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CLIMATE LITIGATION IN THE PHILIPPINES: TRENDS AND POSSIBILITIES

Legal Rights and Natural Resources Center

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I. Introduction

The findings of the Intergovernmental Panel on Climate Change (IPCC), presented in its Climate Change 2021 report, paint an urgent and dire picture for all living things if climate change is not arrested. Clearly, 1C of heating is a reality and already dangerously close to the 1.5C limit set in the Paris Agreement. The report underscores that the warming is largely attributable to anthropogenic drivers, primarily emissions from human activities. The current and dominant economic system is one, which is entangled in conflicting interests—corporate interest on one hand and humanity's collective survival on the other. Ideas of development are many and, at times, opposing. Out of these tensions climate change litigation evolved as a mechanism, particularly from the broader arena of environmental law in seeking to ensure that the effects of climate change are mitigated—that the social contract for humanity's collective survival in the face of a climate crisis is ensured.

Climate change litigation, or simply "climate litigation," has been growing in importance over the past decades. This becomes especially critical for the Philippines in view of its climate change vulnerability, due to its high exposure to natural hazards (typhoons, landslides, floods, droughts), dependence on climate-sensitive natural resources, and vast coastlines where all major cities and the majority of the population reside.[1] The country is, thus, extremely prone to the impacts of climate change such as sea level rise, increased frequency of extreme weather events, rising temperatures, and extreme rainfall.[2]

Despite the obvious vulnerability of the Philippines to climate change, there is a dearth of cases that directly deal with climate litigation. Two cases have mentioned it in the text of the decisions, thereby showing that climate change is a matter of judicial notice. In *MMDA v. Concerned Citizens of Manila Bay*,[3] Justice Presbitero J. Velasco Jr. stated: "The need to address environmental pollution, as a cause of climate change, has of late gained the attention of the international community. Media have finally trained their sights on the ill effects of pollution, the destruction of forests and other critical habitats, oil spills, and the unabated improper disposal of garbage. And rightly so, for the magnitude of environmental destruction is now on a scale few ever foresaw and the wound no longer simply heals by itself. But amidst hard evidence and clear signs of a climate crisis that need bold action, the voice of

cynicism, naysayers, and procrastinators can still be heard." Similarly, in the *Saguisag v. Ochoa*,[4] the Supreme Court mentioned that "[t]he Philippines is one of the countries most directly affected and damaged by climate change."

For a country like the Philippines—one of the most megadiverse countries in the world, rich in natural resources, and home to unique flora and fauna— environmental laws and measures to protect nature are crucial. This becomes more of a challenge for a developing country with 110 million people, with a government policy bent on simulating the past economic miracles of highly developed countries through an all-cost industrialization, and the need to later on balance this desire to the needs of future generations.

Much of the current focus of climate change litigation in the country is on small and isolated cases, couched generally as "environmental" cases, and premised on a broad range of legal theories, usually seeking redress based on tort and quasi delict, without necessarily examining the broader context of history, jurisprudence, and policy development. This paper thus attempts to navigate that broader landscape by examining policies, jurisprudence, and current cases, and the unique circumstances that led to their development.



II. JURISPRUDENTIAL DEVELOPMENT

a.) Standing, Right to Health, and Right to a Balanced and Healthful Ecology

Oposa v. Factoran Jr.[5] is the first landmark case on climate litigation under the 1987 Constitution. The case involved 34 minors who, claiming to represent their generation as well as generations yet unborn, sought to stop the Department of Environment and Natural Resources (DENR) Secretary from issuing licenses to cut timber, pursuant to the former's Constitutionally guaranteed rights to health[6] and a balanced and healthful ecology.[7]

Oposa was followed by the case of *LLDA v. Court of Appeals*.[8] This case involved the stoppage of a dumpsite's operation because of its harmful effects on the health of the community's residents. The Supreme Court upheld the injunction against the dumpsite, declaring that the people's right to health as enshrined under the Constitution, the Universal Declaration of Human Rights, and the Alma Conference Declaration of 1978 to which the Philippines is a State Party, carries a corresponding state obligation of non-impairment. *LLDA* therefore expanded the doctrinal implications of *Oposa* by linking climate change litigation as a right to health issue.

The case of *Arigo v. Swift* [9] likewise echoed the pronouncements under *Oposa*. In *Arigo*, the petitioners representing their generation, as well as generations yet unborn, sought to make the United States government liable for damages for the grounding of USS Guardian on the Tubbataha Reefs Natural Park. The Supreme Court in *Arigo* sustained the standing of the petitioners to file the suit because ordinary citizens have legal standing to sue for the enforcement of environmental rights. They can do so as representatives of their own and future generations. The Court further affirmed the relationality of human beings and their environment by explaining that the right to a balanced and healthful ecology is a public right that exists from the inception of humankind. As such, it is an issue of transcendental importance with intergenerational implications and carries with it the correlative duty to refrain from impairing the environment.

The act of suing on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the "rhythm and harmony of nature." Nature means the created world in its entirety. Such rhythm and harmony indispensably include, inter alia, the judicious disposition, utilization, management, renewal, and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, offshore areas, and other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.

b.) Compelling State Action Through Mandamus

The case of *MMDA v. Concerned Citizens of Manila Bay*[10] reiterated the possibilities of the judicial remedy of mandamus for climate change litigation. In MMDA, several concerned residents filed a complaint against several government agencies to clean up, rehabilitate, and protect Manila Bay. Ruling in favour of the concerned citizens, the Court ruled in favor of the concerned citizens, decreeing that the government agencies may be compelled by mandamus to clean up Manila Bay as a ministerial duty. The legal basis to compel government action to rid the bay of pollution can be found under the following laws, and rules, and regulations:

i. The Environment Code (PD 1152) and Ecological Solid Waste Management Act (RA 9003), which require the MMDA to operate appropriate landfill facilities;
ii. The Philippine Clean Water Act of 2004 (RA 9275), which, under its Section 19 (k), directs the Department of Environment and Natural Resources to take measures, using available methods and technologies, to prevent and abate pollution;
iii. Republic Act 6234,[11] directs the Metropolitan Waterworks and Sewerage System to construct, maintain, and operate such sanitary sewerages as may be necessary for the proper sanitation and other uses of the cities and towns within its territorial jurisdiction;
iv. The Department of Agriculture (DA), pursuant to the Administrative Code of 1987 (EO 292), is designated as the agency tasked to promulgate and enforce all laws and issuances respecting the conservation and proper utilization of agricultural and fishery resources. Furthermore, the DA, under the Philippine Fisheries Code of 1998 (RA 8550), is in charge of establishing a monitoring, control, and surveillance system to ensure that fisheries and aquatic resources in Philippine waters are judiciously utilized and managed on a sustainable basis;
v. The Philippine Coast Guard, in accordance with Sec. 5(p) of PD 601, or the Revised Coast Guard Law of 1974, and Sec. 6 of Presidential Decree 979, or the Marine Pollution Decree of 1976, shall have the primary responsibility of enforcing laws, rules, and regulations governing marine pollution within the territorial waters of the Philippines, including the apprehending of violators. It shall, under Sec. 4 of the law, apprehend violators who discharge, dump x x x harmful substances from or out of any ship, vessel, barge, or any other floating craft, or other man-made structures

at sea, by any method, means or manner, into or upon the territorial and inland navigable waters of the Philippines; and

vi. In accordance with Sec. 72 [12]of PD 856, the Code of Sanitation of the Philippines, the Department of Health must the proper disposal of wastes by private sludge companies through the strict enforcement of the requirement to obtain an environmental sanitation clearance of sludge collection treatment and disposal before these companies are issued their environmental sanitation permit.

c.) Standing of Animals to Sue and the Emerging Notion of the Rights of Nature

The case of *Resident Marine Mammals v. Angelo Reyes*[13] further recognized the emerging liberalization of standing in climate litigation in the Philippine context. Specifically, the petitioners in *Resident* were the marine mammals residing in Tañon Strait, such as toothed whales, dolphins, porpoises, and other cetacean species, who were represented by their human stewards. They sought to impugn the validity of the service contract to conduct oil exploration in the Tañon Strait on account of the direct injury they would inevitably suffer.

The Court, in *Resident*, stopped short of recognizing the standing of animals or inanimate objects to sue in Philippine courts. Nonetheless, it acknowledged that the emerging trend has been to take a permissive position insofar as standing is concerned with respect to environmental law cases, a direction first enunciated in *Oposa*. If only to emphasize this leniency, *Resident* tempered the traditional requirement on "personal and direct benefit or injury" to sustain standing in Philippine courts, and instead scrutinized standing for environmental cases under the lens of "humans are stewards of nature enforcing environmental laws." In so doing, although *Resident* failed to recognize standing of animals to sustain a suit, natural persons may still file a climate change case despite the absence of "personal and direct benefit or injury," as long as there remains a rational connection between the environmental law, and the "human duty to be stewards of nature."[14]

d.) The Department of Environment and Natural Resources (DENR) as the Agency mandated to protect the environment

R Metals v. Reyes[15] involved the validity of the cease and desist order issued by the DENR to a mining corporation for exceeding the annual 50,000 MTs production quota for mineral ore in small scale mining. According to the DENR, the production quota should be computed based on the extracted mass, and not the processed mass of minerals, which obviously has lesser impurities. The Supreme Court sustained the DENR's interpretation and emphasized that it is the agency mandated to protect the environment and the country's natural resources. To sustain any other interpretation would result in irreversible degradation of the natural resources and possible landslides and flash floods.

Appreciating this principle more broadly and inasmuch as agencies of the state are mandated to protect the environment, a corollary entry point for potential litigation is to call to task the

the accountability of government officers and employees on the dispensation of their duties. Section 3 (e) of Republic Act 3019[16] penalizes the **[c]ausing any undue injury to any party**, including the Government, or giving any private party any unwarranted benefits, advantage, or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith, or gross inexcusable negligence. **This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.**

With specific application to government offices that grant licenses or permits, this provision may be used to make officials and employees criminally and administratively liable for grossly negligent conduct, which caused undue injury to any party.[17] This injury may be couched as a violation of the right to a balanced and healthful ecology, or even as a human rights violation in light of the decision of the Commission of Human Rights against the fossil fuel corporations.



III. The Rules of Environmental Procedure

In 2007, the Supreme Court promulgated the Rules of Procedure for Environmental Cases (RPEC). The RPEC is a response to the procedural lacunae that has peculiarly long hounded environmental cases in the country. Among the objectives of the RPEC are the following: (a) to protect and advance the constitutional right of the people to a balanced and healthful ecology; (b) to simplify, and make more speedy and inexpensive the enforcement of environmental rights and duties; and (c) to help courts monitor compliance with orders and judgments in environmental cases.

The RPEC introduced innovations insofar as climate litigation is concerned. Specifically, the RPEC fashioned two special writs as special civil actions, which were not found under the then existing remedial rules; these special writs are the Writ of Kalikasan and the Writ of Continuing Mandamus.

The Writ of Kalikasan is an extraordinary remedy because it requires that the damage or threatened damage transcend political and territorial boundaries.

The underlying emphasis on the Writ of Kalikasan is the magnitude of its coverage, as it deals with damage that transcends political and territorial boundaries. Magnitude is thus measured according to the qualification set forth in this Rule — when there is environmental damage that prejudices the life, health or property of inhabitants in two or more cities or provinces.

The Writ of Continuing Mandamus on the other hand is primarily directed at government agencies with respect to the performance of their legal duties. The idea is to direct any agency or instrumentality of the government or officer thereof to perform an act or series of acts decreed by final judgment which shall remain effective until judgment is fully satisfied. It is important to note, however, that in petitions for the issuance of a Writ of Continuing Mandamus, it is not required that there be a final court decree, order, or decision public officials allegedly failed to act on. The main requirement is the existence of a

of a legal duty on the part of public officials to enforce an environmental law or to protect the right of the people to a balanced and healthful ecology. Thus, in *Maricris Dolot v. Paje*[18] the Supreme Court emphasized that the Writ of Continuing Mandamus is a special civil action that may be availed of "to compel the performance of an act specifically enjoined by law" and that the petition should mainly "involve an environmental and other related law, rule or regulation or a right therein."

Apart from these two special remedies, the RPEC also included the provision on precautionary principle, which skews the scales of proof toward the constitutional right to a balanced and healthful ecology. Specifically, when there is doubt as to the possibility of irreversible harm, the case must be resolved in favor of the right to a balanced and healthful ecology.

a.) Cases decided under RPEC

The body of jurisprudence under the RPEC is growing and demonstrates its potential in climate change litigation. Presently, however, conduct which may contribute to climate change is insufficient to sustain a suit in Philippines courts; rather Philippine law entails that it be linked to recognized rights and violations. For instance, in the *Manila Bay Clean-Up Case*, Justice Presbitero Velasco began his *ponentia* as follows:

> The **need to address environmental pollution, as a cause of climate change, has of late gained the attention of the international community**. Media have finally trained their sights on the ill effects of pollution, the destruction of forests and other critical habitats, oil spills, and the unabated improper disposal of garbage. And rightly so, for the magnitude of environmental destruction is now on a scale few ever foresaw and the wound no longer simply heals by itself. But amidst hard evidence and clear signs of a climate crisis that need bold action, the voice of cynicism, naysayers, and procrastinators can still be heard.

The following are the prominent cases decided using the RPEC to enforce environmental laws.

1. In *Boracay Foundation v. Province of Aklan*,[19] Boracay Foundation sought to enjoin the land reclamation of 2.64 hectares of the Caticlan coastline for the purpose of expanding the sea port for its alleged environmental impacts. Among the pieces of evidence presented was a geohazard map of the proposed project site showing the vulnerability of the coastal zone due to the effects of sea level rise and climate change; this would greatly affect the social, economic, and environmental situation of Caticlan and nearby Malay coastal communities. The Court enjoined the implementation of the project and granted continuing mandamus based on the ground that the classification of the project was incorrect leading to the failure to perform a full environmental impact assessment as required by law and that there was a failure for proper, timely, and sufficient public consultation.

2. *Paje v. Casino*[20] discussed the nature of the Writ of Kalikasan as a remedy. In that case, the Province of Zambales sought to enjoin, through a petition for the issuance of a writ of kalikasan, the construction and operation of a coal-fired power plant within Subic, Zambales; allegedly the operation of the power plant would cause environmental damage and pollution, and that this would adversely affect the residents of the provinces of Bataan and Zambales, particularly the municipalities of Subic, Morong, Hermosa, and the City of Olongapo. In the same proceedings, the petitioners also sought to invalidate the Environmental Compliance Certificate (ECC) issued for the project due failure to comply with the procedures and requirements for the issuance of the ECC.

Although *Paje* failed to issue a Writ of Kalikasan due to insufficiency of evidence, the Court liberally ruled that an ECC may be challenged in a Writ of Kalikasan case. The doctrinal implication of *Paje* therefore is to allow for a collateral dispute of an ECC. *Paje*, however, emphasized that a party, who invokes the writ based on alleged defects or irregularities in the issuance of an ECC must not only allege and prove such defects or irregularities, but must also provide a causal link or, at least, a reasonable connection between the defects or irregularities in the issuance of an ECC and the actual or threatened violation of the constitutional right to a balanced and healthful ecology of the magnitude contemplated under the RPEC.

3. The case of *West Tower v. First Philippine Industrial Corporation (FPIC)*[21] was one of the first cases decided under the RPEC. In *West Tower*, the condominium corporation filed a petition for a Writ of Kalikasan against FPIC to stop the operations of its defective oil pipeline, which caused the flooding of the basement of the condominium. Several cause-oriented groups also intervened in that case. In granting the Writ of Kalikasan, the Court ruled that the RPEC does not require that a petitioner be directly affected by an environmental disaster. The rule clearly allows juridical persons to file the petition on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation.

4. The case of *International Service v. Greenpeace Southeast Asia*[22] is likewise worthy of mention because of the application of the precautionary principle. In that case Greenpeace Southeast Asia (Philippines) (Greenpeace), Magsasaka at Siyentipiko sa Pagpapaunlad ng Agrikultura (MASIPAG), and others (respondents) filed before the Court of Appeals a Petition for Writ of Continuing Mandamus and Writ of Kalikasan with Prayer for the Issuance of a Temporary Environmental Protection Order (TEPO) questioning the biosafety permit granted to Bt talong, a genetically modified variety of eggplant. In granting the writ, the Court of Appeals ruled that the precautionary principle applies in this case since the risk of harm from the field trials of Bt talong remains uncertain and there exists a possibility of serious and irreversible harm. It opined that eggplants are a staple vegetable in the country that is mostly grown by small-scale farmers who are poor and marginalized. Thus, given the country's rich biodiversity, the Court determined that the consequences of contamination and genetic pollution would be disastrous and irreversible.

5. *Pilar Caneda Braga v. Abaya*[23] lays down the importance of establishing the link between a Writ of Kalikasan petition and the proof of environmental damage. In *Pilar*, the petition sought to enjoin the implementation of the Davao Sasa Wharf modernization project, a 30-year concession to develop, operate, and manage the port under the Public-Private Partnership (PPP) scheme. Allegedly, the respondents have begun the process of transgressing their right to health and a balanced ecology through the bidding process. In denying the writ, however, the Court opined that the petition failed to identify the particular threats from the project itself. Moreover, the petition is misleading because it only identified the risks but neglected to mention the existence and availability of mitigating measures. The bidding process is not equivalent to the implementation of the project. The bidding process itself cannot conceivably cause any environmental damage.

6. In *Segovia v. The Climate Change Commission*[24] the petitioners sought the issuance of a Writ of Kalikasan and/or a Writ of Continuing Mandamus to compel the government to implement the Road Sharing Principle. According to the petitioners, the Road Sharing Principle is mandatory and enshrined under Administrative Order No. 171 (AO 171), which directs the government to reduce the consumption of fossil fuels. The same principle is echoed under AO 254, which directs the adoption of an environmental and sustainable transport strategy. The Court, however, dismissed the petition on the ground that there is no showing that there was an act or omission that violated the petitioner's right to a balanced and healthful ecology. In other words, in the Writs of Kalikasan or Continuing Mandamus, it must be shown that there is a law, rule, or regulation that was violated or would be violated. The Road Sharing Principle is precisely as it is denominated a principle. It cannot be considered an absolute imposition to encroach upon the province of public respondents to determine the manner by which this principle is applied or considered in their policy decisions. Mandamus lies to compel the performance of duties that are purely ministerial in nature, not those that are discretionary, and the official can only be directed by mandamus to act but not to act one way or the other. The duty being enjoined in mandamus must be one according to the terms provided in the law itself. Thus, the recognized rule is that, in the performance of an official duty or act involving discretion, the corresponding official can only be directed by mandamus to act, but not to act one way or the other.[25]



IV. Right to Balanced and Healthful Ecology and Environmental Laws as the nexus of Philippine Climate Change Litigation

Philippine climate change litigation is essentially anchored in interconnected principles that serve as the entry point to establish a cause of action for climate litigation. First is the right to a balanced and healthful ecology, a right clearly articulated in *Oposa*. Apart from the clear provision under the Constitution, the right to a balanced and healthful ecology can also be found scattered under various provisions of the various statutes, and implied from the others. Among these are as follows: a.) the Local Government Code mentions of the duty of the local and national government to maintain ecological balance and environmental integrity;[26] b.) Section 4 of Executive Order (E.O.) No. 192 creating the DENR, Section 3 of Presidential Decree (P.D.) No. 1151 (Philippine Environmental Policy), Section 16, Article II of the 1987 Constitution recognizing the right of the people to a balanced and healthful ecology, the concept of generational genocide in Criminal Law and the concept of man's inalienable right to self-preservation and self-perpetuation embodied in natural law.

Of course, this list is not exhaustive. Nonetheless, what is important to note is that it is required to link the particular policy with the right to a balanced and healthful ecology to at least establish a cause of action. In the case of *MMDA* for instance, the Court relied on agency mandates to establish the ministerial duty of government agencies to clean up the Manila Bay. In other words, these government agencies are enjoined, as a matter of statutory obligation, to perform certain functions relating directly or indirectly to the cleanup, rehabilitation, protection, and preservation of the Manila Bay. Among the provisions cited are as follows: (1) The DENR, under Executive Order No. (EO) 192, is the primary agency responsible for the conservation, management, development, and proper use of the country's environment and natural resources. Sec. 19 of the Philippine Clean Water Act of 2004 (RA 9275), on the other hand, designates the DENR as the primary government responsible for its enforcement and implementation, more particularly over all aspects of water quality management.

On water pollution, the DENR, under the Act's Sec. 19(k), exercises jurisdiction "over all aspects of water pollution, determine[s] its location, magnitude, extent, severity, causes and effects and other pertinent information on pollution, and [takes] measures, using available methods and technologies, to prevent and abate such pollution; (l) The DENR, under RA 9275, is also tasked to prepare a National Water Quality Status Report, an Integrated Water Quality Management Framework, and a 10-year Water Quality Management Area Action Plan which is nationwide in scope covering the Manila Bay and adjoining areas.[27] This is as opposed to the case of *Segovia* (road-sharing case) which required that there be actual reference to a law, rule, or regulation that was actually violated by the government agency concerned.

One could argue, however, that the complexity of the prayer in the *Segovia* case proved to be its own undoing. Specifically, the *Segovia* case prayed for the overhauling of the transportation program of the government while *MMDA* merely prayed for the clean-up of the Manila Bay. The specificity and the simplicity of the *MMDA* case therefore permitted the Court to skirt the possibility of engaging in judicial legislation and encroaching on executive discretion. On the other hand, *Segovia*'s prayer entailed an evaluation, examination of a transportation system, a field entirely within the expertise of an executive agency; to grant the *Segovia*'s prayer amount to the encroachment of separation of powers.

Another option, of course, is to merely cite a specific environmental law rule or regulation that was violated by a particular agency. In this regard, the RPEC mentions specific environmental laws that can serve to establish a cause of action. Among them are the following:

> (a) Act No. 3572, Prohibition Against Cutting of Tindalo, Akli, and Molave Trees;
> (b) P.D. No. 705, Revised Forestry Code;
> (c) P.D. No. 856, Sanitation Code;
> (d) P.D. No. 979, Marine Pollution Decree;
> (e) P.D. No. 1067, Water Code;
> (f) P.D. No. 1151, Philippine Environmental Policy of 1977;
> (g) P.D. No. 1433, Plant Quarantine Law of 1978;
> (h) P.D. No. 1586, Establishing an Environmental Impact Statement System Including Other Environmental Management Related Measures and for Other Purposes;
> (i) R.A. No. 3571, Prohibition Against the Cutting, Destroying or Injuring of Planted or Growing Trees, Flowering Plants and Shrubs or Plants of Scenic Value along Public Roads, in Plazas, Parks, School Premises or in any Other Public Ground;
> (j) R.A. No. 4850, Laguna Lake Development Authority Act;
> (k) R.A. No. 6969, Toxic Substances and Hazardous Waste Act;
> (l) R.A. No. 7076, People's Small-Scale Mining Act;

(m) R.A. No. 7586, National Integrated Protected Areas System Act including all laws, decrees, orders, proclamations and issuances establishing protected areas;
(n) R.A. No. 7611, Strategic Environmental Plan for Palawan Act;
(o) R.A. No. 7942, Philippine Mining Act;
(p) R.A. No. 8371, Indigenous Peoples Rights Act;
(q) R.A. No. 8550, Philippine Fisheries Code;
(r) R.A. No. 8749, Clean Air Act;
(s) R.A. No. 9003, Ecological Solid Waste Management Act;
(t) R.A. No. 9072, National Caves and Cave Resource Management Act;
(u) R.A. No. 9147, Wildlife Conservation and Protection Act;
(v) R.A. No. 9175, Chainsaw Act;
(w) R.A. No. 9275, Clean Water Act;
(x) R.A. No. 9483, Oil Spill Compensation Act of 2007; and
(y) Provisions in C.A. No. 141, The Public Land Act; R.A. No. 6657, Comprehensive Agrarian Reform Law of 1988; R.A. No. 7160, Local Government Code of 1991; R.A. No. 7161, Tax Laws Incorporated in the Revised Forestry Code and Other Environmental Laws (Amending the NIRC); R.A. No. 7308, Seed Industry Development Act of 1992; R.A. No. 7900, High-Value Crops Development.



V. The Need for Enabling Policies for Climate Litigation

The case of *Urgenda*[28] versus the Dutch government is a landmark case in climate litigation. It is the first in the world where a government was found to have a legal duty to prevent climate change. The Dutch Supreme Court decided that while the "the decision-making on greenhouse gas emissions belongs to the government and parliament," it was still "up to the courts to decide whether, in taking their decisions, the government and parliament have remained within the limits of the law by which they are bound." In the case of the Dutch government, its Constitution required it to abide by the provisions of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), and thus had a duty to prevent climate change. In *Vereniging Milieudefensie et al. v. Royal Dutch Shell PLC*,[29] non-government organizations and over 17,000 individuals filed an injunction versus the Royal Dutch Shell to compel it to reduce its emissions. The petition cited "duty of care" ("unwritten standard of care") under Dutch civil law. The Dutch District Court ruled in favor of the petitioners, stating that the ruling applied to the entire Shell group, which is headquartered in The Hague and incorporated in the U.K., with operating companies all over the world.[30] It also considered international human rights treaties and international as "soft law." It would be the first instance that a national court found a private corporation responsible and accountable for its emissions, ordering it to reduce the same in accordance with the Paris Agreement. The implications of the judgment are significant: first, the legal recognition of the necessity of damage prevention, and second, the interpretation of human rights to include climate change—the court clarified that is not only states that have the obligation to meet climate change targets but that corporate emitters are also responsible for the emissions caused and emanating from their products.

There has been some uptake in the initiation of climate litigation elsewhere internationally. This reflects a broader appreciation of the courts as a recourse in mitigating climate change and its impacts. The framing of environmental issues as part of the broader issue of the climate emergency is also an indication of the development and progress in international and national climate change policies.

To address the climate emergency, all branches of government need to be fully at the frontline.

Towards this end, it is important for the courts to develop a legal framework and judicial appreciation of the current climate crisis and its role in safeguarding the rights of peoples and to ensure everyone's survival and well-being. Under the current Philippine legal framework, there remains difficulty and no clear pathway to hold anyone responsible for contributions to environmental hazards, much less the climate crisis: plaintiffs have been challenged to prove the violations they suffer and the causal relationships between how particular corporate activities are contributing to environmental damage, if not climate change. This exposes another urgent need: policy support to enable the courts to better address climate change controversies.

Towards our Collective Survival: Addressing the Asymmetry of Power

It is well established that certain industries, particularly the fossil fuel industry, bear substantial responsibility for the climate emergency—which can be traced to the extraction and processing of carbon fuels.[31] The industry and others similarly situated in the extractives, therefore, are in the best and strategic position to address the climate emergency. The industry, however, face no urgent risk of sanctions nor have the incentive to change the current situation. Arguably, their interest is to maintain the status quo and preserve their profit margins (as with other large industrial projects such as mining, agroforestry and agro industries). Moreover, the notion of "well-mixed greenhouse gases" has often been used to challenge and obfuscate emission contributions and injuries to the point that litigants are often judged without proper cause(s) of action(s) even as the impacts continue to be felt, are tangible and experiential. Communities are left to bear the brunt of the every day impacts and colossal catastrophes brought on by climate change while having little to no means to adapt, much less mitigate these. Put differently, even though issues concerning the climate change crisis are universal, capacity to mitigate impacts and risks, and access to courts and justice are not.[32]

In the Philippines, financial constraints faced by most people limit access to remedies. The lack of information about rights and of possible legal recourse further limit access to justice. Other barriers aggravate the condition: incomplete legal foundations, absence of legislation, and limited political will. While these barriers implicate broader systemic problems, having at the very least a legal foundation to help address the urgent need to ensure that climate change targets can be achieved—primarily collective survival, gives us all a chance. Litigation has presented a way for communities and civil society to push for inferred causes for climate change, limited and peripheral the focus may be. If the courts, however, are to become a relevant venue to arrest the climate emergency and to protect the more vulnerable, policies that more clearly set the parameters for climate mitigation and sanctions against actors are urgently needed.

The Need for Policy to Enable Climate Litigation

As the preceding survey of cases presents, cases filed in the Philippines rely mostly on constitutional rights to challenge government policies that impact on climate change. Courts are asked to determine cases that challenge specific projects and their implications on the environment, which only, if at all, tangentially challenge their impacts on climate change. Most of the cases are without particular

challenge to the projects' climate change impacts. Among the reasons given for this are limited access to justice, absence of climate law frameworks, and poor implementation of existing frameworks.[33] What is absent in Philippine jurisdiction are enabling policies that can directly and with more particularity allow a challenge, redress, and accountability against climate change-contributing actors.

In 2015, human rights and environmental groups, as well as concerned citizens and individuals from climate-impacted communities in the Philippines, filed a petition before the Philippine Commission on Human Rights (CHR) seeking for an investigation into the world's biggest fossil fuel corporations and cement companies. Its intention was to call out the corporations for their significant CO2 emissions and greenhouse gases in the conduct of their businesses. The petition named 47 entities, including multinationals Shell, Chevron, Exxon, Total, and BP, all publicly traded corporations, as respondents. While it was not filed before a tribunal, the petition would be the first of its kind in the Philippines to relate business practices, corporate accountability, to contributions to climate change. The petition drew from multiple sources of human rights—primarily from the UN Human Rights Commission's Guiding Principles on Business and Human Rights. Among the petitioners were Filipino survivors of the 2013 Typhoon Yolanda (Haiyan) and other extreme weather events. The legal theory being that the fossil fuel companies are responsible for the human rights abuses resulting from climate change, such as the loss of life of those killed in the typhoon. In 2019, the CHR granted the petition. Although the decision remains an inquiry into human rights abuse and liability, the CHR lacking the power of enforcement, it is the first official finding of corporate responsibility—calling out "emissions from human activities," thereby buttressing, and with more specificity, accountability for causing or adding to the climate emergency, and propounded a categorical link between human rights and climate change.

In December 2015, countries from all over the world came together and negotiated what would be the climate treaty, the Paris Agreement. Adopted by 196 parties at the Conference of Parties 21 (COP 21) and entered into force on November 4, 2016, its goal is to limit global warming to well below 2C above pre-industrial levels, and preferably limit the increase to 1.5C. Part of the duties of the State parties to the Paris Agreement is to submit a Nationally Determined Contribution (NDC) five (5) years from the signing of the binding agreement. The Philippines signed the Agreement on 22 April 2016 and ratified the same on 23 March 2017 and entered into force on 22 April 2017.

On April 15, 2021, the Philippines submitted its updated NDC to the United Nations Framework Convention on Climate Change (UNFCCC) stating its commitments to arrest climate change. The Philippines NDC provided that it "recognizes the private sector as the country's main engine of economic growth and transformation, and promotes its full engagement in climate change adaptation and mitigation."[34] In the same vein, it stated "the importance of ensuring the ecosystem's integrity and promoting the country's obligations on human rights and the rights of its indigenous peoples." Being a signed international treaty, the Paris Agreement, and, concomitantly, the Philippine NDC, binds the Philippines to its aspirations. The Philippines committed itself to lessen its projected greenhouse gas (GHG) emissions by 75% for the period of 2020 to 2030 for the sectors of agriculture, wastes, industry, transport, and energy.

With the Paris Agreement, the seemingly amorphous construction of climate change is given better context. As such, some cases filed in court, while challenging specific resource-extraction or resource-dependent projects that pose environmental hazards, now include climate change narratives and considerations for climate impacts. Arguably, while policies (other than law) may not necessarily provide justiciable cause, climate-related policies may be made the legal basis of actions. As foundations, however, they are weakened by institutional uncertainties as to their mandate and the parameters for addressing the climate crisis. Neither the Paris Agreement nor the NDC provide enforceable limits on emissions. What they do provide is the basis for the development and institution of policies (legislative measures) that ensure climate change mitigation measures are undertaken by the state, on one hand, and to ensure corporate liability and responsibility;[35] on the other hand. More than participation of government by mere publication of country review reports, a policy that substantially refers to safeguards against negative social, environmental impacts and violation of human, indigenous peoples' and other crucial rights must be in place to meaningfully address the climate crisis—one that operationalizes these by, for example, providing for redress mechanisms. The Philippines primarily follows a civil law framework and, thus, requires written legislation. It is this lack of enforceable basis for actions that predicates the need for more concrete policies to be in place. The court has been limited when it is left to interpret existing legislation to require climate consideration.

While it may be posited that the Philippines already has a gamut of environmental laws in its arsenal to prevent environmental hazards, there is, however, no single framework that binds the environmental concerns in a comprehensive manner. Instead, there is an "abundance of laws and regulations which address separate environmental issues."[36] This lack of framework lends the courts at risk of failing to appreciate justiciable questions within the context of the current and urgent climate crisis. A review of environmental decisions by the Supreme Court "…shows a court that has narrowed the statutory avenues for environmental protection and has opted to refrain from involvement in environmental litigation."[37] A few hypotheses are forwarded to explain the demotivation: the lack of knowledge to fully appreciate the range of environmental issues or finding "itself confronted with the task of balancing economic progress with environmental concerns."[38] A report that inquired about judicial response to climate change among Asian judges found them acknowledging the threat of climate change but needing to better understand the issue and requiring more information about climate litigation. More profoundly, they articulated how their positions could be "isolating"—how judgments that support environmental protection are often regarded with disfavor and deemed to be acts of activism or interference with government policy.[39] These underscore the importantance of codifying climate change obligations and accountability of both public and private actors, providing not only a cohesive framework but also a categorical basis for legal actions. It avoids obfuscation of issues and uncertainty of the court of its duties.

With more information regarding the environment and climate change, and intensifying human activity particularly in resource exploitation, it is incumbent upon the court to take up its duty when controversies arise and brought before it. While there is a broad agreement on the urgency and causes of climate change, seeking accountability against the actor-drivers of the climate emergency remains elusive. To effect meaningful actions towards climate mitigation, climate-related laws and policies are essential, if not indispensable, components of any national plan of action.

Endnotes

1 USAID, Climate Change Risk Profile Philippines, available at https://www.climatelinks.org/sites/default/files/asset/document/2017_Climate%20Change%20Risk%20Profile_Philippines.pdf, last accessed 31 December 2020.

2 Ibid.

3 G.R. Nos. 171947-48, December 18, 2008.

4 G.R. No. 212426, January 12, 2016.

5 224 SCRA 792 (1994).

6 1987 Constitution, Article II, Section 15. The State shall protect and promote the right to health of the people and instill health consciousness among them.

7 1987 Constitution, Article II, Section 16. 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.

8 231 SCRA 292 (1994).

9 G.R. No. 206510, September 16, 2014.

10 G.R. Nos. 171947-48, December 18, 2008.

11 An Act Creating the [MWSS] and Dissolving the National Waterworks and Sewerage Authority [NAWASA]; and for Other Purposes

12 Sec. 72.Scope of Supervision of the Department.––The approval of the Secretary or his duly authorized representative is required in the following matters:
x x x x
Method of disposal of sludge from septic tanks or other treatment plants.

13 G.R. No. 180771, April 21, 2015.

14 The notion of "human duty to be stewards of nature" finds interpretation in other jurisdictions as the rights of nature. The Constitutional Court of Columbia, for example, broadens the idea of legal standing to include nature. In the Atrato river case (2016), Tierra Digna, an organization representing Afro-Colombian territories, filed an acción de tutela—an action to protect fundamental Constitutional rights—against illegal mining, which was causing contamination and pollution on the Atrato river. The river coursed through the ancestral domains of the indigenous and Afro-Colombian communities. In granting the protection, the Constitutional Court ordered the recognition of the Atratoriver as an "entity subject to rights of protection, conservation, maintenance and restoration by the State and ethnic communities." The government and community representatives were charged with the legal representation of the river, making them the "guardians of the river." In 2019, The Supreme Court of Bangladesh pronounced a landmark decision declaring the country's rivers as having "legal personhood." The rights of nature have also been recognised in other jurisdictions—in Ecuador in relation to the Vilcabamba River (2011), the Ganges and Yamuna rivers in India (2017), and Te Awa Tupua (Whanganui river) in New Zealand (2017). The notion of the rights of nature emanates from a cultural and national consciousness that these countries, not unlike the Philippines, were born by and shaped by their rivers.

15 G.R. No. 179669, June 04, 2014.

16 Anti-Graft and Corrupt Practices Act.

17 Elsewhere, analogously, the Federal Court of Australia delivered a judgment finding that an environment minister, on whether to approve the planned expansion of a coal mine, had a climate-related "duty to take reasonable care to avoid causing personal injury to the Children."See Sharma by her litigation representative Sister Marie Brigid Arthur v. Minister for the Environment [2021] FCA 560, https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca0560

18 G.R. No. 199199, August 27, 2013.

19 G.R. No. 196870, June 26, 2012.

20 G.R. No. 207257, G.R. No. 207276, G.R. No. 207282, G.R. No. 207366, February 3, 2015.

21 G.R. No. 194239, June 16, 2015.

22 G.R. No. 209271.

23 GR No. 223076, Sep 13, 2016.

24 G. R. No. 211010, March 7, 2017.

25 In other jurisdictions, legal theories have been developed to help enable climate litigation. In New Zealand's Smith v. Fronterra Co-Operative Group Limited, the plaintiff sued greenhouse-gas emitting facilities, on the grounds that their emissions amounted to a public nuisance, negligence, and violated an inchoate duty to cease contributing to climate change. Dismissing the two other grounds, the Court allowed the suit on the theory that there may be an inchoate duty to cease contributing to climate change.

26 Republic Act 7160, Section 3, Local government units shall share with the national government the responsibility in the management and maintenance of ecological balance within their territorial jurisdiction, subject to the provisions of this Code and national policies; SECTION 26. Duty of National Government Agencies in the Maintenance of Ecological Balance. -It shall be the duty of every national agency or government-owned or -controlled corporation authorizing or involved in the planning and implementation of any project or program that may cause pollution, climatic change, depletion of non-renewable resources, loss of crop land, rangeland, or forest cover, and extinction of animal or plant species, to consult with the local government units, nongovernmental organizations, and other sectors concerned and explain the goals and objectives of project or program, its impact upon the people and the community in terms of environmental or ecological balance, and the measures that will be undertaken to prevent or minimize the adverse effects thereof.

27 Sec. 19 of RA 9275 provides:
Sec. 19 Lead Agency.––The [DENR] shall be the primary government agency responsible for the implementation and enforcement of this Act x x x unless otherwise provided herein. As such, it shall have the following functions, powers and responsibilities:
a) Prepare a National Water Quality Status report within twenty-four (24) months from the effectivity of this Act: Provided, That the Department shall thereafter review or revise and publish annually, or as the need arises, said report;

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b) Prepare an Integrated Water Quality Management Framework within twelve (12) months following the completion of the status report;
c) Prepare a ten (10) year Water Quality Management Area Action Plan within 12 months following the completion of the framework for each designated water management area. Such action plan shall be reviewed by the water quality management area governing board every five (5) years or as need arises.

28 Urgenta vs State of the Netherlands. Available at https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf

29 Vereniging Milieudefensie et al. v. Royal Dutch Shell PLC, Hague District Court, Decision of May 26, 2021, C/09/571932 / Ha Za 19-379. Available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-2.pdf

30 Roeline Knottnerus (2021). How We Defeated Shell. Vereniging Milieudefensie. Available at https://milieudefensie.nl/actueel/md_how_we_defeated_shell_en_final.pdf

31 Richard Heede (2019). Carbon Majors Accounting for carbon and methane emissions 1854-2010 Methods & Results Report. Lambert Academic Publishing.

32 Allen Blackman. (2008). Can Voluntary Environmental Regulation Work in Developing Countries? Lessons from Case Studies, 36 POL'Y STUD. J. 119, 120.

33 Jacqueline Peel & Jolene Lin. (2019). Transnational Climate Litigation: The Contribution of the Global South, 113 AJIL 679.

34 Philippine Nationally Determined Contributions. Available at https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Philippines%20First/Philippines%20-%20NDC.pdf
35 The mechanism should include provision(s), among others, on climate disclosures—the availability of information on business operations and practice to ensure mitigation policies are integrated and accounted; and as a safeguard against misinformation and greenwashing, which could also be made the basis of suits.

36 Dante Gatmaytan (2003). Artificial Judicial Environmental Activism: Oposa v. Factoran as Aberration. Ind. Int'l & Comp. L. Rvv. Vol. 17:1. Available at https://mckinneylaw.iu.edu/iiclr/pdf/vol17p1.pdf

37 Id.

38 Id.

39 ADB. (2020). Climate Change, Coming Soon To A Court Near You Climate Litigation in Asia and the Pacific and Beyond. Accessed from https://www.adb.org/sites/default/files/publication/659631/climate-litigation-asia-pacific.pdf

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