

## **RATIONALE TO THE RULES OF PROCEDURE FOR ENVIRONMENTAL CASES**

### **I. INTRODUCTION: THE RIGHTS-BASED APPROACH TO ENVIRONMENTAL JUSTICE**

#### **A. BASIC PARADIGMS OF ENVIRONMENTAL PROTECTION**

While the gradual, yet ominous and potentially cataclysmic degradation of our environment is undeniable, the concept of environmental protection is in of itself a quagmire of grand proportions. Unlike more traditionally defined human rights (and other categories of rights as well, such as civil rights), the question of whether environmental rights should be enforced depends on where the assessor's paradigm is plotted along a spectrum of competing interests. In the contrasting example of genocide, for instance, assuming the elements of this international crime have been established, there is no general grey area in which one can question and argue whether rights have been violated. Generally, either it is genocide or it is not. In addition, the subject of genocide is sensitive, and pointedly strikes at the nerve of human dignity because of the crime's gruesome and inhumane nature. The protection of the environment, on the other hand, does not boast of such clear polar ends of interpretation. One can argue that less environmental protection maximizes the exploitation of resources for the benefit of the people's consumption.<sup>1</sup> This traditional dichotomy of economic interests as against environmental interests has suffused the discourse on environmental protection, as well as other areas such as economic and social development. The dynamic between sociology, economics and science (and not merely ecology) is now taken into consideration when discussing the subject of environmental protection.

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<sup>1</sup> See HARALD HOHMANN, PRECAUTIONARY LEGAL DUTIES AND PRINCIPLES OF MODERN INTERNATIONAL ENVIRONMENTAL LAW 1-2 (1994).

Given these commonly competing interests, several schools of thought have arisen in seeking to address this perpetual tug of war. The seemingly boundless and multifaceted nature of environmental rights has spawned different basic approaches to its enforcement.<sup>2</sup> Taken together, an amorphous pool of theoretical and practical legal principles materialized, giving way for an evolving environmental legal movement recognized all over the world, but applied in varying degrees, often producing contradictory stances.<sup>3</sup>

The first is the anthropocentric approach to environmental protection. Under this approach, the goal of preserving the environment is to satisfy the health, aesthetic and economic interests of man.<sup>4</sup> Man's primary interest is that there are sufficient resources to exploit for consumption. Thus, at the breaking point of realizing the limit of resources, man is forced to consider preserving nature to the extent that it could provide for enough resources to last his lifetime.<sup>5</sup> The glaring repercussion of this approach is that the subsistence of our ecosystems would be endangered.<sup>6</sup> In all likelihood, the rate of exploitation would far exceed the rate of protection, and indifference to protection is exacerbated by the presence of sufficient resources for the time being. Accordingly, along the abovementioned spectrum of competing interests, the anthropocentric approach would lie on the end favoring economic interests.

Whether based on scientific evidence or mere observation, environmental destruction has slowly gained worldwide attention. Prerogatives to slow down the effects of an anthropocentric approach resulted in more ecologically-favorable approaches to environmental protection.<sup>7</sup> The discipline of ecology is based on the interconnectivity and interdependence between organisms and the

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* (The anthropocentric approach calls for the preservation of nature to the extent that it may continue to satisfy the needs of man, whereas the sustainability principle claims that nature must also be maintained for its own sake and sustainable indefinitely spanning future generations.).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 2.

elements of the environment.<sup>8</sup> An appreciation of this link between all elements of living things and nature would naturally instill a sense of urgency to protect our ecosystems. Without such protection, the endangerment of the ecosystems would correlate to the endangerment of humankind. Conversely, its protection would benefit man and his ability to survive and sustain in the world. An extreme manifestation of ecological protection is an ecocentric approach, the obvious antithesis of anthropocentricity, where economic and environmental interests are at odds. Under the ecocentric approach, plants and animals themselves have legal rights.<sup>9</sup> The obvious trouble with strictly applying this approach is that man may be impeded from exploiting natural resources for his survival. As with the anthropocentric approach, heavily favoring one interest over another, in this case environment over economy, could produce absurd results for social and economic development.<sup>10</sup>

Thus, the more nuanced principle of sustainability came into fruition. The sustainability principle seeks to strike a delicate balance between the competing interests of economic exploitation (and thus economic development) and environmental protection. It espouses a system in which man can exploit resources for his benefit without destroying the environment in such a way that future generations cannot meet their own needs.<sup>11</sup> In other words, sustainability seeks to protect posterity, or inter-generational equity.<sup>12</sup> Sustainability requires that renewable resources be exploited at a rate that allows for its continuing usage and availability in the future without decline.<sup>13</sup> Sustainability also requires non-renewable resources be used as efficiently as possible.<sup>14</sup> In sum, the aim of this principle is to demand optimal management of environmental resources.<sup>15</sup> Taking the main elements of other approaches and disciplines such as ecology,

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.* at 2-3.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 1.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

sustainability appears to be the ideal principle upon which legal regimes protecting the environment should be based.

Implementing sustainability, however, is an entirely different challenge. There is a lingering question on how to develop environmental laws, both internationally and domestically, which properly reflect the balanced approach to environmental protection. Several factors make this development extremely difficult. For instance, certain jurisdictions have different economic needs than others. The mere difference in degree of economic interests alone can hamper political will to protect the environment. Moreover, such nuances also challenge the development of international environmental norms where consensus among jurisdictions with different economic and environmental needs would be difficult to conceive. Yet, despite these potential issues, the push for the enactment and enforcement of environmental laws comes with the hope that they become authoritative through international norms, or at least influential through best domestic practices.

### **B. THREE MAIN PRINCIPLES**

The aforementioned paradigms revolve around the basic focal points of man and nature, and use the same to shape an approach to environmental protection. The study of the environment is complicated because of its multi-disciplinary character and the scientific uncertainty that is associated with many environmental problems. Hence, the development of solutions for environmental problems is also tedious and complex. Protection based on empirical data (what we know) and on reasonable calculations or expectations (what we know will happen) appears to be the logical framework for solution-building. More recently, a newer principle emerged wherein precaution must be exercised. Under the precautionary principle, bodies exercise precaution against grave risks of environmental harm where there is lack of full scientific evidence available to prove its inevitable occurrence.<sup>16</sup>

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<sup>16</sup> See e.g., Principle 15, U.N. Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992) [hereinafter Rio Declaration].

The first of these principles is the polluter-pays principle. It requires the polluter to internalize the costs associated with causing pollution.<sup>17</sup> Based on an economic theory of externalities, polluters can produce goods or services while causing harm to the environment, but the prices of such goods and services do not reflect the environmental costs.<sup>18</sup> When the polluter is made to pay, the polluter takes responsibility for all the costs arising from pollution, but is considered incomplete when part of the cost is shifted to the community as a whole.<sup>19</sup> Implementation of this principle occurs in two main methods: taxation that corresponds to the estimated economic value of the environmental damage, and regulatory standards to prohibit or limit the damage associated with an economic activity.<sup>20</sup> These methods ensure that the price of products and services more accurately reflect the total cost for producing the same, where the effect on the environment is also factored into the equation.

The Organization for Economic Co-Operation and Development (OECD) and the European Community (EC) have adopted the polluter-pays principle. Additionally, versions of the polluter-pays principle can be found in the preambles and functional provisions of multilateral conventions. The language laying out the principle in preambles is non-binding,<sup>21</sup> while language in operative provisions is binding as a matter of international law.<sup>22</sup> The polluter-pays

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<sup>17</sup> NICHOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES – FROM POLITICAL SLOGANS TO LEGAL RULES 21 (2002).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 23 (enumerating the conventions where the principle is found in the preamble and are thus non-binding insofar as the principle is concerned: 1980 Athens Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities (as amended in Syracuse on 7 March 1996); the 1990 OPRC Convention; the 1992 Helsinki Convention on the Transboundary Effects of Industrial Accidents; the 1993 Lugano Convention on Civil Liability Damage Resulting From Activities Dangerous to the Environment; and the 2000 London Protocol on Preparedness, Response, and Co-Operation to Pollution Incidents by Hazardous and Noxious Substances).

<sup>22</sup> *Id.* (enumerating the conventions where the principle is found in operative provisions: the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources; the 1991 Convention on the Protection of the Alps; the 1992 Porto Agreement to establish the European

principle had evolved from one of economic objectives (i.e. to harmonize markets and prevent distortion of competition) to prevention of environmental harm, mainly because the purely economic approach would seem to allow for polluters to continue causing damage to the environment as long as such costs have been internalized.<sup>23</sup> Although the prevention aspect of the polluter-pays principle is moderate, its character as a curative measure is evident.<sup>24</sup>

Curative measures by regulatory or legal bodies reflect recognition of the urgency to address environmental harm. Yet, curative measures are only stopgap solutions to already existing environmental damage.<sup>25</sup> The prevention principle looks to stop environmental damage before it occurs and is critical where such potential damage may be irreversible.<sup>26</sup> There are several methods in implementing the prevention principle. One common way is through the issuance of permits or authorizations that set out the conditions for administrative controls and criminal penalties where appropriate.<sup>27</sup> The permits are highly specific and set standards that dictate the means of operation, quantities and concentrations of pollutants that may be discharged, as well as what type of security measures must be put in place by the permit holder for the duration of the permit.<sup>28</sup> Prevention can also be linked to areas which are not directly related to environmental protection, such as civil liability, environmental taxation and criminal law.<sup>29</sup>

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Economic Area (EEA); the 1992 OSPAR Convention; the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes; the 1992 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area; the 1994 Agreements concerning the Protection of the Scheldt and Meuse Rivers; the 1994 Convention on Co-Operation for the Protection and Sustainable Use of the Danube River; the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution (as amended in 1995); the 1996 London Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; and the 1998 Rotterdam Convention on the Protection of the Rhine).

<sup>23</sup> *Id.* at 33-36.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 61.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 72.

<sup>28</sup> *Id.* at 73.

<sup>29</sup> *Id.*

Since the operation of the prevention principle comes in many forms and touches upon several realms unrelated to the environment, the parameters of its enforcement are not quite clear.<sup>30</sup> Nonetheless, the prevention principle finds its roots in the prevention of transboundary pollution.<sup>31</sup> It eventually spawned into a more general and encompassing principle that is reflected in several environmental protection measures mentioned above.

The third principle is the precautionary principle. Given the general sphere of uncertainty encompassing environmental science, protection and regulation, the newer approach of precaution looks to transcend the standards of prevention and instead address potential harm even with minimal predictability at hand.<sup>32</sup> To adopt the precautionary principle is to accede to the notion that taking action before the risk becomes known is the more prudent approach to environmental protection today.<sup>33</sup>

As explained in a subsequent section, the Supreme Court has adopted the precautionary principle recognizing that the consideration of scientific uncertainty plays a crucial role in environmental litigation. To do so would be to give environmental plaintiffs a better chance of proving their cases, where the risks of environmental harm may not easily be proven.

### **C. ENVIRONMENTAL LAW AND THE EMERGENCE OF THE RIGHTS-BASED APPROACH**

The approaches to and principles of environmental protection must necessarily be subsumed in environmental law. Environmental law is associated with two main approaches: the traditional approach, and the modern resource-economical and ecological approach.<sup>34</sup>

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<sup>30</sup> *Id.* at 63.

<sup>31</sup> *Id.* at 62 (describing the *Trail Smelter* case, wherein the Dominion of Canada was held liable for a foundry's causing of pollutants to be discharged in the atmosphere, and that it had a duty to protect other states against injurious acts caused by individuals within its jurisdiction).

<sup>32</sup> *Id.* at 18.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 3-4.

There are three main purposes for environmental law under the traditional approach:

1. protecting the safety and health of human beings from harm and the risk of potential or impending harm;
2. assuring the general welfare of man (protection against nuisance, fulfillment of recreational and esthetic needs, etc.); and
3. protecting economic interests (especially in the fields of agriculture, forestry, fish farming, energy production and drinking water supply) from detrimental effects of pollution.<sup>35</sup>

These purposes reflect important qualities: protecting man from environmental harm and protecting the environment in such a way that man's interests (e.g. economic, esthetic) are not impeded. The qualities reveal shades of the anthropocentric approach.

The more progressive paradigm is the modern resource-economical and ecological approach. Under this approach, the economic and esthetic interests of man are protected, but also tempered with the protection of the environment through sustainable use and optimal management of resources.<sup>36</sup> In contrast to the traditional approach, the modern resource-economical and ecological approach reflects the sustainability principle. In this regard, the survival of future generations is vital, demanding that environmental protection be done in such a manner that guarantees sustainable use of natural resources.<sup>37</sup>

Taking sustainability a step further, environmental law received a boost from components of the international community. Yet another, newer angle took into account the now recognized intersection between environmental rights and human rights, which aptly reflects the interdependent relationship of man and nature. In 1994, Fatma Zohra Ksentini, Special Rapporteur on Human Rights and Environment finalized a seminal report entitled "Human Rights

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<sup>35</sup> *Id.* at 3.

<sup>36</sup> *Id.* at 4.

<sup>37</sup> *Id.*

and the Environment.”<sup>38</sup> The Ksentini Report is known for imploring the international community to recognize a human rights approach to solving environmental issues. It generally posits that subsumed in the nexus between human rights and the environment are several other disciplinal elements such as the global economy, democracy and cultural development among others.<sup>39</sup> All of these elements together constitute a more comprehensive human dimension to environmental justice. In this regard, the Ksentini Report outlined the following principles:

### Part I

1. Human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.
2. All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.
3. All persons shall be free from any form of discrimination in regard to actions and decisions that affect the environment.
4. All persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.<sup>40</sup>

Similar to the traditional approach of environmental law, these principles revolve around persons. It differs from the traditional approach insofar as it integrates the element of sustainability with the person-oriented right to a healthy environment.<sup>41</sup> Even more compelling is the human rights aspect to the rights-based approach.

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<sup>38</sup> Special Rapporteur’s Final Report, U.N. Doc. E/CN.4/SUB.2/1994/9 (July 6, 1994) [hereinafter Ksentini Report].

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 74.

<sup>41</sup> HOHMANN, *supra* note 1, at 2-4.

Under this approach, the right of persons to environmental protection would possess the same degree of authority of fundamental rights that are backed by international norms.<sup>42</sup> The aim is that this new wave of environmental protection would be treated with the same respect as international norms so as to allow domestic jurisdictions to take necessary action in protecting the environment. Assuming that the conventions reflecting the rights-based approach are binding international law (or have risen to the level of customary international law), environmental rights as human rights can enjoy ascendancy in law that, by its fundamental nature, cannot be restrained or altered by states.<sup>43</sup> At the least, the familiar construct of a human rights regime is mainly characterized by the enforceability by the people (holders of the rights), and therefore serves as an ideal framework within which environmental rights can be enforced and exercised.

#### **D. ADOPTING A RIGHTS-BASED APPROACH**

This crucial implication to the rights-based approach of who can enforce environmental rights is most relevant in the topic of litigation. The language of the Ksentini Report focusing on the right of persons lends to the suggestion that it is such persons who can enforce his or her right to a healthy environment in the same way persons can seek judicial relief for the violation of their civil or socioeconomic rights.<sup>44</sup> This particular aspect of the rights-based approach is one of the more important considerations for formulating solutions to environmental protection in the Philippines. Accordingly, the Supreme Court adopted the rights-based approach as the most appropriate paradigm for facilitating the administration of environmental justice.

The Constitution bestows upon the Supreme Court of the Philippines a peculiar form of authority. Specifically, the Court can enact rules to enforce constitutional rights, the power of which may

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<sup>42</sup> See e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) (Although the Declaration itself is non-binding in nature, some international law scholars believe that at least some of its principles have risen to the level of binding customary international law.).

<sup>43</sup> *Id.*

<sup>44</sup> Ksentini Report, *supra* note 38, at 74.

be typically lodged in the legislative bodies or branches of other jurisdictions.<sup>45</sup> The Court also determines the procedures and rules of the judiciary which are necessary to facilitate the administration of justice and address the obstacles that come with specific legal issues.<sup>46</sup> The complexity of environmental laws and their enforcement requires the Court to rethink its procedures in order to facilitate the administration of environmental justice. Of the many guiding principles in formulating such solutions, the participation of the people in enforcing environmental rights is key. It is with this general framework, that the Court has adopted the rights-based approach and effectuated the Rules of Procedure for Environmental Cases.

## II. SOURCES OF ENVIRONMENTAL RIGHTS

### A. INTRODUCTION: THE NEXUS BETWEEN HUMAN RIGHTS AND ENVIRONMENTAL RIGHTS

A growing number of international instruments as well as national constitutions, domestic legislations and academic literature have recognized the inextricable link between human rights and environmental rights.<sup>47</sup> It is significant to note that a fair amount of literature on the origins of environmental rights documents in parallel that the “right to an adequate environment” or what is collectively known as “environmental rights” grew out of a human rights framework.<sup>48</sup>

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<sup>45</sup> CONSTITUTION, Art. VIII, Sec. 5, par. (5) (“The Supreme Court shall have the following powers...Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts...”).

<sup>46</sup> *Id.*

<sup>47</sup> The United Nations Environmental Program (UNEP) has a database of environmental law instruments that date back to 1933 *available at* [http://www.unep.org/Law/Law\\_instruments/index.asp](http://www.unep.org/Law/Law_instruments/index.asp).

<sup>48</sup> Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 66 (2002) (Another way of framing this theory is acknowledging the reality that signs, values and attitudes towards human rights helped endorsed the environmental rights movement.).

The human rights movement came to fore shortly after the international community was recovering from the aftermath of World War II.<sup>49</sup> In many ways, human rights emerged as new kind of periphery for political and economic development in a period of very great uncertainty. The atrocities committed during the Second World War riveted public attention to the urgency for the community of nations to adopt an internationally-recognized policy that would foster and protect basic human dignity, peace, respect, and tolerance. In 1948, this common aspiration of according the highest respect for human dignity was soon crystallized by the United Nations General Assembly in its adoption of the “Universal Declaration of Human Rights.”<sup>50</sup> For the first time in history, the 1948 Universal Declaration of Human Rights sets out fundamental human rights to be universally protected.

This milestone document includes specific human rights such as the right to life, liberty, security of person, right against arbitrary arrest and detention, right to property, freedom of expression and peaceful assembly.<sup>51</sup> The political and legal significance of this instrument is of such import that despite its status as a mere non-binding declaration it has influenced national constitutions, serves as the foundation for a growing number of international and regional covenants and treaties, including national legislation, and is recognized by many international law scholars as part of customary international law. In fact, the declaration also served as the foundation for two binding United Nations’ documents – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESC).

Paramount to environmental rights advocates is Article 25 of the Declaration which sets out in its first paragraph, “the right to a standard of living adequate for the health and well-being” of an individual and his family. Although neither the Declaration nor any

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<sup>49</sup> Franz Perrez, *Key Questions Concerning the Human rights and Environment Debate – An Introduction*, in HUMAN RIGHTS AND THE ENVIRONMENT: PROCEEDINGS OF A GENEVA ENVIRONMENT NETWORK ROUNDTABLE 4, (2004) [hereinafter Geneva Roundtable].

<sup>50</sup> Universal Declaration of Human Rights.

<sup>51</sup> *Id.*

of its articles made specific reference to environmental protection, the adoption of the Declaration makes a strong case for the position that a human rights lens is a helpful way of viewing environmental issues. This Declaration captured the critical thesis that the enjoyment of all human rights – not only the rights to life and health – but also other social, economic, cultural, as well as civil and political rights, depended greatly on a sound environment.<sup>52</sup>

It must be noted however, that at that point in environmental legal history, the right to a safe and adequate environment was recognized alongside other substantive human rights such as the right to life, the right to health, the right to adequate housing, the right to water, the right to food, the right to culture, the right to participate in public life and the right to freedom of speech.<sup>53</sup> An *independent* right to a healthy environment had yet to emerge and a deliberate plan by environmental rights advocates to sketch out a massive grassroots political campaign for environmental rights was in the offing. The brief inattention given to environment issues after the Second World War (with the pre-occupation of most world leaders and policymakers on human rights) would soon be short-lived as environmental rights advocates pressed on with the environment agenda more deliberately in the 1960s with the publication of Rachel Carson's seminal work, *Silent Spring*,<sup>54</sup> on the ecologically-unsound pattern of usage by man of pesticides.

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<sup>52</sup> Vid Vukasovic, *Human Rights and Environmental Issues* in HUMAN RIGHTS AND SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENT (1990) (A good number of human rights instruments guarantee a human right to a healthy and safe environment, some of these are:

- a. Universal Declaration of Human Rights: Articles 22, 25, and 27.
- b. ICESCR: Articles 1, 6, 7, 11, 12, 13, and 15.
- c. Convention on the Elimination of All Forms of Discrimination Against Women Articles 11 and 14.
- d. Convention on the Elimination of All Forms of Racial Discrimination: Articles 2 and 5.
- e. Convention on the Rights of the Child: Articles 24 and 27.
- f. ILO Indigenous and Tribal Peoples Convention (No. 169): Article 7.).

<sup>53</sup> See generally *The National Human Rights Consultation – Engaging in the Debate* (2009), available at <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/a-human-rights-act-for-all-australians/> (last accessed on 5 February 2010).

<sup>54</sup> No less than U.S. Supreme Court Associate Justice William O. Douglas commended Carson's work as "the most important chronicle of this century for the human race."

Carson's work not only created more awareness regarding the debilitating effects of environmentally hazardous practices, it also gave more legitimacy to the troubled crusade of the environmental rights movement.

The first signs of an impending environmental crisis had already been felt by the time of the extremely tumultuous decade of the 1970's.<sup>55</sup> As a response to this clarion call for more precautionary measures in dealing with the environment, the United Nations convened the first major international environmental conference in Stockholm, Sweden<sup>56</sup> which gave rise to the Stockholm Declaration of 1972, known world-over as the first international document which recognized the right to a healthy environment. Principle 1 of the Stockholm Declaration linked environmental protection to human rights, stating:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

Two decades after the adoption of the Stockholm Declaration, a second major international environmental conference was held in Rio de Janeiro, Brazil,<sup>57</sup> which focused on strategies to reverse the effects of environmental degradation alongside efforts to promote international and national sustainable development. A key result area of the conference was the adoption of the Rio Declaration of 1992 which identifies 27 principles concerning a number of issues related to the environment – environmental protection, eradication of poverty, precautionary principle, polluter-pays principle, right to development, right to information and right to public participation

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<sup>55</sup> The Vietnam War exacted a huge toll on the economies of the world (as the US suspended the convertibility of the dollar to gold in 1971), two massive oil shocks caused LDC trade deficits to balloon, cracks in the welfare system first began to show in the West, and mass marketing in cities, along with the break-up of the traditional family structure, produced widespread alienation. Protests were rife – against the North-South divide, against the indifference and cruelty of the 'Establishment,' against the conservatism of previous decades.

<sup>56</sup> The United Nations Conference on the Human Environment, June 5-16, 1972.

<sup>57</sup> The United Nations Conference on Environment and Development (UNCEP) June 3-14, 1992.

in environmental decision-making processes. Principle 1 of the Rio Declaration states that “human beings are at the centre of concerns for sustainable development.” Though the statement falls short of recognizing a healthy environment as a basic human right, it certainly points to that direction.

## **B. GENERAL SOURCES OF ENVIRONMENTAL RIGHTS**

### **1. NON-BINDING INTERNATIONAL SOURCES**

International documents of a non-binding nature play an important role in all fields of international relations, and the human rights problematique is not an exception. In many cases they can regulate international relations in a specific field de facto, although they are not formally binding. Notably, they often lead to a higher level of regulation (i.e. international treaties, institutional arrangements, etc.). The Universal Declaration on Human Rights was followed, for instance, by the Covenants, and similar developments occurred in other fields. From that point of view the proposed Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind<sup>58</sup> could be seen as an important step towards better protection and promotion of human rights. It seems that such a declaration should contain, more or less, what has already been proposed by the group of experts convened by the United Nations in Geneva in September 1975, but that an additional effort should be made to link it more closely to development and the environment.

Naturally, one must always have in mind the other side of the coin. Moreover, so-called soft law does not automatically mean more regulation and further progress in the field. In some cases, it leads to a proliferation of documents with very little or no importance at all, and it could even hinder the process of legal regulation. In other cases, however, including the fields of science, technology, the environment and some other cognate domains, non-

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<sup>58</sup> G.A. Res. 3384, 10 November 1975 available at <http://www2.ohchr.org/english/law/mankind.htm>.

binding norms can be, if functionally well-designed, very important and almost universally accepted and applied in such a way as to influence human rights beneficially. Good examples of such norms are formally non-binding ecological standards which are accepted by all or most interested states and other subjects of international law because it is in their interest to do so. The sanction for those who do not apply the standard becomes functional. That means that the mere fact of not applying them can cause impairment of the environment, loss of profit, health problems, loss of life or lessening of political prestige. If adequately set, they could represent an optimal mode of behavior. In that way, although formally non-binding, they contribute to the protection of the environment, having a directly or indirectly positive impact on the protection and promotion of human rights.

There are a number of other international instruments that specifically refer to environmental human rights but are not legally binding on the Philippines because they are draft texts, are not intended to be legally binding on parties, or are conventions to which the Philippines is not a party. Some of these instruments are environmental instruments that note human rights linkages, while others are human rights instruments that note the importance of environmental rights. Although they are not binding on the Philippines, they are evidence of a strong global recognition of the importance of environmental rights, and they indicate the path that the Philippines can follow.

As noted above, the Stockholm Declaration was the first international instrument that specifically recognized the indivisible link between the environment and human rights. It states at Principle 1:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

Similarly the 1992 Rio Declaration on Environment and Development recognizes the right of humans to a healthy and productive life in harmony with nature.

The most comprehensive of all the international texts on environmental rights is the 1994 Draft Principles on Human Rights and the Environment, which was derived from the Ksentini Report.<sup>59</sup> It contains a number of articles which outline the importance of environmental rights in the human rights context. The document was drafted by a group of international experts on human rights and environment protection on behalf of the UN Special Rapporteur for Human Rights and the Environment. It was never formalized as an international instrument and is not binding, but it is perhaps one of the most important texts in terms of setting a framework for recognizing the link between human rights and environmental rights. Some of the key articles in the Draft Principles state:

- Human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.
- All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.

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- All persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.

The Draft Principles highlight the indivisibility of human rights and environmental rights. A clean, healthy environment is integral to the enjoyment of many other human rights such as the right to life, the right to health and food, and the right to adequate housing. The Draft Principles are often quoted by human rights experts and international human rights bodies as a model text of environmental rights protection.

As can be seen from the above statements there is considerable support at the international level of the importance and indivisibility of environmental rights within human rights protections. It is neither a new nor radical concept. This recognition continues to grow

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<sup>59</sup> Draft Principles On Human Rights And The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994) *available at* <http://www1.umn.edu/humanrts/instree/1994-dec.htm> on 19 May 2009.

through many international bodies and provides a strong foundation for the Philippines to include environmental rights within human rights protections.

## **2. ENVIRONMENTAL RIGHTS WITHIN DOMESTIC HUMAN RIGHTS INSTRUMENTS**

The protection of environmental rights in a human rights context at a domestic level is not a new concept. Many countries around the world provide some protection of environmental rights within their human rights charters.

The following is a summary of the constitutional recognition of environmental rights worldwide, which was submitted to the UN Commission on Human Rights:

Numerous constitutions of the nations of the world guarantee a right to a clean and healthy environment or a related right. Of the approximately 193 countries of the world, there are now 117 whose national constitutions mention the protection of the environment or natural resources. One hundred and nine of them recognize the right to a clean and healthy environment and/or the state's obligation to prevent environmental harm. Of these, 56 constitutions explicitly recognize the right to a clean and healthy environment, and 97 constitutions make it the duty of the national government to prevent harm to the environment. Fifty-six constitutions recognize a responsibility of citizens or residents to protect the environment, while 14 prohibit the use of property in a manner that harms the environment or encourage land use planning to prevent such harm. Twenty constitutions explicitly make those who harm the environment liable for compensation and/or remediation of the harm, or establish a right to compensation for those suffering environmental injury. Sixteen constitutions provide an explicit right to information concerning the health of the environment or activities that may affect the environment.<sup>60</sup>

For example, South Africa has specifically protected environmental rights in its Constitution:

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<sup>60</sup> Earthjustice, *Environmental Rights Report on Human Rights and the Environment available at* [http://www.earthjustice.org/our\\_work/issues/international/human\\_rights/](http://www.earthjustice.org/our_work/issues/international/human_rights/) (May 19, 2009).

Everyone has the right (a) to an environment that is not harmful to their health or well being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable and other legislative measures that (i) prevent pollution and degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.<sup>61</sup>

In 2005, France amended its Constitution to include environmental provisions, known as the Environment Charter. The Charter contains 10 articles covering rights and responsibilities of its citizens in relation to the Environment. As it is incorporated into the Constitution, it is legally binding and gives environmental rights and responsibilities the same status as other rights such as the right to life and universal suffrage. Article 1 of the Charter states:

Everyone has the right to live in a balanced environment which shows due respect for health.<sup>62</sup>

Even small developing countries such as East Timor have provided protection of environmental rights in their constitutions. Section 61 of the East Timor Constitution states:

1. Everyone has the right to a humane, healthy, and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generations.
2. The State shall recognize the need to preserve and rationalize natural resources.
3. The State should promote actions aimed at protecting the environment and safeguarding the sustainable development of the economy.<sup>63</sup>

**C. THE RIGHT TO A BALANCED AND HEALTHFUL ECOLOGY IN THE PHILIPPINES – A FUNDAMENTAL AND ENFORCEABLE RIGHT**

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<sup>61</sup> Commonwealth Constitution, Chapter 2 section 24.

<sup>62</sup> Constitution of October 4, 1958 *available at* <http://www.assemblee-nationale.fr/english/8ab.asp>.

<sup>63</sup> Constitution of the Democratic Republic of Timor-Leste August 2001 *available at* <http://www.timor-leste.gov.tl/constitution/constitution.htm>.

**1. THE CONSTITUTION AND JURISPRUDENCE ON ENVIRONMENTAL RIGHTS**

A leading commentator on environmental law posits that there is diversity of approaches to structuring environmental rights in domestic constitutions: (1) as a policy statement; (2) as a procedural right or duty; or (3) as a substantive right.<sup>64</sup>

The Philippine Constitution contains a basic design for environmental rights protection and policy. The environmental provisions of the Constitution are located within a larger legal framework of constitutionally-guaranteed rights. This legal framework primarily establishes first principles<sup>65</sup> by which government ought to exercise its powers in relation to environmental rights and provides for institutional arrangements and structures<sup>66</sup> for authoritative governance.

The developmental construct of environmental rights under the Constitution is framed in such a way that these rights are shaped as state policies and do not form part of the Bill of Rights.<sup>67</sup> Section 16, Article II<sup>68</sup> of the Constitution is the flagship provision for environmental rights and is complemented by Section 15, Article II<sup>69</sup> which provides the state policy on the right to health. This uproot from Article III of the Bill of Rights however, does not in anyway make it less of a human right compared to other freedoms

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<sup>64</sup> James R. May & Erin Daly, *Vindicating Fundamental Environmental Rights Worldwide*, 11 OREGON REV. INT'L LAW 373 (2009).

<sup>65</sup> CONSTITUTION, ART. II.

<sup>66</sup> CONSTITUTION ARTS. VI, VII and VIII.

<sup>67</sup> See generally James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 PACE ENVIRONMENTAL LAW REVIEW 173 (2005-2006) (listing countries whose constitutions contained some reference to environmental protection treating environmental rights as fundamental rights and referring to environmental rights as policy statements).

<sup>68</sup> This section states:

The state shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.

<sup>69</sup> This section states:

The state shall protect and promote the right to health of the people and instill health consciousness among them.

protected by the Constitution, because it also reemerges as part of, and is interdependent of other fundamental rights as carved out (directly and indirectly) in other constitutional provisions, the state policies on peace and order and general welfare,<sup>70</sup> on social justice,<sup>71</sup> on personal dignity and human rights.<sup>72</sup> The constitutional provisions on social justice and human rights<sup>73</sup> are treasured concepts since the enactment of the 1935 Constitution. Furthermore, fleshed out in greater detail, the right to life under Section 1, Article III,<sup>74</sup> does not only pertain to the protection of the right to be alive but also means the right to a good life.<sup>75</sup> The exchange between Commissioners Bennagen and Nolloedo during the deliberations of the 1986 Constitutional Convention also supports the general idea that environmental rights are included in the complete concept of human rights.<sup>76</sup>

As much as the right to a balanced and healthful ecology is ordained in our constitution, there is also the question of enforceability. Many legal scholars who correlate fundamental environmental rights with enforceability either through administrative agencies or courts of law have managed to demonstrate that constitutionalizing commitments without the muscle of enforcement do not translate to real improvements in environmental conditions. Viewed as a whole, enforcement is seen as a barometer of how confident people are about environmental justice. Even as nations around the world have increasingly incorporated the principle of environmental protection in their fundamental laws, many of their courts have not found the occasion to interpret these textually-demonstrable constitutional provisions.

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<sup>70</sup> CONSTITUTION, Art. II, Sec. 5.

<sup>71</sup> CONSTITUTION, Art. II, Sec. 10.

<sup>72</sup> CONSTITUTION, Art. II, Sec. 11.

<sup>73</sup> CONSTITUTION, Art. XIII.

<sup>74</sup> CONSTITUTION, Art. III, Sec. 1.

<sup>75</sup> JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* (2003).

<sup>76</sup> IV RECORD, CONSTITUTIONAL COMMISSION 688 (In response to the question of Commissioner Bennagen if the state should make a conscious effort to enhance social, economic, and political conditions in relation to human rights, Commissioner Nolloedo replied, "...when we talk of human rights, we talk of the whole gamut of human rights.").

In 1993, the Supreme Court of the Philippines found the occasion to clarify and recast the notion of fundamental right to a healthy environment when minors, represented by their parents, filed a complaint to compel the Secretary of Environment and Natural Resources (DENR) to cancel all existing Timber License Agreements (TLA) and prevent the Secretary from issuing or renewing licenses. The landmark case of *Oposa v. Factoran, Jr.*<sup>77</sup> offered an angle of vision for viewing environmental rights as constitutionally-guaranteed and fundamental human rights which are enforceable in a court of law.<sup>78</sup> Through then Chief Justice Hilario Davide, the Court pronounced that the right to a balanced and healthful ecology was not just an empty incantation found in the Constitution:

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

The Court went further and even maintained that environmental rights “are enforceable notwithstanding whether they are constitutionally expressed because of their inception before humankind:”

As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come - generations

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<sup>77</sup> G.R. No. 101083, July 30, 1993, 224 SCRA 792.

<sup>78</sup> *Id.*

which stand to inherit nothing but parched earth incapable of sustaining life.<sup>79</sup>

*Oposa* is one of the best known jurisprudential triumphs in the history of the Court and not long after this case was decided, the Court found itself continually securing for current and future generations the wealth of the environment, among others — *Laguna Lake Development Authority (LLDA) v. C.A., et. al.*,<sup>80</sup> *Henares, et al. v. Land Transportation and Franchising Regulatory Board (LTFRB)*,<sup>81</sup> and *Social Justice Society, et al. v. Atienza, Jr.*<sup>82</sup>

The key insights pronounced by the Court in *Oposa* provided powerful arguments for recognizing that not only were there fundamental environmental rights in the Philippine Constitution, but more importantly, ethical obligations were due to the entire community of life. *Oposa* was a cause célèbre for the entire environmental rights community because it declared that a correlative duty to protect the environment could be exacted on each and every individual:

The right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment. During the debates on this right in one of the plenary sessions

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<sup>79</sup> *Id.* at 187.

<sup>80</sup> G.R. No. 110120, March 16, 1994, 231 SCRA 292 (Balancing between the responsibility of the city government to take care of its garbage and the right of the people living near the dumpsite to a pollution-free environment, the Court ruled that the right to health is a constitutionally enshrined right over which no impairment can be made. The Court further said that the Philippines is a party to international instruments which recognizes the right to health as a fundamental right.)

<sup>81</sup> G.R. No. 158290, October 23, 2006, 505 SCRA 104 (This petition focuses on one fundamental legal right of petitioners, their right to clean air. While the Court recognized the right of the petitioner, it ruled, however, that the lack of legislation on the matter served as a restriction on the prayer to grant *mandamus*.)

<sup>82</sup> G.R. No. 156052, March 7, 2007, 545 SCRA 92 (The petitioners filed with the Court an original action for *mandamus* praying to compel Manila Mayor Atienza to enforce Ordinance No. 8027 which reclassifies certain portions of Pandacan and Sta. Ana from industrial to commercial and directs businesses not falling under the following classifications to “cease and desist from their operations” or relocate to another area. Among the businesses affected were the oil terminals of Caltex, Petron, and Shell. The Supreme Court granted the petition and ordered the immediate removal of the terminals of the said oil companies. The Court held that “there is nothing that legally hinders [Mayor Atienza] from enforcing Ordinance No. 8027.”)

of the 1986 Constitutional Commission, the following exchange transpired between Commissioner Wilfrido Villacorta and Commissioner Adolfo Azcuna who sponsored the section in question:

“MR.VILLACORTA:

Does this section mandate the State to provide sanctions against all forms of pollution ? air, water and noise pollution?

MR. AZCUNA:

Yes, Madam President. The right to healthful (sic) environment necessarily carries with it the correlative duty of not impairing the same and, therefore, sanctions may be provided for impairment of environmental balance.” The said right implies, among many other things, the judicious management and conservation of the country’s forests. Without such forests, the ecological or environmental balance would be irreversibly disrupted.<sup>83</sup>

Perhaps the second most eponymous decision of the Supreme Court of the Philippines after *Oposa*, that inspired countless of people working in the field of environmental law to enforce the right to a balanced and healthful ecology is the case of *Metropolitan Manila Development Authority (MMDA) et al. v. Concerned Residents of Manila Bay*.<sup>84</sup> The case upheld a request for a multi-faceted injunctive relief to prevent pollution discharges from choking Manila Bay and exacting compliance on various government agencies to clean and protect it for future generations.<sup>85</sup> The Court held:

Even assuming the absence of a categorical legal provision specifically prodding petitioners to clean up the bay, they and 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. Anything less would be a betrayal of the trust reposed in them.<sup>86</sup>

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<sup>83</sup> *Oposa v. Factoran, Jr.*, *supra* note 77.

<sup>84</sup> G.R. Nos. 171947-48, December 18, 2008, 574 SCRA 661.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

Justice Presbitero J. Velasco, Jr., the *ponente* of the decision, explains that the *Manila Bay* case was the first in a series of decisions that affirms the constitutional environmental rights of citizens to push government agencies that skirt their obligation to provide for institutional environmental protection arrangements.<sup>87</sup> Opportunity for reform frequently beckons in the wake of a disaster and the decision produced a lot of pressure points for these agencies to clean up Manila Bay. Justice Velasco observed:

Those who have read the Court's disposition in *Manila Bay* would at once notice the all-encompassing thrust of the ruling. Consider: It ordered any and all government agencies whose official functions and statutory duties have a connective bearing, however remote, to the cleaning and rehabilitation of the Manila Bay to spare no effort, at the implied risk of contempt of court, to perform these functions and duties, so as to achieve the desired purpose. It tried to address all possible causes, direct or contributory, of the pollution and decay of the bay. In essence, the Court's directives revolved around, and may be broken into, three main areas: (1) prevention, control and protection; (2) prosecution and sanctions; and (3) rehabilitation.<sup>88</sup>

## 2. ENFORCEMENT OF ENVIRONMENTAL RIGHTS IN THE PHILIPPINES

The DENR is the lead national agency to look into environmental concerns of the country. In addition, special governmental agencies have been created to look into specific areas of concern such as the Pollution Adjudication Board, the Laguna Lake Development Authority, the Land Transportation and Franchising Regulatory Board and the National Pollution Commission. Further, the local government units have the power to issue ordinances for the protection of the environment and regulate the projects and activities of transnational corporations for instance. First, the authority to grant license to these transnational corporations lies with the State. In

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<sup>87</sup> Justice Presbitero J. Velasco, Jr., Speech at the 3<sup>rd</sup> Annual Symposium on the Confluence of Human Rights and the Environment: Manila Bay: A Daunting Challenge in Environmental Rehabilitation and Protection (February 20, 2009).

<sup>88</sup> *Id.*

some Supreme Court decisions, licenses and/or registrations were withheld in instances where it was found that the corporation has violated the environment and has failed in protecting and caring for the same.<sup>89</sup> Second, the State has the power to issue restraining orders and/or injunctions for those found violating the Environmental Code. In addition, closure of violating corporations and payment of damages may also be ordered.<sup>90</sup> Third, heads or officers of these corporations may likewise be found criminally liable for negligence in their operation and violations of environmental laws.<sup>91</sup> Fourth, the local government units may issue ordinances protecting the environment. In some Supreme Court decisions, the constitutionality of these ordinances insofar as they were made in furtherance of the right to a healthful ecology was sustained.<sup>92</sup> Fifth, the legislature can enact laws to regulate projects and activities of industries in order to protect the environment and promote health. Further, the legislature can enact laws protecting the environment.<sup>93</sup> In fact the Philippines has enacted legislation to protect the rights of life and health against environmental harms arising from various activities. Some of these laws include the Revised Forestry Code of the Philippines, the National Integrated Protected Areas System Act of 1992, the Ecological Solid Waste Management Act of 2000, the Philippine Mining Act of 2005 and the Biofuels Act of 2006. Lastly, efforts towards education of the people in the area of environment are being conducted by the state agencies as well as non-governmental organizations.

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<sup>89</sup> *Ysmael vs. Deputy Executive Secretary*, G.R. No. 79538, October 18, 1990.

<sup>90</sup> *Republic vs. Marcopper*, G.R. 137174, July 10, 2000; *Laguna Lake Development Authority vs. Court of Appeals*, G.R. Nos. 120865-71, December 7, 1995; *Pollution Adjudication Board, vs. Court of Appeals*, G.R. No. 93891, March 11, 1991; *Technology Developers, Inc. vs. Court of Appeals*, G.R. No. 94759, January 21, 1991.

<sup>91</sup> *Loney vs. People*, G.R. No. 152644, February 10, 2006; *Mustang Lumber, Inc. vs. Court of Appeals*, G.R. No. 104988, June 18, 1996 (The Court boldly stated that, "The Government must not tire in its vigilance to protect the environment by prosecuting without fear or favor any person who dares to violate our laws for the utilization and protection of our forests.").

<sup>92</sup> *Social Justice Society, et al. vs. Atienza, Jr.*, G.R. No. 156052, March 7, 2007; *Taño vs. Socrates*, G.R. No. 110249, August 21, 1997).

<sup>93</sup> *Province of Rizal vs. Executive Secretary*, G.R. No. 129546, December 13, 2005.

### III. HIGHLIGHTS OF THE RULES OF PROCEDURE FOR ENVIRONMENTAL CASES

The Rules of Procedure for Environmental Cases aim to achieve the following objectives:

- a) To protect and advance the constitutional right of the people to a balanced and healthful ecology;
- b) To provide a simplified, speedy and inexpensive procedure for the enforcement of environmental rights and duties recognized under the Constitution, existing laws, rules and regulations, and international agreements;
- c) To introduce and adopt innovations and best practices ensuring the effective enforcement of remedies and redress for violation of environmental laws; and
- d) To enable the courts to monitor and exact compliance with orders and judgments in environmental cases.<sup>94</sup>

In meeting these objectives, the following guidelines are vital: (1) the Rules must reflect the constitutional and jurisprudential concepts of liberalized standing requirements for plaintiffs in environmental suits; (2) the Rules will facilitate access to courts by providing for litigation tools such as citizen's suits, and anti-SLAPP provisions; (3) the Rules should shape procedural elements of environmental litigation to implement the basic tenets of the precautionary principle; and (4) the Rules must provide other innovations deemed necessary for the proper administration of environmental justice.

The following elements of the Rules of Procedure for Environmental Cases highlight the unique nuances created for the accomplishment of the abovementioned goals.

#### A. LIBERALIZED *LOCUS STANDI* AND CITIZEN'S SUIT

The doctrine of standing under the constitutional law of the United States (U.S.) presents interesting implications for environmental litigation. In *Lujan v. Defenders of Wildlife*, Justice

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<sup>94</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 1, Sec. 3.

Scalia described the doctrine of standing as a landmark, “still less uncertain...setting apart the ‘Cases’ and ‘Controversies’ that are of the justiciable sort...serving to identify those disputes which are appropriately resolved through the judicial process.”<sup>95</sup> Much of the debate on whether a party has standing revolves around the question of whether that party had suffered an injury in fact.<sup>96</sup> In *Sierra Club v. Morton*, the U.S. Supreme Court reviewed the issue of whether an environmental group was injured in fact by the development of a recreational skiing development in the Mineral King Valley.<sup>97</sup> It concluded that the organization did not suffer an injury in fact by the recreational development of the subject land and therefore did not have standing, but suggested that individual members could have standing if such persons show the court that they have suffered personal harm. Such environmental cases in American jurisprudence underscore a persistent commitment to a stricter reading of injury in fact. Generally, the persistence of the injury in fact requirement can be seen as a relatively conservative doctrinal approach.<sup>98</sup>

The Supreme Court of the Philippines recognizes the injury element of standing, but has given it a more liberal interpretation with regard to environmental claims. This was established by the Court in *Oposa*.<sup>99</sup> The Court held that representatives suing in behalf of succeeding generations had standing based on an “intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.”<sup>100</sup> In this case, petitioners sought to prevent the Secretary of the DENR from further issuing timber licensing agreements, and to cancel those already issued.<sup>101</sup> The petitioners were parents representing their children and “generations yet unborn.”<sup>102</sup>

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<sup>95</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>96</sup> See e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972).

<sup>97</sup> *Id.*

<sup>98</sup> See generally, *Lujan v. Defenders of Wildlife*, *supra* note 94.

<sup>99</sup> *Oposa v. Factoran, Jr.*, *supra* note 77.

<sup>100</sup> *Id.* at 802-803; See also *Henares, et al. v. LITFRB*, *supra* note 81.

<sup>101</sup> *Oposa v. Factoran, Jr.*, *supra* note 77, at 792-803.

<sup>102</sup> *Id.*

*Oposa* represents a progressive approach to environmental justice. The Court has shown that it is not restrained by artificial doctrinal barriers, which would result in absurdity. In this case, the idea of injury in fact as strictly applied might have prevented the petitioners in *Oposa* from pursuing this case.

The doctrine of standing in Philippine jurisprudence, although groundbreaking, is merely the catalyst of a greater concept: public participation in environmental enforcement. If indeed the people have enforceable environmental rights, then the legal system must give the people a venue to protect these rights. One such mechanism is through the use of citizen suits. Certain environmental statutes have already recognized the importance of public participation in environmental cases.

The citizen suit provisions in Section 41 of Republic Act (R.A.) No. 8749 or the Clean Air Act<sup>103</sup> and Section 52 of R.A. No. 9003 or the Ecological Solid Waste Management Act<sup>104</sup> focus on the

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<sup>103</sup> This section provides:

SECTION 41. Citizen Suits. — For purposes of enforcing the provisions of this Act or its implementing rules and regulations, any citizen may file an appropriate civil, criminal or administrative action in the proper courts against:

(a) Any person who violates or fails to comply with the provisions of this Act or its implementing rules and regulations; or

(b) The Department or other implementing agencies with respect to orders, rules and regulations issued inconsistent with this Act; and/or

(c) Any public officer who willfully or grossly neglects the performance of an act specifically enjoined as a duty by this Act or its implementing rules and regulations; or abuses his authority in the performance of his duty; or, in any manner, improperly performs his duties under this Act or its implementing rules and regulations: Provided, however, That no suit can be filed until after thirty-day (30) notice has been given to the public officer and the alleged violator concerned and no appropriate action has been taken thereon.

The court shall exempt such action from the payment of filing fees, except fees for actions not capable of pecuniary estimations, and shall, likewise, upon prima facie showing of the non-enforcement or violation complained of, exempt the plaintiff from the filing of an injunction bond for the issuance of a preliminary injunction.

Within thirty (30) days, the court shall make a determination if the complaint herein is malicious and/or baseless and shall accordingly dismiss the action and award attorney's fees and damages.

<sup>104</sup> This section provides:

SECTION 52. Citizen Suits. — For purposes of enforcing the provisions of this Act or its implementing rules and regulations, any citizen may file an appropriate civil, criminal or administrative action in the proper courts/bodies against:

violative conduct of the polluter or regulating government agency as opposed to the specific nature of the injury sustained. Both R.A. No. 8749 and R.A. No. 9003 require the citizen to notify the public officer and alleged violator concerned before filing a complaint. They also prohibit citizen suits where an appropriate action has been taken prior to the filing of a complaint.

The general structure of these citizen suit provisions is similar to the citizen suit provisions in U.S. environmental statutes. The U.S. Clean Air Act of 1970, a good representation of analogous provisions in other U.S. environmental statutes, requires potential plaintiffs to provide the violator as well as the federal agency with jurisdiction and, in some cases, a state agency with jurisdiction, notice before commencing a suit.<sup>105</sup> The notice requirement “preserves the government’s role as the primary enforcer of environmental laws,” presenting federal and state government agencies the opportunity to take enforcement action.<sup>106</sup>

The legislative history of the U.S. citizen provisions reveal that their enactment was in the same period where “capture” theories were predominant, suggesting that regulatory agencies “were sometimes subject to sustained political pressure from regulated

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- (a) Any person who violates or fails to comply with the provisions of this Act or its implementing rules and regulations; or
  - (b) The Department or other implementing agencies with respect to orders, rules and regulations issued inconsistent with this Act; and/or
  - (c) Any public officer who willfully or grossly neglects the performance of an act specifically enjoined as a duty by this Act or its implementing rules and regulations; or abuses his authority in the performance of his duty; or, in any manner, improperly performs his duties under this Act or its implementing rules and regulations: Provided, however, That no suit can be filed until after thirty-day (30) notice has been given to the public officer and the alleged violator concerned and no appropriate action has been taken thereon.

The Court shall exempt such action from the payment of filing fees and shall, likewise, upon prima facie showing of the non-enforcement or violation complained of, exempt the plaintiff from the filing of an injunction bond for the issuance of a preliminary injunction.

In the event that the citizen should prevail, the Court shall award reasonable attorney’s fees, moral damages and litigation costs as appropriate.

<sup>105</sup> Trent A. Dougherty, et al., *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick up the Slack?* 20 DUKE ENVTL. L. & POL’Y F. 1, 10 (2010).

<sup>106</sup> *Id.* at 11.

industries.”<sup>107</sup> Regulatory agencies were thought to be “unduly sympathetic to the interests of the regulated industries,” because they had the resources to be heard in the regulatory process of decision-making.<sup>108</sup> Citizen suits, designed to close the “resource gap between industry and public interest groups,” provided the opportunity for oversight of the regulatory enforcement process.<sup>109</sup> Citizen suit provisions were intended to encourage public vigilance and to allow the government to benefit from technical work of information gathering and litigation by citizens.<sup>110</sup> More importantly, the nature of the rights involved in environmental protection justified the unprecedented power given to citizens.<sup>111</sup>

While citizen suits appear to be a relatively new mechanism for the enforcement of regulatory statutes, the concept of shared public and private enforcement is rooted in the history of Anglo-American law. A water pollution statute enacted in 1388 provided for a dual system of enforcement at the instance of either public officials or private individuals.<sup>112</sup> The difference was often in the remedy sought. Public authorities were generally interested in the punishment and deterrence of violations as well as the imposition of fines as a result thereof, while private individuals “were generally more interested in getting compensation for the injuries they had suffered and in preventing future injuries.”<sup>113</sup>

That private enforcement appeared to be common through the nineteenth century may be attributed to the absence of a developed distinction between public and private functions. A violation of

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<sup>107</sup> Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 183-184 (1992); See also Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits* 21 STAN. ENVTL. L.J. 81, 83 (2002).

<sup>108</sup> Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 843-844 (1985).

<sup>109</sup> *Id.*

<sup>110</sup> Dougherty, et al., *supra* note 105, at 15.

<sup>111</sup> *Id.*

<sup>112</sup> Boyer & Meidinger, *supra* note 108 at 946-947.

<sup>113</sup> *Id.* at 949.

community rules affected the entire community and its members so that it may be reasonably inferred that the encouragement of private individuals to prosecute wrongs increased their “investment in and commitment to the existing order.”<sup>114</sup> By the industrial revolution, the shift in the basis of private enforcement appeared in numerous common informer statutes passed in England.<sup>115</sup> These statutes provided “that parties aiding in the apprehension and conviction of violators would share in the fines collected as a result.”<sup>116</sup> Similarly, the U.S. Supreme Court in the early decades of the last century, referred to *qui tam* actions providing private enforcers with a share of criminal fines.<sup>117</sup> Private prosecution of criminal cases, without the financial incentive of the *qui tam* actions, was also a practice extensively used.<sup>118</sup> The monopoly of the bureaucracy of public prosecution eventually took over private prosecutions.

## **B. SPEEDY DISPOSITION OF CASES**

Justice delayed is justice denied. It is a truism that has been both a criticism and an exhortation to action. Delay has been attributed to a host of factors, ranging from the case load of the courts, the efforts of litigants to create it and downright neglect on both the part of the courts and the litigants.

The Rules of Procedure for Environmental Cases tackle the question of delay by identifying and addressing key areas of delay to speedily address issues posed in environmental cases, taking into account the requirements of due process at every stage.

### **1. CIVIL CASES**

In civil cases filed under the Rules, procedural innovations are introduced at filing. The Rules require the submission of all evidence supporting the cause of action.<sup>119</sup> This entails a relative relaxation

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<sup>114</sup> *Id.* at 952.

<sup>115</sup> *Id.* at 953.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 954.

<sup>118</sup> *Id.*, at 955.

<sup>119</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 2, Sec. 3.

on the rules of admissibility to facilitate the early evaluation of the merits of the controversy.

A number of pleadings which have been identified as sources of delay<sup>120</sup> are prohibited. Nevertheless, in recognition of the fact that some controversies involving the environment may raise complex issues of fact and law, certain pleadings which have hitherto been prohibited under Summary Procedure have been allowed as well.<sup>121</sup>

The next stage entails the extensive use of pre-trial as a procedural device. The Rules specify in detail stages of interaction between the court and the litigants where the possibility of settlement is explored, the issues between the parties simplified and the evidence procured through depositions and properly identified and marked.<sup>122</sup>

At trial, a significant procedural innovation is the use of affidavits in lieu of direct examination. This is in recognition of the fact that direct examination of witnesses have traditionally consumed the greatest amount of time in civil litigation, and this procedural innovation seeks to simplify the process by focusing the scope of inquiry during direct examination to matters covered within the affidavit.<sup>123</sup>

The overall duration of the trial has been abbreviated to one (1) year, subject to extension for justifiable cause.<sup>124</sup>

## 2. CRIMINAL CASES

Some procedural innovations for civil cases have likewise been adopted for criminal cases. These include the extensive use of pre-trial to clarify and simplify the issues,<sup>125</sup> the use of affidavits in

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<sup>120</sup> RULE ON SUMMARY PROCEDURE.

<sup>121</sup> These include the motions for postponement and new trial and petition for relief from judgment.

<sup>122</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 3.

<sup>123</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 4, Sec. 2.

<sup>124</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 4, Sec. 5.

<sup>125</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 16.

direct examination<sup>126</sup> and the abbreviation of the period to resolve to one (1) year.<sup>127</sup>

Additional innovations in stages which are unique to criminal cases have been added as well, to address areas of concern in terms of delay. The most prominent of these are placed in the provisions on bail.<sup>128</sup> Here the execution of an undertaking, authorizing the judge to enter a plea of not guilty in instances where the accused fails to appear at arraignment, is made a requisite for the availment of bail.<sup>129</sup> This seeks to address the numerous instances where the accused has jumped bail prior to arraignment, foreclosing the possibility of proceeding with litigation and ultimately leading to the archiving of the case.

### 3. SPECIAL CIVIL ACTIONS

Two special writs, which are of themselves speedy remedies, have been added into the Rules: The writs of *kalikasan* and continuing *mandamus*.

The proceedings for the application, issuance and resolution of the writ of *kalikasan* are all conducted within very short periods. The Writ issues after three (3) days, if the petition is sufficient in form and substance.<sup>130</sup> The hearing for the writ must be set within sixty (60) days from filing,<sup>131</sup> and the entire proceeding must terminate within sixty (60) days from submission for resolution.<sup>132</sup>

In addition, the writ of *kalikasan* incorporates the prohibition of certain pleadings<sup>133</sup> and is given the same level of priority as the writs of *habeas corpus*, *amparo* and *habeas data*.<sup>134</sup>

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<sup>126</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 17, Sec. 2.

<sup>127</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 17, Sec. 4.

<sup>128</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 14.

<sup>129</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 14, Sec. 2.

<sup>130</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 7, Sec. 5.

<sup>131</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 7, Sec. 11.

<sup>132</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 7, Sec. 15.

<sup>133</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 7, Sec. 9.

<sup>134</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 7, Sec. 11.

Summary proceedings have been adopted for the writ of continuing *mandamus* in order to facilitate speedy resolution.<sup>135</sup>

### C. CONSENT DECREE

In the settlement of environmental litigation, there may be a shift in focus from the issue of liability to relief. The primordial consideration then becomes a question of the action necessary for compliance. In such cases, the benefits of negotiating a settlement include the preservation of litigation resources and prevention of any further delay in the implementation of regulatory programs.<sup>136</sup> Thus, the complexity of environmental disputes has paved the way for the increasing use of consent decrees in their settlement.<sup>137</sup>

In the U.S., the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted to insure the cleanup of hazardous waste sites.<sup>138</sup> It identifies settlements, including consent decrees, that may be negotiated in governmental actions pursuant to this federal hazardous waste cleanup legislation.<sup>139</sup> A consent decree may provide for reimbursement to reallocate the costs of the cleanup, or the undertaking of response activities by potentially responsible parties.<sup>140</sup> Upon the conclusion of the settlement, the settling potentially responsible party is protected from liability to other potentially responsible parties, “while retaining the right to seek contribution against nonsettlers.”<sup>141</sup>

By facilitating the settlement of complex environmental litigation, the model of the U.S. Environmental Protection Agency

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<sup>135</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 8, Sec. 5.

<sup>136</sup> Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327, 331 (1987).

<sup>137</sup> David L. Callies, *The Use of Consent Decrees in Settling Land Use and Environmental Disputes*, 21 STETSON L. REV. 871, 873 (1992) (citing settlement through consent decrees of several cases in the United States).

<sup>138</sup> William B. Johnson, *Propriety of Negotiated Settlements in Government Cleanup Actions under Federal Hazardous Waste Statutes*, 114 A.L.R. Fed. 1.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

illustrates the advantages of a consent decree: (1) it encourages the parties to come up with comprehensive, mutually-acceptable solutions to the environmental problem, and since the agreement was arrived at voluntarily, there is a greater possibility of actual compliance; (2) it is open to public scrutiny; (3) it allows the parties to address issues other than those presented to the court; and (4) it is still subject to judicial approval and can be enforced through a court order.<sup>142</sup> The component of judicial approval allows the court to foster cooperation between two previously adverse parties.<sup>143</sup> Moreover, in supervising its terms, the court may take an active role in the enforcement of the settlement, particularly in complicated settlements to be worked out over a certain period.<sup>144</sup>

#### **D. REMEDIAL MEASURES**

##### **1. ENVIRONMENTAL PROTECTION ORDER (TEMPORARY AND PERMANENT)**

Cases affecting the environment have a fundamental sense of immediacy. Environmental threats, as well as existing environmental damage, necessitate an immediate relief, if further damage is to be averted. For this purpose, the Rules provide for the issuance of an Environmental Protection Order (EPO), which is defined under its provisions as:

Environmental protection order (EPO) refers to an order issued by the court directing or enjoining any person or government agency to perform or desist from performing an act in order to protect, preserve, or rehabilitate the environment.<sup>145</sup>

From the foregoing definition, it is clear that the EPO may be employed to perform the rules of a prohibitory injunction and a

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<sup>142</sup> See Justice Consuelo Ynares-Santiago, *Framework for Strengthening Environmental Adjudication in the Philippines*, 52 ATENEO L.J. 744 (2008); See, e.g. *U.S. v. The Boc Group, Inc.*, 2007 EPA Consent LEXIS 35 (W.D.W. 2007); *U.S. v. Davis, et al.* 1998 EPA Consent LEXIS 80 (D.R.I. 1998).

<sup>143</sup> Judge Harry Pregerson, *The Freeway with a Heart: My Life as a Consent Decree Judge in the Century Freeway Case*, 36 Sw. U. L. REV. 291 (2007).

<sup>144</sup> Callies, *supra* note 137, at 872.

<sup>145</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 7, Rule 1, Sec. 4 par. e.

mandatory injunction, empowering the court with ample discretion and means to appropriately address the environmental case before it.

The EPO may be issued as an ancillary remedy in environmental cases, as a Temporary Environmental Protection Order (TEPO). Procedurally, the application for and the issuance of a TEPO is similar to that of that of a TRO.<sup>146</sup> As with a TRO, the TEPO must, as a general rule, issue with notice and hearing. In exceptional circumstances, a TEPO may be issued *ex parte*. As an additional procedural safeguard, a summary hearing is required to determine whether to extend the TEPO.<sup>147</sup>

Both the EPO and TEPO are available as remedies in criminal cases filed under the Rules.<sup>148</sup>

## 2. WRIT OF CONTINUING *MANDAMUS*

Environmental law highlights the shift in the focal-point from the initiation of regulation by Congress to the implementation of regulatory programs by the appropriate government agencies.<sup>149</sup> Thus, a government agency's inaction, if any, has serious implications on the future of environmental law enforcement. Private individuals, to the extent that they seek to change the scope of the regulatory process, will have to rely on such agencies to take the initial incentives, which may require a judicial component. Accordingly, questions regarding the propriety of an agency's action or inaction will need to be analyzed.

This point is emphasized in the availability of the remedy of the writ of *mandamus*, which allows for the enforcement of the conduct of the tasks to which the writ pertains: the performance of a legal duty.<sup>150</sup> *MMDA v. Concerned Residents of Manila Bay*,<sup>151</sup>

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<sup>146</sup> RULES OF COURT, Rule 58, Sec. 5.

<sup>147</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 2, Sec. 8.

<sup>148</sup> RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 13, Sec. 2.

<sup>149</sup> Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 462 (2008).

<sup>150</sup> RULES OF COURT, Rule 65, Sec. 3.

<sup>151</sup> *MMDA v. Concerned Residents of Manila Bay*, *supra* note 84.

introduces continuing *mandamus* and cited two cases decided by the Supreme Court of India as examples of its issuance. In the first case,<sup>152</sup> the Supreme Court of India held an investigating body accountable to it through continuing *mandamus*.<sup>153</sup> The second case involved a petition for the issuance in the nature of a writ of *mandamus* to restrain tanneries along the Ganges River from releasing trade effluents into the river which have not undergone treatment due to the absence of the necessary treatment plants.<sup>154</sup> In India, continuing *mandamus* was used to require the government “to take specific actions and report progress on a regular basis.”<sup>155</sup>

Continuing *mandamus*, as illustrated in the *Manila Bay* case, is an exercise of the Court’s power to carry its jurisdiction into effect pursuant to Section 6, Rule 135 of the Rules of Court. The same section provides that even in the absence of the procedure to be followed in the exercise of this jurisdiction by the law or the Rules of Court, “any suitable process or mode of proceeding may be adopted which appears conformable to the spirit of said law or rules.” For instance, *Social Justice v. Atienza*,<sup>156</sup> cited in the *Manila Bay* case as an example of the Court’s issuance of a writ of *mandamus* to compel the enforcement of a city ordinance, ordered the submission of plan with regard to the enforcement of the Court’s resolution. In the *Manila Bay* case, the Court ordered several government agencies to submit progress reports of the activities undertaken in accordance with its decision.<sup>157</sup> The Court also created an Advisory Committee to verify these reports.

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<sup>152</sup> *Vineet Narain v. Union of India*, 1 SCC 226 (1998).

<sup>153</sup> See also S.P. Sathe, *Judicial Activism in India*, 6 WASH. U. J. L. POL’Y 29 (2001).

<sup>154</sup> *M.C. Mehta v. Union of India*, 4 SCC 463 (1987).

<sup>155</sup> Deepa Badrinarayana, *The Emerging Constitutional Challenge of Climate Change: India in Perspective*, 19 FORDHAM ENVTL L. REV. 1, 24 (2009); See also D. Y. Chandrachud, *Constitutional and Administrative Law in India* 36 INT’L J. LEGAL INFO. 332 (2008) and Avani Mehta Sood, *Gender Justice through Public Interest Litigation: Case Studies from India*, 41 VAND. J. TRANSNAT’L L. 833 (2008).

<sup>156</sup> G.R. No. 156052, February 13, 2008, 545 SCRA 92.

<sup>157</sup> *MMDA v. Concerned Residents of Manila Bay*, *supra* note 84, at 693-697.

### 3. WRIT OF *KALIKASAN*

Many commentators and scholars remarked that the Philippine Supreme Court has entered an age of judicial activism, and this is more than just judicial fortuity since the Court has manifested its unique expanded judicial power under the Constitution: "...promulgate rules concerning the protection and enforcement of constitutional rights."<sup>158</sup> The Court's treatment of the issue of human rights protection is emblematic of its attitude towards safeguarding human rights. Given the inadequacies of our laws and the inutility of our system of justice, the "judiciary, on its part, has decided to unsheathe its unused power to enact rules to protect the constitutional rights of the people."<sup>159</sup>

On the issue of environmental justice, the Supreme Court has certainly not taken a retreat in judicial activism. After 2007's *National Consultative Summit Seeking Solutions to the Problem of Extralegal Killings and Enforced Disappearances* that constitute a violation of our people's civil and political rights, and 2008's *Forum on Increasing Access to justice by the Poor and Marginalized Groups*, the Court focused its attention to what has been termed as "third generation" rights, particularly, environmental rights. The *Forum* enabled the Court to receive input directly from the different stakeholders in the justice system, particularly the sectors that are most vulnerable. The output from the *Forum* enabled the Court to draft rules of procedure which will govern environmental cases.

In the drafting of the Rules, the Supreme Court has fashioned an environmental writ, more aptly known as the writ of *kalikasan*, the parameters of which this *Rationale* and the *Annotation to the Rules* proceed to document thoroughly. The writ is intended to provide a stronger defense for environmental rights through judicial efforts where institutional arrangements of enforcement, implementation and legislation have fallen short. It seeks to address

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<sup>158</sup> CONSTITUTION, Art. VIII, Sec. 5, par. 5.

<sup>159</sup> Chief Justice Reynato S. Puno, Speech at the University Convocation and Presentation of the 2007 Outstanding Silliman University Law Alumni Association (SULAW) Award to Prof. Rolando V. del Carmen and 19th SULAW General Assembly and Alumni Homecoming: No Turning Back on Human Rights (August 25, 2007).

the potentially exponential nature of large-scale ecological threats. Similar to the writs of *habeas corpus*, *amparo*, and *habeas data*, the writ of *kalikasan* was recast as a different and unique legal device drawing as models available writs in the country and practices in other jurisdictions.

One important challenge faced in the implementation of effective environmental laws is the regulation of the interplay between ecological transformation and human activities.<sup>160</sup> It is not simply the complex and dynamic nature of ecological transformation that contributes to this challenge but also the spatial dimensions of environmental harms.<sup>161</sup> Environmental harms occur in spatial scales and the notoriety of environmental effects across borders is well-documented.<sup>162</sup> Certain environmental effects could either be localized or far removed from a particular area both spatially and temporally. The effects have caused significant problems for many governments because of the increased awareness that vulnerability to environmentally harmful activities is not only confined to a nation's own borders but have "reciprocal externalities" of an international dimension.<sup>163</sup> Environmental problems such as acid rain and the pollution of many bodies of water have a widespread dimension of destruction. It is with this concern that the writ was fashioned to address the concern of magnitude and the questions of jurisdiction arising from the environmental damage occurring in wide areas by allowing the petition for the issuance of the writ to be filed in the Supreme Court or any stations of the Court of Appeals because of their nationwide jurisdiction.<sup>164</sup>

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<sup>160</sup> RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 8 (2004).

<sup>161</sup> *Id.*

<sup>162</sup> The foundation of the doctrine on transboundary environmental harm first received international attention in the Train Smelter case. According to Stephen Wood, "Trail Smelter is revered in that young field as the germ from which the entire law of transboundary environmental harm sprang. It is remembered as the earliest articulation of two core principles of international environmental law: that states have a duty to prevent transboundary environmental harm, and that they have an obligation to pay compensation for the harm they cause."

<sup>163</sup> *See generally*, HENK FOLMER & IGNAZIO MUZU, *ENVIRONMENTAL AND RESOURCES ECONOMICS* 102-116 (1992).

<sup>164</sup> *RULES OF PROCEDURE FOR ENVIRONMENTAL CASES*, Rule 7, Sec. 3.

Another important concern for any party seeking to enforce environmental rights are the evidentiary matters which supports such a claim, apart from affidavits and other documents which he could procure independently for himself. A key component of any case is the competence and admissibility of evidence accompanying the complaint. In environmental cases, the presence or absence of such evidence is crucial: it may lead to the successful prosecution of the claim for enforcement of environmental rights or it may lead to the dismissal of the case. The latter brings with it the bar of finality, *res judicata*, even when the initial claim is a valid one.

It is in this regard that the writ of *kalikasan* was refashioned as a tool to bridge the gap between allegation and proof by providing a remedy for would-be environmental litigants to compel the production of information within the custody of the government. The writ would effectively serve as a remedy for the enforcement of the right to information about the environment. The scope of the fact-finding power could be: (1) anything related to the issuance, grant of a government permit issued or information controlled by the government or private entity and (2) Information contained in documents such as environmental compliance certificate (ECC) and other government records. In addition, the Writ may also be employed to compel the production of information, subject to constitutional limitations. This function is analogous to a discovery measure, and may be availed of upon the application for the writ.

Procedural safeguards have also been considered in the drafting of the writ to prevent its use as a mechanism for “fishing” this includes a clear showing of a violation of a law, rule or regulation in the verified petition. This effectively narrows the instance in which the writ may be applied for against private entities. Judicial discretion also comes into play in this aspect. Notably, the Court has already provided for the remedy of Civil Searches and Seizures (the English “Anton Piller” Order) as a remedy in alleged violations of the Intellectual Property Code. To compel the production of evidence is a considerably tempered and restrained exercise of judicial power.

Clearly, through the enactment of the writ of *kalikasan*, the Supreme Court has fortified the long standing conceptual link between substantive and procedural environmental rights. The addition of

the writ adds weight to the operative provisions for the implementation of the procedural environmental rights of access to information, participation in decision-making and access to justice and indicates that such procedural rights are not ends in themselves, but are meaningful precisely as means towards the end of protecting the individual's substantive right to live in a healthy environment.

#### **IV. APPLICATION OF THE PRECAUTIONARY PRINCIPLE**

Common to the aforementioned features, the key nuances of the Rules of Procedure for Environmental Cases have been developed to address the practical and procedural obstacles linked to environmental litigation. The formulation of evidence-related provisions were made with the guidance of the precautionary principle in order to facilitate access to courts in environmental cases and create a more relevant form of court procedure tailored to the unique and complex characteristics of environmental science.

The precautionary principle is linked to a paradigm shift from a model of risk theory in the context of the twentieth century to the emergence of post-industrial risks.<sup>165</sup> In the former context, "risk... gave rise to a 'right' to compensation within the framework of [compensation mechanisms] that ally solidarity with insurance."<sup>166</sup> Thus, insurability relied on risks that were "regular, foreseeable, and calculable," or those "based entirely on knowledge."<sup>167</sup> The emergence of post-industrial risks characteristic of a globalized economy and the development of technology complicate the ability to calculate risks. While in the former context, risk primarily concerned individuals or specific groups, post-industrial risks deal with issues that are multi-dimensional.<sup>168</sup> Moreover, post-industrial risks may cause damage that depends on a variety of factors, thus permeating its evaluation with uncertainty. These factors may include time of latency between the first exposure and the actual impact of damage, frequency, duration, extent, nature and scale.<sup>169</sup>

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<sup>165</sup> DE SADELEER, *supra* note 17, at 150.

<sup>166</sup> *Id.* at 151.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 152.

<sup>169</sup> *Id.* at 153.

Precaution is an approach that espouses prudence where risk is uncertain, but plausible. It is an addition to two basic tenets of problem-solving: curing problems and preventing them. Under a curative approach, the harm has already been realized, and measures are created to reverse the harm, or require compensation for the costs associated with harm.<sup>170</sup> Under the preventive approach, measures are taken to prevent known risks from materializing into actual harm.<sup>171</sup> Precaution requires even greater diligence than prevention, by calling for measures to safeguard the environment even if the occurrence of harm is uncertain.<sup>172</sup> The precautionary principle affirms the need for urgent measures given the unpredictable patterns of the environment, and the harm resulting from its abuse.

#### A. WEAK AND STRONG VERSIONS OF THE PRECAUTIONARY PRINCIPLE

The Supreme Court has recognized the varying degrees to which the precautionary principle is applied. Without academic consensus, the Court found it best to consider all versions of the precautionary principle in order to determine which elements are most compatible for purposes of the Rules of Procedure on Environmental Cases.

The varying versions of the precautionary principle have different implications. For instance, the most cautious and weak versions suggest that a lack of decisive evidence of harm should not be grounds for refusing to regulate.<sup>173</sup> The presence of an attenuated link between the health of the people and generally known but not fully scientifically proven risks will at times justify such regulation.<sup>174</sup> This principle can be seen in the Rio Declaration, which states, “[w]here there are threats of serious or irreversible damage, lack of

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<sup>170</sup> *Id.* at 23.

<sup>171</sup> *Id.* at 61.

<sup>172</sup> *Id.* at 150-153.

<sup>173</sup> Cass R. Sunstein, *Irreversible and Catastrophic*, John M. Olin Law & Economics Working Paper No. 242, 2d series at 8 (2005).

<sup>174</sup> *Id.*

full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”<sup>175</sup> The Ministerial Declaration of the Second International Conference on the Protection of the North Sea, held in London in 1987, states in the same vein: “Accepting that in order to protect the North Sea from possibly damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolutely clear scientific evidence.”<sup>176</sup> Similarly, the United Nations Framework Convention on Climate Change offers cautious language:

“Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing . . . [regulatory] measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.”<sup>177</sup>

The *Wingspread Consensus Statement on the Precautionary Principle* goes further: “When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause-and-effect relationships are not fully established scientifically. In this context the proponent of an activity, rather than the public, should bear the burden of proof.”<sup>178</sup> The first sentence of this quote is a mildly more aggressive version of the statement from the Rio Declaration; it is more aggressive because it is not limited to threats of serious or irreversible damage.<sup>179</sup> But the component of reversing the burden of proof, as stated in the second sentence adds to the strong favorability of the environment, further depending on what is being required of the proponent holding the burden of proof.<sup>180</sup>

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<sup>175</sup> Principle 15, Rio Declaration.

<sup>176</sup> No. VII., Ministerial Declaration, Second International Conference on the Protection of the North Sea.

<sup>177</sup> Article 3, No. 3, U.N. Framework Convention on Climate Change.

<sup>178</sup> The *Wingspread Consensus Statement on the Precautionary Principle*.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

Stronger versions exist in which precaution must factor in “a margin of safety into all decision making.”<sup>181</sup> Such expectations would require a higher level of responsiveness to the precautionary approach. Other stronger versions have been articulated to shift the burden of evidence in light of scientific uncertainty: “when there is a risk of significant health or environmental damage to others or to future generations, and when there is scientific uncertainty as to the nature of that damage or the likelihood of the risk, then decisions should be made so as to prevent such activities from being conducted unless and until scientific evidence shows that the damage will not occur.”<sup>182</sup> Some versions accentuate the minimal margin of risk needed to trigger protection. The Final Declaration of the First European Seas at Risk Conference provides that if the worst case scenario for a certain activity is serious enough, then even a small amount of doubt as to the safety of that activity is sufficient to stop it.<sup>183</sup>

This account shows that the precautionary principle might be described both in terms of the level of uncertainty that triggers a regulatory response and in terms of the tool that will be chosen in the face of uncertainty (as in the case of technological requirements or prohibitions). In its strongest and most distinctive forms, the principle imposes a burden of proof on those who create potential risks, and it requires regulation of activities even if it cannot be shown that those activities are likely to produce significant harms.

For purposes of developing special rules of procedure, the Court considered the varying versions of the precautionary principle and the implications of adopting some elements over others. Further, the Court explored the role of court procedure in addressing cases that involve serious and irreversible environmental harm.

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<sup>181</sup> Sunstein, *supra* note 183 at 8 (citing BJORN LOMBORG, *THE SKEPTICAL ENVIRONMENTALIST* 348 (2001)).

<sup>182</sup> *Id.* (quoting the testimony of Dr. Brent Blackwelder, President, Friends of the Earth, before the Senate Appropriations Committee, Subcommittee on Labor, Health and Human Services (Jan. 24, 2002)).

<sup>183</sup> *Id.* at 9.

**B. VARIOUS DEFINITIONS OF THE PRECAUTIONARY PRINCIPLE**

The different degrees of the precaution sought to be instilled is perhaps best reflected in the several definitions created by organizations or found in conventions. One of the most practically compelling (yet ethic-laden) definitions is the version created by the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Commission on the Ethics of Scientific Knowledge and Technology (COMEST). It states:

[W]hen human activities may lead to morally unacceptable harm that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that harm. Morally unacceptable harm refers to harm to humans or the environment that is (1) threatening to human life or health; (2) serious and effectively irreversible; (3) inequitable to present or future generations; or (4) imposed without adequate consideration of the human rights of those affected.<sup>184</sup>

Under this definition, specific parameters are placed to qualify the use of precaution, which in turn acts as a buffer against an unbridled use of the principle. Notably, the definition adds a different dimension to environmental protection by branding such behavior as “morally unacceptable.”

Another popular definition can be found in the Rio Declaration of 1992. Specifically, Principle 15 of the Rio Declaration states:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Similar to the COMEST definition, there is an important qualification of “serious or irreversible” damage. Following a finding of the qualification, lack of full scientific certainty is not an impediment to environmental regulation or enforcement.

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<sup>184</sup> United Nations Educational, Scientific and Cultural Organization (UNESCO) World Commission on the Ethics of Scientific Knowledge and Technology (COMEST) published March 2005.

The Final Declaration of the First European Seas at Risk Conference of 1994 also contained references to the precautionary principle within the context of marine environment. It states:

**Preamble**, ...to ensure that appropriate preventative measures are taken when there is reason to believe that substances or energy introduced into the marine environment or activities taking place in the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relationship between inputs/activities and effects; this applies to the entire spectrum of environmental policy making and to all types of human impact on the environment.<sup>185</sup>

**Annex I, Principle 1**<sup>186</sup>, Lack of scientific certainty regarding cause and effect is not used as a reason for deferring measures to prevent harm to the environment. Science, while important in providing evidence of effect, is no longer required to provide proof of a causal link between pollutant/disturbing activity and effect, and where no clear evidence is available one way or the other the environment must be given the “benefit of the doubt.”

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**Annex I, Principle 4**, If the “worst case scenario” for a certain activity is serious enough then even a small amount of doubt as to the safety of that activity is sufficient to stop it taking place;

In another example, a state government had declared its commitment to the precautionary principle within the text of a law. Under the 1999 Canadian Environmental Protection Act (CEPA 1999), the pertinent text provides:

Whereas the Government of Canada is committed to implementing the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

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<sup>185</sup> Notably, the definition also lays down the scope of the principle.

<sup>186</sup> Annex I enumerates five principles of precautionary action. Principle 3 is equally important because it shifts the burden of proof from the “regulator to the person responsible for the harmful activity.” Principle 3, “the “burden of proof” is shifted from the regulator to the person or persons responsible for the potentially harmful activity, who will now have to demonstrate that their actions are not/will not cause harm to the environment.”

The common theme of these definitions should be incorporated into the Rules of Procedure for Environmental Cases. It is cognizant of the fact that the complexities associated with environmental cases will present difficulties under the regular rules of procedure. Overall, the precautionary principle would essentially aid plaintiffs in establishing cases that would be, under most circumstances, difficult if not impossible to prove.

## **V. STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION (SLAPP)**

A Strategic Lawsuit Against Public Participation or Strategic Legal Action Against Public Participation (SLAPP) is a phenomenon that finds its roots in U.S. litigation. It generally refers to a civil lawsuit for monetary damages filed against non-governmental individuals and groups as retaliation for the latter's petitioning or communication to the government (or other relevant body) on an issue of public concern, or to enforce a right or law such as environmental rights or statutes.<sup>187</sup> These suits are typically reactions to past or anticipated opposition to such issues, and are usually instituted not to vindicate any cognizable interest. Instead, a SLAPP is brought to court to chill opposition.<sup>188</sup> Many of these SLAPP actions are brought within the context of environmental litigation, and thus deserve consideration in formulating the Rules of Procedure for Environmental Cases.<sup>189</sup>

A SLAPP can be effective because it diverts attention away from the petitioning party and can delay resolution of the original or real issue. In addition, persons instituting a SLAPP typically have more resources to sustain litigation against smaller petitioning parties.<sup>190</sup> In this regard, a SLAPP suit is used to financially burden

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<sup>187</sup> See Edward W. McBride, *The Empire State SLAPPs Back: New York's Legislative Response to SLAPP Suits*, 17 VT. L. REV. 925 (1993) (SLAPP was initially analyzed by Penelope Canan and George W. Pring of the University of Denver).

<sup>188</sup> *Id.* at 926.

<sup>189</sup> See Sheri Coover, *The 2<sup>nd</sup> Annual Goddard Forum Symposium: Global Warming: Causes, Effects and Mitigation Strategies for States and Localities*, 12 PENN ST. ENTL. L. REV. 263, 264 (2004).

<sup>190</sup> *Id.* at 263.

a petitioning party with frivolous litigation. In the realm of environmental law where public participation is central, chilling litigation serves as a serious obstacle to the enforcement of environmental rights.

#### A. CONSTITUTIONAL BASIS FOR PROTECTION AGAINST A SLAPP

The original basis for measures against SLAPP can be found in the U.S. Constitution. First Amendment of the U.S. Constitution (and several state constitutions in their own manner) provides citizens with the right to free speech and the right to petition the government to redress grievances of public matter.<sup>191</sup> It is from this superior law that states have enacted Anti-SLAPP legislation.<sup>192</sup>

Moreover, under the Noerr-Pennington doctrine, a citizen's right to petition the government should be protected regardless of whether the motivation for doing so is to advance their own interests.<sup>193</sup> Typically, in order for a person to avail of the protection of an Anti-SLAPP law, he or she must have communicated the complaint or information regarding the public matter to the branch or agency of government instituting the SLAPP.<sup>194</sup>

Given the constitutional basis for Anti-SLAPP laws, one would logically think that the protection afforded persons in such situations applies only when a government body institutes a SLAPP. Such is the case in the state of Florida.<sup>195</sup> This limitation, however, is the exception to the general practice.<sup>196</sup> Other jurisdictions, such as the state of Oregon, are broader in application, and have thus formulated

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<sup>191</sup> See First Amendment, The Constitution of the United States of America.

<sup>192</sup> See McBride, *supra* note 197, at 925.

<sup>193</sup> See Coover, *supra* note 199, at 267-68 (Footnote 23 states: "The Noerr-Pennington doctrine is based on two Supreme Court cases - *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Although both of these cases dealt with anti-trust litigation, the Noerr-Pennington doctrine has been extended to protect other action in which a citizen or organization petitions the government. *Barnes Found v. Township of Lower Merion*, 927 F. Supp 874 at 876 (E.D. Pa. 1996).")

<sup>194</sup> See McBride, *supra* note 197, at 927.

<sup>195</sup> Coover, *supra* note 199, at 277.

<sup>196</sup> *Id.*

Anti-SLAPP legislation to protect persons from SLAPPs instituted by private parties as well.<sup>197</sup>

For purposes of the Rules of Procedure for Environmental Cases that promote access to justice, the Oregon view that SLAPP protection should also cover protection against private parties such as polluting corporations was adopted. The web of players in environmental issues includes several private and public entities or persons. The Court recognizes the simple reality that private corporations threaten the exercise of environmental rights as much as government agencies that fail to fulfill their duties. In the Philippines, assessing methods to uphold the constitutional right to a balanced and healthful ecology cannot be done in the abstract and without regard for the real obstacles to enforcement. Other aspects of environmental protection under the Rules of Procedure, such as speedy disposition of the case and the precautionary principle only accentuate the urgency to establish measures against vexatious behavior and harassment. Thus, the Court recognizes the need for innovative and groundbreaking legal solutions such as prohibiting SLAPP cases, regardless of whether SLAPP plaintiffs are public or private persons.

## **B. FORMS OF SLAPP**

SLAPP suits can come in many seemingly valid forms of action such as defamation suits,<sup>198</sup> and tortious interference with contractual relations<sup>199</sup> as they have been filed in the U.S. Some Anti-SLAPP laws recognize that a SLAPP can be brought before a court as a claim (instituted as a lawsuit in the first instance), a counterclaim (brought within litigation instituted against the SLAPP party)<sup>200</sup>, and a cross-claim.<sup>201</sup> This broad approach is in line with

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<sup>197</sup> See Oregon Anti-SLAPP Law - Title 3. Remedies and Special Actions and Proceedings, Chapter 31. Tort Actions, Special Motion to Strike, ORS § 31.150 (2007).

<sup>198</sup> *Northon v. Rule*, 494 F. Supp. 2d 1183, 2007 U.S. Dist. LEXIS 51537 (D. Or. 2007) (Oregon - motion to strike applied to defamation suit).

<sup>199</sup> *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56 (R.I. 1996) (Rhode Island - anti-SLAPP applied to tortious interference with contractual relations claim).

<sup>200</sup> See Note under Washington Anti-SLAPP law, ARCW § 4.24.510 (2009), citing history at 2002 c 232 §2.

<sup>201</sup> Florida Citizen Participation in Government Act — Strategic Lawsuits Against Public Participation (SLAPP) suits by governmental entities prohibited, Fla. Stat. §768.295 (2009).

a comprehensive approach to environmental enforcement, especially since there is more than one way for alleged environmental violators to institute a SLAPP.

### C. MODES OF ANTI-SLAPP MEASURES

Given the different aforementioned forms of SLAPP, Anti-SLAPP legislation executes protection against SLAPP typically in a form of a defense. Some U.S. state jurisdictions refer to this as qualified or conditional immunity from civil liability.<sup>202</sup> If a person falls under the requirements mentioned above, he or she can avail of qualified immunity.

Some jurisdictions provide this immunity through a Special Motion to Strike,<sup>203</sup> Motion to dismiss, and/or Motion for Summary Judgment.<sup>204</sup> In most of these motions, the court sets hearings on the matter and relies on affidavits and pleadings in making their determination.<sup>205</sup>

In the state of Maine, filing a motion to dismiss under an Anti-SLAPP provision can be done within a 60-day period following the service of the complaint, or at the court's discretion, at any later time upon terms the court determines proper.<sup>206</sup> Given the potentially complex and tedious concerns of establishing that a claim or counterclaim is a SLAPP, this provision might be ideal because it gives parties a "soft" period to resolve the matter, and the judge the discretion to do the same at a later time.<sup>207</sup> Moreover, after the court has decided that a SLAPP exists, it must dismiss the SLAPP claim unless the non-moving party shows that the SLAPP target initiated a "sham petition" (described below in greater detail), which

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<sup>202</sup> See *e.g.*, Title 9. Courts and Civil Procedure Generally, Chapter 33. Limits on Strategic Litigation Against Public Participation, R.I. Gen. Laws §9-33-2 (2009).

<sup>203</sup> See Oregon Anti-SLAPP Law.

<sup>204</sup> See Coover, *supra* note 199, at 277-78.

<sup>205</sup> See Oregon Anti-SLAPP Law, at par. (4).

<sup>206</sup> Osborn and Thaler, *Feature: Maine's Anti-SLAPP Law: Special Protection Against Improper Lawsuits Targeting Free Speech and Petitioning*, 23 MAINE BAR J. 32, 34 (2008).

<sup>207</sup> *Id.*

action was made in bad faith or intended to harass a passive enforcer or alleged violator of the original issue.<sup>208</sup>

Other jurisdictions provide SLAPP protection in a more preventative manner. The state of Georgia, for example, requires that a party initiating a suit also submit a special verification with its pleading.<sup>209</sup> The party initiating the claim and his or her counsel must sign the verification.<sup>210</sup> The signed verification guarantees, among other things, that the “claim is not interposed for any improper purpose such as to suppress a person’s or entity’s right of free speech or right to petition government, or to harass, or to cause unnecessary delay or needless increase in the cost of litigation.”<sup>211</sup>

If the claim does not have with it a verification that meets these requirements, the claim shall be stricken unless the party makes the corrections within ten days after the omission is called to its attention.<sup>212</sup> If claim is verified, but violates the Anti-SLAPP law, the court upon motion or its own initiative, shall impose upon the persons who signed the verification, sanctions which may include dismissal of the claim and an order to pay to the other party reasonable expenses plus attorney’s fees.<sup>213</sup>

In Oregon, the defendant has the initial burden to establish that the SLAPP claim arises out of an act protected by the constitution.<sup>214</sup> If the defendant meets this, the burden then shifts to the plaintiff to produce evidence to support a prima facie case that the lawsuit is not a SLAPP.<sup>215</sup> If the plaintiff is successful, then the courts deny the motion to strike.<sup>216</sup> Rhode Island’s Anti-SLAPP law is different

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<sup>208</sup> *Id.*

<sup>209</sup> See Exercise of rights of freedom of speech and right to petition government for redress of grievances; legislative findings; verification of claims; definitions; procedure on motions; exception; attorney’s fees and expenses, §O.C.G.A. 9-11-11.1 (2009).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Oregon Anti-SLAPP Law, at par. (3).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

insofar as the SLAPP plaintiff has the burden of proving that the defendant's petition was a sham petition and thus did not qualify for immunity.<sup>217</sup> In both these examples, the burden-shifting aspect is that which makes the Anti-SLAPP motion to dismiss different from the motion to dismiss falling under the normal rules of civil procedure.

The Washington Anti-SLAPP law provides for a more definitive burden of proof for the SLAPP plaintiff in a defamation suit. It states that the defamed party must show by clear and convincing evidence that the defendant did not act in good faith when alleging a SLAPP.<sup>218</sup> In contrast, the Anti-SLAPP law in Georgia suggests that neither party has the burden of proof on a motion to dismiss or strike under its Anti-SLAPP law "because this issue is a matter of law for the trial court's determination based upon the pleadings rather than upon evidence presented by either party."<sup>219</sup>

A "SLAPP-back" is a method for a party targeted by an alleged SLAPP, to counter that SLAPP by instituting his or her own SLAPP. Some jurisdictions such as Oregon, California, and Rhode Island have Anti-SLAPP-back provisions that provide for damages to be awarded to a plaintiff who successfully debunks the assertion that his or her claim was a SLAPP action.<sup>220</sup> In Oregon, the court can direct a defendant found to have brought a frivolous Anti-SLAPP motion to strike to pay reasonable costs and attorney fees to the plaintiff defending against the motion.<sup>221</sup> In California, the court is authorized to direct costs against a defendant if it is found that the motion to strike was merely made to cause delay.<sup>222</sup> Other jurisdictions, such as Pennsylvania do not have such provisions.

As a matter of policy, Rhode Island does not allow SLAPP-Backs, as they find the ruling on a motion to dismiss (with its

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<sup>217</sup> Coover, *supra* note 199, at 278.

<sup>218</sup> See *Gilman v. MacDonald*, 74 Wn. App. 733, 875 P.2d 697, review denied, 125 Wn.2d 1010, 889 P.2d 498 (1994); *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 46 P.3d 789 (2002).

<sup>219</sup> *Browns Mill Dev. Co. v. Denton*, 247 Ga. App. 232, 543 S.E.2d 65 (2000), *aff'd*, 275 Ga. 2, 561 S.E.2d 431 (2002).

<sup>220</sup> Coover, *supra* note 199, at 280.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

corresponding potential damages, costs, and fees awarded) based on an Anti-SLAPP legislation to be sufficient in resolving the matter.<sup>223</sup>

Other jurisdictions allow, though not explicitly, the use of SLAPP-backs to battle SLAPPs.<sup>224</sup> The targets of original SLAPPs are attracted to using SLAPP backs because of potential damages to be awarded in their favor.<sup>225</sup> The disadvantage of using this strategy is that it would entail more costly litigation and further delay the already chilled original action seeking to enforce environmental rights.<sup>226</sup>

For purposes of the Rules of Procedure for Environmental Cases, these modes of anti-SLAPP measures were considered in developing rules that are best suited for environmental litigants in this jurisdiction. Due process for all parties of the case is a primary consideration in these decisions.

#### **D. PROHIBITION AGAINST SHAM PETITIONS**

As mentioned above, courts in several jurisdictions must dismiss a claim that is found to be a SLAPP unless the SLAPP plaintiff establishes that the SLAPP target originally engaged in a sham petition against the SLAPP plaintiff (e.g. a citizen's group puts forth a sham petition against a government agency intended only to harass that agency). This made way for the doctrine of "sham exception" to SLAPP suits.

The U.S. Supreme Court developed a two-part test to determine if an action that is filed with the government falls under the sham exception.<sup>227</sup> First, the Court identified that a "sham" petition is baseless in that "no reasonable litigant could realistically expect success on the merits."<sup>228</sup> Second, a "sham" petition is directed at

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<sup>223</sup> See *Palazzo v. Alves*, 944 A.2d 144, 2008 R.I. LEXIS 33 (R.I. 2008).

<sup>224</sup> See Stetson, Mamie, *Reforming SLAPP Reform: New York's Anti-SLAPP Statute*, 70 N.Y.U.L. REV. 1324, 1351-1353 (1995).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> Coover, *supra* note 199, at 268 (citing *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-62 (1993)).

<sup>228</sup> *Id.*

injuring the opposition through the use of government process, as opposed to the outcome of the process.<sup>229</sup>

**E. COMPENSATORY AND PUNITIVE DAMAGES, REASONABLE COSTS AND ATTORNEY’S FEES**

To further the policy of providing disincentives to instituting SLAPPs, Anti-SLAPP legislation provides courts with the authority to award compensatory and punitive damages, reasonable costs, and attorney’s fees to successful movants against SLAPPs.<sup>230</sup> Delaware, Minnesota and Rhode Island provide for punitive damages for cases where it is established that the suit was brought for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of petition, speech or assembly.<sup>231</sup> In Hawaii, a court should direct a plaintiff found instituting a SLAPP the greater amount of \$5,000 or actual damaged incurred by the defendant, plus costs, attorney’s fees, and any additional sanctions it may deem necessary.<sup>232</sup>

Conversely, in Oregon, if the court determines that a SLAPP-back was instituted (meaning the defendant responded with a SLAPP of his/her own in violation of the law), then the defendant should pay reasonable costs and attorney fees.<sup>233</sup>

Georgia provides that attorney’s fees and expenses may be requested by motion at any time during the course of the action but not later than 45 days after final disposition, including but not limited to dismissal by the plaintiff of the action.<sup>234</sup> Notably, failure to request for damages in the original adjudication of SLAPP issues may bar a party from requesting for such damages on appeal.<sup>235</sup>

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 279-280.

<sup>231</sup> *Id.* at 279.

<sup>232</sup> *Id.* at 279-280.

<sup>233</sup> *Id.* at 280.

<sup>234</sup> Georgia Anti-SLAPP Law, at par. (f).

<sup>235</sup> *See Palazzo*, at 33.

The Philippine Supreme Court has taken into consideration the importance of awarding damages, litigation costs and attorney's fees to the successful party in a SLAPP determination. It recognized that the aim is to not only defray the costs of excess litigation, but also to establish a disincentive for parties to institute a SLAPP.

**F. THE ROLE OF GOVERNMENT IN SLAPP CASES**

Some U.S. jurisdictions, such as Washington, Nevada and Pennsylvania, provide that a government agency may intervene or participate in the lawsuit.<sup>236</sup> In some of these states, the agency to which the communication was made has the option of providing the defense against a lawsuit that pertains to the exercise of the defendant's free speech.<sup>237</sup> In Nevada, the Attorney General may replace the government agency to which the communication was made in defending a SLAPP action.<sup>238</sup>

In Florida, the governmental entity that is found to violate this section shall report such a ruling to Attorney General no later than 30 days after order is final.<sup>239</sup> The Attorney General shall then report to Cabinet, Senate president and Speaker of the House.<sup>240</sup>

Given these practices, in the Philippines, the Supreme Court assessed the role of appropriate government agencies and the Department of Justice in the Rules of Procedure for Environmental Cases.

**G. VOLUNTARY DISMISSAL OF A LAWSUIT BY A PLAINTIFF**

In cases where the SLAPP is in the form of an initial claim, Georgia provides that a voluntary dismissal of such lawsuit by plaintiff does not preclude imposition of a sanction under the law.<sup>241</sup>

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<sup>236</sup> Coover, *supra* note 199, at 280.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> Florida Anti-SLAPP Law, at par. (6).

<sup>240</sup> *Id.*

<sup>241</sup> *See Hagemann v. Berkman Wynhaven Assoc., L.P.*, 290 Ga. App. 677, 660 S.E.2d 449 (2008).

Other jurisdictions are more lenient. The Anti-SLAPP law in New York for example, contains a safe-harbor provision that gives the SLAPP plaintiff a period in which he or she may voluntarily withdraw the SLAPP without fear of being penalized for the same.<sup>242</sup> In this regard, a sanctions motion cannot be filed at least twenty-one days after being served, and the original filer of the lawsuit may withdraw the suit during the twenty-one days without impunity.<sup>243</sup> This creates an effective incentive to withdraw a SLAPP, but also allows the SLAPP filer to enjoy the chilling effect of his or her lawsuit for twenty-one days without sanction.<sup>244</sup>

#### H. ADMISSION OF EVIDENCE

Oregon has a provision states that if the plaintiff (the party accused of instituting a SLAPP) wins the SLAPP motion, the fact that the determination has been made and the substance of the same may not be admitted into evidence at any later stage of the case.<sup>245</sup> The determination also does not affect the burden of proof standard applied to the proceeding.<sup>246</sup> The Philippine Supreme Court has taken into account the implications of allowing evidence submitted during a SLAPP hearing, to be admitted in the subsequent trial.

### VI. CONCLUSION

In early 2009, the Technical Working Group (TWG) convened to draft the Rules of Procedure for Environmental Cases. The composition of the TWG included esteemed members of the academe and legal profession, who provided input relating to procedural issues in environmental cases, and how to best address them.

On April 16-17, 2009, the Supreme Court held the *Forum on Environmental Justice: Upholding the Right to Balanced and Healthful Ecology* simultaneously in Baguio City, Iloilo City and Davao City.

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<sup>242</sup> Stetson, *supra* note 234 at 1345.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> See Oregon Anti-SLAPP Law, at par. (5) (a).

<sup>246</sup> *Id.*, at par. (5)(b).

The objectives of the Forum included the following: (1) to recommend to the Supreme Court actions it may take to protect and preserve the environment; (2) to validate the draft Rules of Procedure for Environmental Cases; (3) to discuss the need for a mechanism/structure that will address the need to monitor environmental cases or issues and monitor compliance therewith; and (4) to identify best practices of some agencies/units and replicate in a particular situation.<sup>247</sup> In the Forum, the TWG presented to the participants the draft Rules of Procedure for Environmental Cases. From thereon, the participants were divided into workshop groups, and provided further input and recommendations regarding the draft Rules based on their own experiences. The participants came from different sectors and organizations, including the academe, prosecutors, environmental lawyers and NGOs, in addition to members of the judicial, legislative, and the executive branches of government.

Following the Forum, the draft Rules were submitted to the Sub-committee on Rules of Procedure for Environmental Cases for further review. On April 13, 2010, the Court *En Banc* approved the Rules. The Rules were published in the Philippine Star on April 14, 2010 and takes effect on April 29, 2010.

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<sup>247</sup> Forum Bulletin, Day 1, Public Information Office, Supreme Court of the Philippines.