Improving Environmental Access to Justice: Going Beyond Environmental Courts

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I. INTRODUCTION

The environmental problem has always posed a serious challenge to traditional legal thinking, throwing many established legal norms and principles into question with its unique set of legal demands. For instance, a major cornerstone in international law that has been eroded over the years is the principle of state sovereign control over natural resources found within

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its territory.[1] The emergence of issues such as migratory species, transboundary pollution, persistent organic pollutants, ozone depletion, and presently, climate change, has chipped away the traditional notion of jurisdictional boundaries and paved the way for new legal frameworks that promote shared responsibility over resources rather than singular state control.

The Philippines has some problems that test the sufficiency and effectiveness of its legal system, being one of the few countries superbly endowed with rich biological diversity. Unfortunately, its marine, terrestrial, and aerial ecosystems are all on an alarming state of decline: fish catch is down, forests are vanishing, rivers are dying, and the Metro Manila air is indisputably dirty. These neither developed overnight nor happened due to natural causes.

Interestingly, there are barriers in the current judicial system that contribute to the country's environmental problems. Legal procedure, in particular, was designed for distinct party-litigants playing-out well-established conflicts, features which are not always present in environmental cases. Also, ordinary procedural rules, without taking into account environmental nuances, impede efforts to protect and conserve the environment. With environmental cases expected to increase with the looming challenges posed by climate change, it is now imperative to reform the legal system. The establishment of a system by which environmental offenders are held legally accountable, for instance, can lead to a better and healthier environment for Filipinos.

The present initiative of the judiciary to protect the environment by designating environmental courts is surely laudable. This Article is aimed to complement such effort by identifying issues which can serve as useful discussion points in crafting a more responsive environmental legal procedure. Verily, one major challenge is determining what constitute environmental cases. It is hoped that the ensuing discussion may prove useful in future efforts to refine the judicial system.

Admittedly, the problem is complex and the proposed solutions, just like the causes, vary widely. Legal reform is just one of many areas of action, and a more comprehensive response from all branches of the government, not just the judiciary, is needed. Fortunately, the Puno administration has shown openness to and appreciation of the environmental situation for,

1. Declaration of the U.N. Conference on the Human Environment, Principle 21, U.N. Doc. A/Conf.48/14/Rev. 1 (1973); 11 I.L.M. 1416 (1972).

undoubtedly, an "access to justice" approach can help serve the ends of justice and protect the environment.

II. ENVIRONMENTAL COURTS

Through Administrative Order (A.O.) No. 23-2008,[2] promulgated in early 2008, the Supreme Court identified different court branches all over the country to handle environmental cases (environmental courts).[3] This move was welcomed by so-called green groups who have long advocated for the development of environmental expertise among the ranks in the judiciary. This also augmented the efforts of Congress which has enacted about a dozen new environmental laws in the last decade or so. Critics, meanwhile, question whether the establishment of environmental courts can truly make a dent on the problem, given its enormity.

At the onset, two things are worth noting. First, the creation of special courts has been a key strategy used by the Supreme Court to highlight its resolve over specific areas of concern such as family relations,[4] dangerous drugs,[5] and more recently, human rights.[6] The creation of environmental courts is therefore indicative of the importance being placed by the judiciary on this issue. Second, the Supreme Court, under the leadership of Chief Justice Reynato S. Puno, has been proactive in improving the delivery of justice and has not balked at changing its own rules in the process. This was

2. Supreme Court, Re: Designation of Special Courts to Hear, Try and Decide Environmental Cases, Administrative Order No. 23-2008 (Jan. 28, 2008).

3. *See* Green Courts to Bolster Enforcement of Environmental Laws, GOV.PH NEWS, Jan. 17, 2008, *available at* http://www.gov.ph/news/default.asp?i=19888 (last accessed Feb. 21, 2009); Press Release, Senate of the Philippines, 14th Congress, Pia: Green Courts Should Lead to Punishment of Environment Plunderers (Jan. 14, 2008), *available at* http://www.senate.gov.ph/press_release/2008/0114_cayetano1.asp (last accessed Feb. 21, 2009).

4. *See generally* Supreme Court, Re: Designation of Certain Branches of the Regional Trial Courts as Family Courts, A.M. No. 99-11-07-SC (Apr. 24, 2007).

5. *See generally* Supreme Court, Re: Designation of Special Courts For Kidnapping, Robbery, Carnapping, Dangerous Drugs Cases, and Other Heinous Crimes, Intellectual Property Rights Violations and Jurisdictional Libel Cases, Administrative Circular No. 104-96 (Oct. 21, 1996).

6. *See generally* Supreme Court, Designation of Special Courts to Hear, Try, and Decide Cases Involving Killings of Political Activists and Members of Media, Administrative Order No. 25-2007 (Mar. 1, 2007).

evident in the innovations introduced in the rules on the Writs of *Amparo*[7] and *Habeas Data*,[8] and in the establishment of small-claims courts.[9] The prospects, therefore, for an environmentally responsive legal agenda through judicial action are highly encouraging.

III. ENVIRONMENTAL CASES

A cursory reading of A.O. No. 23-2008 reveals that it is a preliminary step. Aside from identifying specific branches of first- and second-level courts which will try and decide violations of environmental laws, its only other significant feature is the enumeration of environmental laws under which violations may be prosecuted.

Although already quite a handful, the scope of A.O. No. 23-2008 is just a small subset of what truly constitute environmental cases. Unknown to many, environmental law is broad, ranging from regulatory measures that promote conservation and protection to the different modes of resource use and development. In fact, the perceived legal divide between the Law on Natural Resources on one hand and Environmental Law on the other is more conceptual than real. Natural resources, whether utilized or conserved, pertain to the same inter-connected ecosystems and must be managed in a holistic and sustainable manner.

The doctrine of exhaustion of administrative remedies is a legal principle that has evolved over time. The doctrine states that "where a claim is cognizable in the first instance by an administrative agency alone, judicial intervention is withheld until the administrative process has run its course."[10] This applies even to environmental cases which stem from administrative matters (e.g., securing logging permits or licenses, enforcement of lease agreements, etc.). The Department of Environment and Natural Resources (DENR) and its different component bureaus exercise primary jurisdiction, as quasi-judicial agencies, over cases involving the allocation and utilization of commercially valuable natural resources such as timber, minerals, sources

7. RULE ON THE WRIT OF AMPARO, A.M. No. 07-09-12-SC, Oct. 24, 2007.

8. RULE ON THE WRIT OF HABEAS DATA, A.M. No. 08-01-16-SC, Feb. 2, 2008.

9. Supreme Court, Re: Designation of Pilot Courts for Small Claims Cases, Administrative Order No. 141-2008 (Sep. 29, 2008).

10. Merida Water District v. Bacarro, G.R. No. 165993, Sep. 30, 2008 (citing U.S. v. Western P.R. Co., 352 U.S. 59 (1956)); *see generally* People v. Almazan, 426 SCRA 108 (2004); Fernando v. Sto. Tomas, 234 SCRA 546 (1994); Rosario v. Court of Appeals, 211 SCRA 384 (1992); Rosales v. Court of Appeals, 165 SCRA 344 (1988).

of energy, and so on.[11] Thus, it is only when these cases are eventually appealed to the Court of Appeals that they would be solved judicially.

The environmental courts under A.O. No. 23-2008 cannot try and hear such type of cases if the doctrine of exhaustion of administrative remedies is to be followed. Conversely, environmental cases which first- and second-level courts can preside over are those outside the jurisdiction of said administrative agencies. There are several of this kind.

First, criminal cases for violation of environmental laws — precisely what A.O. No. 23-2008 was made for. As conventional legal wisdom goes, the threat of legal punishment can serve as strong deterrent against the future commission of environmental offenses. It must also be borne in mind, however, that failure to prosecute can foster impunity.

Another group of environmental cases are those for damages arising from activities that cause significant adverse environmental impacts. A graphic example is the fatal gas leak in Bhopal, India which killed thousands in an instant in December 1984. Note that although the responsible parties may also be held criminally liable, actions for damages of this kind are mostly civil in nature and involve a large number of people. Jurisdiction would be determined as in ordinary civil cases[12] and governed by the rules on civil procedure. One early question, therefore, is whether this type of civil action is contemplated by A.O. No. 23-2008.

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11. Component bureaus of the DENR include the Pollution Adjudication Board, the Environmental Management Bureau, the Mines Adjudication Board, among others.

    See generally Providing for the Reorganization of the Department of Environment, Energy, and Natural Resources, Renaming it as the Department of Environment of Natural Resources, and for Other Purposes [Reorganization Act of the Department of Environment and Natural Resources], Executive Order No. 192 (1987).

    Fishery issues, however, fall under the Bureau of Fisheries and Aquatic Resources (BFAR) under the Department of Agriculture.

    See generally An Act Providing for the Establishment of National Integrated Protected Areas System, Defining its Scope and Coverage, and for Other Purposes [National Integrated Protected Areas System Act of 1992], Republic Act No. 7586 (1992).

12. An Act Expanding the Jurisdiction of the Metropolitan Trial Court, Municipal Trial Courts, and Municipal Circuit Trial Courts, Amending for the Purpose Batas Pambansa, Blg. 129, Otherwise Known as the "Judiciary Reorganization Act of 1980," Republic Act No. 7691 (1994).

The last, and most emergent, type of environmental cases are those so-called strategic lawsuits against public participation or SLAPP suits. Since under the constitution and the law public consultation is mandatory for activities with significant environmental impacts,[13] adventurous proponents of such activities do not hesitate to file lawsuits as a means of harassment to stifle or coerce community action. An action for damages due to business losses, albeit fictitious, filed by a polluting entity against its protesting neighbors is a good example of this.

Legal victory is not the intended effect of SLAPP suits since these are usually based on flimsy grounds and deserve outright dismissal; SLAPP suits are employed precisely to take advantage of the fact that local communities, especially those living in remote areas, have no access to legal representation such that legal threat alone is enough to compel them to consent to or abandon their opposition in exchange for the dropping of charges or suits against them. Of course, this vitiation of consent is legally contestable but the remedy begs the question of lack of legal representation.

Incidentally, the reality of SLAPP suits is now recognized in two laws, both of which are enumerated in A.O. No. 23-2008 — the Clean Air Act[14] and the Solid Waste Management Act.[15]

IV. ANALYSIS

A. Administrative Cases

As mentioned, a big chunk of environmental cases are administrative in nature; involving disputes relating to the allocation of natural resources and their various modes of utilization. This includes questions over compliance

13. *See* PHIL. CONST. art XIII, § 10, ¶ 2; Establishing an Environmental Impact Statement System, Including Other Environmental Management Related Measures and for Other Purposes, Presidential Decree No. 1586 (1978); An Act Providing for a Local Government Code of 1991 [LOCAL GOVERNMENT CODE], Republic Act 7160, § 27 (1991).

14. An Act Providing for a Comprehensive Air Pollution Control Policy and for Other Purposes [Philippine Clean Air Act of 1997], Republic Act No. 8749, § 43 (1999).

15. An Act Providing for An Ecological Solid Waste Management Program, Creating the Necessary Institutional Mechanisms and Incentives, Declaring Certain Acts Prohibited and Providing Penalties, Appropriating Funds Therefor, and for Other Purposes [Ecological Solid Waste Management Act of 2000], Republic Act No. 9003, § 53 (2000).

with the conditions provided by law and the issued permits. As each environmental agency utilizes different kinds of legal instruments for every natural resource available and embodies them in separate administrative orders, the source law for this type of environmental suit is actually voluminous and specialization is often required in the fields of forestry, fisheries, energy, and mining.

These cases are well outside the coverage of A.O. No. 23-2008. They only reach the judiciary much later at the Court of Appeals level. While this setup seems in keeping with the rationale that administrative agencies have developed the necessary expertise in certain fields,[16] some key features of the environment warrant a different approach.

First, many sectors are wary of the DENR administrative setup. The issue of corruption aside, there is a perceived institutional conflict when the permit-giving authority is also the adjudicating arm. For one, the DENR Secretary, who has the final say in the issuance of permits, is also the head of the different adjudicatory bodies, most especially when large-scale resource use is at stake.[17] On top of this, the required final step in the exhaustion of administrative processes is a review by the same DENR Secretary who not only issued the permit but also took part in coming up with the decision or resolution that reviewed the permit. In short, the first real opportunity for an institutionally objective assessment of the permit-issuance process happens only when the case is brought to the Court of Appeals via ordinary appeal,[18] or in some instances, by way of special civil action of certiorari.[19]

Unfortunately, by the time the questioned permits reach the appellate court, significant destruction would have already been wrought on the

16. *See generally* Energy Regulatory Board v. Court of Appeals, 357 SCRA 30 (2001) (citing First Lepanto Ceramics, Inc. v. Court of Appeals, 253 SCRA 552 (1996); Nestle, Philippines, Inc. v. Court of Appeals, 203 SCRA 504 (1991); Asturias Sugar Central, Inc. v. Commissioner of Customs, 29 SCRA 617 (1969)).

17. For instance, under the Mining Act of 1995, mining permits are issued by the MGB Director with the approval of the DENR Secretary. In resolving disputes, however, both the MGB Director and the DENR Secretary are members of the Mines Adjudication Board.

    See An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation [Philippine Mining Act of 1995], Republic Act No. 7942, § 79 (1995).

18. 1997 RULES OF CIVIL PROCEDURE, rule 43.

19. *Id.* rule 65.

environment. Given the irreversibility of damage done to the environment, restoration or rehabilitation is not always an option. While it is true that many natural resources are renewable, it can take decades, if not generations, before an ecosystem can be restored to its former health. Moreover, the Philippines has the highest number of endemic species likely to be extinct,[20] so the country cannot afford to be imprudent. Given the sizes of the areas allowed for timber-cutting or mineral extraction,[21] the potential damage is alarming and incongruent with the country's obligation to the global patrimony.[22] In this context, the doctrine of exhaustion of administrative remedies presents a major hurdle — a luxury of time that the Philippine ecosystem can ill-afford.

This brings the discussion to another problematic aspect of this type of environmental cases. Aside from wasting time in exhausting administrative reliefs, a party seeking to preserve the environment through an injunction or restraining order is required to file a bond to answer for potential damages as a result of such issuance.[23] Because many entities engaged in environmentally

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20. *See* Conservation International, Philippines, *available at* http://www.conservation.org/explore/priority_areas/hotspots/asia-pacific/Philippines/Pages/biodiversity.aspx (last accessed Feb. 21, 2009).

21. For instance, a logging permit such as an IFMA can cover a maximum of 40,000 hectares.

    Department of Environment and Natural Resources, Regulations Governing the Integrated Forest Management Program, Administrative Order No. 99-53 (Dec. 23, 1999).

    A mineral permit such as a MPSA can cover 8,100 hectares.

    Department of Environment and Natural Resources, Revised Implementing Rules and Regulations of Republic Act No. 7942, Otherwise Known as the "Philippine Mining Act of 1995," Administrative Order No. 96-40, § 33 (1996).

22. The Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, 31 I.L.M. 818.

23. 1997 RULES OF CIVIL PROCEDURE, rule 58, § 6.

    > Sec. 6. *Grounds for objection to, or for motion of dissolution of, injunction or restraining order.* The application for injunction or restraining order may be denied, upon a showing of its insufficiency. The injunction or restraining order may also be denied, or, if granted, may be dissolved, on other grounds upon affidavits of the party or person enjoined, which may be opposed by the applicant also by affidavits. It may further be denied, or, if granted, may be dissolved, if it appears after hearing that although the applicant is entitled to the injunction or restraining order, the issuance or continuance thereof, as the case may

destructive activities are highly capitalized, the bond amount can be substantial and would effectively render the exercise of the constitutional right to a healthy environment illusory. Ironically, resource utilization is easier to apply for and obtain than the right to a healthy environment which comes at a premium and is more difficult to assert.

Perhaps the well-intentioned resource-use applicant is often frustrated by the seemingly endless requirements at present that take too long to process.[24] However, it should be stressed that the resources applied for are actually shared and generally do not come about out of one's efforts, especially minerals, fisheries, and the various sources of energy. These resources are part of the natural patrimony and unless utilized sustainably, these may end up as a profligate or inequitable allocation of natural capital that benefits only one person. Such an instance therefore justifies the strict regulation of permits.

On top of all these, the large-scale resource extraction activities generate significant environmental, social, and economic impacts on local stakeholders who often end up shouldering the costs of degradation but not the profits. The logging and mining industries are particularly notorious: their impacts persist over long periods of time even after their operations have already shut down. The public therefore has every right to be informed and consulted, though, unfortunately, this is not always the case. Legal burdens get in the way, such that an aggrieved party, a concerned citizen, or an affected community seeking to uphold the constitutional right would surely be lost in the bureaucratic maze. Also, actions to question the validity of issued resource-use permits may not be filed at whim, even if there is clear need for judicial intervention, since these need to be legally substantiated like any other claim.

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be, would cause irreparable damage to the party or person enjoined while the applicant can be fully compensated for such damages as he may suffer, and the former files a bond in an amount fixed by the court conditioned that he will pay all damages which the applicant may suffer by the denial or the dissolution of the injunction or restraining order. If it appears that the extent of the preliminary injunction or restraining order granted is too great, it may be modified.

24. This has actually been addressed by recent DENR regulations that aim to expedite the permit issuance process. Interestingly, in many of these orders, failure by the agency to act within the specified timeframe will result in an award of the permit. Why this should be so and whether this augurs well for the environment is a further source of contention.

B. Criminal Cases

Cases involving violation of environmental laws fall squarely within the ambit of A.O. No. 23-2008. While the number of environmental convictions is relatively few, its true value lies in its deterrent effect. From a political perspective, legislators also see the advantage in labeling certain acts as prohibited because this indicates political seriousness over issues of utmost public importance.[25] Hence, it is *de rigueur* for new environmental laws to contain a section on *Prohibited Acts*. Environmental courts facilitate this legislative intent.

A number of criticisms, however, have been leveled at the concept of penalizing environmental violators. First is the fact that everyone, in varying degrees, contributes to the detriment of the environment particularly in the form of pollution. For some, the more important challenge is finding ways to encourage and harness public participation while developing less punitive measures to deter unwanted behavior. This has proved successful in remote areas of the country where interestingly, the absence or sheer distance of regular courts and law enforcement officials have forced local communities to devise creative ways of handling environmental violations. Among coastal barangays, for example, illegal fishers are required to serve as Bantay-Dagat as punishment rather than face detention. They turn-out to be effective fishery wardens because of their knowledge of the ins and outs of illegal trade.

Another serious objection to criminal sanctions comes from church-based groups and non-governmental organizations (NGOs) advocating social justice. These groups claim that with millions of Filipinos directly dependent on their natural environment for livelihood and subsistence, there is a perceived anti-poor bias in the manner by which environmental laws tend to restrict, bureaucratize, and punish small-scale access while prioritizing and even streamlining large-scale use. To be sure, more recent laws have begun to recognize the small-scale access[26] but many of the earlier environmental

25. For one, this explains the plethora of bills filed in Congress calling for the imposition of the death penalty on illegal loggers after the fatal landslides in 2004 that left over a thousand people in the Quezon and Aurora provinces dead.

See, e.g. S.B. 1176, 14th Cong., 1st Sess. (July 4, 2007); S.B. 783, 14th Cong., 1st Sess. (July 3, 2007); S.B. 443, 14th Cong., 1st Sess. (July 2, 2007); S.B. 240, 14th Cong., 1st Sess. (June 30, 2007).

26. For instance, the Fisheries Code of 1998 has provisions that protect the access rights of municipal fisherfolk.

statutes are still used to harass marginalized groups to protect commercial interests.[27] These groups also point out that environmental offenses, like most other crimes, tend to punish the small fry, not the big fish. This argument will be further explored later.

Lastly, there is much criticism as to the effectiveness of criminal sanctions because such sanctions proceed from the mistaken notion that widespread environmental damage is the result of illegal activities. For instance, for much too long, the denudation of Philippine forests has been conveniently blamed on the lowly *kaingero* (swidden farmer). This is such a persistent myth that it is almost rotely recited by every high school student all over the country. A simple inventory, however, of the volume of logs allowed by the DENR to be cut in the last half-century would show that logging is the real cause of the decimation. How else could extensive forest areas have been cut if not allowed by the authorities, legally or otherwise? Moreover, documents from log-importing countries like Japan disclose the real volume of logs from the Philippines, both legally exported and smuggled; the figures are staggering. It is even a wonder how the remaining forests managed to survive this wholesale organized onslaught.

To its credit, the Supreme Court has consistently ruled that resource-use permits are not unbridled licenses to destroy the environment but are mere

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See An Act Providing For the Development, Management, and Conservation of the Fisheries and Aquatic Resources, Integrating All Laws Pertinent Thereto, and for Other Purposes [PHILIPPINE FISHERIES CODE OF 1998], Republic Act No. 8550 (1998).

Another example is the Indigenous Peoples Rights Act which recognizes sustainable traditional practices.

See An Act to Recognize, Protect, and Promote the Rights of Indigenous Cultural Communities/Indigenous People, Creating a National Commission of Indigenous People, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes [The Indigenous Peoples Rights Act of 1997], Republic Act No. 8371 (1997).

27. For instance, the Revised Forestry Code has provisions on illegal occupation and *kaingin* which have been used as harassment tools against millions of upland dwellers all over the country.

See Revised Forestry Code Revising Presidential Decree No. 389, Otherwise Known as the "Forestry Reform Code of the Philippines" [REVISED FORESTRY CODE OF THE PHILIPPINES], Presidential Decree No. 705, § 79 (1975).

privileges which can be revoked in case of violations.[28] Furthermore, environmental laws and their implementing rules spell-out the remedies, both administrative and criminal, which can be taken against an erring permit grantees. The reality, however, is that criminal conviction for misuse or abuse of permit is a rarity. The offender is simply subjected to administrative sanctions such as suspension or cancellation of permit and nothing more. The fact is, the DENR, faced with various constraints ranging from institutional to financial, simply cannot effectively monitor and enforce its own rules. What is more, the imprudent grant of permits by the DENR, in itself, is generally not considered a criminally punishable act.

This then partly explains why most convictions involve individuals, often those belonging to the poorest sectors of society. An ordinary upland dweller who cuts a tree, on one hand, would be unequivocally guilty of a criminal offense because he or she most likely has no permit, much less effective legal representation. The lack of a permit, in turn, would be explained by the simple fact that it entails costs. On the other hand, a corporation who successfully obtains a permit but clears an entire forest is liable only for administrative sanctions. This is because determining the nature of the violation immediately transforms the issue into a technical one involving interpretation of maps and analysis of technical data, tasks which very few judges have the mental fortitude, much less tolerance, for.

Hence, while environmental laws can deter illegal activities, those with permits are more likely to remain unscathed; while criminal sanctions can deter future offenses, they may foster environmental impunity if not pursued. All these cumulatively reinforce the perception that the prohibition of certain acts are intended more to protect the interests of permit-holders by ensuring that local stakeholders — i.e., the small-scale users — are legally kept off-limits from their virtual concessions.

Nevertheless, some maintain that criminal sanctions remain effective and unparalleled in situations where actual offenders are involved. But even then, new legal problems, unique to so-called green cases, emerge. One is filing and maintaining environmental criminal suits. In other crimes, the aggrieved party, or any peace officer or law enforcer could file the complaint.[29] Moreover, in other crimes, all pillars of the criminal justice system are well-represented. These cannot be said about environmental crimes.

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28. *See, e.g.* Merida v. People, 554 SCRA 366 (2008); Mustang Lumber v. Court of Appeals, 257 SCRA 430 (1996); People v. CFI of Quezon, 206 SCRA 107 (1992).

29. 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 110, § 5.

Geographically, the country's extensive coastline and secluded mountain ranges present another set of challenges. In these locales, courts are few and far in between and hearings are conducted by circuit courts much less frequently. Even DENR personnel are overwhelmed by the sheer size of the area they need to cover. Unfortunately, the lack of financial and logistical support ultimately reduces their fieldwork into mere desk jobs.

To bridge this gap, some environmental NGOs and civic groups have taken the initiative of instituting and prosecuting environmental cases themselves. On some occasions though, their legal standing is questioned on the theory that under the regalian doctrine,[30] it is the State and not them who is the aggrieved party in environmental crimes, thus, the State should be represented by public officials and other agents and not by the NGOs or civic groups. In practice, this makes the initiation and pursuit of cases dependent on the local environment official and the public prosecutor respectively; and when stakes are high, this discretion becomes highly vulnerable to corruption.

Members of civil society have questioned the limitation on ordinary citizens to initiate cases against environmental violators, citing pragmatic reasons such as sparse State presence in areas where environmental crimes are often committed. It should be noted also that the issue of whether the regalian doctrine indeed excludes citizens' suits is still unresolved, though it bears stressing that Congress has passed two laws — the Clean Air Act and the Solid Waste Management Act — which contain provisions that allow ordinary citizens to initiate cases, among others, on behalf of the State for violation of said laws.[31] Unfortunately, this did not catch on and subsequent laws like the Clean Water Act[32] no longer contained a similar provision.

While these two laws serve to crystallize the concept, the right to bring a citizens' suit need not be legislated for. It emanates directly from the right to a healthy environment as elucidated in *Oposa v. Factoran*[33] which held that the act of filing a case was the very exercise of the right itself: "[T]he … assertion of [the] right to a sound environment constitutes, at the same time, the performance of [the] obligation to ensure the protection of that right for

30. PHIL. CONST. art XIII, § 2.

31. Philippine Clean Air Act of 1997, § 41; Ecological Solid Waste Management Act of 2000, § 52.

32. An Act Providing For a Comprehensive Water Quality Management and for Other Purposes [Philippine Clean Water Act of 1994], Republic Act No. 9275 (2004).

33. Oposa v. Factoran, Jr., 224 SCRA 792 (1993).

the generations to come."[34] Ultimately, democratizing the power to initiate citizens' suits addresses the shortage of prosecutorial personnel (particularly in far-flung areas where environmental crimes are more likely to be committed), reduces corruption, and improves the civil society aspect of governance.

C. SLAPP Suits

Technically, this third form of environmental suits is not covered by A.O. No. 23-2008 as this involves offenses not enumerated in the A.O. SLAPP suits take the form of criminal cases for theft, robbery, slander, malicious mischief, and even murder, or as civil suits for damages, injunction, or ejectment, all of which can be heard by any first- or second-level court. SLAPP suits are considered environmental mainly due to the reality that underlying such disputes is a conflict over natural resources the exploitation of which requires consultations with the community to be affected.[35] Unfortunately, rather than depend on the merits of their respective projects to either convince local communities or incorporate appropriate mitigation measures, some proponents opt for the SLAPP route, especially when community opposition is strong.

SLAPP suits are particularly effective in remote locales where court presence is limited. Of late, SLAPP suits have become more insidious, targeting not just leaders but entire communities, all in order to sap local resources. Especially in criminal SLAPP suits, bail becomes next to impossible because it has to be multiplied by the number of persons detained. The guidelines on bail[36] set by the Department of Justice aggravate the problem because they tie prosecutors up with amounts set for a very limited number of persons. Thus, bail can very well run into tens of thousands or even millions of pesos, and, once again, a constitutional right is diminished in importance.

Recognizing SLAPP suits as abuse of the legal system, the Clean Air Act and the Solid Waste Management Act provide for measures against such suits, to wit:

> Sec. 53. Suits and Strategic Legal Action Against Public Participation (SLAPP) and the Enforcement of this Act. - Where a suit is brought against

34. *Id.* at 803.

35. Philippine Mining Act of 1995; LOCAL GOVERNMENT CODE, arts. 26-27.

36. Department of Justice, The 2000 Bail Bond Guide, Circular No. 18 (Aug. 8, 2000).

> a person who filed an action as provided in Section 52 of this Act, or against any person, institution or government agency that implements this Act, it shall be the duty of the investigating prosecutor or the Court, as the case may be, to immediately make a determination not exceeding thirty (30) days whether said legal action has been filed to harass, vex, exert undue pressure or stifle such legal recourses of the person complaining of or enforcing the provisions of this Act. Upon determination thereof, evidence warranting the same, the Court shall dismiss the complaint and award the attorney's fees and double damages.[37]

Like the fate of the citizens' suit, this was similarly left out of the Clean Water Act.

Arguably, the Supreme Court is the better body to formulate rules against SLAPP suits, incorporating the same in the Rules of Court and in the Rules on Legal Ethics. The new rules should include a requirement for stricter and more thorough examination of the case by the judge prior to issuing a warrant since SLAPP suits are more damaging when the accused is wrongfully detained. The patent permission of SLAPP suits should also be penalized under Legal Ethics. Finally, more liberal procedural remedies akin to the writ of *amparo*[38] may be needed to stem this form of legal abuse and to prevent further injustice.

D. Class Actions

The last category of environmental cases are civil actions for damages resulting from activities which cause direct harm to communities and their environment. While environmental crimes affect nature in the abstract and

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37. Ecological Solid Waste Management Act of 2000, § 53. The counterpart of this provision in the Clean Air Act provides:

> Sec. 43. Suits and Strategic Legal Actions Against Public Participation and the Enforcement of This Act.- Where a suit is brought against a person who filed an action as provided in Sec. 41 of this Act, or against any person, institution or government agency that implements this Act, it shall be the duty of the investigating prosecutor or the court, as the case may be, to immediately make a determination not exceeding thirty (30) days whether said legal action has been filed to harass, vex, exert undue pressure or stifle such legal recourses of the person complaining of or enforcing the provisions of this Act. Upon determination thereof, evidence warranting the same, the court shall dismiss the case and award attorney's fees and double damages.

Philippine Clean Air Act of 1999, § 43.

38. *See* RULE ON THE WRIT OF AMPARO, *supra* note 7.

do not have a private offended party (e.g. cutting a tree or killing an endangered species), some directly injure individuals (e.g. deaths and diseases from toxic mine tailings, chemical and radioactive leaks, etc.). In this context, a civil suit is preferred over a criminal case because it offers reliefs more responsive to the needs of the affected parties and the burden of proof is less, at least in theory. Civil actions of this type fall under the provisions of the Civil Code on quasi-delicts.[39]

Like other civil suits, environmental class actions are governed by the Rules on Civil Procedure.[40] Ordinarily, these Rules function well in other civil cases but in the environmental context, they can be major hurdles to attaining environmental justice. And despite massive environmental tragedies like the Ormoc landslide in 1991 and the Marinduque mining disasters in 1996, the Philippines has yet to devise its own set of rules similar to what other countries have evolved from their own experiences with environmental tragedies. The reason given, however — the lack of jurisprudential opportunity to develop new legal principles — is actually symptomatic of the problem of access to justice. After all, how long has it been since these tragedies happened?

Before proceeding any further, two things need to be clarified. First, many aspects of this problem involve rules of procedure. Because this is a contentious subject matter that is constantly enriched by jurisprudence, only general references will be made to serve as discussion points herein. Second, while environmental justice is a valid goal, as the saying goes, prevention remains the better alternative to a cure. Measures to manage, if not avoid, environmental risks should therefore remain the paramount strategy.

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39. An Act to Ordain and Institute The Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386 (1950). Article 2176 states:

> Art. 2176. Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called a quasi-delict and is governed by the provisions of this Chapter.

40. 1997 RULES OF CIVIL PROCEDURE, rule 3, § 12. This provision states:

> Sec. 12. *Class suit.* When the subject matter of the controversy is one of common or general interest to many persons so numerous that it is impracticable to join all as parties, a number of them which the court finds to be sufficiently numerous and representative as to fully protect the interests of all concerned may sue or defend for the benefit of all. Any party in interest shall have the right to intervene to protect his individual interest.

Erstwhile effective rules can become major hindering factors in environmental class actions because these rules were designed for situations that generally involve a limited number of individuals or groups who are already existing and identifiable at the time of the dispute.[41] Conflicts of this type are also generally bound geographically and their causation is understood based on ordinary human experience.

In environmental class actions, such considerations do not always apply. Though ideal, waiting for the appropriate case to carve-out the proper exceptions would just be a time-consuming and energy-draining task given the sheer number of new principles that need to be eked out. Environmental damage over a broad geographic expanse extending well beyond several territorial jurisdictions, such as the case of the Guimaras oil spill in 2006, is a case worth considering. Also, the sheer number of affected parties, as in the said case, may well include even the unborn, especially when persistent forms of pollution are involved. These considerations surely have implications on venue, jurisdiction, and parties.

However, even if these initial points of contention are eventually resolved under the existing rules of procedure, time will wear down the aggrieved parties into giving up. In this regard, the concept of environmental vulnerability needs to be considered, i.e., while nature does not discriminate in its impacts, some groups are more vulnerable than others and the ability to adapt is usually a factor of one's economic standing. In other words, the economically marginalized are hit harder by environmental damage and when cases drag on, they will more likely settle for whatever little crumbs are offered. Hence, the judiciary needs to act more swiftly and decisively in resolving these initial legal stumbling blocks.

A second procedural concern is the promulgation of new stricter rules on pre-trial,[42] docket fees,[43] and notarization[44] — all designed to expedite

41. Under Rule 3, Section 12 of the 1997 Rules of Civil Procedure, "every action must be prosecuted or defended in the name of the real party in interest." A real party in interest, as defined in the same provision, is "the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit." Thus, the rule, though not absolute, requires that the parties must also have identifiable interests at the time the suit is filed.

42. Supreme Court, Implementing the Provisions of Republic Act No. 8493, Entitled "An Act to Ensure the Speedy Trial of All Criminal Cases Before the *Sandiganbayan*, Regional Trial Court, Metropolitan Trial Court, Municipal Trial Court in Cities, Municipal Trial Court, and Municipal Circuit Trial Court, Appropriating Funds Therefor, and for Other Purposes," Memorandum Circular No. 38-98 (Aug. 11, 1998).

proceedings and improve the delivery of justice. Undoubtedly, these are noble aims. In environmental class actions, however, the new formal requirements can translate to formidable legal obstacles. For instance, personal presence is required during pre-trial, or, in the alternative, a special power of attorney must be executed for this purpose. Judicial affidavits are likewise required. These are not difficult to comply with for a few party-litigants but not when the number of parties run into hundreds. The fact remains that even when parties intend to personally appear before the courts, if they reside in remote areas, they are still hampered by the limited means of transportation.

Meanwhile, stricter notarization rules, especially on the type of identification allowed, also work against the poor. They are normally not expected to possess a taxpayer's identification number (TIN), a Social Security System (SSS) card, or a driver's license, much less a passport. Thus, notarizing critical legal documents like verification, special power of attorney, judicial affidavits, or proof of indigence are actually extremely laborious processes. Add to this the fact that community-plaintiffs involved in environmental class actions generally reside in remote rural areas spaced far apart, so gathering the required signatures to be sworn before a notary is a challenge in itself.

Evidence is the third area for procedural reform. More often than not, communities affected by man-made environmental disasters have no idea how to prove such. Current jurisprudence requires proof of causality[45] but the context of environmental damage is radically different from common quasi-delicts. The factors at play in environmental cases are beyond the realm of ordinary human experience albeit the fatal results are gruesomely familiar. They are steeped in science and involve highly technical and complex operations such as those in the nuclear, mining, petroleum, energy, and chemical industries. On top of this, the data necessary to prove culpability are totally in the possession of the responsible party and, unless the plaintiffs have the financial and legal means, availment of the various modes of discovery provided under the Rules of Court[46] will not yield significant

43. *Id.* rule 141.

44. RULES ON NOTARIAL PRACTICE, A.M. No. 02-8-13-SC, Aug. 1, 2004.

45. *See generally* Vda. de Bataclan v. Medina, 102 Phil. 181 (1957); Teague v. Fernandez, 51 SCRA 181 (1973); Manila Electric v. Remoquillo, 99 Phil. 117 (1956) (for the rules concerning causality in establishing quasi-delicts).

46. 1997 RULES OF CIVIL PROCEDURE, rules 23-29.

results. Expecting ordinary citizens, therefore, to prove causality is a very tall order.

For these reasons, the evidentiary burden should rest on the shoulders of the defendant, not the community-plaintiff. It bears noting that this would not be the first time that the law has shifted the evidentiary burden and created legal presumptions in other forms of civil cases.[47] More specifically, the concept of strict environmental liability (akin to strict product liability[48] in consumer protection and liability of common carriers[49]) should be developed out of public interest for the health and safety of individuals and communities from the catastrophic social, economic, and environmental consequences of irresponsible activities. Thus, when fatalities result from environmental incidents, the burden of proof should rest on the defendant to prove that the deaths and damage did not result from its operations.

Acquiring jurisdiction over the person of the defendant, especially when foreign entities are involved, is the final area of procedural reform vis-à-vis environmental class actions. The pertinent rules here are quite complex, but suffice it to state that when a foreign defendant cannot be found in the Philippines or has no resident agent or any agent whatsoever, summons[50] will be very difficult to serve. Substituted service[51] is not an option because environmental class actions do not fall within the list of cases where this type of service is allowed.[52] Consequently, in environmental disasters where the culprit has quickly divested shareholdings and left the country, short of absconding, jurisdiction over the person of the defendant cannot be attained.

Sadly, this procedural limitation is legally and technologically anachronous to modern day standards and capabilities: information systems now operate globally and have sufficient safeguards such that service of summons can be done electronically. What is more, such service is traceable,

47. *See* CIVIL CODE, arts. 2184-85 & 2188 (for examples of presumptions of negligence with regard to quasi-delicts).

48. *See* The Consumer Act of the Philippines [Consumer Act of the Philippines], Republic Act No. 7394, arts. 96-107 (1992).

49. *See* CIVIL CODE, arts. 1732-1763.

50. 1997 RULES OF CIVIL PROCEDURE, rule 14, § 15.

51. *Id.* rule 14, § 7. (Substituted service "may be effected (a) by leaving copies of the summons at the defendant's residence with some person of suitable age and discretion then residing therein, or (b) by leaving the copies at defendant's office or regular place of business with some competent person in charge thereof.").

52. *See* 1997 RULES OF CIVIL PROCEDURE, rule 14.

legally binding, and comes at very minimal costs.[53] In fact, in one foreign jurisdiction, service of summons to an evasive defendant was effected by way of Facebook, a popular social networking website.[54]

Also, trade globalization has linked economies in so many ways that courts are no longer without means to effect their orders and judgments, particularly when monetary damages are awarded. Even if for some reason this is not presently possible, equity demands that new means (including treaty arrangements) be developed if only to attain a fair balance between what the State conceded to in liberalizing the entry of foreign investments and what it must do to hold accountable foreign entities who shirk and flee from their environmental responsibilities.

Fact is, many foreign companies are already several steps ahead and their ability to evade liability is built into their corporate structures. This is actually very prevalent in the environmental sector where constitutional nationality requirements[55] force foreign corporations to set-up layers upon layers of parent-subsidiary corporations and enter into confidential subscription agreements in routine evasion of the Constitution so as to arrive at an operating entity that is Filipino by ownership but foreign in effective

53. *See* RULES ON ELECTRONIC EVIDENCE, A.M. No. 01-7-01-SC, Aug. 1, 2001.

54. Martha Neil, In Seeming First, Aussie Court Says Default Judgment Can Be Served on Facebook, ABA JOURNAL LAW NEWS NOW, Dec. 15, 2008, *available at* http://www.abajournal.com/news/in_seeming_first_aussie_court_says_default_judgment_can_be_served_on_facebo (last accessed Feb. 21, 2009).

55. PHIL. CONST. art. XII, § 2. This provision states:

> Sec. 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

control. Their bonus from this arrangement is that the corporate layers form a redundant shield that protect the mother corporation from being held liable unless all layers of its corporate veil are pierced. As any corporate practitioner would know, this is not an easy task and once more, mere legal privilege in effect trumps the Constitution.

As a last proposition, rules in determining when prescriptive periods should accrue have to be reviewed anew to take into account the persistent nature of some forms of environmental damage and the reality that some environmental impacts can take years or even decades to gestate and manifest. The U.S. Supreme Court has long recognized this feature of environmental damage suits and has developed the concept of continuing tort theory[56] and the discovery rule.[57]

In sum, there are several types of cases that can arise out of environmental conflicts. The current environmental courts under A.O. No. 23-2008 address only one type and there remain a lot of work to be done. Nevertheless, the Supreme Court's recent initiatives provide good reasons to be optimistic.

Although the foregoing discussion is not meant to be fully exhaustive,[58] what cannot be overemphasized is the fact that many of the environmental legal disputes so identified do not arise out simple questions of better right to resources. Rather, these disputes have constitutional underpinnings where unsustainable, exclusionary, and inequitable decisions over resource use often have devastating consequences and basic rights are frequently frustrated by mere legal privileges.

V. CONCLUSION

The environment poses new challenges to our traditional understanding of the legal system. Aside from its vast breadth and scope — both intergenerational and inter-geographic — the sheer number of people it affects and its ubiquity, especially with looming crises like climate change,

56. *See* Reynolds Metals Co. v. Yturbide, 258 F.2d 321, 333 (9th Cir. 1958).

57. *See* Ruth v. Dight, 75 Wn. 2d 660, 453 P.2d 631 (1969); Del Guzzi Construction Company, Inc. v. Global Northwest, Ltd., Inc, 105 Wn. 2d 878, 884, 719 P.2d 120 (1986); U.S. Oil & Refining Co. v. Dep't of Ecology, 96 Wn. 2d 85, 633 P.2d 1329 (1981).

58. Several other topics have been left out of this Article, such as those regarding the constitutionality of certain environmental laws and DENR administrative orders, since these usually involve pure questions of law and are adequately provided for by current procedures.

compel a more in-depth reexamination of existing rules to take into account its unique circumstances. Taking cue from the laudable initiative by the Supreme Court to designate environmental courts, this Article explored possible areas for further reform as it juxtaposed the Administrative Order with other types of cases considered as environmental.

While the focus of this Article has been procedural and was intended to draw attention to current rules which stifle efforts to attain environmental justice, the more critical legal agenda should require a rethinking of the legal environmental framework into something founded on the principles of transparency, accountability, and public participation. If not obvious from the foregoing discussions, the environmental predicament is inextricably linked with social justice; and the legal problems that beset the Philippine environment cannot be resolved unless the issues of poverty and injustice are taken into full consideration. Access to justice tries to address the latter; a robust natural environment can alleviate the former. Although intermediary, the reforms suggested herein aim to level the playing field and achieve a legal environment where people matter.