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The Role of Philippine Courts in Establishing the Environmental Rule of Law

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Abstract

In 2010, the Supreme Court led the Philippines to become the first nation with rules of procedure specific to environmental cases. This article examines environmental cases before and after the implementation of the rules, proposing a definition for the “environmental rule of law” and analyzing how the Court has contributed to it. While the Philippines has made great strides in adopting environmental laws and providing access to courts, more work is needed to ensure consistent decisions and to build capacity in both lower courts and government agencies. As shown in the case of Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay, the Court will need to find a balance between making environmental laws a reality and taking on more than it can (and should) handle.

Acknowledgement

Many thanks to my Filipino colleagues who generously shared their time and knowledge of Philippine law with me, including Professor Gloria (Golly) Estenzo Ramos of the University of Cebu College of Law and the Philippine Earth Justice Center, Attorney in Dolphins v. Reyes; Antonio (Tony) G.M. La Viña, Dean of the Ateneo School of Government, Former Department of Environment and Natural Resources Undersecretary, Member of the Manila Bay Advisory Committee, Chair of the Technical Working Group that drafted the 2010 Rules of Procedure for Environmental Cases for the Supreme Court’s review; Asis Perez, Director of the Bureau of Fish and Aquatic Resources, Department of Agriculture, Member of the Supreme Court committee responsible for the Environmental Rules; Jose F. Leroy Garcia, Consultant, School of Government, Ateneo de Manila University and Former Department of Environment and Natural Resources counsel; Professor Harry Roque of the University of Philippines College of Law and the Center for International Law, Attorney in Makati v. Meralco; and Reynato Lopez, Jr., Philippines Deputy Director for the American Bar Association Rule of Law Initiative.

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I. Introduction

Fifty years ago, there was little “environmental rule of law” in the United States. It was a time when a community could be built on top of a toxic waste dump (Love Canal), and a river, oozing with oil slicks, could catch on fire (the Cuyahoga River). The legal landscape began to change in the late 1960s and early 1970s with the enactment of watershed laws like the National Environmental Protection Act (NEPA),¹ the Clean Air Act, ² and the Clean Water Act. ³ But these aspirational laws were not enough to clean up the environment. Federal courts were instrumental in making NEPA and other laws a reality. Newly established environmental agencies⁴ likewise played an important role in carrying out the laws.

In developing countries that have enacted environmental laws similar to those in the U.S., it is apparent that legislative action alone is not enough. Environmentalists around the world have hailed judicial efforts such as those of the Indian Supreme Court to implement environmental laws in the face of executive apathy or inability. At the same time, this judicial activism raises questions as to whether courts are intruding into the arena of executive agencies.

This article explores the role that the Philippine Supreme Court has played in establishing the environmental rule of law, along with the significance of the Philippines’ 2010 Rules of

¹ 42 U.S.C. § 4321 et seq.
² 42 U.S.C. § 7401 et seq.
³ 33 U.S.C. § 1251 et seq.
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Procedure for Environmental Cases (hereinafter “the Environmental Rules”). But first, it lays out the concept of the environmental rule of law and examines how courts in other jurisdictions have helped implement environmental law. It also discusses aspects of the Philippine legal system relevant to the environmental rule of law, including stare decisis, administrative jurisdiction, and standing. Finally, it considers the use of the writ of continuing mandamus in Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay and the prospects for an environmental rule of law in the Philippines.

The article is based on my review of Philippine and American law review articles, Philippine newspapers, published Supreme Court cases, and interviews with Filipino environmental lawyers. The lawyers’ knowledge was essential, since there is no centralized electronic system in the Philippines for publishing and Shepardizing cases.

II. Defining the Environmental Rule of Law

The “rule of law” is a vague concept. Some definitions focus on the elements believed to be necessary to accomplish the rule of law, such as comprehensive laws, well-functioning courts, and trained law enforcement agencies. Others focus on the goals of the rule of law, including a government bound by law, equality before the law, public order, predictable and efficient


7 Supreme Court orders are generally published in paper format in the Supreme Court Reports Annotated (SCRA) and in electronic form on the Supreme Court’s website, http://elibrary.judiciary.gov.ph/, which is not searchable by the public. I obtained most of the cases cited herein from two privately maintained websites, Chan Robles Virtual Law Library, www.chanrobles.com, and the LawPhil Project, www.lawphil.net. These websites, powered by the Google search engine, contain only Supreme Court cases.

rulings, and human rights. Many entities concerned with the rule of law are reluctant to precisely define it, opting instead to list elements that should be included in the definition.

I propose the following definition for the “environmental rule of law”: (1) there is a system of laws in place that regulate, to the extent practicable, all human-induced actions that by themselves or collectively have significant impacts on the environment; (2) these laws will be consistently applied over time and across the jurisdiction; (3) effective and fair enforcement action, initiated by a government entity or citizen suit/complaint, will be taken against one who breaks the law, regardless of the offender’s socio-economic or political status.

There has been relatively little discussion in the United States on the rule of law in the environmental context. Two notable exceptions are Craig Segall’s article applying the rule-of-law concept to deforestation, and A. Dan Tarlock’s article on environmental litigation in the United States during the second half of the twentieth century.

Segall associates deforestation in developing countries with the central government’s abuse of power, as in the case of clear-cutting that has occurred under colonial powers and

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9 Id.


12 A. Dan Tarlock, The Future of Environmental “Rule of Law” Litigation, 19 PACE ENVTL. L. REV. 575 (2002); see also Alberto Székely, Democracy, Judicial Reform, the Rule of Law, and Environmental Justice in Mexico, 21 HOUS. J. INT’L L. 385 (Spring, 1999) (discussing how the lack of rule of law in Mexico impedes environmental justice).
dictators. He also attributes deforestation to disempowered local communities unable to control resource use through their traditional norms.

Tarlock analyzes the environmental litigation pursued before U.S. environmental statutes and judicial interpretations of these statutes became firmly entrenched in the legal landscape. He implies that, while environmentalists brought suit under the guise of upholding the rule of law, they were really petitioning the court to advance their own view of environmental protection and conservation. This characterization of environmental rule of law litigation seems more applicable to pre-NEPA lawsuits seeking to reinterpret obscure provisions of old laws. It seems less germane to lawsuits seeking judicial enforcement of new statutes (as NEPA was in the early 1970s), or statutes that the executive branch has never really enforced due to a lack of resources or corruption (as may be the case with environmental laws in developing countries).

Tarlock suggests that changes in science and the environment inhibit the application of the rule-of-law concept to environmental law and litigation. I take a different view: changes in the environment may require updates to environmental laws, but the scientific and legal

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14 Id. at 1546 (explaining that where there are no legitimate and local management institutions, individuals have little incentive to avoid over-cutting).

15 Tarlock, supra note 12, at 579-582.

16 Id. at 579.

17 One example Tarlock cites is Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966), regarding the Federal Power Act of 1920. In Tarlock's words, First, an ad hoc citizen group gained unprecedented standing to represent non-economic, aesthetic interests. Second, the plaintiffs convinced the Court of Appeals to read a broad regulatory statute, which at best conferred discretion on the agency to consider aesthetic values (a then much contested idea), to impose mandatory duties on an agency to consider environmental values and to justify those decisions not to protect environmental values. This is the core “rule of law” litigation strategy.

18 Tarlock, supra note 12, at 595-97; 601-07.
principles behind these laws change little, if at all. There will always be a need for a legal regime through which environmental data is collected and analyzed through transparent, systematic methods; decisions affecting the environment are made by managers with technical competence, subject to being challenged for arbitrariness; and those who exceed set levels of pollution or resource use are held liable.

Without such a legal regime, prospects for both the rule of law and environmental justice are dim. 19

III. The Judiciary and the Environmental Rule of Law

A. International Recognition of the Judicial Role

The judiciary can play a key role in implementing the environmental rule of law. It upholds constitutional guarantees to a clean environment, provides concrete remedies to prevent or compensate for environmental harm, and may introduce international environmental law into national jurisprudence. 20 This potential was recognized at the Global Judges Symposium held in

19 In the words of Székely, supra note 12, at 425.

In the midst of such legal realities, go ahead and try as a concerned citizen … to stop the dumping of nuclear or hazardous wastes in a site located on top of aquifers and near a rural community. Try to stop a highly-polluting industrial project in a zone where the permitted land use is “ecological preservation” … Try to ensure compliance by a powerful and influential entrepreneur who belongs to or supports the political or financial establishment. …


Johannesburg in 2002.\textsuperscript{21} There, an international group of judges adopted the “Johannesburg Principles on the Role of Law and Sustainable Development,” melding the sustainable development principles of the 1992 Rio Declaration on Environment and Development\textsuperscript{22} with the principles of judicial independence and due process.\textsuperscript{23} The 2012 Principles recognize the need for access to the courts, and for judges to be educated on the technical aspects of environmental law.\textsuperscript{24}

Since then, the United Nations Environmental Program (UNEP) has implemented the Global Judges Program. Under the program, UNEP and the chief justices of participating countries promote adherence to the rule of law and the effective implementation of national environmental laws.\textsuperscript{25} Outputs of the program include environmental case law compilations and training materials explaining the role of the judiciary.\textsuperscript{26} In 2010, UNEP and the Asian Development Bank sponsored the Asian Judges Symposium on Environmental Decision-

\begin{footnotesize}
\begin{enumerate}
\item Even before this conference, the United Nations Environment Program and the International Union for the Conservation of Nature collaborated to put on symposia on the judiciary’s role in sustainable development. Judges from around the world attended six of these events between 1996 and 2002. Lal Kurukulasuriya and Kristen A. Powell, History of Environmental Courts and UNEP’s Role, 3 J. CT. INNOVATION 1, 270 (2010).
\item\textit{Available at} www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163.
\item See Johannesburg Principles on the Role of Law and Sustainable Development (Aug. 20, 2002), Preamble, available at www.unep.org/law/Symposium/Principles.htm (“We recall the principles adopted in the Rio Declaration on Environment and Development and affirm adherence to these principles … We affirm that an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law …”).
\item \textit{Id.} (“We recognize the importance of ensuring that environmental law … feature[s] prominently in academic curricula, legal studies and training at all levels, in particular among judges … We express our conviction that the deficiency in the knowledge, relevant skills and information in regard to environmental law is one of the principal causes that contribute to the lack of effective implementation, development and enforcement of environmental law …We are strongly of the view that there is an urgent need to strengthen the capacity of judges …”; calling for “access to justice for the settlement of environmental disputes and the defense and enforcement of environmental rights”).
\end{enumerate}
\end{footnotesize}
Making, the Rule of Law, and Environmental Justice in the Philippines. The symposium proposed the establishment of an Asian Judges’ Network on the Environment to help improve adjudication in environment and natural resource cases. 27

Thus, at least on an international level, there is recognition of the role judges play in providing for the environmental rule of law. Whether the recognition and training that has come out of these symposia translates into the actual rule of law is a critical question for each country involved.

B. The Judicial Role in the United States

Though it had a late start compared to other fields of law, environmental law has made more progress in the United States than in many other countries. Since the 1970s, the Administrative Procedure Act and citizen suit provisions in environmental statutes have enabled concerned citizens and organizations to prosecute violations of environmental law in court. 28 At first, courts lowered the barriers to this litigation, interpreted environmental laws expansively, and rigorously reviewed agency decisions that allowed projects to move forward. 29 Circuit court cases such as Calvert Cliff v. Atomic Energy 30 breathed life into provisions of NEPA that might have otherwise gone unnoticed. The Supreme Court likewise played a role, putting


30 449 F.2d 1109, 1111 (C.A.D.C. 1971) (holding that courts have power to require agencies to comply with procedural directions of NEPA and that the Atomic Energy Commission's rules did not comply with Act; stating “Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.”)
environmental injuries on par with personal injuries by granting standing to those whose use of an area would be adversely affected by proposed development. 31

As the U.S. environmental law regime aged, the Supreme Court’s interpretation of NEPA,32 deference to agency decisions,33 and limitations on standing34 have disappointed environmentalists. To some extent, these rulings reflect the fact that agencies have become more adept at fulfilling procedural requirements and arguing that substantive standards are discretionary, such that their actions cannot be second-guessed by courts.35 The rulings may also signify that the environmental rule of law has largely been established, and environmental groups as well as the regulated community have relatively clear expectations of how environmental laws will be enforced.

31 See Sierra Club v. Morton, 405 U.S. 727, 734 (1972). At the same time, the Court rejected the dissent’s suggestion to allow groups to sue on behalf of other species. Id. at 749-50 (Douglas, J., dissenting). The Court held that a plaintiff group must demonstrate an individualized injury on the part of one or more members, consistent with the collective goals of the group. Id. at 739-740.

32 See, e.g., Kleppe v. Sierra. 427 U.S. 390, 413-15 (1976) (finding that an agency need not consider the combined effects of concurrent actions throughout a region unless several proposals are pending concurrently before the agency).

33 See, e.g., Kleppe, 427 U.S. at 410 n. 21 (“The only role for a court is to insure that the agency has taken a ‘hard look’ at environmental consequences; it cannot ‘interject itself within the area of discretion of the executive as to the choice of the action to be taken.’” quoting Natural Resources Defense Council v. Morton, 458 F.2d 827, 838 (C.A.D.C. 1972); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (whether the legislature’s delegation of authority to an agency is explicit or implicit, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency”).

34 See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (imposing a three-part standing test on plaintiffs, requiring a concrete, actual injury traceable to the defendant’s action and likely to be redressable by the court). But two later decisions have taken a slightly broader view of standing; see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, Inc. 528 U.S. 167, 181-82 (2000) (plaintiffs had standing to sue based on current and reasonable concerns about a potential harm from defendant’s discharge of mercury into a river; Court did not intend to “raise the standing hurdle higher than the necessary for achieving success on the merits in an action alleging noncompliance with a NPDES permit”); Mass. v. EPA, 549 U.S. 497, 520–526 (2007) (granting standing to a state, acting on behalf its citizens through the parens patriae doctrine, to sue for current and future harm resulting from climate change).

35 Tarlock, supra note 12, at 601 (“Environmental law is at best a law of process …Students of NEPA and other rational planning processes have long known that efforts to specify processes have inherent limitations and decay over time as agencies comprehend the formal, judicial rules of the game and become better players.”).
C. The Judicial Role in Developing Countries

In environmental law and other legal areas, developing countries have often borrowed statutory language and structures from developed countries. As many have pointed out, these models often fail due to limited capacity, corruption, and various social, economic, political, and geographic factors. Rule-of-law reforms have typically sought to increase administrative and judicial capacity and reduce corruption, although it might make sense to devote resources toward drafting laws more suitable to country circumstances. Still, even if laws could be perfectly adapted to these countries, there would be a need for national and local institutions capable of implementing laws, and independent judiciaries willing to uphold the laws.

There are numerous examples of courts in developing countries that are too resource-starved, corrupt, or disempowered to render just decisions on environmental laws. Mary Elizabeth Whittemore describes the challenges Ecuador faces in implementing the environmental

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36 The Philippines has adopted many laws similar to those of the United States. See note 80, infra (comparing Philippine and U.S. environmental laws).

37 See, e.g., Tu T. Nguyen, *Competition rules in the TRIPS Agreement - the CFI's ruling in Microsoft v Commission and implications for developing countries*, IIC 2008, 39(5), 558-586 (explaining that competition law adopted by developing countries based on the laws of developed countries often reflects a lacks understanding of the economic objectives of the developed countries' competition enforcement policy; noting lack of competition culture in many developing countries); Gary Goodpaster, *Law Reform in Developing Countries*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 659 (2003) (suggesting reasons why laws transplanted to developing countries often fail).

38 In Michael Faure, Morag Goodwin, and Franziska Weber, *Bucking the Kuznets Curve: Designing Effective Environmental Regulation in Developing Countries*, 51 VA. J. INT'L L. 95 (2010), the authors question the wisdom of focusing on capacity building, suggesting that there is a dearth of progress to show for the significant investments it requires. Id. at 109. The authors propose an alternative approach that centralizes power and employs fewer, simpler and more precise rules to reduce administrative costs and reduce local corruption. Id. at 145. The authors suggest that this command-and-control approach could negate the need for complicated individual permits and economic incentives. Id. at 148. But international donors may not be willing to wade into the political morass that this approach would likely instigate.

39 See generally Luz Estella Nagle, *The Cinderella of Government: Judicial Reform in Latin America*, 30 CAL. W. INT'L L.J. 345 (2000) (describing systemic problems with courts in Latin American countries, stemming back to the establishment of courts during colonialization); Székely, supra note 12 (highlighting problems with the Mexican judiciary that worsened with changes implemented by President Zedillos, noting that the constitution has continually been implemented to benefit those in power); Faure et al, supra note 38, at 99 (“Although countries including India, Columbia, and Costa Rica have registered modest successes, environmental regulation in developing countries has remained a dead letter, unimplemented and unenforced.”)
provisions of its 2008 constitution.\textsuperscript{40} She relates a history of justices being removed from the constitutional court at the whim of the legislature\textsuperscript{41} and notes that the court was once entirely closed down. \textsuperscript{42} Since the 2008 constitution, a court decision halting the government’s construction of a dam has been essentially ignored, \textsuperscript{43} and the court lacks the power to impose sanctions on the government.\textsuperscript{44}

Laurence Juma describes challenges to enforcing Kenya’s 1999 Environmental Management and Coordination Act (EMCA).\textsuperscript{45} Courts are out of the realm of many of the rural poor who might seek redress under the act, as the courts do not conduct business in the vernacular;\textsuperscript{46} complaint filing fees are high; \textsuperscript{47} there are only nine court stations in the country that handle EMCA litigation;\textsuperscript{48} and courts are reluctant to interfere with government decisions.\textsuperscript{49}

Alan Khee-Jin Tan describes problems with the Thai judicial system, including difficult standing requirements and court awards that grant monetary compensation without requiring environmental restoration.\textsuperscript{50} While there have been proposals to establish specialized courts for

\begin{itemize}
\item \textsuperscript{41} Id. at 674 (noting that between 1996 and 2007, no constitutional court justice completed the constitutionally mandated four-year term).
\item \textsuperscript{42} Id. (noting that after one of Ecuador’s presidents was removed from office, new constitutional court members were not appointed for eleven months, during which time the court simply ceased to function).
\item \textsuperscript{43} Id. at 677, citing Resolution No. 1212-2007-RA.
\item \textsuperscript{44} Id. at 678-79.
\item \textsuperscript{46} Id. at 214, citing CONST. § 77(2)(b) (Kenya).
\item \textsuperscript{47} Id. at 209, citing 8 Laws of Kenya Schedule to Part IX, Section I (1988).
\item \textsuperscript{48} Id. at 214.
\item \textsuperscript{49} Id. at 215.
\item \textsuperscript{50} Tan (2004), \textit{supra} note 81, at 180.
\end{itemize}
environmental and natural resource conflicts, these courts would still have to overcome Thai prosecutors’ unwillingness to bring environmental cases and indigenous communities’ lack of access to evidence and to the courts.\textsuperscript{51}

The Indian Supreme Court stands in stark contrast to these courts,\textsuperscript{52} having issued sweeping orders to protect the Taj Mahal,\textsuperscript{53} the River Ganges,\textsuperscript{54} and Indian forests,\textsuperscript{55} as well as addressing air pollution\textsuperscript{56} and garbage pile-up\textsuperscript{57} in cities. Lavanya Rajamani\textsuperscript{58} describes the Indian Supreme Court’s recognition of the right to pollution-free water and air,\textsuperscript{59} based on constitutional protections of the right to life and liberty,\textsuperscript{60} as well as other environmental principles based on the 1992 Rio Declaration on Environment and Development.\textsuperscript{61} These actions

\begin{footnotesize}
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\item Id.
\item This is not to say that the Indian Supreme Court is the only developing-country supreme court that has had a strong role in effecting the environmental rule of law, although it may be the most well-known. See Mulqueeny et al, supra note 20, at 8, citing landmark decisions from supreme courts in other developing countries, including the 2003 Mandalawangi case in Indonesia (precautionary principle) and the 2000 Eppawela case (Bulankulama v. Secretary, Ministry of Industrial Development) in Sri Lanka (public trust doctrine).
\item M.C. Mehta v. Union of India (Taj Trapezium Case), Writ Petition Number 13381 of 1984 (requiring measures to address air pollution, including banning coal-based industries near the Taj Mahal).
\item M.C. Mehta v. Union of India (Ganga Pollution Case), Writ Petition Number 3727 of 1985.
\item T.N. Godavarman Thirumulpad v Union of India and Ors, Writ Petition Number 202 of 1995 (prohibiting the conversion of forest and wildlife reserves to other uses; limiting logging and non-forestry activity in national parks and wildlife sanctuaries).
\item M.C. Mehta v. Union of India (Delhi Vehicular Pollution Case), Writ Petition Number 13029 of 1985 (mandating conversion of Delhi’s public transport system from conventional fuel to compressed natural gas); M.C. Mehta v Union of India (Delhi Industrial Relocation Case), Writ Petition Number 4677 of 1985 (closing or relocating hazardous and noxious industries in Delhi).
\item Almitra Patel v Union of India, Writ Petition Number 888 of 1996.
\item Lavanya Rajamani, Public interest environmental litigation in India: exploring issues of access, participation, equity, effectiveness and sustainability, 19(3) J. ENV. L. 293, 294 (2007).
\item Id. at n11, citing Sabash Kumar v State of Bihar (1991) 1 SCC 598.
\item CONST. (1950), Art. 21 (India).

This judicial activism is not without criticism. Lavanya Rajamani cites problems with the Court’s efforts in Almitra Patel v Union of India\footnote{Initiated by Writ Petition Number 888 of 1996, cited in Rajamani, supra note 58, at 297-307.} to address solid waste problems in large cities. He suggests that the Court ignored the realities of the urban poor, targeting slums despite their relatively low contribution to solid waste,\footnote{Rajamani, supra note 58, at 302, citing Almitra Patel v Union of India (Municipal Solid Waste Management Case).} and ignoring the informal recycling industry led by “waste pickers.”\footnote{Id. at 307.} Solid waste disposal rules created by the Court may be difficult to implement as they are too prescriptive in some respects, unrealistic in others, and conflict with existing regulations.\footnote{Id. at 310.}

Rajamani also considers problems with M.C. Mehta v Union of India,\footnote{Initiated by Writ Petition Number 13029 of 1985.} in which the Court sought to ameliorate air pollution by requiring New Delhi diesel buses to be retrofitted for

\begin{itemize}
  \item Initiated by Writ Petition Number 888 of 1996, cited in Rajamani, supra note 58, at 297-307.
  \item Rajamani, supra note 58, at 302, citing Almitra Patel v Union of India (Municipal Solid Waste Management Case).
  \item Id. at 307.
  \item Id. at 310.
  \item Initiated by Writ Petition Number 13029 of 1985.
\end{itemize}
compressed natural gas. This requirement addressed only a portion of the pollutants that were contributing to the air pollution problem. It also proved to be extremely expensive. Diesel bus drivers unable to afford compressed natural gas went out of business, only to be replaced by a greater number of private diesel vehicles. Rajamani notes that the court served the role of the executive branch for the many years these cases persisted, at one stage performing all the functions of a Regional Transport Office. He suggests that this overloaded court employees without leading to improved executive capacity.

But what if the executive and legislative branches had no intention of addressing India’s environmental problems, and nothing would have been done in the absence of court action? Faure et al. suggest that the Supreme Court’s actions can be seen as a “second-best” alternative that implemented some measure of environmental protection. Given the weak or unwilling executive agencies and legislators, innovative lawyers and the Indian Supreme Court may have been the only actors capable of bringing about change.

IV. Environmental Laws in Philippines

Before considering the Philippine Supreme Court’s approach to the environmental rule of law, an overview of Philippine environmental law is useful. The 1987 Philippine Constitution, like many modern constitutions, provides for “the right of the people to a balanced and healthful

69 Rajamani, supra note 58, at 308, citing M.C. Mehta v Union of India (Delhi Vehicular Pollution Case), initiated by Writ Petition Number 13029 of 1985.
70 Rajamani, supra note 58, at 313-14.
71 Id. at 309.
72 Id. at 315.
73 Id.
74 Faure et al, supra note 38, at 153.
75 Id.
ecology.” The Supreme Court has characterized this right as being so basic that it “need not even be written in the Constitution for [it is] assumed to exist from the inception of humankind.”

...
National laws consisting of legislative acts and presidential decrees (executed during the martial law period) contain civil and criminal provisions regarding pollution control and natural resource management. Many are similar to United States laws.

In the executive branch, most of the authority over both natural resources and pollution control is concentrated in the Department of the Environment and Natural Resources and its

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78 There is a broad expanse of local environmental law that I do not attempt to cover in this article. See, e.g., Local Government Code of 1991, Rep. Act. No. 7160, §§ 16-17 (Jan. 1, 1992) (Phil.) (allowing local governments to enact ordinances to protect the environment); Taño v. Socrates, G.R. No. 110249, 278 SCRA 154 (1997) (upholding the power of a local government to enact laws criminalizing destructive fishing methods, based on the general welfare clause of the Local Government Code of 1991; stating “We hope that other local government units shall now be roused from their lethargy and adopt a more vigilant stand in the battle against the decimation of our legacy to future generations”); Social Justice Soc’y v. Atienza, G.R. No. 156052, 517 SCRA 657 (Mar. 7, 2007), reconsidered, 545 SCRA 92 (Feb. 13, 2008) (requiring the Manila mayor to comply with the Manila Council’s zoning ordinance prohibiting oil terminals from locating within city limits despite the mayor’s entering into a Memorandum of Understanding with the Department of Energy allowing the oil terminals to remain, since the Local Government Code required the mayor “to enforce all laws and ordinances relative to the city”).

79 Compare Pres. Decree No. 705, Revised Forestry Code (1975); Pres. Decree No. 856, Sanitation Code (1975); Pres. Decree No. 979, Marine Pollution Decree (1976); Pres. Decree No. 1067, Water Code (1976); Pres. Decree No. 1151, Philippine Environmental Policy (1977); Pres. Decree No. 1433, Plant Quarantine Law (1978); Pres. Decree No. 1586, Establishing an Environmental Impact Statement System Including Other Environmental Management Related Measures and for Other Purposes (1978). Presidential decrees were executed while President Ferdinand Marcos, through his declaration of martial law, had control of both the executive and legislative branches. Email from Professor Gloria Estenzo Ramos, University of Cebu College of Law and Philippine Earth Justice Center (Feb. 13, 2012) (hereafter “Ramos Interview”). These decrees continue to be upheld to the extent not superseded or amended. See Environmental Rule 1(2) (listing presidential decrees related to the environment as being within the scope of the Rules); Antonio G.M. La Viña and Josef Leroi L. Garcia, Environmental Law and Procedural Rules, in Alfredo Tadiar (Ed.), BENCHBOOK FOR PHILIPPINE TRIAL COURTS (REVISED AND EXPANDED) (2011) [hereafter “BENCHBOOK”] K-1 (listing decrees pertinent to environmental law).

80 Compare Pres. Decree No. 1151, Philippines Environmental Policy (1977) and Pres. Decree No. 1586, Establishing an Environmental Impact Statement System Including Other Environmental Management Related Measures and for Other Purposes (1978) (requiring environmental impact statements for actions that significantly affect the quality of the environment with the National Environmental Policy Act of 1969 (NEPA), 42 USC § 4321; compare Rep. Act No. 9147, Wildlife Resources Conservation and Protection Act (2001), § 2 (Phil.), (criteria for determining whether species are threatened, requirement for designating critical habitat) with Endangered Species Act, § 4, 6 USC § 1533; see Implementing Rules and Regulations of the Philippine Clean Air Act of 1999 (setting ambient air quality standards, requiring the use of best available control technology, and relying on criteria set by the U.S. EPA in 40 CFR parts 50 and 60); Rationale, 69 (“The general structure of these citizen suit provisions is similar to the citizen suit provisions in U.S. environmental statutes.”).

81 Prof. Khee-Jun has drawn attention to the conflict of interest inherit in the Department of Environment and Natural Resource’s (DENR) mandate to simultaneously protect natural resources and collect revenue from natural resource licensing. See Alan Khee-Jun Tan, All that glitters: Foreign investment in mining trumps the environment in the Philippines, 23 PACE ENVT'L. L. REV. 183 (Winter 2005-2006). The situation is akin to that of the U.S. Minerals Management Service before it was split into separate agencies for regulation and revenue collection. Splitting DENR into different agencies might address this issue, but it might also create another layer of bureaucracy that would reduce capacity and coordination between executive agents. See Alan Khee-Jin Tan, Environmental Laws and Institutions in Southeast Asia: A Review of Recent Developments, 8 S.Y.B.I.L. 177, 185 (2004). In 2010, a
attached agencies\textsuperscript{82} and regional divisions (collectively, DENR).\textsuperscript{83} DENR is charged with managing and rule-making in the areas of air quality,\textsuperscript{84} water quality,\textsuperscript{85} toxic and nuclear wastes,\textsuperscript{86} forestry,\textsuperscript{87} protected areas,\textsuperscript{88} mining,\textsuperscript{89} terrestrial and wetland species,\textsuperscript{90} and caves,\textsuperscript{91} while the Department of Agriculture manages most fisheries\textsuperscript{92} and other aquatic resources.\textsuperscript{93} The

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82 Attached agencies are independent in terms of their regulatory and quasi-judicial functions but are under the administrative supervision of DENR. See National Water Resources Board website, at www.nwrb.gov.ph/ (last visited Nov. 23, 2011) (explaining the nature of attached agencies). The Laguna Lake Development Authority, established in 1966 to promote sustainable development in the Laguna de Bay Region, is an example of a DENR-attached agency. See Laguna Lake Development Authority website, at www.llda.gov.ph/geojuris.shtml (last updated 2011). The agency has environmental regulatory and law-enforcement functions, particularly concerning water quality monitoring, conservation of natural resources, and community-based natural resource management. Id.

83 See notes 82-91, infra (citing laws giving DENR authority).

84 See Rep. Act. No. 8749, Philippine Clean Air Act (1999), Ch. 4. The act is implemented mainly through DENR’s local offices, its Environmental Management Bureau, and local government units. DENR’s Pollution Adjudication Board assesses fines for violation of the act, id. at Ch. 6, although the Traffic Adjudication Service of the Land Transportation Office handles motor vehicle air pollution violations, see Clean Air Act Implementing Rules and Regulations, Rule LI.

85 See Rep. Act. No. 9275, Philippine Clean Water Act (2004). The act is implemented mainly through the National Water Resources Board (an attached agency of DENR), the Laguna Lake Development Authority, and local government units. Id. at arts.1 and 3. DENR cooperates with other agencies, including the Philippines Coast Guard, which have jurisdiction over specific waters or uses. Id. at Ch. 3, § 20; Pres. Decree No. 979, Marine Pollution Decree (1976).


87 The former Bureau of Forestry, now the Forest Management Bureau (FMB) under DENR, has jurisdiction over all forest lands, grazing lands, and forest reservations, including watershed reservations. Pres. Decree No. 705, Revised Forestry Code (1975) § 5, as amended by Exec. Order No. 277 (1987); see also Rep. Act No. 9175, Chain Saw Act (2002) (providing for DENR to regulate chainsaws used in logging).


89 Rep. Act No. 7942, Philippine Mining Act (1995), §§ 8 and 9 (charging the Mines and Geo-Sciences Bureau under DENR with the administration and disposition of mineral lands and mineral resources).


91 Rep. Act No. 9072, National Caves and Cave Resources Management and Protection Act (2002), § 4. Jurisdiction is coordinated with the Department of Tourism (DOT), the National Museum, the National Historical Institute, concerned local government units, and the Palawan Council for Sustainable Development.

92 Under Rep. Act No. 8550, Philippine Fisheries Code (1998), Art. 1, the Department of Agriculture, through the Bureau of Fisheries and Aquatic Resources, has jurisdiction over waters not under the jurisdiction of municipalities and DENR. National and local Fisheries and Aquatic Resources Management Councils serve in an advisory capacity. Id. at art. 2.
National Solid Waste Management Commission, made up of various agencies and chaired by DENR, has authority over solid waste.94

DENR’s rules and regulations, like those of U.S. agencies, are supposed to be within the scope of legislatively granted authority.95 But unlike U.S. agencies, DENR has substantial power to revoke natural resource permits and licenses. This is the case even though the due process and non-impairment clauses of the Philippine Constitution mirror those of the U.S. Constitution.96 Revocation is considered a valid exercise of police power,97 based on the principle that the State reserves ownership of all natural resources,98 and licenses and permits are privileges rather than

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93 Rep. Act No. 9147, Wildlife Resources Conservation and Protection Act (2001), § 4 (listing aquatic habitats and resources over which the Department of Agriculture has jurisdiction).
95 See Smart Comm’n, Inc. v. Nat’l Telecomm. Comm’n, G.R. No. 151908, 408 SCRA 678 (Aug. 12, 2003) (regulations “must conform to and be consistent with the provisions of the enabling statute in order for such rule or regulation to be valid”); Ople v. Torres, G.R. No. 127685, 293 SCRA 141, 153 (July 23, 1998) (“[r]egulations are not . . . substitute[s] for the general policy-making that Congress enacts in the form of a law).
96 Compare CONST. (1987), Art. III, § 1 (Phil.) (“No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.”) and Art. III, § 10 (“No law impairing the obligation of contracts shall be passed.”) with U.S. CONST. Amendment 14 (“… nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”) and Art. I, § 10 (“No State shall … pass any … Law impairing the Obligation of Contracts”).
97 See BENCHBOOK K-24 (referring to State’s all-encompassing police power); Pollution Adjudication Board v. Court of Appeals, GR No. 93891, 195 SCRA 112 (Mar. 11, 1991) (referring to “pervasive, sovereign power to protect the safety, health, and general welfare and comfort of the public, as well as the protection of plant and animal life”; upholding revocation of effluent permit).
98 See CONST. (1987), Art. XII, § 2 (Phil.):

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.

rights. Revocation of permits related to pollution discharge also appears to be within DENR’s police power.

In addition to its rule-making authority, DENR has adjudicatory power through its Pollution Adjudication Board, Panel of Arbitrators, and Mines Adjudication Board. As in the United States, environmental litigants are generally supposed to exhaust their administrative remedies through DENR or other agencies prior to going to court.

The Ombudsman’s Office is a third possible path for Philippine environmental litigants, as it has the jurisdiction to prosecute cases regarding corruption and wrongdoing by public authorities.

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99 In Minors Oposa v. Factoran, supra note 77, the Court held that timber licenses were not contracts, property or a property right protected by the due process clause of the constitution, such that they could be revoked or rescinded by executive action. This finding has been cited numerous times to revoke licenses, e.g., Alvarez v. PICOP Resources, Inc., G.R. Nos. 162243, 508 SCRA 498, (Nov. 29, 2006) (“Needless to say, all licenses may thus be revoked or rescinded by executive action.”); Southeast Mindanao Gold Mining Corp. supra, note 98, (like timber licenses, mining permits “do not vest in the grantee any permanent or irrevocable right within the purview of the non-impairment of contract and due process clauses of the Constitution”); Alcantara v. DENR, G.R. No. 161881 (July 31, 2008) available at http://elibrary.judiciary.gov.ph/decisions.php?doctype=Decisions%20%20Signed%20Resolutions&docid=12180906381988754104 (“Like timber or mining licenses, a forest land grazing lease agreement is a mere permit which, by executive action, can be revoked … whenever public welfare or public interest so requires”).

100 In Pollution Adjudication Board vs. Court of Appeals, supra note 97, the Supreme Court upheld the DENR Pollution Adjudication Board’s decision to revoke an effluent permit. The Court found that, based on Presidential Decree No. 984, an ex parte cease and desist order could be issued even when discharge standards were not established, so long as there was clear evidence that an effluent posed an immediate threat to life, public health, safety or welfare or to animal or plant life. The Court held, “It is a constitutional commonplace that the ordinary requirements of procedural due process yield to the necessities of protecting vital public interests like those here involved, through the exercise of police power.” See also Laguna Lake Development Authority (LLDA) v. Court of Appeals G.R. 110120 (Mar. 16, 1994) available at www.lawphil.net/judjuris/juri1994/mar1994/gr_110120_1994.html (finding that LLDA had implied authority to issue a cease and desist order to halt unauthorized garbage disposal, even if the act establishing the agency did not expressly give it this power); Bautista v. Juinio, G.R. No. L-50908, 127 SCRA 329 (Jan. 31, 1984) (explaining that police power trumps due process); Anglo-Fil Trading Corporation v. Lazaro G.R. No. L-54958, 124 SCRA 49 (Sep. 2, 1983) (explaining that police power trumps the contract clause).

101 This board was created by Executive Order 192, issued by President Corazon Aquino before the new (post-Marcos) legislature convened. The Board assumed the adjudicatory functions of the previous National Commission on Pollution Control. Id., § 19.


103 See Section V(C), Judicial versus Administrative Jurisdiction and Administrative Deference, infra.
officials. The Office may file criminal cases with a court based on a complaint against a
DENR official submitted by an environmental group.

The extent of environmental laws, regulations, and institutions in the Philippines suggests that there is a system in place to regulate actions that significantly impact the environment—the first prong of my definition of the environmental rule of law. Whether these laws are appropriate for the Philippines’ social and economic situation, and whether they can be enforced, is another question. The next section considers the Philippine judiciary’s ability to give meaning to these laws.

V. Philippine Courts

The previous section suggests that the Philippines has statutes and institutions that are similar to (but not exactly like) those of the United States. The same can be said of the judicial system, which was influenced by the Philippines’ near-half-century of American occupation. Today, like the state of Louisiana or the province of Quebec, the Philippines is essentially a

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104 Telephone Interview with Jose F. Leroy Garcia, Consultant, School of Government, Ateneo de Manila University (Feb. 10, 2012) (hereafter “Garcia Interview”) (explaining jurisdiction of Ombudsman). Before the impeachment of former Ombudsman Merceditas Gutierrez and promulgation of the Environmental Rules, environmental groups sometimes opted to file environmental complaints with this office. Ramos Interview (noting that she previously filed cases through the Ombudsman).

105 Ramos Interview (describing complaint she filed against DENR officials with the Office of the Ombudsman after being denied access to public documents; the Office ultimately filed criminal and civil actions in court); Telephone Interview with Asis Perez, Director of the Bureau of Fish and Aquatic Resources, Department of Agriculture (Feb. 15, 2012) (hereafter “Perez Interview”) (describing jurisdiction of the Office of the Ombudsman).

106 At least on paper, the Philippines has expansive environmental laws and policies. See Ellalyn B. De Vera, Philippines A ‘Strong Performer’ In Environmental Policies, MANILA BULLETIN A1 (Feb. 19, 2012) www.mb.com.ph/articles/351897/philippines-a-strong-performer-in-environmental-policies (“The Philippines ranked 42nd among 132 countries as a ‘strong performer’ in environmental policies, outranking Australia, United States, Singapore, and Bulgaria, in the latest biennial Environmental Performance Index (EPI) conducted by Yale and Columbia Universities in the US.”).

107 The laws of both of these jurisdictions are rooted in the French civil code system, but both jurisdictions are now part of common law countries.
mixed common-law/civil-law jurisdiction. The civil tradition stems from more than three centuries of Spanish control. Much of the Spanish Civil Code remained in effect during the American period, although the United States and implemented American-style rules of court that are mostly still in place. Another American legacy is the principle of *stare decisis*, which was codified through the 1949 Civil Code.

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108 There are also provisions for Islamic law under Pres. Decree 1083, Code of Muslim Personal Laws of the Philippines (1977), which codified Sharia family and inheritance law and established a court system with jurisdiction over matters covered under the Code involving Muslim parties.


110 The United States acquired the Philippines in 1898 and governed the territory under military rules for nearly three years, until a civilian government was instituted through the Philippine Organic Act, ch. 1369, 32 Stat. 691 (1902). The civilian government was authorized to enact laws for the Philippines, although the U.S. Congress retained the ability to make laws regulating the territory. The same year, Act of July 1, 1902, Pub. L. No. 57-235, § 10, 32 Stat. 691, 695, gave the U.S. Supreme Court “jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands” in most types of cases. The U.S. Supreme Court exercised broad discretion in deciding where U.S. law trumped or supplanted Philippine and Spanish law. See Tahirih V. Lee, *The United States Court for China: A Triumph for Local Law*, 52 BFLR 923 (2004), citing *Dorr v. U.S.*, 195 U.S. 138, 142-44 (1904) (Congress may refuse to incorporate into the United States a territory ceded to the United States by treaty and yet retain the power to legislate for that territory); *Carino v. Insular Government*, 212 U.S. 449 (1909); *Bosque v. U.S.*, 209 U.S. 91 (1908) (U.S. law on professions supplant Spanish law); *Alzua v. Johnson*, 231 U.S. 106, 111 (1913) (U.S. principles of law supplant Spanish law with the establishment of U.S. courts in the Philippines).


The utility of American-style rules, particularly strict rules on evidence, is questionable in a system in which there is no jury. Perez Interview. The drafting of the Environmental Rules is part on a larger effort to rewrite the Philippines Rules of Court. Id.

112 See Civil Code Art. 8 (“Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines.”); see also *Lazatin v. Desierto*, G.R. No. 147097 (June 5, 2009) available at http://sc.judiciary.gov.ph/jurisprudence/2009/june2009/147097.htm (“only upon showing that circumstances attendant in a particular case override the great benefits derived by our judicial system from the doctrine of *stare decisis*, can the courts be justified in setting aside the same”); *Fermin v. People*, G.R. No. 157643, 550 SCRA 132 (Mar. 28, 2008) (“The doctrine of *stare decisis*… requires courts in a country to follow the rule established in a decision of the Supreme Court thereof”); *Chinese Young Men's Christian Association of the Philippine Islands v. Remington Steel Corporation*, G.R. No. 159422, 550 SCRA 180 (Mar. 28, 2008) (“Time and again, the court has held that it is a very desirable and necessary judicial practice that when a court has laid down a principle of law as
A. Judicial Power

The 1935 Constitution, created in preparation for the Philippines’ independence from the United States, established a Supreme Court with powers similar to those of the U.S. Supreme Court. The 1987 (and current) Constitution, implemented after the ouster of President Ferdinand Marcos, provided for a potentially stronger judiciary. It specifically granted courts the power to determine whether an executive agency has abused its discretion or acted without jurisdiction. This provision has been interpreted as expanding judicial review to cover “political questions.”

applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases in which the facts are substantially the same.”).

113 Compare CONST. (1935), Art. VIII (Phil.) (providing for the judicial department) with U.S. CONST., Art. III (establishing the judicial branch).

114 CONST. (1987), Art. VIII, § 1 (Phil.) (giving courts the power “to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government”). The incorporation of judicial review into the Constitution reflects the drafters’ intent to avoid a repeat of the virtually unchecked executive power during the Marcos era. See Diane Desierto, Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa, 11 ASIAN-PAC. L. & POL’Y J. 114, 119 (2010) (referring to the former Chief Justice’s proposal of this provision to the 1986 Constitutional Commission). Journalists and politicians critical of a particular executive action often compare it to the extreme executive power of the Marcos era. E.g., Christina Mendez, “Joker Slams Noy’s legal advisers, De Lima for hitting SC,” THE PHILIPPINE STAR NEWS 10 (Dec. 5, 2011) available at www.abs-cbnnews.com/nation/12/05/11/joker-slams-noys-legal-advisers-de-lima-hitting-sc (Senator Joker Arroyo compared the Department of Justice’s attempts to circumvent the Supreme Court to events that occurred under martial law); Rey E. Requejo, Aquino like Hitler, Marcos, critics say, MANILA STANDARD, 2011 WLNR 25732573 (Dec. 14, 2011).

By comparison, the U.S. Constitution does not specifically provide for judicial review. This power was recognized by the Supreme Court in Marbury v. Madison, 5 U.S. 137, 170 (1803) (“If one of the heads of departments commits any illegal act under color of his office by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law.”) and codified in the Administrative Procedure Act. See 5 U.S.C. § 706(a)(2) (allowing courts to set aside agency decisions that are arbitrary and capricious, unconstitutional, or in excess of statutory jurisdiction).

115 Oposa, supra note 77; see also Daña v. Singson, G.R. No. 86344 (Dec. 21, 1989) (political questions “come within our powers of review under the expanded jurisdiction conferred upon us by Article VIII, Section 1, of the Constitution”). This contrasts with the prohibition on the American judiciary from considering political questions, see Baker v. Carr 369 U.S. 186, 212 (1962) (outlining the elements of the political question doctrine), and that on Philippine courts prior to the 1987 Constitution, see Mabanag v. Vito, G.R. No. L-1123 (Mar. 5, 1947) available at www.lawphil.net/judjuris/juri1947/mar1947/mar1947/gr_1-1123_1947.html (“It is a doctrine too well established to need citation of authorities, that political questions are not within the province of the judiciary, except to the extent that power to deal with such questions has been conferred upon the courts by express constitutional or statutory provision”).
The 1987 Constitution also allows the Supreme Court to create rules concerning the enforcement of constitutional rights—a power that is almost legislative.\textsuperscript{116} The Supreme Court took advantage of this power in 2010 by promulgating the Environmental Rules.\textsuperscript{117}

In spite of the constitutional provisions designed to empower the court, Philippine Supreme Court justices probably enjoy less independence than their U.S. counterparts for both constitutional and political reasons. Judges may only serve until they are 70 years old,\textsuperscript{118} and many are appointees of politicians still in power. In 2011, 12 of the 15 Supreme Court justices were appointees of the former president and then-representative Gloria Arroyo,\textsuperscript{119} and the chief justice was Arroyo’s former spokesman and chief of staff.\textsuperscript{120} When Arroyo was indicted for election fraud, the Department of Justice prohibited her from leaving the country.\textsuperscript{121} The Supreme Court became embroiled in a controversy when it placed a temporary restraining order on the execution of the Department of Justice order.\textsuperscript{122} This led to a political dispute between the president and the chief justice, which ended with the justice’s impeachment.\textsuperscript{123}

\begin{footnotesize}
\textsuperscript{116} See CONST. (1987), Art. VIII, § 5(5) (Phil.). The 1973 and 1935 constitutions also allowed the Supreme Court to make rules, but these rules could be repealed, altered, or supplemented by the legislative body. See CONST. (1973) Art. X, § 5(5); CONST. (1935) Art. VIII, § 13; Rationale at 49-50 (“the Court can enact rules to enforce constitutional rights, the power of which may be typically lodged in the legislative bodies or branches of other jurisdictions”).

\textsuperscript{117} Rules of procedure are adopted by the Supreme Court pursuant to its rule-making power under § 5(5) of Article VIII of the 1987 Constitution.

\textsuperscript{118} CONST. (1987) Art. VIII, § 11

\textsuperscript{119} Tetch Torres, “De Lima warns SC: Aquino to reclaim court for the people,” INQUIRER.NET (Dec. 15, 2011) available at http://newsinfo.inquirer.net/11603/de-lima-warns-sc-aquino-to-reclaim-court-for-the-people (Secretary of Justice Leila De Lima warned the Arroyo-appointed associate justices at the Supreme Court that they could face impeachment, as the chief justice did)

\textsuperscript{120} Christina Mendez, “Joker Slams Noy’s legal advisers, De Lima for hitting SC,” THE PHILIPPINE STAR 10 (Dec. 5, 2011) (Senator Frank Drilon noted that the chief justice had sided with the former president in many Supreme Court cases).

\textsuperscript{121} See “Arroyo still in watch list,” BUSINESSWORLD, 2011 WLNR 21592624 (Oct. 21, 2011).

\textsuperscript{122} See Marlon Ramos, High court affirms TRO: It still stands, PHILIPPINE DAILY INQUIRER 1, 2011 WLNR 23967132 (Nov. 19, 2011).

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The Supreme Court’s constitutional authority is undermined by the other branches’ relatively frequent changes to the Constitution. Since the 1935 Constitution, there have been several major constitutional changes and two completely new constitutions. In 2006, the Supreme Court narrowly defeated a proposal that would have changed the constitution again by creating a parliamentary system and allowing Arroyo to retain her presidency beyond the six-year term limit of the 1987 Constitution.

In sum, the 1987 Constitution creates a potential for a strong judiciary, able to keep executive power in check. But this has not always been a reality, as may be shown by the Supreme Court’s lack of adherence to the stare decisis principle.

B. Stare decisis

In spite of the codification of stare decisis, Supreme Court orders do not always seem to be consistent with prior case law, or even the law of a case. This inconsistency may be due in part to the manner in which decisions are often made by different divisions rather than the full

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125 See Lambino v. Comm’n on Elections, G.R. No. 174153, 505 SCRA 160 (Oct. 25, 2006). The majority seemed aware of need to avoid repeated changes to the Constitution: “To allow such change in the fundamental law is to set adrift the Constitution in unchartered waters, to be tossed and turned by every dominant political group of the day. … A revolving-door constitution does not augur well for the rule of law in this country.” Five of the seven dissenting justices were Arroyo appointees, while the four other Arroyo appointees joined the eight-justice majority. See the biographies of justices, indicating dates of appointment, at http://sc.judiciary.gov.ph/justices/index.php; Summary of Voting in Lambino at http://sc.judiciary.gov.ph/jurisprudence/2006/october2006/174153_summary.htm.

126 See Civil Code Art. 8, supra note 112.

127 It is not uncommon for the Supreme Court to reverse itself on a second or even third motion for reconsideration. See Apo Fruits Corporation v. Landbank of the Philippines, G. R. No. 164195, 632 SCRA 727 (Oct. 12, 2010) (listing cases in which a judgment was reversed on the second or third motion for reconsideration “after finding that doing so was in the interest of substantial justice”); League of Cities v. Comelec, G.R. No. 176951 (June 28, 2011), (Sereno, J., dissent) available at http://sc.judiciary.gov.ph/jurisprudence/ 2011/june2011/176951_sereno.htm (noting that the Supreme Court had reconsidered its ruling in the case five times).
Court. It may also relate to the fact that orders are not published in an easily searchable electronic system.

But sometimes, inconsistency may be tied to political pressure. An example is the 2004 case *Bugal-B’laan Tribal Association, Inc. v. Ramos.* In that case, the Supreme Court initially granted much of a petition brought by environmental groups and indigenous residents to void the 1995 Mining Act and a mining contract executed pursuant to the Act. The government and foreign mining company defendants filed motions for reconsideration. While the motion was under consideration, DENR drafted a mineral action plan pursuant to the Act, and the President ordered all government agencies to begin implementing the plan. Ten months later (and one month before a major international mining conference was to take place in Manila), the Supreme Court issued a reconsideration of its original decision. Reinterpreting the Constitution, the Court held that it “should be construed to grant the President and Congress sufficient discretion and reasonable leeway to enable them to attract foreign investment and

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128 Telephone Interview with Antonio G.M. La Viña, Dean of the Ateneo School of Government (Feb. 15, 2012) (hereafter “La Viña Interview”) (explaining that Supreme Court decisions are issued by different divisions, and some divisions may have stricter standards than others). See the Internal Rules of the Supreme Court, Rule No. 2, A.M. No. 10-4-20-SC (2010) at www.lawphil.net/courts/supreme/am/am_10-4-20-sc_2010.html (explaining that most Supreme Court cases are heard by divisions of five out of the fifteen justices; but the Court considers certain kinds of cases *en banc*, including cases that raise novel questions of law and cases of sufficient importance to merit *en banc* consideration).

129 G.R. No. 127882, 421 SCRA 148 (Jan. 27, 2004) [hereafter *La Bugal* (Jan. 27, 2004)]. An eight-member majority granted the petition. *Id.*

130 *Id.* (declaring unconstitutional the mining agreement and parts of the Mining Act).


132 See Tan (Winter 2005-2006), *supra* note 81, at 191; Mining Action Plan Executive Summary 1 (Sep. 13, 2004) (“The most pressing concern facing the Industry is the January 27, 2004 Supreme Court Decision that nullified the provisions of the Mining Act allowing the direct participation of foreign-owned corporations in mining.”).


“expertise” and “not be used to strangulate economic growth or to serve narrow, parochial interests.”

The President called the reconsideration an act of statesmanship done in the national interest.

Another example of this kind of reconsideration is the 1991 case *Technology Developers, Inc. v. Court of Appeals*, concerning a charcoal manufacturer that failed to obtain permits required by the local government and DENR. Finding that fumes from the charcoal plant were polluting the air and affecting human health, the local government issued a cease-and-desist order and declined to grant the locally required operating permit. The manufacturer’s suit to reopen the plant made its way to the Supreme Court, which upheld lower court decisions in favor of the local government. The Court acknowledged DENR’s authority to determine the existence of pollution, but found that the mayor’s police power allowed him to deny a permit application unless appropriate measures were taken to avoid injury to the health of local residents.

The manufacturer filed a motion for reconsideration, raising completely new facts and legal arguments. The Supreme Court granted the motion, deciding this time that DENR’s

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136 Id.

137 Tan (Winter 2005-2006), *supra* note 81, at 203, citing Press Release, Office of the Press Secretary to the President, GMA Points to SC Decision as the Proverbial ‘Silver Lining’ (Dec. 2, 2004).

138 G.R. No. 94759, 193 SCRA 147 (Jan. 21, 1991) (original Supreme Court decision).

139 Id.

140 Id.

141 Id.

142 Like American courts, Philippine courts are generally prohibited from considering new facts and legal arguments raised for the first time on appeal (much less on a motion for reconsideration). Philippine Rules of Court, No. 37 (New Trial or Reconsideration), § 1, (Listing justifications for reconsideration, including fraud, mistake or excusable negligence which ordinary prudence could not have guarded against; newly discovered evidence, which could not have been discovered and produced at the trial, and which if presented would probably alter the result; excessive damages; and where “evidence is insufficient to justify the decision or final order, or that the decision or final order is contrary to law”); No. 44 (Ordinary Appealed Cases) §15 (“... appellant … may include in his assignment of errors any question of law or fact that has been raised in the court below and which is within the issues framed by the parties.”) No. 51 (Judgment), § 8 (“No error which does not affect the jurisdiction over the
authority to control pollution under Presidential Decree No. 984 superseded all other laws, including provisions of the legislatively enacted Civil Code relating to nuisance.\footnote{143} This reconsideration conflicts with other decisions regarding the ability of local governments to issue and suspend permits,\footnote{144} as well as cases citing the police power as a basis for permit revocation.\footnote{145}

*Social Justice Society v. Atienza,*\footnote{146} a more recent case decided by different justices, provides an interesting contrast. This case concerned a Manila zoning ordinance prohibiting industrial activity in a zone that previously served as an industrial hub. Oil companies had an agreement with the Department of Energy and the Manila mayor allowing them to continue

\footnote{143} Technology Developers, Inc. vs. Court of Appeals, G.R. No. 94759, 201 SCRA 11 July 31, 1991), cited in Dante Gatmaytan-Magno, *Artificial Judicial Environmental Activism: Oposa v. Factoran as Aberration,* 17 IND. INT'L & COMP. L. REV. 1, 10-14 (2007). The Court quoted the repealing clause in Pres. Decree 984, Providing for the Revision of Republic Act No. 3931, Commonly Known as the Pollution Control Law, and for Other Purposes (Aug. 18, 1976), which states that “any provision of laws, presidential decrees, executive orders, rules and regulations and/or parts thereof inconsistent with the provisions of this Decree are hereby repealed and/or modified accordingly.” The legitimacy of this order, issued during President Marcos’s period of martial law, is questionable. Nevertheless, the Court found that, “even the provision of the Civil Code on nuisance, insofar as the nuisance is caused by pollution of the air, water, or land resources, are deemed superseded by Presidential Decree No. 984 which is the special law on the subject of pollution.” *Id.* (Civil Code Art. 699 lists “[a]batement, without judicial proceedings” as a remedy for a public nuisance.)

\footnote{144} E.g., Roble Arrastre, Inc. v. Villafor, G.R. No. 128509 (Aug. 22, 2006) available at www.lawphil.net/judjuris/juri2006/ aug2006/gr_128509_2006.html (finding that Local Government Code of 1991 allows local government units to prescribe regulations to protect the lives, health, and property of their constituents and maintain peace and order within their respective territorial jurisdictions); Lueue v. Villegas, G.R. No. L-22545 (Nov. 28, 1969) available at www.lawphil.net/judjuris/juri1969/nov1969/gr_l-22545_1969.html (powers conferred by law upon the Public Service Commission were not designed to deny or supersede the regulatory power of local governments over motor traffic in the streets subject to their control).

\footnote{145} E.g., Pollution Adjudication Board v. Court of Appeals, supra note 97. There, the Court upheld DENR’s revocation of an effluent permit based on the “pervasive, sovereign power to protect the safety, health, and general welfare and comfort of the public, as well as the protection of plant and animal life, commonly designated as the police power.” *Id.* The Court drew support for its decision in this case from its original decision in *Technology Development.* See *id.*, referring to local government’s cease-and-desist order.

\footnote{146} G.R. No. 156052, 517 SCRA 657 (Mar. 7, 2007), reconsidered, 545 SCRA 92 (Feb. 13, 2008).
operating in the zone, despite the zoning ordinance. In 2007, the Supreme Court found that the agreement had expired, such that the oil companies were subject to the zoning ordinance. The oil companies moved for reconsideration of this decision, arguing that the zoning ordinance was inconsistent with national ordinances granting regulatory powers to the Department of Energy.\textsuperscript{147} This time, the Court stuck to its original position, emphasizing the Constitution’s guarantee of local autonomy\textsuperscript{148} and the significance of local police power.

The difficulty of squaring rulings such as \textit{Atienza} with \textit{Technology Developers} suggests that environmental laws have not been consistently applied over time and across the jurisdiction, the second prong of my definition of the environmental rule of law.

C. Judicial versus Administrative Jurisdiction and Administrative Deference

As in the United States, exhaustion of administrative remedies is generally required before pursuing a case in court.\textsuperscript{149} In some cases, this rule has been taken to the extreme, suggesting a lack of judicial power. An example is the 1982 case \textit{Mead v. Argel}, in which the Supreme Court dismissed the prosecution of an oil company for unauthorized waste discharge.\textsuperscript{150}

The bill of information alleged that the discharge damaged vegetation in the vicinity, in violation

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\textsuperscript{148} CONST. (1987), Art. X (Phil).
\textsuperscript{149} See \textit{Factoran v. Court of Appeals}, G.R. No. 93540, 320 SCRA 530 (Dec. 13, 1999) (“The doctrine of exhaustion of administrative remedies is basic. Courts … should not entertain suits unless the available administrative remedies have first been resorted to and the proper authorities have been given an appropriate opportunity to act and correct their alleged errors, if any, committed in the administrative forum.”); \textit{Dy v. Court of Appeals}, G.R. No. 121587 (Mar. 9, 1999) available at http://sc.judiciary.gov.ph/jurisprudence/1999/mar99/121587.htm (a party must exhaust all administrative remedies before he can resort to the courts); \textit{Ysmael v. Deputy Executive Secretary}, G.R. No. 79538, 224 SCRA 992 (Oct. 18, 1990) (“A long line of cases establish the basic rule that the courts will not interfere in matters which are addressed to the sound discretion of government agencies entrusted with the regulation of activities coming under the special technical knowledge and training of such agencies”).
\textsuperscript{150} G.R. No. L-41958, 115 SCRA 256 (July 20, 1982). The Supreme Court granted \textit{certiorari} in this case despite recognizing that \textit{certiorari} should not normally be granted:

There is no disputing the validity and wisdom of the rule invoked by the respondents. However, it is also recognized that, under certain situations, recourse to the extraordinary legal remedies of \textit{certiorari}, \textit{prohibition} or \textit{mandamus} to question the denial of a motion to quash is considered proper in the interest of “more enlightened and substantial justice …”
\end{flushright}
of Republic Act No. 3931.\textsuperscript{151} This act broadly defines pollution\textsuperscript{152} and requires a permit to discharge industrial waste or any waste that could cause pollution.\textsuperscript{153} The Court looked to Section 6 of the Act, which authorizes a DENR commission to “[d]etermine if pollution exists in any of the waters and/or atmospheric air of the Philippines.” Although the Act does not give the commission exclusive authority to make this determination, the Court decided that the commission alone had the technical expertise to determine whether the discharge at issue was “pollution,” and to hold the public hearings necessary to make this determination.\textsuperscript{154}

In other cases, the Supreme Court has acknowledged exceptions to the rule of administrative exhaustion—where the administrative action in question is patently illegal; there is a risk of irreparable injury; or purely legal questions are involved.\textsuperscript{155} But the Court has

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\item An Act Creating a National Water and Air Pollution Control Commission (1964).
\item Id. at § 2(a)
\item Id. at § 9.
\item Mead v. Argel, supra note 150 (“As may be seen from the law, the determination of the existence of pollution requires investigation, public hearings and the collection of various information relating to water and atmospheric pollution. … The definition of the term ‘pollution’ in itself connotes that the determination of its existence requires specialized knowledge of technical and scientific matters which are not ordinarily within the competence of … those sitting in a court of justice.”); see also Remman Enterprises, Inc. v. Court of Appeals, G.R. No. 107671 (Feb. 26, 1997) available at http://sc.judiciary.gov.ph/jurisprudence/1997/feb1997/107671.htm (finding that petitioners did not have to go before the former Pollution Control Commission prior to bringing suit against a hog and poultry farm discharging waste into petitioners’ yard, but only because the case was filed as a nuisance claim).
\item The more recent Clean Air Act provides for citizen suits without any mention of the need for an agency to determine if pollution exists, although the Supreme Court does not appear to have ruled on whether citizen plaintiffs must first seek relief with DENR’s Pollution Adjudication Board. See Rep. Act No. 8749, Clean Air Act (1999) at § 41.
\item See Paat v. Court of Appeals, G.R. No. 111107, 266 SCRA 167 (Jan. 10, 1997) (citations omitted), listing eleven instances in which administrative remedies need not be exhausted:
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\item a violation of due process, (2) when the issue involved is purely a legal question, (3) when the administrative action is patently illegal amounting to lack or excess of jurisdiction, (4) when there is estoppel on the part of the administrative agency concerned, (5) when there is irreparable injury, (6) when the respondent is a department secretary whose acts as an alter ego of the President bears the implied and assumed approval of the latter, (7) when to require exhaustion of administrative remedies would be unreasonable, (8) when it would amount to a nullification of a claim, (9) when the subject matter is a private land in land case proceedings, (10) when the rule does not provide a plain, speedy and adequate remedy, and (11) when there are circumstances indicating the urgency of judicial intervention.
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narrowly interpreted what constitutes a “patent illegality.” An example is the 2003 case *Magbuhos v. Lanzanas*,\(^\text{156}\) where fishermen sued to cancel DENR’s issuance of an environmental clearance certificate (ECC) that exempted proposed construction from the Environmental Impact Statement (EIS) System.\(^\text{157}\) Plaintiffs alleged that the proposed construction was patently illegal, in violation of the Local Government Code\(^\text{158}\) and a presidential decree designating the area as an ecologically threatened zone.\(^\text{159}\) Dismissing arguments as to why the construction was patently illegal,\(^\text{160}\) the Court found that the plaintiffs failed to exhaust the administrative remedies provided in a DENR order concerning EISs.\(^\text{161}\)

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See also *PNOC-Energy Development Corp. v. Veneracion*, G.R. No. 129820, 509 SCRA 93 (Nov. 30, 2006), (distinguishing between disputes concerning the granting of an application, which are resolved by executive agencies, and disputes of a civil or contractual nature that may be adjudicated only by courts).

\(^\text{156}\) G.R. No. 131442, 405 SCRA 530 (July 10, 2003).

\(^\text{157}\) *Id.* Presidential Decree 1586 (1978) established an Environmental Impact Statement (EIS) System similar to the U.S. system created by NEPA. All proposed projects (public as well as private) that “significantly affect the quality of the environment” are generally required to secure environmental clearance or/and "Environmental Compliance Certificate" (ECC). The requirements and processes vary depending on whether a proposed project is outside the purview of the EIS system, considered an environmentally-critical project, or located in an environmentally-critical area. *Id.* at § 4. The government agency evaluating a proposed project may issue an ECC certifying that the project will not bring about an unacceptable environmental impact and that the proponent has complied with the requirements of the EIS system. See Rep. Act No. 7942, Philippine Mining Act (1995), at § 3.

\(^\text{158}\) Sections 26 and 27 of Republic Act No. 7160, the Local Government Code (1991), require national agencies and corporations to consult with local governments prior to undertaking any project that may cause pollution, climatic change, depletion of non-renewable resources, loss of forest, or species extinction. The *Magbuhos* court determined that the construction in that case, a wharf, did not fall into any of these categories (even though barges using the wharf could require consultation).

\(^\text{159}\) Presidential Decree No. 1605, Granting the Metropolitan Manila Commission Certain Powers (1978) prohibits construction of commercial structures as well as “any form of destruction by other human activities.” The *Magbuhos* court ignored this catch-all category, determining that the proposed construction was not commercial such that the decree did not apply.

\(^\text{160}\) See notes 158-59, *supra* (citing laws that the project appeared to violate). In a similar case, *Otadan v. Rio Tuba Nickel Mining Corp.*, G.R. No. 161436 (June 23, 2004), available at http://sc.judiciary.gov.ph/resolutions/2nd/2004/2Jun/161436.htm, the Supreme Court declined to overturn an ECC issued to a mining company. It held, “The issuance of the ECC is an exercise by the Secretary of the DENR of his quasi-judicial functions. This Court has consistently held that the courts will not interfere in matters which are addressed to the sound discretion of the government agency entrusted with the regulation of activities coming under the special and technical training and knowledge of such agency.” *Id.*

Still, there are cases in which the Court has ruled against DENR, either in favor or against environmental plaintiffs. An example is the 2005 case Province of Rizal v. DENR, concerning a landfill that was contaminating the local watershed. The Supreme Court ruled against DENR and in favor of the local government and conservation group, ordering the landfill to be closed. The Court chastised DENR for falling short of its duty to refrain from impairing the environment. In contrast to its finding in Magbuhos, the Court found that DENR had failed to consult with the local communities, as required by the Local Government Code.

The inconsistency of these rulings makes it hard to predict whether a case must be pursued through administrative or judicial channels, and whether a court will defer to DENR’s position. Again, this inconsistency suggests that the second prong of my definition of the environmental rule of law (regarding the consistent application of environmental laws) has not been met.


163 See id.: We expounded on this matter in the landmark case of Oposa v. Factoran, G.R. No. 101083, 30 July 1993, 224 SCRA 792, where we held that the right to a balanced and healthful ecology is a fundamental legal right that carries with it the correlative duty to refrain from impairing the environment. This right implies, among other things, the judicious management and conservation of the country’s resources, which duty is reposed in the DENR.

164 Id.

An example of a case with an unfavorable outcome for environmental litigants is Philippines v. City of Davao, G.R. 148622, 388 SCRA 691 (Sept. 12, 2002). Developers sued DENR for failing to exempt their project from an environmental impact assessment. Id. DENR declined to exempt the project since it was located in a critical environmental area, even though the area was not on DENR’s list of critical environmental areas, which had not been updated in 20 years. Id. The Supreme Court found that DENR did not have the discretion as to whether the project should be exempt—it had to exempt any project that fell within categories listed in Presidential Decree No. 1586 and related laws. Id.
D. Standing

The Supreme Court’s doctrine on standing, in contrast to its variable application of *stare decisis*, has consistently favored environmental litigants. This liberal standing doctrine was made famous in *Minors Oposa v. Factoran,* a suit brought in 1991 to annul timber licenses based on the right to a “balanced and healthful ecology” under the Philippine Constitution. Characterizing this right as an issue of transcendentational importance with intergenerational implications, the Court recognized the standing of future generations.

Courts before and after *Minors Oposa* have conferred standing to litigants asserting a “public right” (such as contesting an illegal official action) upon a showing that the case is one of “transcendental importance.” One example, reminiscent of the vehicular pollution case in

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166 *Oposa*, supra note 77. This was probably the first suit to be brought based on the right to a “balanced and healthful ecology” under Article 2 of the 1987 Philippine Constitution. La Viña Interview, Ramos Interview (noting that the 1987 Constitution was the first to have a provision on environmental rights (Art. II, §16), and the *Minors Oposa* case was filed in 1991).

167 Standing was not challenged in this case, but the Court made a point of emphasizing that “every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology.” *Id.*

168 *Id.*

169 See, e.g., *Solicitor General v. Metro. Manila Authority*, G.R. No. 102782 (Dec. 11, 1991) available at www.lawphil.net/judjuris/juri1991/dec1991/gr_102782_1991.html (granting Solicitor General standing to sue to prohibit government from confiscating license plates, even though parties injured by the confiscation had not filed complaints; citing *Araneta v. Dinglasan*, G.R. No. L-2044 (Aug. 26 1949) www.lawphil.net/judjuris/juri1949/aug1949/gr_l-2044_1949.html (“the transcendental importance to the public of these cases demands that they be settled promptly and definitely, brushing aside, if we must, technicalities of procedure”); *Tañada v. Tuvera*, G.R. No. 63915, 136 SCRA 27 (Apr. 24, 1985) (finding that petitioners had standing to sue to compel the publication of unpublished presidential issuances of general application, even if petitioners were not personally affected by non-publication); *La Bugal* (Jan. 27, 2004) (overturned on other grounds by *La Bugal* (Dec. 1, 2004) (granting standing to residents to enjoin an allegedly unconstitutional use of natural resources); compare with *Morton*, 405 U.S. at 738-40 (to establish standing, a member of an organization seeking judicial review must allege facts to show that he himself is adversely affected).

Philippine courts also employ a standing doctrine similar to the American concept, in which standing may only be accorded to the real party in interest. *See People v. Vera*, G.R. No. L-45685 (Nov. 16, 1937) www.lawphil.net/judjuris/juri1937/nov1937/gr_l-45685_1937.html (plaintiff must have “a personal and substantial
India, is the 2006 case Henares v. Land Transportation Franchising and Regulatory Board. As in the Indian case, the Henares plaintiffs were citizens concerned about air pollution, seeking a mandamus to require public buses to use compressed natural gas. The Supreme Court found that plaintiffs clearly had standing, since the petition invoked the fundamental right to clean air. The Court characterized standing as a “procedural technicality which may, in the exercise of the Court’s discretion, be set aside in view of the importance of the issue raised.”

Another example is La Bugal-B’laan Tribal Association v. Ramos, which, as discussed in the section on stare decisis, was brought by environmentalist and indigenous plaintiffs to invalidate a government mining contract on grounds that the mining activities would displace residents. Defendants argued that, since plaintiffs were not parties to the mining contract, they had no standing to sue. The Supreme Court accorded standing on grounds that the action was not merely for annulment of the contract, but for prohibition of an allegedly unconstitutional use of natural resources and mandamus. The Court stated, “As the case involves constitutional

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170 M.C. Mehta v Union of India (Delhi Vehicular Pollution Case), initiated by Writ Petition Number 13029 of 1985.
171 Henares v. Land Transportation Franchising and Regulatory Board, G.R. No. 158290, 505 SCRA 104 (Oct. 23, 2006).
172 Id.
173 Id.
174 Id.
176 Id.
177 Id.
questions, this Court is not concerned with whether plaintiffs are real parties in interest, but with whether they have legal standing.”

A 2009 case that pushes the limits of the Philippine standing doctrine is *Dolphins v. Reyes*, brought by lawyers acting as guardians for marine mammals whose habitat has been affected by underwater blasting and drilling.

By increasing the likelihood that action will be taken against those who break the law, the Supreme Court’s broad concept of standing can help implement the third prong of my definition of the environmental rule of law. Compared to the United States, there seems to be relatively little resistance to allowing broad standing in environmental actions. Of course, broad standing does not guarantee success in environmental cases. Plaintiffs in *Minors Oposa, Henares*, and *La Bugal* were all beneficiaries of the Court’s liberal standing doctrine, but none of their claims prevailed.

**VI. Rules of Procedure in Environmental Cases**

All of the cases discussed above were brought before the Supreme Court promulgated its Environmental Rules in 2010. The annotation to the Environmental Rules explains that they were “a response to the long felt need for more specific rules that can sufficiently address the procedural concerns that are peculiar to environmental cases.” The Rules apply to cases concerning environmental law in the 117 trial courts designated as environmental courts in

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178 *Id.*

179 G.R. No. 180771, discussed in Delmar Carino, “SC chief: Implementation of environment laws poor,” PHILIPPINE DAILY INQUIRER, 17, 2009 WLNR 7094043 (Apr. 17, 2009). At the time of this article, the Court had not yet ruled on the issue of standing. Ramos Interview. The case was filed before the implementation of the Environmental Rules, and it apparently could not benefit from the Rules’ expedited timelines for environmental cases. See note 186, infra (describing expedited timelines in environmental cases).

180 Defendants in *Minors Oposa* did not contest standing. See *Oposa*, supra note 77.

181 *Annotation* at 100.
2008. Judges in these courts received some training on the Rules from the Philippine Judicial Academy (PHILJA), the division of the Supreme Court responsible for training judges in the Philippines.

The Environmental Rules govern procedure in civil and criminal actions involving any environmental law or provision of a law. Also covered are “strategic lawsuits against public participation” (SLAPP)—suits to stifle action taken to enforce environmental laws or assert environmental rights.

The Environmental Rules are designed to expedite proceedings. Courts must prioritize the adjudication of environmental cases over other kinds of cases, and timeframes for

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182 The Supreme Court made this designation through Administrative Order 23-20081, Designation of Special Courts to Hear, Try and Decide Environmental Cases (Jan. 28, 2008). See Annotation at 101. Other Asian countries, including Bangladesh, China, India, Japan, South Korea, Malaysia, Pakistan, and Thailand, have similarly designated environmental courts. See Asian Development Bank, Law and Policy Reform, Asian Judges: Green Courts and Tribunals, and Environmental Justice, Brief No. 1 (Apr. 2010) at www.adb.org/documents/briefs/law-policy-reform/2010-Brief-01-Asian-Judges.pdf. The Philippines is the first of these to promulgate rules of procedure specific to environmental cases.


184 See Environmental Rule 1(2) (containing a non-exclusive list of environmental statutes), Annotation at 100

185 See Environmental Rule 6 (explaining how a defendant may assert the defense that a civil suit is a SLAPP); Environmental Rule 19 (governing criminal suits).

186 One of the stated purposes of the Environmental Rules is to “provide a simplified, speedy and inexpensive procedure for the enforcement of environmental rights and duties recognized under the Constitution, existing laws, rules and regulations, and international agreements.” Environmental Rule 1(3)(b). Compare Environmental Rule 2(2) (prohibiting motions to dismiss, motions for clarification, and third party complaints) with Civil Rule of Procedure 16 (stating grounds for motions to dismiss), Civil Rule 12 (allowing for a motion for particulars), and Civil Rule 6(12) (allowing for third-party complaints); compare Environmental Rule 3(1) (requiring court to set pre-trial hearing within two days of the last pleading), with Civil Rule 18(1) (imposing on plaintiff the duty to move for a pre-trial hearing); compare Environmental Rule 15(1) (requiring court to set arraignment within 15 days of acquiring jurisdiction) with Criminal Rule of Procedure 116(1)(g) (setting arraignment 30 days after jurisdiction is acquired); compare Environmental Rule 17(1) (trial to last three months) with Criminal Rule 119(2) (trial to last six months). Under the Environmental Rules, the court generally has a year from the filing of the complaint to hear and decide the case. See Environmental Rule 4(5). There is no such time limit in the Civil Rules of Procedure. Finally, judgments “in favor of the environment” (i.e., directing the performance of acts for the protection, preservation, or
pleadings and decisions are truncated.\textsuperscript{188} The effort to expedite is notable, since litigation in Philippine courts can drag on for years.\textsuperscript{189}

The Environmental Rules allow citizen suits to be filed in any environmental case.\textsuperscript{190} Citizen plaintiffs can defer payment of filing fees until after the judgment,\textsuperscript{191} and they may recover attorneys’ fees and litigation expenses if successful.\textsuperscript{192} They typically cannot recover damages,\textsuperscript{193} although the defendant may be required to pay for restoration.\textsuperscript{194}

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\item[187] Environmental Rule 4(5).
\item[188] See note 186, supra (detailing timelines).
\item[189] See, e.g., Aie Balagtas, “MMDA to sue judge over billboard ruling,” THE PHILIPPINE STAR (Jan. 23, 2012) available at www.philstar.com/nation/article.aspx?publicationsubcategoryid=65&articleid=770403 (“Most legal battles in the country usually last for years.”); La Viña Interview (environmental cases could last for seven to ten years).
\item[188] Part of the reason for the delay is the lack of appointed judges—in 2010 the number of courts exceeded the number of judges by about 500. Davide and Vinson, supra, note 183, at 123. Another source of delay is the lack of automated case management information systems outside of small claims and appeals courts. See “Case Monitoring System Strengthens Local Courts’ Transparency and Accountability, ABA ROLI-Philippines (Nov. 2011) at http://apps.americanbar.org/rol/news/news_philippines_case_monitoring_system_strengthens_local_courts_transparency_and_accountability_1111.shtml (discussing automation of small claims courts); “Court of Appeals Automation System Strengthens Transparency in the Judiciary” ABA ROLI-Philippines (Aug. 2011) at http://apps.americanbar.org/rol/news/news_philippines_court_automation_system_strengthens_the_judiciary_0811.shtml (discussing automation of Court of Appeals).
\item[190] Civil suits concerning environmental laws are governed by the Environmental Rules unless brought under the citizen suit provisions of the Clean Air Act or the Ecological Solid Waste Management Act. See Environmental Rule 2(5) and Annotation at 111, citing Act 8749 (Clean Air Act) at § 41 and Rep. Act No. 9003 at § 52.
\item[191] Citizens also have the opportunity to participate in criminal actions under Environmental Rule 9(3) (“In criminal cases, where there is no private offended party, a counsel whose services are offered by any person or organization may be allowed by the court as special prosecutor, with the consent of and subject to the control and supervision of the public prosecutor.”)
\item[192] Environmental Rule 2(12).
\item[193] Environmental Rule 5(1). As in the United States, each litigant must pay her own attorney’s fees unless litigating under a statute allowing for awards of attorney’s fees. The prevailing party is typically awarded costs. See Civil Code Art. 2208.
\item[194] Environmental Rule 5(1) does not provide for personal damages in citizen suits. Environmental plaintiffs may still collect damages in cases where they are filing on their own behalf, as real parties in interest. Compare Environmental Rule 2(4) (personal suits) with Environmental Rule 2(5) (citizen suits). Other opportunities for damages include the writ of continuing mandamus (Environmental Rule 8), actions for civil liability instituted simultaneously with criminal actions (Environmental Rule 10), and civil suits brought under the Ecological Solid Waste Management Act, which provides for “moral damages.” See Rep. Act No. 9003 at § 52.
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Plaintiffs can seek injunctive relief in the form of ex-parte Temporary Environmental Protection Orders (TEPOs)\textsuperscript{195} as well as long-term Environmental Protection Orders (EPOs).\textsuperscript{196} Orders can require defendants to take action to protect or restore the environment.\textsuperscript{197}

The provision allowing courts to issue TEPOs is striking, given that the legislature has prohibited any court other than the Supreme Court from issuing temporary restraining orders (TROs) against government-authorized construction or public works projects.\textsuperscript{198} An injunction cast as a TEPO instead of a TRO could potentially be used to halt a project posing imminent danger to the environment.\textsuperscript{199}

Another innovation of the Environmental Rules is the writ of kalikasan (nature), a special civil action for indefinite injunctive relief designed to address unlawful acts or omissions by anyone that threaten to violate the constitutional right to a balanced and healthful ecology.\textsuperscript{200}

\begin{footnotes}
\item[195] See Environmental Rule 2(8) (providing for 72-hour TEPOs). Similar to temporary restraining orders, TEPOs are available when it appears that “the matter is of extreme urgency and the applicant will suffer grave injustice and irreparable injury.” Id. See also West Tower Condominium Corp. (May 31, 2011), supra, note 165 (Supreme Court issued a TEPO and writ of kalikasan requiring defendant to cease operations on two pipelines). The bond normally required for temporary restraining orders is waived for TEPO applicants. See Environmental Rule 2(8).
\item[196] See Environmental Rule 1(4)(d) (defining environmental protection order (EPO) as “an order issued by the court directing or enjoining any person or government agency to perform or desist from performing an act in order to protect, preserve or rehabilitate the environment”). EPOs and TEPOs may also be used in criminal cases. Rule 13(2).
\item[197] See Environmental Rule 5(1).
\item[198] See Rep. Act No. 8975, An Act to Ensure the Expeditious Implementation and Completion of Government Infrastructure Projects by Prohibiting Lower Courts from Issuing Temporary Restraining Orders (2000). The only exception to this act is a “matter is of extreme urgency involving a constitutional issue, such that unless a temporary restraining order is issued, grave injustice and irreparable injury will arise.” Id. at § 3. This law and its predecessors (Pres. Decree 1818, Prohibiting Courts from Issuing Restraining Orders in Cases Involving Infrastructure and Natural Resource Development (1981) and Pres. Decree 605, Banning the Issuance of Restraining Orders in Cases Involving the Exploitation of Natural Resources (1974)) could block TROs against projects with the potential to cause irreparable damage to the environment. See Gregg M. Rubio, “DPWH: No turning back on flyover construction,” THE PHILIPPINE STAR (Sep. 28, 2011) available at www.philstar.com/Article.aspx?articleID=731740&publicationSubCategoryId=107 (quoting government official regarding Rep. Act 8975 in the context of a highway project opposed by citizen groups and environmentalists).
\item[199] La Viña Interview (noting that TEPO is basically a form of TRO, but prior to the Environmental Rules, it was difficult to get TROs in environmental cases).
\item[200] Environmental Rule 7(1). Rule 7(5) explains that the writ of kalikasan includes a “cease and desist order and other temporary reliefs effective until further order.”
\end{footnotes}
The unlawful act or omission must involve environmental damage that prejudices the life, health or the property of inhabitants in two or more cities or provinces.\textsuperscript{201} A petition for the writ can be filed with the Supreme Court or the Court of Appeals by anyone for no fee.\textsuperscript{202} Relief may include monitoring and periodic reports to ensure enforcement of the judgment of the court.\textsuperscript{203} The writ may also be used by environmental litigants to compel information necessary to prove their case.\textsuperscript{204} Thus, it can serve a function similar to a motion to compel in the United States, or a request under the U.S. Freedom of Information Act.\textsuperscript{205}

Antonio Oposa, Jr., the attorney and one of the plaintiffs behind the famous \textit{Oposa Minors} case, put the Environmental Rules to test straightaway by filing the first petition for a writ of \textit{kalikasan}.\textsuperscript{206} The petition sought to compel the government to enforce laws requiring the

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\textsuperscript{201} See Environmental Rule 7(1). The requirement that damage must affect “inhabitants in two or more cities or provinces” has been criticized as being unfair to residents from any of the large island ecosystems that only constitute one province (like Palawan) or unincorporated municipalities, where large numbers of people may be affected. La Viña Interview.

\textsuperscript{202} See Environmental Rule 7(2-3).

\textsuperscript{203} See Environmental Rule 7(15), listing the relief available under this writ. The rule does not provide for damages, although a plaintiff can bring a separate action for damages. See Annotation at 139 (“A person who avails of the Writ of Kalikasan may also file a separate suit for the recovery of damages for injury suffered. This is consistent with Sec.17, Institution of separate actions.”).

\textsuperscript{204} See Rationale at 80 (“the writ of \textit{kalikasan} was refashioned as a tool to bridge the gap between allegation and proof by providing a remedy for would-be environmental litigants to compel the production of information within the custody of the government”).

\textsuperscript{205} See id. (“This function is analogous to a discovery measure, and may be availed of upon the application for the writ.”).

\textsuperscript{206} \textit{Global Legal Action on Climate Change v. Philippines}, G.R. No. 191806 (filed Apr. 21, 2010).
construction of rainwater collectors in every locality. 207 The Supreme Court ordered the
defendant government agencies to comment on the petition, 208 and a settlement was reached. 209

The writ of kalikasan was first issued in West Tower Condominium Corporation v. First
Philippine Industrial Corporation, based on a petition filed by residents citing health and
environmental concerns. 210 The Supreme Court directed the defendant pipeline company to stop
operating its leaking fuel pipeline until ordered otherwise. 211 In Hernandez v. Placer Dome, Inc.,
the Supreme Court issued its second writ of kalikasan pending the resolution of a petition filed
by residents living along a river contaminated with toxic mine tailings. 212

By itself, the writ of kalikasan may be mostly symbolic, since it does not impose
substantial costs on defendants. 213 Still, the symbolism of a “Writ of Nature” is important, 214 and

207 See “Citizens, lawyers sue government to push for rainwater catchment ponds” UP NEWSLETTER, Vol. 32,

Rep. Act 6716, Water Wells, Rainwater Collectors and Spring Development (1989), requires the
Department of Public Works and Highways to construct rainwater collectors and develop springs in every barangay
(similar to a subdivision of a city). Rep. Act 7160, the Local Government Code (1991), extends the requirement to
local governments.

208 Edu Punay, “Supreme Court orders government to answer first kalikasan petition,” THE PHILIPPINE STAR

209 See Global Legal Action on Climate Change, supra, note 206, Manifestation and Motion to Set for Oral
Hearing (Sep. 27, 2011); Rita Linda V. Jimeno “Rainwater collection,” MANILA STANDARD TODAY (July 25, 2011),
(explaining that case led to a Memorandum of Agreement between the Department of Public Works and the
Department of Interior and Local Governments to construct rainwater collection systems in local government units
by the end of 2012).

210 See West Tower Condominium Corporation, supra, note 165 (explaining that the writ was issued
November 19, 2010).

211 Id.

www.chanrobles.com/sresolutions/2011juneresolutions.php?id=189 (explaining that writ was issued March 8,
2011).

213 Telephone Interview with Prof. Harry Roque, University of Philippines College of Law and the Center for
International Law (Feb. 10, 2012) [hereafter “Roque Interview”] (suggesting that the writ of kalikasan is largely
symbolic and does not impose enough costs on defendants to deter their behavior).

214 La Viña Interview (stating that just the name, “writ of kalikasan (nature),” is attractive to plaintiffs).
the writ can allow for quick relief while actions with more significant consequences are pending.215

Another procedure under the Environmental Rules with no equivalent in U.S. law is the writ of continuing mandamus.216 A petition for this writ can be filed by anyone personally aggrieved217 by the government’s neglect of its enforcement duties, or by a violation of a right for which there is no adequate remedy in the ordinary course of law.218 Like the writ of kalikasan, a petition for the writ of continuing mandamus can be filed directly with the court for no fee.219 Unlike the writ of kalikasan, the writ of continuing mandamus can provide for monetary damages resulting from an agency’s “malicious negligence.”220 The court issuing the

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215 Roque Interview (suggesting that TEPO and the writ of continuing mandamus can be more effective than the writ of kalikasan).

216 See Environmental Rule 8.

217 This provision suggests that standing for a continuing mandamus is narrower than that for a writ of kalikasan. See Annotation at 143, explaining the difference between the continuing mandamus and the writ of kalikasan.

218 Environmental Rule 8(1). A continuous mandamus may also arise when a court decides to convert a TEPO to continuing mandamus through its judgment, see Environmental Rule 5(3), or as relief obtained from a writ of kalikasan, see Annotation at 134 (discussing Rule 7(2)). The continuing mandamus can only be directed at a government party, while the writ of kalikasan can be directed at anyone. See Annotation at 143 (explaining the difference between the continuing mandamus and the writ of kalikasan).

219 Environmental Rule 8(1). The writ may be filed with the Regional Trial Court, the Court of Appeals, or the Supreme Court. In contrast, the writ of kalikasan can only be filed with the Court of Appeals or the Supreme Court. See Environmental Rule 7(2-3).

220 Environmental Rule 8(1).
writ can set timetables for the government’s performance of tasks\textsuperscript{221} and require the agency to submit written progress reports.\textsuperscript{222} The writ remains in effect until the judgment is fully satisfied.\textsuperscript{223}

The Environmental Rules rely on the precautionary principle as an actual rule of evidence.\textsuperscript{224} In its rationale accompanying the Rules, the Supreme Court says that adoption of the rule gives environmental plaintiffs a better chance of proving their cases, where the risks of environmental harm may not easily be proven.\textsuperscript{225} It is not yet clear whether this rule shifts the burden of proof, requiring defendants to prove that their activity will not cause environmental damage.\textsuperscript{226}

As of 2012, the only published Supreme Court order to mention the principle is \textit{Tribal Coalition of Mindanao v. Taganito Mining Corporation},\textsuperscript{227} in which plaintiffs sought a writ of

\begin{itemize}
\item \textsuperscript{221} Environmental Rule 8(7), Manila Bay (2011).
\item \textsuperscript{222} Environmental Rules 5(3) and 8(7).
\item \textsuperscript{223} Environmental Rules 1(4)(c) and 8(8).
\item \textsuperscript{224} See Environmental Rule 20 (“…When there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it. …”); Environmental Rule 1(3)(f) \textit{“Precautionary principle} states that when human activities may lead to threats of serious and irreversible damage to the environment that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that threat.” These Rules probably represent the first appearance of the precautionary principle in Philippine law. Garcia Interview.
\item \textsuperscript{225} Rationale at 46.
\item \textsuperscript{226} In the \textit{Annotation}, the Supreme Court states that “the precautionary principle shifts the burden of evidence of harm away from those likely to suffer harm and onto those desiring to change the status quo.” \textit{Id.} at 158 (discussing Rule 20(1), applicability of precautionary principle). But the Supreme Court also states that application of the precautionary principle is limited to cases where there is “truly a doubt in the evidence available.” \textit{Id.} at 159 (discussing Rule 20(2)).
\end{itemize}

In Makati \textit{v. Meralco}, CA-G.R. SP No. 116742-UDK (Jan. 20, 2011), a case that seemed ripe for the application of the precautionary principle, the Court of Appeals did not mention it. The court denied a petition for a writ of \textit{kalikasan}, rejecting assertions and evidence linking power lines to cancer. Assessing an article submitted by plaintiffs, the court stated, “In fine, the studies (given that the sources of the article actually exist) mentioned in this article have not established on a scientific level the causation between EMF and the diseases commonly associated with its exposure.”
kalikasan and TEPO against a nickel mining operation. The Court found that the petition on its face did not contain sufficient allegations and evidence for immediate relief. Still, based on the precautionary principle, the Court gave applicants a chance to re-plead their allegations and submit evidence.  

**VII. Continuing Mandamus in the Manila Bay Case**

A decade before the Environmental Rules were in place, environmentalists sought a writ of mandamus to require government agencies to restore and protect Manila Bay. Plaintiffs, including the Concerned Residents of Manila Bay and Antonio Oposa, alleged that the defendant government agencies had allowed the water quality of Manila Bay to fall far below the standards set by law. They also asserted their constitutional right to a balanced and healthful environment.

Three years later, the trial court issued a decision in favor of plaintiffs, generally directing each government agency to fulfill its duties under the relevant environmental laws. The government agencies appealed.

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228 A writ of kalikasan was later issued, but not a TEPO. Ramos Interview. At least one trial court has relied on the precautionary principle in issuing a TEPO: *Earth Justice v. DENR*, Regional Trial Court, Branch 28, Mandaue City (Aug. 17, 2010), cited in Lauren Ice, “Judge halts coal ash dumping” (March 29, 2011) at http://elawspotlight.wordpress.com/2011/03/29/judge-halts-coal-ash-dumping/ (“Judge Yap said she was practicing the ‘precautionary principle’”) and the Jan. 26, 2012 order in the same case (stating “The court continues to adhere to the ‘precautionary principle’ to avoid or diminish the threat to human life or health, inequity to present or future generations or prejudice to the environment.”).


230 *Id.*


232 *Manila Bay* (2008), citing Sep. 13, 2002 Regional Trial Court opinion.
In 2005, the Court of Appeals denied the government agencies’ appeal, stressing that the trial court’s decision did not require defendants to do tasks outside of their usual, basic functions under existing laws.\textsuperscript{233}

The case then came before the Supreme Court, and on December 18, 2008, Justice Velasco issued an opinion in which all justices concurred.\textsuperscript{234} The opinion explained the applicability of a writ of mandamus, differentiating between the government agencies’ obligation to perform their duties as defined by law and the manner in which they choose to carry out these duties.\textsuperscript{235} While the implementation of cleanup duties could entail discretion, “the very act of doing what the law exacts to be done is ministerial in nature and may be compelled by mandamus.”\textsuperscript{236} In other words, the agency charged with executing the Ecological Solid Waste Management Act\textsuperscript{237} could choose where to set up landfills, but not whether to set them up.\textsuperscript{238}

The December 18, 2008 order was essentially a continuing mandamus,\textsuperscript{239} directing DENR to implement a specific plan for the rehabilitation, restoration, and conservation of the Manila Bay at the earliest possible time. Ten other agencies received similarly ambitious marching orders. Local government units were required “to inspect all factories, commercial establishments, and private homes along the banks of the major river systems in their respective areas of jurisdiction” to determine whether they had compliant wastewater treatment systems.

\textsuperscript{233} Manila Bay (2008), citing Court of Appeals opinion, CA-G.R. CV No. 76528, CA-G.R. SP No. 74944 (Sep. 28, 2005).
\textsuperscript{234} Manila Bay (2008).
\textsuperscript{235} Id.
\textsuperscript{236} Id.
\textsuperscript{238} Id.
\textsuperscript{239} The Court used the term “continuing mandamus” even though it did not yet exist in Philippine law, referencing the Indian Supreme Court. Id. (“Under what other judicial discipline describes as ‘continuing mandamus,’ the Court may, under extraordinary circumstances, issue directives with the end in view of ensuring that its decision would not be set to naught by administrative inaction or indifference.”).
All informal settlements and structures along the bay and riverbanks were to be demolished. The Department of Education would have to “inculcate in the minds and hearts of the people through education the importance of preserving and protecting the environment.”

All defendant-agencies were ordered to submit quarterly progress reports to the Manila Bay Advisory Committee, created to monitor the execution phase of the judgment. This committee was comprised of Justice Velasco as well as the court administrator and technical experts.

On February 15, 2011, Justice Velasco issued a new order in the same case, setting specific deadlines for each agency’s tasks. But this time, not everyone on the Court agreed. Justice Carpio, joined by two other justices, wrote a dissenting opinion, as did Justice Sereno.

Justice Carpio argued that the justices were improperly assuming non-judicial administrative functions. Justice Sereno cited cases regarding the separation of powers.

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240 Specifically, the Court ordered “Defendant DPWH [Department of Public Works and Highways], to remove and demolish structures and other nuisances that obstruct the free flow of waters to the bay.” Id.

241 Id.

242 Id.


244 Manila Bay (2011). The order was issued based on the recommendation of the Manila Bay Advisory Committee rather than on the basis of a motion. Id.

245 The February 15, 2011 resolution, like the December 18, 2009 decision, was issued by the Court sitting en banc.

246 Manila Bay (2011) (Dissent, Caprio, J.), citing CONST. (1987) Art. VIII §12 (“The members of the Supreme Court and of other courts established by law shall not be designated to any agency performing quasi-judicial or administrative functions.”); Noblejas v. Teehankee, 131 Phil. 931 (1968) (Court cannot be required to exercise administrative functions such as supervision over executive officials); In Re: Designation of Judge Manzano as Member of the Ilocos Norte Provincial Committee on Justice, 248 Phil. 487 (1988) (invalidating the designation of a judge as a member of a committee tasked to receive complaints and to make recommendations for the speedy disposition of detainee cases); Manila Electric Co. v. Pasay Transportation Co., 57 Phil 600 (1932) (prohibiting court from sitting as a board of arbitrators).

247 Justice Sereno was not on the Court at the time of the December 18, 2008 decision.

and suggested that the Court was improperly using *mandamus* to compel discretionary actions.\(^\text{249}\) She argued that the Philippine Constitution did not authorize the Courts to "monitor" the execution of its decisions,\(^\text{250}\) and that Congress (rather than the Court) had the power to monitor and ensure that its laws were enforced.\(^\text{251}\) She also pointed out problems the Indian judiciary faced in “tak[ing] on the role of running the government in environmental cases.”\(^\text{252}\) Justice Sereno’s opinion concludes, “While the remedy of ‘continuing mandamus’ has evolved out of a Third World jurisdiction similar to ours, we cannot overstep the boundaries laid down by the rule of law.”

The dissent’s criticism is reminiscent of Justice Feliciano’s warning in his concurring opinion to *Minors Oposa v. Factoran.*\(^\text{253}\) Observing that the Court lacked technical competence and experience in the area of environmental protection and management, he suggested that “where no specific, operable norms and standards are shown to exist, then the legislature must be given a real and effective opportunity to fashion … them, before the courts may intervene.”\(^\text{254}\)

Justice Velasco responded to the dissent’s criticism in his opinion, stating that the progress report requirement was an exercise of judicial power under Art. VIII of the

\(^{249}\) *Manila Bay* (2011) (Dissent, Sereno, J.), citing *Sps. Abaga v. Sps. Panes*, G.R. No. 147044, 531 SCRA 56 (Aug. 24 2007) (*mandamus* lies ``(1) when any tribunal, corporation, board, officer or person *unlawfully neglects the performance of an act which the law specifically enjoins* as a duty resulting from an office, trust, or station; or (2) when any tribunal, corporation, board, officer or person unlawfully excludes another from the use and enjoyment of a right or office to which the other is entitled” (*emphasis in original*); *Alvarez v. PICOP Resources*, G.R. No. 162243, 508 SCRA 498 (Nov. 29, 2006), (“remedy of mandamus lies only to compel an officer to perform a *ministerial* duty, not a discretionary one”).

\(^{250}\) *Manila Bay* (2011) (Dissent, Sereno, J.), citing *Tolentino v. Secretary of Finance*, G.R. No. 115525, 435 SCRA 630 (Aug. 25, 1994) (case and controversy requirement means that judges “render judgment according to law, not according to what may appear to be the opinion of the day”).


\(^{253}\) *Oposa, supra* note 77 (Feliciano, J., concurring).

\(^{254}\) *Id.*
Constitution, “because the execution of the Decision is but an integral part of the adjudicative function of the Court.”

He pointed out that none of the agencies ever questioned the power of the Court to implement the December 18, 2008 Decision. He also noted that the Environmental Rules specifically gave courts the authority to require progress reports.

Still, Justice Velasco acknowledged some of the obstacles to the execution of the December 18, 2008 order. As was the case with *M.C. Mehta v Union of India*, the Court was overloaded with quasi-administrative responsibilities. Voluminous quarterly progress reports were being submitted, and reporting was not taking place in a uniform manner. A national election took place in 2010, changing leadership in the agencies subject to the continuing mandamus. And “some agencies … encountered difficulties in complying with the Court's directives.”

These were not the only issues raised by the case. Another is the unanticipated impact of the 2008 ruling on poor slum-dwellers in the Manila Bay area, not unlike that on Delhi slum-

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255 *Manila Bay* (2011). Justice Velasco expounded on the separation of powers issue in an article he authored for the Oregon Law Review, stating that “separation of powers between the three branches is not absolute. … The same concerns that led the framers of the U.S. Constitution to delegate specific powers to separate branches of government also led them to incorporate internal balancing mechanisms so that powers cannot be abused.” Presbitero J. Velasco, Jr., *Manila Bay: A Daunting Challenge in Environmental Rehabilitation and Protection*, 11 OR. REV. INT'L L. 441, 450 (2009). He noted that the Philippine Constitution goes beyond the U.S. Constitution by specifically providing for judicial review of legislative and executive actions. *Id.* at 450n28, citing CONST. (1987), Art. VIII, § 1 (Phil.).


257 Environmental Rule 8(7-8).


259 Initiated by Writ Petition Number 13029 of 1985.


261 *Id.*

262 *Id.*
dwellers resulting from the Indian Supreme Court’s decisions on solid waste. In 2009, groups of fisherman sought to intervene in the already decided case, asserting that DENR was destroying their fishing facilities under the guise of following the 2008 order. In reality, the fishermen argued, the demolition was clearing the path for a highway project and the development of a billion-dollar casino. They warned the Court that 26,000 fishermen and urban poor families stood to lose their home and livelihood.

The Court found that the groups were not entitled to intervene in the case. But it clarified the vague requirement in the 2008 order regarding removal of structures along the bay, explaining that the structures to be removed were those illegally situated within three meters of water bodies. It also emphasized that any evictions had to conform to the Philippines’ protective squatter law.

It is not clear how much can be accomplished if the executive agencies do not take ownership of the cleanup, such that it remains a court-supervised endeavor. The Court is not equipped to handle all the executive and legislative work needed to address the country’s

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263 Almitra Patel v Union of India, Writ Petition Number 888 of 1996.
265 Id.
266 Id.
267 Id.

The order did not settle the controversy regarding the removal of structures from around the bay. In May 2011, local fishermen and non-profit groups submitted a letter to the Court complaining that the bay cleanup was really targeted at removing slum-dwelling communities from around the bay in order to make way for corporate interests. See “Manila Bay cleanup ruling stirs unrest,” MANILA STANDARD, 2011 WLNR 9874445 (May 17, 2011); Jerome Aning, “Spare us from cleanup, Manila Bay squatters urge high court,” PHILIPPINE DAILY INQUIRER 11, 2011 WLNR 6384571 (Apr. 2, 2011). It is not clear how this was addressed.
environmental problems. Still, the Court continues to take on a role akin to that of executive officials in the *Manila Bay* case—court justices have personally conducted site inspections.\(^{270}\) Meanwhile, Attorney Oposa has filed motions alleging that the agencies have failed to comply with both the 2008 and 2011 court orders.\(^{271}\) Interestingly, the head of DENR has expressed support for the court-mandated timelines, publicly stating that they “will hopefully lead to the bay’s rehabilitation at the soonest possible time.”\(^{272}\)

The cleanup has limped forward. In August 2011, the government embarked on a month-long cleanup of the tributaries leading to Manila Bay, which have been clogged with garbage.\(^{273}\) Enough garbage to fill three Olympic-sized pools was removed.\(^{274}\) DENR announced in February 2012 that it was considering banning plastic from the Metropolitan Manila Area, to reduce the amount of plastic that ends up in the bay.\(^{275}\)

The Court’s active role in the *Manila Bay* case is interesting when compared to its 2006 decision in *Henares v. Land Transportation Franchising and Regulatory Board*.\(^{276}\) As discussed

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\(^{274}\) Tina G. Santos, “45 esteros yield huge garbage pile,” PHILIPPINE DAILY INQUIRER 25, 2011 WLNR 17969834 (Sep. 11, 2011).


\(^{276}\) *Henares*, \textit{supra}, note 171.
above, the environmental plaintiffs in that case sought a mandamus to compel federal agencies to require public buses to use compressed natural gas. Plaintiffs asserted a right to clean air based on the Clean Air Act and their constitutional right to a balanced and healthful ecology, and pointed to an executive order calling for increased compressed natural gas usage. While plaintiffs may have hoped for a sweeping mandamus, à la the Indian Supreme Court in the Delhi vehicular pollution case, they did not get one. The Court agreed that the defendant agencies were responsible for controlling air emissions, but found that there was no law that requiring the use of compressed natural gas in public vehicles. Thus, the Court could not compel agencies to impose this requirement through mandamus. The Court added that mandamus generally could not be used to require the legislative or executive branch to take discretionary action. The Court urged Congress to address the air quality problem by statute.

This showed far more restraint than the Manila Bay order would two years later, when the Court would order agencies to demolish all informal settlements along the bay and to “inculcate in the minds and hearts of the people … the importance of preserving and protecting the environment.”

The reasons for the difference are not entirely clear. Justice Velasco participated in both decisions, although the Henares decision was issued by a five-member panel of judges, and

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277 See Rep. Act 8749, Clean Air Act (1999) § 4 (“Recognition of Rights. … the following rights of citizens are hereby sought to be recognized and the State shall seek to guarantee their enjoyment: [a] The right to breathe clean air; …”)


279 Initiated by Writ Petition Number 13029 of 1985.

280 Henares, supra, note 171 (noting that neither the constitutional right to a clean environment, the Clean Air Act, nor any other act required compressed natural gas usage, and that an executive order encouraging the use of this fuel did not require executive agencies to order usage).

281 Id.

282 Id.

283 Id.

284 Id.
Justice Corona was not yet on the Court. Perhaps the *Henares* case lacked the star power of Antonio Oposa. Or perhaps the *Henares* case dealt with a single, concrete issue, which the Court thought Congress should address. Manila Bay, on the other hand, concerned a quagmire of laws and agencies, with no clear road map for legislative or executive action. Justice Velasco hints at this last point in his Oregon Law Review article defending the 2008 Manila Bay decision. There, he argues that because of the jurisdictional overlap and disorganized bureaucracy among agencies charged with maintaining Manila Bay, no action would have been taken without the Court’s specific task assignments.285

**VIII. Prospects for Environmental Rule of Law in Philippines**

A quarter-century after the enactment of a constitutional provision guaranteeing the right to a healthful and balanced ecology, there are many environmental laws in place, but not the environmental rule of law.286

While the first prong of my definition of environmental rule of law (requiring a system of laws to be in place) may have been met, there is room for progress on the other two. At least prior to the 2010 Environmental Rules, Supreme Court decisions on similar issues have been inconsistent. There is no way to measure the consistency of other courts’ decisions, since they are not published. This suggests that environmental laws have not been applied consistently over time and across the jurisdiction.

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Adequate enforcement action, the third prong, is also lacking. Philippine newspapers are replete with headlines of non-compliance by both the private sector and government officials. Lack of administrative as well as judicial capacity is clearly an obstacle to carrying out environmental laws. If the best-equipped court in the land has had difficulty managing the sea of reports generated from the continuing mandamus in the Manila Bay case, one can only imagine how difficult this would be for a provincial trial court.

Corruption is another obstacle to adequate enforcement action, despite a plethora of anti-graft laws, a special court that considers nothing but government corruption cases (the

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287 See Sheila Crisostomo, “Poor law enforcement, graft worsen air pollution in Metro, THE PHILIPPINE STAR) (Mar. 1, 2012) available at http://www.philstar.com/Article.aspx?articleId=782545&publicationSubCategoryId=63 (“Doctors see poor law enforcement and graft as the cause of the worsening air pollution in Metro Manila.”); Nash B. Maulana and Edwin O. Fernandez, “More heads to roll on ARMM logging,” PHILIPPINE DAILY INQUIRER (Dec. 27th, 2011) available at http://newsinfo.inquirer.net/118251/more-heads-to-roll-on-armm-logging (describing the inability of the head of a local environment and natural resources office to explain why logging persists in the province despite a logging ban); “DENR taps website to boost LGU compliance with environmental laws” INTERAKSYON (Dec. 26, 2011) at http://interaksyon.com/article/20434/denr-taps-website-to-boost-lgu-compliance-with-environmental-laws (DENR reports that only 36% of local government units were complying with the Solid Waste Management Law); Redempto D. Anda, “Court issues order for arrest, bars travel of ex-Palawan gov,” PHILIPPINE DAILY INQUIRER 15, 2011 WLNR 17365421 (Sep. 2, 2011) (arrest of former province governor for violation of mining laws); Marlon Ramos and Juan Escandor Jr., “DOJ decision in Palawan murder case slammed,” PHILIPPINE DAILY INQUIRER 1, 2011 WLNR 11942033 (June 16, 2011) (Department of Justice dismissed criminal charges against former provincial governor and five others tagged in the killing of a Palawan broadcaster and environmentalist; the ruling that came out a day after another media person was murdered); TJ Burgonio, “Senate to probe state of dumps,” PHILIPPINE DAILY INQUIRER 9, 2012 WLNR 3571769 (Feb. 19, 2012) (more than 1,000 local government units are operating open and controlled trash dumps); Melvin Gascon, “Cagayan groups protest inaction on mine abuses,” PHILIPPINE DAILY INQUIRER 10, 2011 WLNR 23163937 (Nov. 10, 2011) (environmental groups criticize government failure to stop the operations of international mining companies, which they accuse of blatantly violating environment laws); Alcuin Papa, “Global warming blamed for wet summer,” PHILIPPINE DAILY INQUIRER 1, 2009 WLNR 7539580 (Apr. 23, 2009) (state regulator failed to put up wastewater and sewage treatment plants as required by Clean Water Act); Nelson F. Flores, “Ombudsman to Go After Officials Abetting Dumps,” PHILIPPINE DAILY INQUIRER 7, 2005 WLNR 8536987 (May 30, 2005) (government officials failing to close illegal dumpsites).

288 See note 189, supra, (re lack of case management automation).

289 Judicial Reform Activities in the Philippines Project, USAID, at http://philippines.usaid.gov/programs/democracy-governance/judicial-reform-activities-philippines-project (last updated Feb. 2012) (“Weak rule of law is a central [democratic governance] challenge in the Philippines … Whether the issue is about common crime … or environmental degradation, impunity is the common thread which allows perpetrators (particularly those with resources and connections) to routinely get away with crimes.”)

Sandiganbayan), and an Ombudsman and Special Prosecutors to handle these cases. Anti-corruption campaigns were particularly challenged by the impeachment of the Ombudsman in 2011. The same year, President Aquino’s advisor on environmental protection went on trial for graft, and Chief Justice Corona was impeached.

Improving the environmental situation in the Philippines will require not only the work of environmental litigants and attorneys, but also reform targeting the pervasive corruption and lack of administrative competence. The judiciary can contribute to the rule of law by acting as an independent branch, deferring to DENR when legally required to do so, and rendering consistent decisions when it has jurisdiction. Publication of significant decisions in a database that is easily accessible to courts and practitioners could increase the likelihood of consistent decisions. The Supreme Court, which has substantially more knowledge of environmental law and Environmental Rules than other courts, can further contribute to the environmental rule of law by ensuring that all courts hearing environmental cases are properly trained—including the Court of Appeals.

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291 This Court was created by the 1973 Constitution (Art. XIII, §5) and retained by the 1987 Constitution (Art. IX, §4).
292 CONST. (1987), Art. IX, §§5-7 (referring to the Offices of the Ombudsman and Special Prosecutor.
295 La Viña Interview (suggesting that Supreme Court has a good record of deciding environmental cases, although many cases don’t get to the Court; lower courts have a more spotty history).
296 The Court of Appeals hears appeals from the environmental courts and shares original jurisdiction with the Supreme Court on some proceedings under the Environmental Rules. E.g., Environmental Rule 7(3) (writ of kalikasan), Rule 8(2) (continuing mandamus). Also, the Supreme Court may assign its cases to the Court of Appeals, as in the case of Tribal Coalition of Mindanao v. Taganito Mining Corporation, supra note 228. Ramos Interview (explaining that the case was assigned to the Court of Appeals in Cagayan de Oro, where the justice openly admitted that he has no knowledge of environmental law); Palmones v. DENR, cited in Philip C. Tubeza, “SC issues writ vs Taal fish cages,” PHILIPPINE DAILY INQUIRER 16 2012 WLNR 3115259 (Feb. 8, 2012) (Supreme Court referred case to the Court of Appeals). Further training for the Court of Appeals is needed. Ramos Interview;
There are few published decisions referencing the Environmental Rules, and it is probably too early to assess their impact on environmental cases. But some practitioners have expressed optimism, noting that environmental litigants are now better able to obtain information and timely injunctive relief. Also, it may now be possible to bypass drawn-out administrative adjudications, such as those conducted by the Pollution Adjudication Board to determine the existence of pollution. Knowledge of the rules is key. Where judges and litigants understand the Environmental Rules, cases have been resolved more quickly—often in favor of the environmental litigants.

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297 | Garcia Interview, Perez Interview, La Viña Interview.
298 | Ramos Interview (“Changes are visible.”); Perez Interview (noting cases filed, training ongoing); La Viña Interview (stating that after the Environmental Rules went into place, there was spike of environmental cases, particularly those seeking the writ of kalikasan). In contrast, Attorney Harry Roque suggests that the best way to get justice is not in Philippine courts, but to sue defendants in the United States when there is jurisdiction. Roque Interview.
299 | Ramos Interview (indicating that government officials seem more willing to provide requested documents since the enactment of the Environmental Rules).
300 | La Viña Interview and Roque Interview (describing utility of TEPO).
301 | See Mead v. Argel, supra note 150 (cases concerning pollution must go through the Pollution Adjudication Board (PAB) before going to the courts); Technology Developers, Inc. v. Court of Appeals, supra note 143 (nuisance cases may be exempt from going before PAB); Garcia Interview (Environmental Rules may change court precedent, allowing one who meets the requisites for a writ of kalikasan or TEPO to go straight to court, bypassing PAB).
302 | Ramos Interview (judges and lawyers alike lack training and knowledge of the Environmental Rules; cases like Filinvest Land v. Taro (see note 304, infra) suggest that environmental lawyers need to know the rules by heart); Perez Interview (noting a big difference in terms of case resolution when the Environmental Rules are used appropriately; cases are solved much more quickly than before).

Supreme Court cases in which environmental litigants obtained relief under the Environmental Rules include West Tower Condominium Corp., supra note 165 (Supreme Court issued TEPO and writ of kalikasan requiring defendant to cease operations on two pipelines); Hernandez v. Placer Dome, Inc., supra note 212 (Supreme Court issued writ of kalikasan pending the resolution of a petition filed against a mining company); Boracay Foundation v. Province of Aklan, G.R. No. 196870 (June 9, 2011) (Supreme Court issued TEPO and writ of kalikasan where plaintiffs argued that defendants failed to perform a full environmental impact assessment and undergo the necessary public consultation before beginning a reclamation project to renovate and expand a port); Palmones v. DENR, supra note 296 (writ of kalikasan issued to stop new clearances for fish cages in Taal Lake); Cosalan v. Baguio, issued Jan. 17, 2012, cited in Aubrey E. Barrameda and AFP, “High court orders dump site closure,” BUSINESSWORLD, 2012 WLNR 2001333 (Jan. 30, 2012) (issuing writ of kalikasan and TEPO against city regarding its illegal dump); Philippine Earth Justice Center v. DENR, G.R. 197754 (Aug. 16, 2011), cited in
It may also be too early to tell whether courts will liberally construe the Environmental Rules to ensure access to justice, as they have for other procedural rules. In *Filinvest Land v. Taro*, the Court denied a petition for a standard preliminary injunction against landfill construction that was allegedly endangering the health and safety of nearby residents, noting that plaintiffs should have brought the proper action under the Environmental Rules. On the other hand, in *Cosalan v. Baguio*, the Court liberally construed the requirement for the writ of *kalikasan* that damage must affect “inhabitants in two or more cities or provinces.”


In August 2010, a trial court in Cebu issued what was perhaps the second TEPO ever in *Philippine Earth Justice v. SPC Power Corp*, Regional Trial Court, Branch 28, Mandaue City (Aug. 17, 2010); see “Issuance of TEPO a ‘partial victory’ for environmental groups,” SUNSTAR CEBU (Aug. 24, 2010) available at www.sunstar.com.ph/cebu/issue-tepo-partial-victory-environmental-groups; “Environmentalists, power firms explore conditions on coal ash dumping,” SUNSTAR CEBU (Jan. 11, 2012) available at www.sunstar.com.ph/cebu/local-news/2012/01/11/environmentalists-power-firms-explore-conditions-coal-ash-dumping-199980. In that case, three environmental groups sought to compel six government offices and three electric companies to stop improper coal ash disposal. *Id.* In March 2011, TEPO was extended indefinitely, and the companies were ordered to dump coal ash only in court-designated areas. *Id.* As of January 2012, it appears that parties may settle the case by agreeing on locations where the coal ash can be dumped. *Id.*

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304 G.R. No. 194246 (Dec. 01, 2010) available at www.chanrobles.com/sresolutions/2010december resolutions.php?id=356. The trial court in this case declined to grant the requested injunction, and petitioners sought a writ of *certiorari* from the Supreme Court on the issue of the preliminary injunction. The Court denied the petition, noting that it frowned upon interlocutory appeals, and that petitioners had not filed the case using the Environmental Rules. The Court was apparently unwilling to convert the petition for a writ of *certiorari* into one for a TEPO, writ of *kalikasan*, or writ of continuing *mandamus*, even if all of the elements of these actions were present.


306 Environmental Rule 7.
granted the writ to plaintiffs even though they resided in one city and one province, as opposed to two cities or two provinces.  

Perhaps the greatest contribution the Supreme Court, its Environmental Rules, and litigants have made to the environmental rule law is raising awareness that environmental law exists. Before *Minors Oposa v. Factoran*, it is doubtful that anyone considered the constitutional right to a balanced and healthful ecology. Even though the case did not result in the suspension of any timber licenses, it became seminal in Philippine and international environmental law.

At least prior to Chief Justice Corona’s impeachment, the Court has had the stature to raise public awareness more so than other institutions, and it has seen itself as the protector of environmental rights.

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307 La Viña Interview (describing the case and the petition, which he helped draft).

308 Neither the Supreme Court nor the trial court ever mandated DENR to take any action regarding the timber licenses in question. See Dante B. Gatmaytan, *The Illusion of Intergenerational Equity: Oposa v. Factoran as Pyrrhic Victory*, 15 GEO. INT’L ENVTL. L. REV. 457, 471. After the Supreme Court remanded the case to the trial court, plaintiffs did not pursue it. That said, prior to the case, DENR had already stopped issuing new timber licenses, and there was a logging ban in place to protect old-growth forests. See Ma. Socorro Manguiat and Vicente Paolo Yu, *Maximizing the Value of Oposa v. Factoran*, 15 GEO. INT’L ENVTL. L. REV. 487, 489 (2003). While Oposa himself did not see the case as having much practical effect, he continued bringing environmental cases. See Antonio A. Oposa, Jr., *Intergenerational Responsibility in the Philippine Context as a Judicial Argument for Public Action on Deforestation*, paper presented at Fourth International Conference on Environmental Compliance and Enforcement, Int’l Network on Envtl. Compliance and Enforcement, Chiang Mai, Thailand (Apr. 1996), available at www.inece.org/4thvol1/oposa2.pdf (suggesting that the case “merely stoke[d] the fire of concern over our vanishing forest resources” and that “environmental controversies and issues are not resolved by legal action and in the legal forum”).


310 See Randy David, “The Writ of Kalikasan and judicial activism,” PHILIPPINE DAILY INQUIRER 14, 2010 WLNR 23169022 (Nov. 21, 2010) (suggesting that the public and the Court view the Court as protecting constitutional rights more so than the executive and legislative branches, but noting that the judiciary cannot remedy the inadequacies of the administrative and legislative branches by assuming their functions). Public trust has presumably weakened with the negative press from the 2012 impeachment trial of Chief Justice Corona.

311 In his speech delivered at the 2011 Asian Judges Symposium on Environmental Adjudication, Chief Justice Corona highlighted the role of the judiciary in enforcing environmental laws: “As protectors of the Constitution, the Supreme Court of the Philippines has considered environmental protection as a sacred duty, not only because the people have a right to it but more importantly, because future generations deserve it.” Rey G. Panaligan, “SC: Chief
If the Court can continue to foster environmental law and judicial independence, it can help close the gap between the Philippines’ well-meaning environmental laws and the effective, even-handed implementation of these laws. But the Court cannot do this alone, and its perceived assumption of non-judicial powers could undermine the environmental rule of law. If the other branches are not compelled or shamed into action, then the environmental rule of law will remain a problem for the Philippines.