty to refrain from impairing the environment," such duty is not what is contemplated in a mandamus suit as this one.[77]

In 2017, the Court ruled upon a similar petition in *Segovia v. Climate Change Commission*. The case involved the petitioners' right to a balanced and healthful ecology in relation to the respondents' duty to adopt the Road Sharing Principle, a principle which provides that "those who have less in wheels shall have more in road."[78] The petitioners prayed for the issuance of the writs of *kalikasan* and continuing mandamus to compel the respondents to implement this principle by reducing government fuel consumption and imposing a Road Users' Tax, among other measures.[79] They alleged that the Road Sharing Principle is a duty contained in several environmental statutes and administrative orders, and the government's failure to implement these laws violate their constitutional right to due process[80] and to a balanced and healthful ecology.

Just like in *Henares*, the Court in *Segovia* dismissed the petition, ruling that petitioners failed to establish the requisites for the issuance of either writs. First, for the writ of *kalikasan* to issue, the plaintiff must show that a law, rule, or regulation was violated or would be violated.[81] While the petitioners merely

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[76] *Id.* at 118-19.

[77] *Id.* at 116, *citing Oposa*, 224 SCRA 792.

[78] *Segovia*, 819 SCRA 543, 556. *See also* Exec. Order No. 774 (2008).

[79] *Segovia*, 819 SCRA 543, 556. Specifically, they seek to compel: "(a) the public respondents to: (1) implement the Road Sharing Principle in all roads; (2) divide all roads lengthwise, one-half (½) for all-weather sidewalk and bicycling, the other half for Filipino-made transport vehicles; (3) submit a time-bound action plan to implement the Road Sharing Principle throughout the country; (b) the Office of the President, Cabinet officials and public employees of Cabinet members to reduce their fuel consumption by fifty percent (50%) and to take public transportation fifty percent (50%) of the time; (c) Public respondent DPWH to demarcate and delineate the road right-of-way in all roads and sidewalks; and (d) Public respondent DBM to instantly release funds for Road Users' Tax."

[80] *Id.* at 559. On due process grounds, the petitioners alleged that the respondents' failure to implement the Road Sharing Principle amounts to "deprivation of life, and of life sources or 'land, water, and air' by the government without due process of law."

[81] *Id.* "For a writ of kalikasan to issue, the following requisites must concur: 1. there is an actual or threatened violation of the constitutional right to a balanced and healthful ecology; 2. the actual or threatened violation arises from an unlawful act or omission of a public official or employee, or private individual or entity; and 3. the actual or threatened

invoked alleged violations of their constitutional rights to health and to environment, the respondents established that they did not refuse to implement the said laws and issuances. The different programs and projects undertaken by respondents aimed at improving the air quality were clearly illustrated.[82] Second, the writ of continuing mandamus cannot lie, since the Road Sharing Principle is "precisely as it is denominated — a principle."[83] As noted in *Henares*, the duty contemplated in a writ of mandamus is one that is provided in law. Speaking for the Court, Associate Justice Alfredo Benjamin Caguioa explained that the plaintiffs attempted to "control the exercise of discretion of the executive as to how the principle enunciated in an executive issuance relating to the environment is best implemented[;]"[84] hence, the petition is beyond the contemplation of the writ of mandamus as a remedy. Executive discretion cannot be "checked" unless there is "gross abuse of discretion, manifest injustice or palpable excess of authority."[85]

As shown in both *Henares* and *Segovia*, while the right to a balanced and healthful ecology has been recognized as a "specific fundamental legal right," it lacks the specificity required in a mandamus case. In both cases, the Court deferred to the political branches the implementation of the constitutional and statutory policies cited by the petitioners in each case—for *Henares*, the use of natural gas for PUVs; and for *Segovia*, the implementation of the Road Sharing Principle. In the absence of a specific legal right, the Judiciary cannot command and direct how the political departments exercise their discretion, as "neither is inferior to the other"[86] and "comity with and courtesy to a coequal branch dictate that we give sufficient time and leeway for the coequal branches to address by themselves the environmental problems"[87] raised in these cases. This is likewise echoed by Justice Feliciano in his Separate Opinion in *Oposa*: "[w]here no specific, operable norms and standards are shown to exist, then the policy making departments — the legislative and executive departments — must be given a real and effective opportunity to fashion and promulgate those norms and standards, and to implement them before the courts should intervene."[88]

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violation involves or will lead to an environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces."

[82] *Id.* at 565-66.

[83] *Id.* at 546-47.

[84] *Id.* at 569.

[85] *Id.*

[86] *Id.* at 117.

[87] *Id.* at 118.

[88] *Oposa*, 224 SCRA 792, 818 (Feliciano, *J., concurring).*

2. The "actual case and controversy" and "legal standing" requirements

The requirement of an actual case or controversy has its roots in 1793, when the United States (U.S.) Supreme Court refused to render an "advisory opinion" sought by then Secretary of State Thomas Jefferson regarding the interpretation of treaties and laws of nations.[89] There, the U.S. Supreme Court adverted to the provisions of Article III of the U.S. Constitution, requiring a "case" and "controversy" as an indispensable element of judicial function. As a consequence, it declined the Executive Branch's invitation to answer abstract questions of law.[90]

In the Philippines, while the 1935 and 1973 Constitutions did not contain an explicit requirement of an "actual case or controversy" appurtenant to the exercise of judicial review,[91] the present charter now expressly contains the "actual case or controversy" requirement in Section 1 of Article VIII thereof.[92] Despite the silence of the two previous constitutions, the case of *Angara* clarified that the actual case or controversy requirement is a clear limitation of judicial review.[93] Actual controversy exists when there is a contrariety of legal rights that is susceptible of judicial determination.[94] Absent a live controversy, the questions presented to, and decided by, a court are abstract and vague due to a lack of clear concreteness of the issues presented by the litigating parties.[95]

The requirement of a live dispute is necessarily intertwined with the element of *locus standi* or legal standing,[96] under which a party must show "personal stake in the outcome of the controversy as to assure that *concrete adverseness which sharpens the presentation of issues* upon which the court depends for illumination of difficult constitutional questions."[97] In the U.S., the requirement of legal standing is "an essential and unchanging part of the case-

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[89] LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 328 (2000 ed.); *See also* Muskrat v. United States, 219 U.S. 346, 352 (1911) (expounding on the nature and extent of judicial power in the context of the American Supreme Court's history).

[90] United States v. Windsor, 570 U.S. 744, 775, 781 (2013) (Scalia, J., *dissenting*).

[91] CONST. (1935), art. VIII, § 1; CONST. (1973), art X, § 1.

[92] CONST. art. VIII, § 1(2).

[93] *Angara*, 63 Phil. 139, 158. "Even then, this power of judicial review is limited to actual cases and controversies".

[94] Garcia v. Exec. Sec'y, G.R. No. 157584, 583 SCRA 119, 129-30, Apr. 2, 2009.

[95] Cruz v. Sec'y of Env't and Nat. Res., G.R. No. 135385, 347 SCRA 128, 247, 256, Dec. 6, 2000 (Kapunan, *J., separate*), *citing* United States v. Fruehauf, 365 U.S. 146 (1961).

[96] Spokeo v. Robbins, 578 U.S. __ (2016).

[97] Integrated Bar of the Phil. v. Zamora, G.R. No. 141284, 338 SCRA 81, 100, Aug. 15, 2000. (Emphasis supplied.)

or-controversy requirement."[98] In *Lujan v. Defenders of Wildlife*, the U.S. Supreme Court explained how legal standing consists of three essential elements:[99] injury-in-fact,[100] causation,[101] and redressability.[102]

As illustrated by the U.S. Supreme Court, these requirements set forth an obstacle to environmental litigants, since environmental injury—such as pollution, for example—generally manifests in broader effects to the public,[103] not necessarily to an individual harm.[104]

In the Philippines, *Oposa* has been praised in liberalizing legal standing in environmental litigation.[105] However, as one commentator pointed out, *Oposa's* holding on legal standing is at best *obiter dictum*; hence, it did not supposedly create a precedent enunciating novel rules on legal standing.[106] In the first place, in this jurisdiction, lack of standing does not disqualify plaintiffs from litigation. Under the "transcendental importance" doctrine, for example, the legal standing requirement may be relaxed since it is merely a "*procedural technicality* which [the Court] may, in the exercise of its discretion, set aside in view of the importance of the issues raised."[107] In *Gios-Samar, Inc. v. DOTC*,[108] however, the Court has constricted the effect of this doctrine. The Court now requires plaintiffs to present pure questions of law as a prerequisite before it

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[98] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[99] *Id.*

[100] *Id.* There must be an "*injury-in-fact*" in favor of the plaintiff based upon an actual or imminent invasion of a particularized and concrete interest.

[101] *Id.* There must be *causation* between the conduct of the defendant and the resulting injury claimed by the plaintiff.

[102] *Id.* at 560-61. There must be a likelihood of *redressing* the injury by the court's favorable decision.

[103] Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 505 (2008).

[104] Robin Kundis Craig, *Removing "The Cloak of a Standing Inquiry": Pollution Regulation, Public Health, and Private Risk in the Injury-in- Fact Analysis*, 29 CARDOZO L. REV. 149, 151-52 (2007). "The injury-in-fact element of the federal court standing analysis has demanded the articulation of an actual or imminent individual harm and hence always threatens to undermine the long-term, population-level, risk-based perspective on environmental regulation that protection of the public health requires [...] [A]s a normative matter, the injury-in-fact analysis for environmental and other public health-related federal lawsuits must be sensitive to the injuries sought to be avoided through the regulatory standards at issue, particularly when—as is peculiarly the case with the public health—regulatory standards simultaneously protect both public-level values and private interests through a precautionary and preventive approach."

[105] La Viña, *supra* note 24.

[106] *See* Gatmaytan, *supra* note 23, extensively analyzing *Oposa* decision.

[107] Kilosbayan v. Morato [hereinafter "Kilosbayan"], G.R. No. 118910, 250 SCRA 130, 140, Nov. 16, 1995. *See also* Solomon Lumba, *The Problem of Standing*, 83 PHIL. L.J. 718, 734 (2009).

[108] G.R. No. 217158, Mar. 12, 2019.

wields its power of judicial review,[109] no matter, and despite, any allegation of "transcendental importance."

Nevertheless, the Court has acknowledged that *Oposa* is indeed the leading case in relaxing the requirement of legal standing in environmental cases:

> Moreover, even before the Rules of Procedure for Environmental Cases became effective, this Court had already taken a permissive position on the issue of locus standi in environmental cases. In Oposa, we allowed the suit to be brought in the name of generations yet unborn "based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned."[110]

In *Resident Marine Mammals v. Reyes*,[111] the Court acknowledged the difficulty of litigants under the rigid rules of standing; hence, it explained how the Court has adverted to the use of its rule-making power to remedy the problem:

> It had been suggested by animal rights advocates and environmentalists that not only natural and juridical persons should be given legal standing because of the difficulty for persons, who cannot show that they by themselves are real parties-in-interests, to bring actions in representation of these animals or inanimate objects. For this reason, many environmental cases have been dismissed for failure of the petitioner to show that he/she would be directly injured or affected by the outcome of the case. However, in our jurisdiction, locus standi in environmental cases has been given a more liberalized approach [...] [T]he current trend moves towards simplification of procedures and facilitating court access in environmental cases.[112]

One example includes Section 5 of the RPEC,[113] where the requirements of a citizen suit have been relaxed "[t]o further encourage the protection of the environment [and] enable litigants enforcing environmental rights to file their cases [...] [It] liberalizes standing for all cases filed enforcing

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109 *Id.*

110 *Resident Marine Mammals*, 756 SCRA 513, 547.

111 *Id.*

112 *Id.* at 545.

113 ENVT'L PROC. RULE, § 5.

environmental laws and collapses the traditional rule on personal and direct interest, on the principle that humans are stewards of nature."[114]

3. Expanded certiorari power

The cases of *Concerned Residents of Manila Bay* and *Boracay Foundation*, as well as *Henares* and *Segovia*, all involve plaintiffs praying for the issuance of a writ of mandamus or a writ of continuing mandamus. As clarified in these cases, mandamus will only lie if it concerns a ministerial duty that is clearly defined by law. In the absence thereof, a petition will likely be dismissed. In this situation, what are other available remedies? If the right to a balanced and healthful ecology cannot be used as basis for a mandamus suit by itself, can it be used in a *certiorari* case? In other words, can such right serve as the benchmark in determining whether government agency gravely abused its discretion?

This question has been preliminarily answered in *Oposa*. Recalling the facts of the case, the petitioners filed a "taxpayers' suit," enjoining respondent DENR from further issuing TLAs. Upon close inspection, the petitioners in *Oposa* invoked two causes of action: *first*, the petitioners' right to a balanced and healthful ecology, which are found in the 1987 Constitution, the New Civil Code, and existing environmental statutes; and *second*, an allegation of DENR's grave abuse of discretion in relation to its issuance of TLAs.[115]

The Court held that the second issue involves a "judicial question," in that the Court's expanded *certiorari* power "vests in the [J]udiciary [...] 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."[116] Unfortunately, the case of *Oposa* only involved the narrow issue of whether the RTC should have granted the respondent's Motion to Dismiss. Since the petitioners decided not to re-file the case before the lower court,[117] this issue has not been elaborated.

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[114] ANNOTATION TO THE RULES OF PROCEDURE FOR ENVIRONMENTAL CASES [hereinafter "Annotation"] 111, *available at* http://philja.judiciary.gov.ph/files/learning_materials/A.m.No.09-6-8-SC_annotation.pdf

[115] *Oposa*, 224 SCRA 792, 808. "Petitioners maintain that the granting of the TLAs, which they claim was done with grave abuse of discretion, violated their right to a balanced and healthful ecology; hence, the full protection thereof requires that no further TLAs should be renewed or granted."

[116] *Id.* at 810, *citing* ISAGANI CRUZ, PHILIPPINE POLITICAL LAW 226-27 (1991 ed.).

[117] *See* Gatmaytan, *supra* note 23, at 459.

The Court's expanded *certiorari* powers pertain to its power and duty 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."[118] This expanded form of judicial review should not give birth to a Judiciary that is wholly foreign to, and far removed from, the concept of a judicial function.[119] The strengthening of judicial power was meant to prevent the immediate dismissal of a proper case upon the invocation of the political doctrine,[120] most notoriously by the Executive Branch.[121]

The Court has consistently defined "grave abuse of discretion" as the "capricious or whimsical exercise of judgment that is patent and gross as to amount to an evasion of positive duty or a virtual refusal to perform a duty enjoined by law."[122] Moreover:

> [It] must be grave as where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility and must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law.[123]

In *Association of Medical Clinics for Overseas Workers, Inc. v. GCC Approved Medical Centers Association, Inc.*,[124] the Court exhaustively explained that it can marshal its power of expanded judicial review not only in cases where the governmental entity acted outside the bounds of what is lawfully granted to it, but also in cases where the entity exercises its lawfully conferred function in a gravely abusive manner.[125]

Chief Justice Artemio Panganiban characterized this as an "activist mandate," primarily because the Court's expanded *certiorari* power has been

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[118] CONST. art VIII, § 1(2).

[119] *See* Vicente V. Mendoza, *The Nature and Function of Judicial Review*, 31 IBP L.J. 6, 20 (2005). "I cannot read in the records of the Constitutional Commission any intent to enlarge the scope of judicial review or to relax the case and controversy requirement of the Constitution."

[120] DANTE GATMAYTAN, MORE EQUAL THAN OTHERS: CONSTITUTIONAL LAW AND POLITICS, 121-22 (2017).

[121] Javellana v. Exec. Sec'y, G.R. No. L-36142, 50 SCRA 30, Mar. 31, 1973.

[122] Arguelles v. Young, G.R. No. L-59880, 153 SCRA 690, 696-97, Sept. 11, 1987.

[123] *Id.*

[124] G.R. No. 207132, 812 SCRA 452, Dec. 6, 2016.

[125] *Id.* at 483-84.

textually conferred as a "duty" in the present charter. This is in contrast to the American constitution, which does not mention judicial review at all.[126]

Indeed, in recent cases, the Court has signed on to, and seized upon, this responsibility of checking other organs of the government. It once solemnly declared that:

> With respect to the [Supreme Court], however, the remedies of *certiorari* and prohibition are necessarily broader in scope and reach, and the writ of *certiorari* or prohibition may be issued to correct errors of jurisdiction committed not only by a tribunal, corporation, board or officer exercising judicial, quasi-judicial or ministerial functions but also to set right, undo and restrain any act of grave abuse of discretion amounting to lack or excess of jurisdiction by any branch or instrumentality of the Government, *even if the latter does not exercise judicial, quasi-judicial or ministerial functions*.[127]

Macapagal-Arroyo v. People[128] demonstrates the pinnacle of expanded *certiorari* power when the Court bypassed the rules it promulgated,[129] and announced that it has "the bounden constitutional duty to strike down grave abuse of discretion *whenever* and *wherever* it is committed."[130]

4. Scientific policy-making

One issue arising from the Court's exercise of its expanded *certiorari* power is its relative incapacity, as compared to specialized environmental agencies, to appreciate the scientific and technical nature of environmental cases. This acknowledgment has been translated to judicial deference to administrative bodies. [131] Under this doctrine, the factual findings of administrative agencies (including environmental agencies) are "generally accorded with great weight and respect, if not finality by the courts, by reason

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[126] Artemio Panganiban, *Judicial Activism in the Philippines*, 79 PHIL. L.J. 265, 269 (2004).

[127] Araullo v. Aquino III, G.R. No. 209287, 728 SCRA 1, 74, Jul. 1, 2014. (Emphasis in the original.)

[128] G.R. No. 220598, 797 SCRA 241, Jul. 19, 2016.

[129] RULES OF COURT, Rule 65, § 1, *in relation to* Rule 119, § 23.

[130] Macapagal-Arroyo v. People, G.R. No. 220598, 797 SCRA 241, 310, Jul. 19, 2016. (Emphasis in the original.)

[131] Manuel v. Villena, G.R. No. L-28218, 37 SCRA 745, 750, Feb. 27, 1971. "And courts, as a rule, refuse to interfere with proceedings undertaken by administrative bodies or officials in the exercise of administrative functions. This is so because such bodies are generally better equipped technically to decide administrative questions and that non-legal factors, such as government policy on the matter, are usually involved in the decisions."

of their special knowledge and expertise over matters falling under their jurisdiction."[132] Judicial deference is likewise found in other jurisdictions: "within particular environmental law contexts, the courts are willing to afford decision-makers a wide scope of discretion on account of the nature of the decision-making and the relevant factors which the decision-maker is obliged to account."[133] In the Philippines, the only exception to this doctrine is if there is a showing that the administrative agency committed grave abuse of discretion.

Some members of the Court have warned against using its expanded *certiorari* power to engage in policy-making, which is the realm of the political departments. For instance, in *Garcia v. Board of Investments*,[134] a case involving the transfer of a petro-chemical plant's site, Associate Justice Ameurfina Melencio-Herrera protested against the majority's apparent entry into the thicket of policy-making, masquerading as an act of determining grave abuse of discretion:

> [The Court] decided upon the wisdom of the transfer of the site of the proposed project [...]; the reasonableness of the feedstock to be used [...]; the undesirability of the capitalization aspect of the project [...] and injected its own concept of the national interest as regards the establishment of a basic industry of strategic importance to the country[.]
>
> It is true that the judicial power embodied in Article VIII of the 1987 Constitution speaks of the duty of Courts of justice 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. By no means, however, does it vest in the Courts the power to enter the realm of policy considerations under the guise of the commission of grave abuse of discretion.[135]

Justice Feliciano made a similar observation in his Separate Opinion in *Oposa*,[136] wherein he explained how pairing broadly-worded standards, such as the constitutional right to a balanced and healthful

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[132] Miro v. Mendoza, G.R. No. 172532, 710 SCRA 371, Nov. 20, 2013.

[133] Ole Pedersen, *Environmental Law and Constitutional and Public Law*, *in* OXFORD HANDBOOK OF COMPARATIVE ENVIRONMENTAL LAW 1084 (Emma Lees & Jorge Vinuales, eds., 2009).

[134] G.R. No. 92024, 191 SCRA 288, Nov. 9, 1990.

[135] *Id.* at 301-302 (Melencio-Herrera, *J.*, *dissenting*).

[136] *Oposa*, 224 SCRA 792, 814.

ecology, with the Court's expanded *certiorari* power may "propel the Court into the uncharted ocean of social and economic policy making":

> When substantive standards as general as "the right to a balanced and healthy ecology" and "the right to health" are combined with remedial standards as broad ranging as "a grave abuse of discretion amounting to lack or excess of jurisdiction," the result will be, it is respectfully submitted, to propel courts into the uncharted ocean of social and economic policy making. At least in respect of the vast area of environmental protection and management, our courts have no claim to special technical competence and experience and professional qualification. Where no specific, operable norms and standards are shown to exist, then the policy making departments — the legislative and executive departments — must be given a real and effective opportunity to fashion and promulgate those norms and standards, and to implement them before the courts should intervene.[137]

For this reason, Associate Justice Vicente V. Mendoza had encouraged the courts to adopt what he called a "double standard of review" in order to balance the tension between the ideals of the rule of majority in a democracy and the counter-majoritarian effect of judicial review.[138] In this standard of review, he counseled that courts must be "strict" if the issues presented affect civil and political rights, whereas they must defer to the judgment of the political branches when it comes to issues dealing with economic and social enterprise.[139] This is because of the perceived institutional incapacity of the Judiciary with respect to questions concerning the latter class.

> [I]ndeed, the guarantees of social and economic rights require the positive finding of wherewithal which courts are in no position to make. For example, courts cannot provide us with jobs, a healthy environment, quality education. Like the constitutional mandate to evolve a "progressive system of taxation," these rights are for Congress to implement.[140]

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137 *Id.* at 818.

138 Mendoza, *supra* note 119, at 20.

139 *Id.*

140 *Id.* at 23. (Citations omitted.)

This counter-majoritarian effect[141] is clearly illustrated by the ruling in *Social Justice Society v. Lim*[142] (*hereinafter*, "SJS"), wherein the Court nullified a Manila City ordinance and practically allowed the continued operations of oil depots in Pandacan, Manila. The Court earlier upheld the validity of Ordinance No. 8027, which signaled the relocation of oil terminals in Pandacan, as they posed a threat to the security and safety of the inhabitants in the area.[143] However, after a change of leadership, its city council issued Ordinance No. 8187 amending its comprehensive land use plan ("CLUP") and creating medium- and high-industrial zones which would house petroleum refineries and oil depots.[144]

The petitioners promptly sought recourse to the Supreme Court, impugning the validity of the amendatory ordinance. They invoked, among others, the right to a balanced and healthful ecology as implemented by various environmental laws and international treaties.[145] While the case was pending, the CLUP was amended yet again to exclude the oil depots from the industrial zone operation, in effect reinstating once more the goal of the first ordinance and ordering petroleum companies to relocate their depots.[146]

The Supreme Court ruled that Ordinance No. 8187 was invalid. It recognized that the Manila city council has the competence to assess and to determine the needs of its constituents and has the power to amend or repeal ordinances under the Local Government Code for the general welfare of its people.[147] However, the Supreme Court still ruled that the ordinance, evidenced by the flip-flopping streak of Manila's leaders with respect to the oil depots, was largely motivated by "personal preference of the members who sit in the council as to which particular sector among its constituents it wishes to favor," and not a genuine and sincere concern for the welfare of the residents of Manila.[148] In nullifying the later ordinance, the Court resurrected the policies under Ordinance No. 8027 and conveniently ignored the safety measures that have since been placed by the oil companies to quell fears of

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[141] *See* Juan Paolo Fajardo, *The Judical Rule-Making Function: A Non-Interpretive Perspective to the Role of the Judiciary*, 83 PHIL. L. J. 749 (2009); Oscar Franklin Tan, *The New Philippine Separation of Powers: How the Rulemaking Power may Expand Juicial Review into True Judicial Supremacy*, 83 PHIL. L. J. 686 (2009).

[142] G.R. No. 187836, 742 SCRA 1, Nov. 25, 2014.

[143] *See* Social Justice Soc'y v. Atienza, G.R. No. 156052, 517 SCRA 657, Mar. 7, 2007; Social Justice Soc'y v. Atienza, G.R. No. 156052, 545 SCRA 92, Feb. 13, 2008.

[144] Social Justice Soc'y Officers v. Lim [hereinafter "Social Justice Soc'y Officers"], 742 SCRA 1, 43.

[145] *Id.* at 46-58.

[146] *Id.* at 62-64.

[147] LOCAL GOV'T CODE, § 16.

[148] *Social Justice Soc'y Officers*, 742 SCRA 1, 90.

terrorist attacks and similar dangers.[149] Even more stunning is the Court's open invitation to its policy preferences on the matter:

> Even assuming that the respondents and intervenors were correct, the very nature of the depots where millions of liters of highly flammable and highly volatile products, regardless of whether or not the composition may cause explosions, has no place in a densely populated area. Surely, any untoward incident in the oil depots, be it related to terrorism of whatever origin or otherwise, would definitely cause not only destruction to properties within and among the neighboring communities but certainly mass deaths and injuries.[150]

The Court was adamant in its conviction that the threat to the safety and security of the inhabitants surrounding Pandacan will only be removed if the oil companies are completely and totally out of the verboten area. Associate Justice Marvic M.V.F. Leonen, however, saw the matter differently. He claimed that unmitigated speculations and feigned fears about terrorist attacks and ecological degradations should not override the political decisions of the people of Manila—through the democratically-adopted acts of their representatives—on important policy questions, such as the petroleum refineries and oil depots.[151]

There may have been noble intentions from the framers of the 1987 Constitution in strengthening the Judiciary not only against external attacks by other coordinate and co-equal branches of government, but also in its role of protecting individual liberty. Jurisprudence, however, proves that "grave abuse of discretion" in the 1987 Constitution has acquired, and is continually acquiring, a new meaning after multiple interpretations by the Judiciary. Its subjective application makes it highly susceptible to elastic interpretations, far removed from the benign and innocuous intentions of the framers and of the people who ratified the charter.[152]

Altogether, the expanded power of judicial review may bode well in an environmental case. Courts, however, must be cautious in the exercise of this power in areas of environmental protection, which may involve policy-making, properly conferred to the political branches.

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149 *Id.* at 93.

150 *Id.*

151 *Id.* at 102 (Leonen, *J., concurring and dissenting*).

152 Theoben Jerdan Orosa, *Constitutional Kritarchy under the Grave Abuse Clause*, 49 ATENEO L.J. 565 (2004).

IV. EXPANDED RULE-MAKING POWERS: THE RIGHT TO A BALANCED AND HEALTHFUL ECOLOGY AND THE RPEC

A. Rule-making powers in the Philippines

As early as the 1935 Constitution, the powers of the Supreme Court have always included the power to promulgate rules concerning procedural matters, as well as the admission to the practice of law.[153] Before the 1987 Constitution, this rule-making power features two express limitations. The first limitation is that the rules must not "diminish, increase, or modify substantive rights."[154] In *Fabian v. Desierto*, the Court developed a test to determine whether a rule is merely procedural or already substantive:

> If the rule takes away a vested right, it is not procedural. If the rule creates a right such as the right to appeal, it may be classified as a substantive matter; but if it operates as a means of implementing an existing right then the rule deals merely with procedure.[155]

This limitation reflects the separation of powers between the three departments, wherein the Legislature, not the Judiciary, makes the law creating substantive rights.

The second limitation was the Legislature's power to repeal, amend, and supplement the rules promulgated by the Supreme Court.[156] In both the 1935 and 1973 Constitutions,[157] the Court's rule-making power was shared with the Legislature. Just like the first limitation, this sharing of powers was an incident of the separation of powers and, more precisely, checks and balances. Unlike the first limitation, however, this "shared power" is no longer found in the 1987 Constitution. As explained by the Court in *Echegaray v.*

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153 *See* CONST. (1935), art. VII, § 13."The Supreme Court shall have the power to promulgate rules concerning pleading, practice and procedure in all courts, and the admission to the practice of law."; CONST. (1973), art. X, § 5(5). "Promulgate rules concerning pleading, practice, and procedure in all courts, the admission to the practice of law, and the integration of the Bar[.]"

154 CONST. art. VIII, § 5(5).

155 Fabian v. Desierto, G.R. No. 129742, 295 SCRA 470, 492, Sept. 16, 1998.

156 *See* CONST. (1935), art. VII, § 13. "The National Assembly shall have the power to repeal, alter, or supplement the rules concerning pleading, practice, and procedure, and the admission to the practice of law in the Philippines."; CONST. (1973), art. X, § 5(5). "Promulgate rules concerning pleading, practice, and procedure in all courts, the admission to the practice of law, and the integration of the Bar, which, however, may be repealed, altered, or supplemented by the Batasang Pambansa."

157 *Id.*

Secretary of Justice,[158] the new Constitution created an "even stronger and more independent judiciary"; as a consequence, the Court's rule-making power is "no longer shared by this Court with Congress, more so with the Executive."[159]

Besides removing the Legislature's ability to modify promulgated rules, the 1987 Constitution also endows the Court with the power to "[p]romulgate rules concerning the protection and enforcement of constitutional rights."[160] Arguably, this is the most dramatic development in the Court's rule-making power. For the first time, such rule-making power is no longer limited to procedural matters alone.

This expanded rule-making power has been used by the Court on at least three occasions: the promulgation of the Rule on the Writ of Amparo (2007),[161] the Rule on the Writ of Habeas Data (2008),[162] and the RPEC (2010). In light of the inadequacy of existing remedies, the Court promulgated these rules to enforce and protect *existing* constitutional rights—for the Writ of Amparo, the right to life, liberty, and security; for the Writ of Habeas Data, the right to privacy; and for the RPEC, the right to a balanced and healthful ecology.

B. The Rules of Procedure for Environmental Cases

As previously discussed, this right to a balanced and healthful ecology, invoked in itself, is often inadequate to sustain existing remedies, such as petition for *certiorari* and a writ of mandamus.[163] After all, as pointed out by Justice Feliciano, a cause of action which primarily rests upon such a broad right will pose difficulties in litigation, especially for the defendants who would "be unable to defend themselves intelligently and effectively."[164]

Besides the enactment of environmental statutes, the promulgation of the RPEC filled in this gap. As explained in its annotations, the RPEC is a "response to the long felt need for *more specific rules* that can sufficiently address the procedural concerns that are peculiar to environmental cases."[165] True

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158 *Echegaray*, 301 SCRA 96, 111.
159 *Id.* at 112.
160 CONST. art. VIII, § 5(5).
161 A.M. No. 07-9-12-SC (2007).
162 A.M. No. 09-1-16-SC (2008).
163 *See supra* Part III.B.
164 *Oposa*, 224 SCRA 792, 818 (Feliciano, *J., concurring).*
165 *Annotation*, *supra* note 114, at 98.

enough, the RPEC provides litigants with novel remedies, such as the writ of *kalikasan*[166] and continuing mandamus,[167] and guiding principles (e.g. the precautionary principle) that directly address the peculiarities of environmental cases. This section does not discuss all of these features extensively.[168] Instead, the discussion focuses on two features that are not found in statute, but are deemed as "enforcing" the right to a balanced and healthful ecology: the concept of relaxed standing and the precautionary principle.

First, the RPEC relaxed the rules on standing, allowing any Filipino citizen in representation of others to file a "citizen suit" for the enforcement of environmental statutes.[169] Along with liberalizing the rules on real parties in interest in environmental cases,[170] citizen suits "collapse[] the traditional rule on personal and direct interest, on the principles that humans are stewards of nature."[171] As previously discussed, the Court has already relaxed the rules on standing in certain cases because it is a mere "procedural technicality"[172] which the Court may forego according to its discretion. This is in stark contrast to the United States, where the question of standing remains as a crucial component of the "case and controversy" requirement found in Article III of its Constitution.[173]

Second, the RPEC also includes the precautionary principle. This provides that, in the absence of scientific certainty and the possibility of serious and irreversible harm, the "constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt."[174] In other words, the precautionary principle eases the burden of proof of those alleging environmental harm.[175]

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166 ENV'T PROC. RULE, Rule 7.

167 Rule 8.

168 For a more comprehensive discussion of the Rules of Procedure for Environmental Cases, *see* Casis, *supra* note 34; Gregorio Rafael Bueta, *Taking Another Green Step Forward: An Analysis of the Rules for Environmental Cases*, 56 ATENEO L.J. 521 (2011).

169 ENV'T PROC. RULE, Rule 2, § 5. *See also* Rule 2, § 4.

170 Rule 2, § 4. *See also Annotation*, *supra* note 114, at 110. "The phrase 'real party in interest ' in this provision retains the same meaning under the Rules of Civil Procedure and jurisprudence. It must be understood, however, in conjunction with the nature of environmental rights, which are enjoyed in general by all individuals."

171 *Id.* at 111.

172 *Kilosbayan*, 250 SCRA 130, 140. *See also* Lumba, *supra* note 107, at 734.

173 *Lujan*, 504 U.S. 555, 560 (1992).

174 ENV'T PROC. RULE, Rule 20, § 1. It must be noted, however, that this rule applies only "when there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect [.]"

175 Casis, *supra* note 34.

While the inclusion of these two principles illustrates the Court's commitment to enhance the protection of environmental rights, the promulgation of the RPEC brings to mind Justice Feliciano's remarks in his Separate Opinion in *Oposa*. In its efforts to protect and enforce environmental rights, is the Court propelling itself into the "uncharted ocean of social and economic policy making"?[176] After all, as these two principles illustrate, the Court may supply—and in this case, it has indeed supplied—principles that are not readily found in existing statutes. To put it bluntly, what differentiates judicial legislation from the Court's expanded rule-making power; and in what circumstances is this delineation most unclear?

C. Judicial Legislation or Rule-Making?

The first and most obvious difference between judicial legislation and rule-making is that the former is forbidden by the Constitution, while the latter is expressly provided for in the same. The doctrine against judicial legislation prevents the Court from creating, amending, or modifying the law in the guise of interpreting it.[177] Otherwise, the Court flouts separation of powers, a doctrine which insists that it is the Legislature, not the Judiciary, which shall make the laws. In other words, "[t]he duty of the courts is to apply or interpret the law, not to make or amend it."[178] On the other hand, the Court's rule-making power is the power to promulgate rules governing procedure, as well as the protection and enforcement of constitutional rights. As already discussed, however, this power is limited only to the promulgation of procedural rules and in no way can its exercise "diminish, increase, or modify" existing substantive rights.[179] Insofar as matters of "pleadings, practice, and procedure" are concerned, it is undeniable that the Court's rule-making power does not offend the separation of powers. In fact, this rule-making power is inherent in the Judiciary's superiority over its "own sphere."[180] However, insofar as the "protection and enforcement of constitutional rights" are concerned, the answer is not as straightforward.

The problem here is as obvious as it is fundamental: constitutional rights, such as the right to a balanced and healthful ecology, are often so broadly worded that, in the course of crafting rules that facilitate for its "protection and enforcement," it becomes rather unclear—and to a certain

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[176] *Oposa*, 224 SCRA 792, 818 (Feliciano, *J., concurring).*

[177] *See In re* Letter of Ct. of Appeals Justice Vicente S.E. Veloso For Entitlement to Longevity Pay for his Services as Commission Member III of the NLRC, A.M. No. 12-8-07-CA, 758 SCRA 1, July 16, 2015; *Silverio*, 537 SCRA 373, 394.

[178] *Id.* at 394.

[179] CONST. art. VIII, § 5(5).

[180] *Angara*, 63 Phil. 139, 156.

extent, unexplained—whether the Court has already "diminished, increased, or modified" such rights.

This problem is not new. Commentators have discussed this tension in the context of the Court's promulgation of the Rule on the Writ of Amparo in 2007. The said Rule is an early example of the Court's exercise of its expanded rule-making power under the 1987 Constitution. As stated in Section 1 of this Rule, the Writ of Amparo is a "remedy available to any person whose right to life, liberty and security is violated or threatened with violation by an unlawful or omission of a public official or employee, or of a private individual or entity."[181] In response to the inadequacy of available remedies for human rights violations committed by government agencies,[182] the Court has designed the Writ as a more potent remedy to enforce and protect the constitutional rights to life, liberty, and security.[183]

For some commentators, the Rule on the Writ of Amparo did not create a new substantive right. Instead, the Rule is only an "operationalization" of existing constitutional rights[184] (in this case, the rights to life, liberty, and security) or serves as an "auxiliary remedy," which is "ancillary" to existing remedies.[185]

For instance, Fajardo, in his article, advocates the view that the Court's promulgation of the Writs of Amparo and Habeas Data did not create new substantive rights since the Court merely sought to "enhance [the] accessibility" [186] of existing ones. Citing Professor Laurence Tribe, he explained that "substantive values underlie all procedural rules and give them intrinsic value."[187] In his view, the Court is "merely exercising its prerogative under its rule-making function to explore the gamut of remedies that could lead to the protection of such right."[188]

Commenting on the Rule on the Writ of Amparo, Justice Mendoza took a different approach in explaining how the Rule does not "diminish, increase, or modify" substantive rights.[189] He posits that the Writ of Amparo

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[181] AMPARO WRIT RULE, § 1.

[182] Vicente V. Mendoza, *A Note on the Writ of Amparo*, 82 PHIL. L.J., 1, 2 (2008).

[183] *Id.*

[184] Juan Paolo Fajardo, *The Judical Rule-Making Function: A Non-Interpretive Perspective to the Role of the Judiciary*, 83 PHIL. L. J. 749 (2009).

[185] Mendoza, *supra* note 182, at 2-3.

[186] Fajardo, *supra* note 184, at 761.

[187] *Id.* at 757.

[188] *Id.* at 761.

[189] Mendoza, *supra* note 182, at 1.

cannot be considered as independent from existing remedies (such as civil and criminal actions) because a "new action can only be provided or created by law or the Constitution by conferring jurisdiction for this purpose on the courts":[190]

> To consider the writ of *amparo* an independent action would be to say either that it increases or that it modifies substantive rights. The Rule in fact disclaims any intention to do so. Sec. 24 expressly provides that "[it] shall not diminish, increase or modify rights recognized and protected by the Constitution.[191]

The parallels between the RPEC and the Writ of Amparo are clear. In addressing the inadequacy of existing remedies, it can be said that the Court merely closed the gap in the enforcement and protection of existing constitutional rights. Principles, such as relaxed standing and the precautionary principle, may be considered as the mere "operationalization" of the right to a balanced and healthful ecology.

However, as Oscar Franklin Tan pointed out, this is precisely why the "expansive" scope of these remedies may be problematic.[192] Along with the Court's liberalized rules on standing, the Court's expanded rule-making power erodes the case and controversy requirement even further. Citing the Rule on the Writ of Amparo as an example, he pointed out that, even in the absence of an actual case, the Court "promulgated rules to enforce a bundle of rights so expansively phrased as the protection of life, liberty and security," which are, in turn, enforced through its power of judicial review.

Unlike Fajardo, Tan dismisses the dichotomy between "procedural" and "substantive" rights as "illusory and pointless."[193] He cited at least two reasons for this: *first*, the underlying substantive value in all procedural rules;[194] and *second*, the "uncontroversial" duty of the court to interpret even the "most abstract" constitutional phrases (such as the due process and equal protection).[195] Consequently, whenever the Court exercises its expanded rule-making power, it is quite unclear whether "the Court enforces the Constitution's text" or "enforces what are arguable interpretations not quite

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[190] *Id.* at 2-3.

[191] *Id.* at 3.

[192] Oscar Franklin Tan, *The New Philippine Separation of Powers: How the Rulemaking Power may Expand Judicial Review into True Judicial Supremacy*, 83 PHIL. L. J. 868 (2009).

[193] *Id.* at 908.

[194] *Id.*, *citing* LAURENCE TRIBE, CONSTITUTIONAL CHOICES 13 (1985). Both Tan and Fajardo made similar statements.

[195] Tan, *supra* note 192, at 908-9.

firmly rooted in the text."[196] Responding to Fajardo's procedural-substantive dichotomy, Tan explains:

> This is obviously *meaningless,* as any draftsman of Chair Fajardo's caliber can *insert the citations to transform the former into the latter.* Otherwise, one must argue that the Court should have a *far more restrained power of exposition outside judicial review and an actual case or controversy.* This is particularly given that the landmark case *Manalo* expounded "the rights to life, liberty and security," which are *so broad that Manalo could conceivably be taken to mean that the Court can make rules about anything that can be articulated as a constitutional right.*[197]

Because of this, he remarked that the "Court's greater power of interpretation in human rights cases should not carry over to the Court's power to seemingly expand its power outside judicial review, even if this is in the context of constitutional rights."[198] Besides the possibility of usurping the role of political departments, the "possibility of new and arguably substantive interpretation, and disjointed from the main flow of jurisprudence, through the rulemaking power is not remote."[199]

The implications of these on the analysis of the RPEC are clear. After all, the "right to a balanced and healthful ecology" is just as broadly worded as the "rights to life, liberty, and security." First, it would be difficult to argue that principles (such as the precautionary principle) are somehow inherently found in the right to a balanced and healthful ecology, more so in any existing environmental statute. Interpretation necessitates the Court's exercise of its judicial power, which in turn requires an actual case and controversy. Of course, as pointed out by both Fajardo and Tan, substantive values underlie procedural matters; but considering that the Court cannot "diminish, increase, or modify" existing substantive rights, to what extent may this be allowed?

This issue is magnified by the prevalence of "textual hooks"[200] in the 1987 Constitution upon which the Court may exercise its expanded rule-making power. Just like in *Oposa*, the Court may hypothetically recognize another broadly-worded constitutional policy as an actionable right and, from there, promulgate rules that "enforce and protect" it. In fact, a recent article

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196 *Id.* at 919.

197 *Id.* at 909. (Emphasis supplied.)

198 *Id.*.

199 *Id.* at 919.

200 *Id.* at 893-895. Tan discusses "textual hooks" in the context of the Court's expanded power of judicial review. The authors argue that these also apply to the Court's rule-making power in relation to constitutional rights.

proposed the promulgation of a new rule—the Writ of Vita—which is aimed to "protect the right to life and right to health of the Filipino people from the inconclusive effects of certain drugs and other substances that could potentially be dangerous to life and health."[201]

Of course, this Note does not suggest that the Court's recent attempts to protect and enforce constitutional rights are undesirable. As discussed, the Court's commitment to protecting human rights has been clear and unequivocal. These remedies reflect the Court's desire—if not, duty— to close the gap between the practical and the ideal. However, as Tan pointed out, the Court's rule-making power may be "readily manipulated for political ends."[202] To illustrate this, he gave the following example:

> Imagine a scenario where a president appoints a chief justice and a majority of Justices in the last years of his term. Selective enhancement of the right to privacy in the informational context more familiar in the Philippines could readily circumscribe the freedom of speech and the right to information, and blunt a multitude of threats to a political patron including corruption investigations by the Ombudsman, legislative inquiries and relentless criticism by the media. This is not new, as the right to privacy has been invoked as a political shield in incidents such as the Jose Pidal bank account controversy and refuse to answer questions before a Senate investigation.[203]

Without the popular support of the sovereign, and in the absence of accountability measures (such as elections), this expansive power may remain unchecked. Constitutional excess, even if used for normatively desirable ends, will nevertheless set the precedent for more malevolent objectives.

V. CONCLUSION

This Note elaborated on how the Court exercised two of its powers—judicial review and rule-making, as "expanded" under the 1987 Constitution—in its commitment to protect and enforce the right to a balanced and healthful ecology. Using *Oposa* as an example, the Note explained how these two powers go hand-in-hand. In its exercise of judicial review, the Court determined that the right to a balanced and healthful

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[201] Neil Jason Mendoza, *Protecting the Right to Life and Right to Health through the Rule-Making Power of the Supreme Court*, 1 U. ASIA & PACIFIC L. J. 199, 227 (2019).

[202] Tan, *supra* note 192, at 924.

[203] *Id.*

ecology is indeed actionable, in turn creating binding precedent that may be enforced against the political departments. This recognition paved the way for the Court's promulgation of the Rules on Procedure for Environmental Cases in 2010, which provided a wide suite of remedies and procedures addressing the peculiarities of and challenges in environmental litigation.

However, these two powers, even in their "expanded" forms, can only do so much in substantiating the said right. Despite its recognition in *Oposa* as a "specific fundamental legal right," subsequent cases show that its plain invocation is often inadequate for some remedies (such as mandamus and *certiorari*). More often than not, it requires additional statutory or remedial grounds. Similarly, in enforcing constitutional rights through its expanded rule-making power, the Court must tread the thin line between "procedural" and "substantive."

It comes as no surprise that in exercising such "expanded" powers, great caution must be used, especially in matters that may be beyond the competency of the courts. While the courts have the power to determine whether an agency (such as the DENR, for example) has committed "grave abuse of discretion," assessing this will be difficult in the absence of specific rules, as well as technical or scientific expertise.

Strengthening the Judiciary does not—and should not—entail the reduction of the political departments, especially in "political" matters such as environmental policy. In fact, the right to a balanced and healthful ecology will only be meaningfully realized when every department does its share—the Legislature crafting more specific environmental rights, the Executive enforcing such rights, and the Judiciary applying these rights in actual controversies.

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