III. Modernization of Laws on the Exploitation of Natural Resources and Its Impact on Enviromental Law

著者	Feliciano Myrna S., Agabin Pacifico A., Magallona Merlin M., Sison Carmelo V.
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III. MODERNIZATION OF LAWS ON THE EXPLOITATION OF NATURAL RESOURCES AND ITS IMPACT ON ENVIRONMENTAL LAW

A. Introduction

The natural correlation between a country's laws on environmental protection and the exploitation of its natural resources is obvious. Depending on the stage of its economic development and the means by which economic activity is structured, unbridled exploitation its natural resources has deleterious effects on the country's commons and, ultimately on the lives and property of its inhabitants. This holds true if exploitation is undertaken in a regime where the country's legal and political system is weak or its administrative and regulatory machinery is ineffective. This is more obvious in a developing country with very limited financial and technical resources, where the temptation for political leaders to sacrifice environmental objectives in favor of economic development may be too strong to resist. The perception among political leaders is that economic goals are usually anti-ethical to environmental objectives, and that economic development always warrants priority.

The modernization of laws on the exploitation of natural resources need not be anti-ethical to protection of the environment in at least one area of the law, and that is the area of civil liability for damages arising from pollution. Unlike the enforcement of sanctions through the regulatory agencies of the government, enforcement of sanctions through recovery of damages arising from civil and criminal liability may depend on private initiative instead of public actions. In other words, a revision of the laws on the development and exploitation of a country's natural resources can also effect a revision of the regime of civil liability based on fault. The character of a country's legal system, at least with respect to the concept of liability, may also be "modernized" through the same regime that effects a modernization of the country's statutes regulating the exploitation of its natural resources. Of course, enforcement of sanctions arising from liability would still depend on the independence of its judiciary, on the vigilance of its non-governmental organizations, and on the courage of its lawyers who are willing to take on unpopular causes. But at least in legal

theory the regime of liability for environmental pollution would be found in the black-letter law.

In crafting legislation to modernize the laws of exploitation of natural resources, the corollary problem of protecting the environment cannot be ignored because the extractive activities that accompany exploitation of resources involves highly pollutive technologies, or destruction of the common resources that would cause erosion and flooding, or depletion of natural sources of food and water, or discharge of commercial wastes that pollute air and water. That is why the political leaders of a country who drastically revise the nationalistic laws on exploitation of natural resources by opening these up to foreign companies realize that there should be compensatory legislation in the form of provisions designed to protect the environment from pollution and degradation.

Most developing countries which have been colonized by industrialized countries consider their natural resources as patrimonial property which is usually reserved for its citizens to develop and exploit. If the political leaders open the floodgates for development and exploitation of natural resources by foreigners, this would raise the hackles of its citizenry if there were no acceptable justification for the radical policy change, even if this change is foisted with the fig leaf of legality. As Mosca cynically puts it, "a system of illusions is not easily discredited until it can be replaced with a new system" (Mosca, The Ruling Class (1939), p. 175).

In the case of the Philippines, the reversal of the policy of nationalization in the exploitation of its natural resources was achieved under a martial law regime, and the policy was replaced with that of "economic development" and sustainable protection of President Ferdinand Marcos foisted on the people to "modernize" the laws on exploitation of natural resources.

B. Modernization of Law as a Double-Edged Instrument

President Marcos, who declared martial law in the Philippines in 1972, and who ruled the country with an iron hand until 1986, was trained as a lawyer in the University of the Philippines. His training as a lawyer had conditioned his mind into using law as an instrument, and for him he knew how to use the law as a means to perpetuate himself in power. His use of the law to serve his ambitions of perpetual power exemplified Galanter's observation in another context that "People learn to manipulate modern law for their purposes, to make it express their concerns and serve their ambitions" (Galanter, M., "The Modernization of Law", in M. Weiner, *Modernization* (1966), quoted in Sack, "Paradigm

Lost: Modern vs. Traditional Legal Systems," in Bacungan and Magallona, *Law and Development*, 1978-1979 (U.P. Law Center) 19, at 23). Of course, Marcos had to cloak his assumption of power by means of an acceptable ideology. He also knew, as a student of Machiavelli, that ideology is the velvet glove with which the iron hand of power is wielded. The ideology acceptable to nations all over the world as a justification for the usurpation of power was "economic development." So, when he declared martial law, he had to tell the world that he had to do it not only to preserve peace and order but also "to reform society." By using the veneer of legality to rationalize his imposition of martial law and by telling the people that there was urgent need to introduce economic reforms, he confounded the lawyers and mystified the populace until early 1986, when he was overthrown by a popular uprising.

At the time Marcos imposed martial law, he thought that economic development could be achieved through fast-paced industrialization, which would be based on exploitation of the natural resources of the Philippines. "Much of the industrial expansion that government will provide for is towards more effective use of our natural resources," he announced after he had declared martial law in the Philippines (Marcos, "Strategy for Economic Growth," Fookien Times Yearbook (1974), p. 32, at 35). This acquired some cogency one year after he declared martial law, when the oil crisis reached its high point.

However, there was a big obstacle that stood in the way of Marcos' vision of development: it was the nationalistic constitution of 1935 which adopted the Regalian doctrine that all lands of the public domain belong to state, and emphasized that the exploitation of natural resources was limited to Filipino citizens or to corporations or associations 60% of whose capital is owned and controlled by Filipino citizens. The 1935 Constitution, which Marcos later abrogated in 1973 and replaced with a new constitution, had provided that:

> "All agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, and other natural resources of the Philippines, belong to the State, and their disposition, exploitation, development, or utilization shall be limited to citizens of the Philippines, or to corporations or associations at least sixty percentum of the capital of which is owned by such citizens, subject to any existing right, grant, lease or concession at the time of the inauguration of the Government under this Constitution. Natural resources, with the exception of public agricultural land, shall not be alienated, and no license, concession, or lease for the exploitation, development, or utilization

of any of the natural resources shall be granted for a period exceeding twenty-five years, renewable for another twenty-five years, except as to water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, in which case beneficial use may be the measure and limit of the grant" (Sec. 1, Article XIII, Philippine Constitution).

A member of the Philippine Constitutional Convention of 1934 and a prominent constitutionalist explains the rationale for this provision, thus:

> "These features of state authority have accentuated the nationalistic tone of the Constitution and are responsible for the expanded use of governmental action in economic enterprises. As vital factors for national survival, land and other natural resources are given special attention. The Constitutional Convention looked to the modern constitutions of Maxico and the Republic of Germany for suggestions on this subject and from them as well as from past Philippine legislation, they formulated into rules suited to Philippine conditions" (Sinco, *Philippine Political Law* (1962), p. 445).

The above-quoted provision of the 1935 Constitution, however, was amended in 1946 to accommodate Americans. The United States had offered to provide financial aid to the war-ravaged Philippines which became independent in July 1946, in exchange for allowing American citizens to exploit the natural resources of the country. The Filipinos were thus compelled to amend the nationalist provisions of the Constitution and to adopt the following ordinance by way of amendment:

> "Notwithstanding the provisions of section one, Article Thirteen, and section eight, Article Fourteen, of the foregoing Constitution, during the effectivity of the Executive Agreement entered into by the President of the Philippines with the President of the United States on the fourth of July, nineteen hundred and forty-six, pursuant to the provisions of Commonwealth Act Numbered Seven-hundred and thirty-three, but in no case to extend beyond the third of July, nineteen hundred and seventy-four, the disposition, exploitation, development, and utilization of all agricultural, timber and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, and other natural resources of the Philippines, and the operation of public utilities,

> shall, if open to any person, be open to citizens of the United States and to all forms of business enterprises owned or controlled, directly or indirectly, by citizens of the United States in the same manner as to, and under the conditions imposed upon, citizens of the Philippines or corporations or associations owned or controlled by citizens of the Philippines" (Ordinance appended to the Philippine Constitution).

The Supreme Court by 1973 had, by a line of precedents, already placed strict limitations on the right of foreigners to own or exploit natural resources. Earlier, the High Court had ruled that foreigners other than Americans could not validly acquire public lands or even private lands except by hereditary succession, and this blanket prohibition included both lands owned by private individuals and public lands, which are considered patrimonial property of the State (*Krivenko v. Register of Deeds*, 79 Phil. 46 [1947]). This doctrine barred aliens from the disposition, exploitation, development or utilization of all lands and other natural resources of the Philippines. Next, the Court held that even the Parity Amendment to the Constitution quoted above did not give Americans the capacity to acquire private agricultural land (*Republic v. Quasha*, 46 SCRA 169 [1972]). This came after the ruling that the sale of agricultural land in violation of this prohibition in the Constitution is null and void, and the state may annul the sale and the land sold may be escheated to the government (*Philippine Banking Corp. v. Lui She*, 21 SCRA 52 [1967]). As for corporations, the Court enforced the restriction by holding that in the determination of the ownership of the 60% capital requirement, the "control" test is the applicable standard, and, if the corporation has no capital stock, the controlling membership should be composed of Filipinos (*Register of Deeds v. Ung Siu See Temple*, 97 Phil. 58*).* Furthermore, the Court held that with the expiration in 1974 of the "parity agreement" to the constitution, the right of Americans to own land and other natural resources in the Philippines has also been terminated (*Republic v. Quasha, supra*). The Supreme Court, in holding that aliens could not even own agricultural land nor take part in the exploitation and utilization of natural resources, declared:

> It should be emphatically stated that the provisions of our Constitution which limit to Filipinos the rights to develop the natural resources and to operate the public utilities of the Philippines is one of the bulwarks of our national integrity. The Filipino people decided to include it in our Constitution in order that it may have the stability and permanency that its

> importance requires. It is written in our Constitution so that it may neither be the subject of barter nor be impaired in the give and take of politics. With our natural resources, our sources of power and energy, our public lands, and our public utilities, the material basis of the nation's existence, in the hands of aliens over whom the Philippine Government does not have the complete control, the Filipinos may soon find themselves deprived of their patrimony and living, as it were, in a house that no longer belongs to them (*Republic v. Quasha,* 46 SCRA 160, 170 [1972]).

C. The Advent of the "Service Contract" in the Exploitation of Natural Resources

So, when Marcos promulgated his Constitution of 1973, he sought to modify these restrictions imposed on foreigners by appending the concept of the "service contract" as a qualifying provision to the Regalian doctrine. He inserted a proviso that the legislature, in the national interest, may allow Filipino citizens to enter into service contracts for financial, technical, management, or other forms of assistance with any foreign person or entity for the exploration, development, exploitation or utilization of any of the natural resources. Thus, while the Marcos Constitution of 1973 retained the restrictions of the 1935 Constitution quoted above, Marcos caused to be inserted the following provision that constitutionalized the "service contract":

> "The disposition, exploration, development, exploitation, or utilization of any of the natural resources of the Philippines shall be limited to citizens of the Philippines, or to corporations or associations at least sixty percentum of the capital of which is owned by such citizens. The Batasang Pambansa (Congress), in the national interest, may allow such citizens, corporations, or associations to enter into service contracts for financial, technical, management, or other forms of assistance with any foreign person or entity for the exploration, development, exploitation, or utilization of any of the natural resources. Existing valid and binding service contracts for financial, technical, management, or other forms of assistance are hereby recognized as such" (Sec. 9, Art. XIV, 1973 Constitution).

In addition to the above, another provision of the 1973 Constitution, Article XVII, section 12 provided that "when the national interest so requires, the incumbent President or

the interim Prime Minister may review all contracts, concessions, permits or other forms of privileges for the exploration, development, exploitation, or utilization of natural resources entered into, granted, issued or acquired before the ratification of the (1973) Constitution."

This opening wedge opened the gate to exploitation of natural resources of the country by foreign corporations. The provision of the Marcos Constitution gave him the necessary authority, in exercising the legislative powers which he had usurped, to open up the natural resources for foreign exploitation. This included all kinds of natural resources in the country without minimum limitations as to the size of the resource development project or the kind of control or supervision to be exercised by the government, except that which Marcos himself would see fit to insert in his presidential decrees, which took the place of legislative acts.

Marcos and his ministers were fixated with the "service contract" as a tool for economic development, describing it as a piece of "innovative legislation" which he saw as a replacement for the "concession system" (*Marcos, Five Years of the New Society*, p. 72 [1978]). Ironically, he saw the "service contract" as a weapon to blunt what he called the "practices that ensured the dominance of multinational corporations, x x x whose patterns of entry xxx had created various dysfunctional situations in the economy even to the extent of preempting Filipino exploitation of their own resources" (*Id.*, at p. 39). It is still a puzzle how he saw the service contract as a weapon to blunt the effects of the concession system, considering that the features of one can be incorporated in the other. But he must have borrowed the idea from his minister of energy who looked upon the service contract as a big watershed in the development of the country's natural resources. According to the latter,

> "The system (of service contracts) opened up the best of two worlds. It allowed maximum benefits to the government while providing reasonable returns to companies that give financial and technical services and assume all the risks of profit-sharing concept which upholds the sovereignty of the producer-country over its resources" (Velasco, *Toward Energy Self-Reliance*, p. 24 [1982]).

In any case, the fixation of President Marcos and his ministers with the service contract led to a rash of legislative measures implementing the scheme after the promulgation of the 1973 Constitution. One of the first economic laws promulgated by Marcos after he assumed martial law powers instituted the regime of service contract in petroleum exploration (Presidential Decree No. 87). Under this decree –

> "(T)he Government may directly explore for and produce indigenous petroleum. It may also indirectly undertake the same under service contracts as hereafter provided. These contracts may cover free areas, national reserve areas and/or petroleum reservations, as provided for in the Petroleum Act of 1949, whether on-shore or off-shore. In every case, however, the contractor must be technically competent, and financially capable as determined by the Board to undertake the operations required in the contract" (Presidential Decree No. 87, sec. 4).

The timing for the issuance of this law, in the form of a decree issued by the President exercising legislative powers, was perfect, for this was issued just before the oil crisis struck the industrialized world in 1973. The executive secretary of President Marcos justified the measure by emphasizing the importance of petrol in the national economy, saying that "oil is power," and that "the energy crisis has shown that the world economy as we know it today is built almost entirely on oil" (Melchor, "The Energy/Power Crisis: The Philippine Response," The Fookien Times Yearbook, 1974, p. 52).

Yet the "service contract" instituted in Presidential Decree No. 87 incorporated most features of the old concession regime. This included the bidding off of a selected area or leasing the choice area to the interested party and then negotiating with the government the terms and conditions of the service contract (Pres. Decree No. 87, sec. 5); management of the enterprise was vested on the service contractors, including operations in the field (Pres. Decree No. 87, sec. 8); control of production, including expansion and development, was left to the service contractors; responsibility for downstream operations, like marketing, distribution and sale may be left to the contractors; repatriation of capital and retention of profits was guaranteed (Pres. Decree No. 87, sec. 13); ownership of equipment, machinery, fixed assets and other properties remained with the contractors (Pres. Decree No. 87, sec. 12); and while title to the petroleum discovered may nominally be in the name of the government, the contractors have almost unfettered control over its disposition and sale (Pres. Decree No. 87, sec. 8). In short, the Philippine version of the service contract is just a dressed-up version of the old concession regime.

And since the concession regime was just borrowed from the development and exploitation of mines, another presidential decree was promulgated legalizing the service contract in the mining industry. Styled as "An Act for a Modernized System of Administration and Disposition of Mineral Lands and To Promote and Encourage the

Development and Exploitation Thereof," Presidential Decree No. 463 instituted the service contract in the mining industry:

> "Said reservation (of mineral lands) shall be opened to mining by the government or its instrumentality or by any qualified person through competitive bidding under such terms and conditions as may be prescribed by the Secretary (of the Department of Natural Resources), or through contracts of service with any party or parties, domestic or foreign, duly qualified as to organization, finances, resources, experience and technical competence, subject in any case to the approval of the President" (Pres. Decree No. 463, sec. 8).

The advent of the power crisis in 1973 forced the Marcos Government to accelerate the oil exploration program and also to develop alternative sources of power generation, like coal and natural gas deposits and geothermal energy. Thus, President Marcos issued Presidential Decree No. 972, entitled "An Act To Promote Accelerated Exploration, Development, Exploitation, Production, and Utilization of Coal," which had provisions for coal operating contracts without any limitation as to citizenship (Pres. Decree No. 972, sec. 8), providing that "in a coal operating contract, service, technology, and financing are furnished by the operator for which it shall be entitled to the stipulated fee and reimbursement of operating expenses." While the statute declared that the government may undertake coal exploration, development and production, it gave authority to the Energy Development Board "to execute coal operating contracts as hereafter defined" (Pres. Decree No. 972, sec. 4). The law also gave incentives to foreign loans and obligations arising from technological assistance contracts (Pres. Decree No. 972, sec. 17).

The service contract scheme was also adopted in commercial fishing in Philippine waters (Pres. Decree No. 704, sec. 21), as can be seen from the following provision:

> "Citizens of the Philippines and qualified corporations or associations, engaged in commercial fishing may, subject to the approval of the Secretary, enter into charter contracts lease, or lease-purchase agreements of fishing boats, or contracts for financial, technical, or other forms of assistance with any foreign person, corporation, or entity for the production, storage, marketing and processing of fish and fishery/aquatic products: *Provided*, That the foreign crew members of the foreign fishing boat who shall not

exceed seventy-five percent of the complement of the boat, may be issued fisherman's license subject to security clearance by the Philippine Coast Guard and to the rules, regulations and guidelines to be promulgated by the Council: *Provided, further,* That it shall be a condition in all charter contracts, lease or lease-purchase agreements that Filipino seamen and fishermen shall be given instruction and training by the foreign crew members in the operation of the fishing boat and the use of fishing gears and after two years shall replace all foreign crew members.

Charter contracts, lease or lease-purchase agreements, and contracts for financial, technical or other forms of assistance with any foreign person, corporation, or entity, shall be subject to the guidelines promulgated by the Council and the approval of the Secretary: *Provided,* That payments under such contracts or agreement shall be made in kind., i.e., in export items of fish and/or fishery/aquatic products" (Pres. Decree No. 704, sec. 21).

The "service contract" also crept into the exploitation of forest resources (Pres. Decree No. 705, sec. 62), which states:

"The Department Head, may in the national interest, allow forest products licensees, lessees, or permittees to enter into service contracts for financial, technical, management, or other forms of assistance, in consideration of a fee, with any foreign person or entity for the exploration, development, exploitation, or utilization of the forest resources covered by their license agreements, licenses, leases or permit. Existing valid and binding service contracts for financial, technical, management or other forms of assistance are hereby recognized as such" (Pres. Decree No. 705, sec. 62).

In the exploration of coal reserves (Pres. Decree No. 972, sec. 4) provides that "the Government, through the Energy Development Board, its successors or assigns, shall undertake by itself the active exploration, development and production of coal resources. It may also execute coal operating contracts as hereafter defined," and the decree's definition of coal operating contracts includes service contracts.

And in the exploitation of geothermal energy, natural gas, and methane gas resources, the Marcos decree follows the phraseology of the previous decree on oil exploration (Pres. Decree No. 1442, sec. 1). It states:

> "Subject to existing private rights, the Government may directly explore for, exploit, and develop geothermal resources. It may also indirectly undertake the same under service contracts awarded through public bidding or concluded through negotiation with a domestic or foreign contractor who must be technically and financially capable of undertaking the operations required in the service contract x x x."

It is also provided in the same decree that –

> "Service contracts may cover public lands, government geothermal reservations, including those presently administered or unappropriated areas, as well as areas covered by exploration permits or leases granted under Republic Act No. 5092. Service contracts for exploration and development of geothermal resources may also cover private lands, or other lands subject of agricultural, mining, petroleum, or other rights or devoted to purposes other than the exploration or use of geothermal energy; x x x" (Pres. Decree No. 1442, sec. 2).

The presidential decrees instituting the service contract were complemented by a host of other laws designed to safeguard the property rights of foreign investors in the Philippines. Government-owned and controlled corporations with substantial capitalization were created by special legislation, which were given not only corporate powers but also regulatory powers in their respective areas of operation. New cabinet departments were created to implement presidential legislation, while existing ones which regulated energy exploration and production, oil industry, extractive mining, water resources, fisheries and public lands, and foreign investments, were strengthened.

D. Economic Effects of the New Legislation

The efforts of the Marcos Government to attract foreign direct investments was a result of the government's shift in economic policy from import substitution to export production. A new investment pattern was sought to be achieved by giving substance to the

existing laws on investment, like the Investment Incentives Act of 1968 (Republic Act 5186) and the Foreign Business Registration Act (Republic Act 5455) so as to create a new investment pattern on the development of import substitution industries that would continually integrate with processing of products which were previously exported in raw form (Paterno, "An Assessment of Seven Years of Operations," Fookien Times Yearbook (1975), p. 88). In the exploitation of natural resources of the Philippines, the Department of Natural Resources, in concert with other agencies of the government, launched an aggressive campaign to attract foreign capital into the mining, forest and fisheries sectors (Leido, "Development Thrust Into Our Natural Resources," Fookien Times Yearbook [1974], p. 256, 258).

In the exploitation of natural resources, the efforts of the Marcos Government paid off in terms of foreign investments. One year after the declaration of martial law in the Philippines, the Philippine Board of Investments registered PhP37 million new investments in the mining and mineral processing industries (Paterno, "The Climate for Industrial Investments," Fookien Times Yearbook [1974], p. 90). American, Japanese, European and Asian investors sent formal inquiries to the Board of Investments on the requirements for investments in the country, and one-fifth of such inquiries were on agro-based and mining industries (*Ibid*). The following year, 1974, the amount of foreign investment in agro-based industries increased by 738% over that in 1970, while, for the same period, the amount of foreign investments in mining and mineral processing increased by 1,180% (Paterno, "An Assessment of Seven Years of Operation," Fookien Times Yearbook [1975], p. 88). By area of investment, mining and mineral processing took the largest share of foreign investments in 1974 (*Ibid.*). Thus, the mining industry in 1974 came up with a net domestic product of PhP32.38 billion, compared with only PhP20 billion ten years before (Fernandez, "The Mining Industry: 1974," Fookien Times Yearbook [1975], P. 238). Even in the fishing and forestry sectors, foreign investments intensified their development (Leido, "A Firm Harnessing of Our Natural Resources," Fookien Times Yearbook [1975], p. 236), such that the production of commercial fisheries jumped from an export value of PhP70,526,887 in 1972 to PhP130,483,404 in 1974 (Gonzales, "The Bureau of Fisheries and Aquatic Resources and Its Role in Economic Development," Fookien Times Yearbook [1975], p. 244). In forestry, the wood export earnings went up to US$415.11 million in 1973 (Viado, "The Logging and Lumber Industry," Fookien Times Yearbook [1975], p. 252). Service contracts brought foreign capital and modern exploration technology to the Philippines, leading to some oil discoveries offshore. For instance, the exploitation of natural resources

in the area of energy, specifically in hydropower, coal, oil and other non-conventional energy resources, gradually reduced the country's dependence on imported oil. Thus, in 1973, only 7.98% of the country's total energy needs were locally sourced from the exploitation and use of conventional and non-conventional sources, but this increased to 19.90% the following year, 20.41% two years after, 27.63% after three years, and reaching a peak of 45% by 1985 (Oposa, "Energy and Mineral Resources" in Environmental Law in the Philippines [1992], Institute of International Law Studies, p. 220, 223).

However, it should be noted that the companies which dominate the extractive industries in the Philippines are mostly foreign companies working as service contractors. In the upstream oil industry, for instance, of the 36 service contracts signed by the Philippines, 24 are held by foreign companies, while the rest are joint ventures of foreign companies with Filipino companies (Gamboa, "Service Contracts in Oil Exploration," Lecture delivered at the U.P. Law Center, 1992). In the exploitation of forest resources, this began to accelerate in the 1970s such that the forest area of the Philippines was reduced from 10 million hectares in 1969 t 8.1 million hectares in 1976, to 7.4 million hectares in 1980, and 6.32 million hectares in 1988 (Oposa, "Species and Ecosystems: Resources for Development," *ibid*). In mining, the industry became one of the prime contributors to the country's foreign exchange earnings, exporting a total mineral value of US$1.19 billion in 1988, and employing 146,000 people in the mining and quarrying areas (Oposa, "Energy and Mineral Resources," *supra*).

E. Impact on the Environment and on Environmental Law: Advent of Strict Liability

Yet even as the development and exploitation of natural resources of the Philippines was accomplished through foreign investments largely, this brought its own set of problems, the most serious being environmental pollution. With industrialization and development came pollution of the air and water. Pollution of the air due to chemical pollutants, industrial emissions such as particulates and toxic gases, exhausts from machines and vehicles, pollution of water resources by organic and inorganic substances as well as microbiological pollution by pathogens, pollution by heavy meals, detergents, solid wastes, pesticides, and thermal pollution by waste heat all began to be felt as a consequence of development and industrialization. In the greater Manila area where a greater percentage of the population and industrial establishments were concentrated, it was becoming serious and was

approaching a critical level (Lesaca, "Pollution: A Growing Problem in the Philippines," Fookien Times Yearbook [1975], P. 284).

Marcos and his Cabinet knew the consequences and the problems arising from the use of natural resources for the production of energy and extraction of minerals. Air pollution from the combustion and refining of oil and its by-products is one of these. There is also the possibility of oil spills during transport, and the construction of refineries, terminals and pipelines would adversely affect the physical environment. Sewage disposal into navigable rivers would kill fish and other aquatic life and make the waters unfit for drinking, washing, and other domestic uses. Dust caused by mining, quarrying, and drilling operations would pollute the atmosphere. Smoke emissions from the burning of oil, coal and other minerals degrade the air, until they fall as acid rain. Improper disposal of mine tailings and wastes lead to poisoning of streams, lakes and rivers used by the rural folk for sustenance, irrigation, or cleansing.

Knowing that he has opened the floodgates of the country's natural resources to foreign investors and that the extractive operations of their companies would cause unprecedented environmental problems in terms of pollution, Marcos had attempted to make amends. This he did by adopting the regime of strict liability for operators of extractive industries who violate their environmental responsibilities. This is addressed to owners and operators of industrial plants and extractive industries whose hazardous operations are likely to pollute or degrade the environment. It is through these presidential decrees of Marcos that the Philippines adopted the "polluter-pays" principle, using not only the direct but also the indirect forms of safety regulation and pollution control, like imposition of civil and criminal liability on polluters. Thus, the idea of environmental responsibility was imposed on business enterprises and economic activities whose operations are likely to pollute the environment. This most specially holds true for socially unacceptable damage, like air and water pollution, dumping of hazardous wastes and sewage, and introduction of substances deleterious to fish or aquatic life in the commons. In other words, Marcos used the regime of "polluter-pays" to sugarcoat his presidential decrees which opened up the natural resources of the Philippines to foreign companies.

Thus, pollution of waters was made a criminal offense. Under Presidential Decree No. 704, it is unlawful "to place, or cause to be placed, discharge, or deposit, or cause to be discharged or deposited, or to pass or place where it can pass into Philippine waters, petroleum, acid, coal, or oil tar, lampback, aniline, asphalt, bitumen, or residuary products of petroleum or carbonaceous material or substance, molasses, mining and mill tailings, or any

refused, liquid or solid, from any refinery, gas house, tannery, distillery, chemical works, sugar central, mill or factory of any kind, or any sawdust, shavings, slabs, edgings, or any factory refused or any substance or material deleterious to fish or fishery/aquatic life" (Pres. Decree No. 704, sec. 37). The construction of works that produce dangerous or noxious substances, or the performance of acts that result in the introduction of sewage, industrial waster, or any substance that pollutes a water supply, or the dumping of mine tailings and sediments into rivers and waterways, without prior permission of the government agency concerned, is also made punishable (Pres. Decree No. 1067, sec. 91 (B) (5) and (6). The law provides:

> B. A fine exceeding Three Thousand Pesos (P3,000.00) but not more than Six Thousand Pesos (P6,000.00) or imprisonment exceeding three (3) years but not more than six (6) years, or both such fine and imprisonment in the discretion of the Court, shall be imposed on any person who commits any of the following:
>
> 5. Constructing, without prior permission of the government agency concerned, works that produce dangerous or noxious substances, or performing acts that result in the introduction of sewage, industrial waste, or any substance that pollutes a source of water supply;
>
> 6. Dumping mine tailings and sediments into rivers or waterways without permission (Pres. Decree No. 1067).

Sections 8 and 9 of Presidential Decree No. 984, otherwise known as the Pollution Control Law, also imposes strict liability for polluting air or water, thus:

> Sec. 8. *Prohibitions*.- No person shall throw, run, drain, or otherwise dispose into any of the water, air and/or land resources of the Philippines, or cause, permit, suffer to be thrown, run, drain, allow to seep or otherwise dispose thereto any organic or inorganic matter or any substance in gaseous or liquid form that shall cause pollution thereof.
>
> Sec. 9. (b) Any person who shall violate any of the provisions of Section Eight of this Decree or its implementing rules and regulations or any order or decision of the (Pollution Control) Commission, shall be liable to a penalty of fine not to exceed one thousand pesos for each day during which

the violation continues, or by imprisonment of from two to six years, or by both fine and imprisonment, and in addition such person may be required or enjoined from continuing such violation as hereinafter provided (Pres. Decree No. 984).

Likewise, the Marine Pollution Decree of Marcos, Presidential Decree No. 979, mandates strict liability in the following terms:

Sec. 4. *Prohibited Acts*.- Except in cases of emergency imperilling life or property, or unavoidable accident, collision, or stranding or in any cases which constitute danger to human life or property or a real threat to vessels, aircraft, platforms, or other man-made structure, or if dumping appears to be the only way of averting the threat and if there is a probability that the damage consequent upon such dumping will be less than would otherwise occur, and except as otherwise permitted by regulations prescribed by the National Pollution Control Commission or the Philippine Coast Guard, it shall be unlawful for any person to –

a. discharge, dump, or suffer, permit the discharge of oil, noxious, gaseous and liquid substances and other harmful substances from or out of any ship, vessel, barge, or any other floating craft, or other man-made structures at sea, or by any other method, means, or manner, into or upon the territorial and inland navigable waters of the Philippines;

b. throw, discharge or deposit, dump, or otherwise cause, suffer or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft or vessel of any kind or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter or any kind or description whatsoever other than that flowing from streets and sewers and passing therefrom in a liquid state into tributary or any navigable water from which the same shall float or be washed into such navigable water; and

c. deposit or cause, suffer or procure to be deposited material or any kind in any place on the bank of any navigable river or on the bank or any tributary of any navigable river, where the same shall be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or

otherwise, whereby navigation shall or may be impeded or obstructed or increase the level of pollution of such water (Pres. Decree No. 979).

The Mineral Lands Development Act (Pres. Decree No. 463), also adopt the strict liability regime with respect to dumping or sludge or mine tailings:

> Sec. 81. *Pollution from Mine Wastes and Mill Tailings*.- Any person who willfully causes or permits sludge or tailings and other mine and mill wastes to accumulate in, or flow from his mining claims so as to cause danger, injury, or obstruction to any public road, rivers or streams, or other public property shall be punishable, upon conviction, by a fine not exceeding five thousand pesos (P5,000.00) or imprisonment not exceeding six (6) years, or both, in the discretion of the court, besides paying compensation for the damage caused thereby (Pres. Decree No. 463).

F. Impact on Traditional Doctrines of Liability

These complementary provisions of the presidential decrees adopting the principles of strict liability for environmental pollution arising from exploitation of natural resources are legal innovations in the Philippines. Since the Philippines is a civil law country, these provisions of the Marcos decrees have dented the most durable civilian concept of liability based on fault. This principle was borrowed from Roman law, which recognized liability based either on wrongful intent or on negligence. An ancient statute of the Romans, the Aquilian law, which dates as far back as the third century B.C., required the payment of money for property damaged by a wrongful act. The concept of *culpa aquiliana* owes its origin to this Roman concept. The classical Roman law revolved around the absolute application of the rule that there should be no liability without fault. In fact, the Aquilian action was incorporated in the French civil code with its formulation that “every act whatsoever of an individual which causes injury to another obliges the one by whose fault it has occurred to make reparation for it" (French Civil Code, sec. A-1382).

The Spanish Civil Code, which was extended to the Philippines in 1879 by Spain, is based on the French Civil Code. As in its French counterpart, the Spanish Code recognized the individuality of quasi-delict, or *culpa aquiliana*. This has been preserved in the Philippine Civil Code, which devotes a number of provisions on quasi-delict. The

Philippine Code uses the term “quasi-delict” so that it would correspond to the Roman law classification of obligations and is in harmony with the nature of this kind of liability.

Thus, fault responsibility is the basis for breach of obligation of due diligence, which is an obligation of conduct. Thus, under Philippine civil law, a person may exonerate himself by proving that he observed the required standard of due diligence. This is consistent with the general recognition of due diligence as the form of primary obligation related to environmental protection supported by customary law.

On the other hand, the innovation in the Marcos decrees revolving on the concept of strict and absolute liability are understood to mean responsibility resulting from the breach of an absolute prohibition of an activity, which constitutes an obligation of result. Unlike fault responsibility, this type does not permit exoneration of the perpetrator by virtue of a standard of conduct determined by due diligence. Of course, while absolute responsibility knows practically no ground for exoneration, strict liability allows exoneration for a limited number of reasons, including force majeure and wrongful conduct of the victim.