THE FUTURE, AND ENVIRONMENTAL LAW AND GOVERNANCE --- WHAT'S NEXT?

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Good afternoon, honorable Justices and Judges, colleagues from the profession and academe, students, ladies and gentlemen. It is an honor to stand before you today and share with you my thoughts and experiences, both good and bad, on the state of environmental law and governance in the country.

Before I go any further, I would like to acknowledge the contribution of Attys. James Kho, Josef Leroi Garcia, Alaya de Leon, Arvin Jo, Justine Nicole Torres, Pauline Agatha Caspellan and Cecilia Therese Guiao, as well as Margarita Roxas and Elirozz Carlie Labaria, to this lecture, which came in the form of ideas, research and shared passion and commitment. I am, of course, solely responsible for this lecture, and any mistakes are my own.

Thanks to La Salle – congrats for the basketball victory. Now that I teach here, as well as Ateneo and being a UP Law alumnus, I am in a very comfortable pave in the UAAP where I have options to cheer from. Thankks of course to Dean Chel Diokno for hosting this and for agreeing to develop an environmental law track in the JD program and for positioning the DLSU college of law to take a good place among the best law schools in the land.

At the Metrobank Foundation Professorial Chair Lecture in 2008, I spoke of the *Future of Environmental Law and Governance*. I identified challenges posed by environmental issues to the Philippines, and proposed a number of practical approaches to address them, through the use of legal and governance tools. Since then, there have been many developments in the field of environmental law and policy, among them the issuance of the Rules of Procedure on Environmental Cases. Because of this, I have decided to call my lecture today *The Future* and *Environmental Law and Governance – What's Next?*

Taking a page from Pope Francis' book, I would like to say that today I have only three things to talk about – failure, progress, and future. Failure – I will make the case that our environmental legal and governance system has not met expectations. Progress – I will discuss how the environmental rule of procedure enacted by the Supreme Court has definitely increase access to environmental justice. Future – I will propose judicial, executive, and legislative actions that will help us leap-frog environmental challenges, catch up instead of clean up, and overtake the curve of environmental destruction.

Part I:
Failure

As previously mentioned, there have been many developments in the field of environmental law and policy. President Marcos began this by requiring the conduct of environmental impact assessments, creating the Pollution Adjudication Board and issuing various decrees on marine pollution. In the early 1990's, after democracy was restored,

Congress enacted the National Integrated Protected Areas System Act, the Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990, and the Strategic Environmental Plan for Palawan Act, which completely stopped logging in Palawan.

The late 1990's to the early 2000's saw another wave of world class legislation, such as the Clean Air Act, Clean Water Act, Wildlife Resources Conservation and Protection Act, Indigenous Peoples Rights Act and Solid Waste Management Act. In the last four years there was the Climate Change Act and Disaster Risk Reduction and Management Act, and just last year, the People's Survival Fund Law was enacted, amending the Climate Change Act. These are all excellent laws.

Can we now live happily ever after?

Unfortunately, there have also been many steps back; so much so that I wonder if we have, in certain areas, made a complete U-turn and are going down a road we had already passed through before, and should already have learned from. We know very well that good, even great, laws are one thing, but their implementation is another thing entirely, and failure in implementation can reduce good law into nothing but mere words.

Indigenous Peoples' Rights

Let us take, for example, the Indigenous Peoples Rights Act of 1997 ("IPRA"). The IPRA is one of the most progressive laws on Indigenous Peoples' rights in the world. This law was the first of its kind in Southeast Asia, even pre-dating the adoption of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") by almost ten years. However, many of its provisions remain unrealized. In particular, the exercise of the right to Free, Prior and Informed Consent ("FPIC") has been plagued with numerous difficulties and anomalies.

For example, in 2011, mining company MacroAsia Philippines reported that they had secured the necessary endorsement from the Indigenous Peoples communities for its nickel-processing project in Brooke's Point, Palawan. Indigenous Peoples in the area however contested the processes used to secure this approval, saying that "fake tribal leaders" who were not from the affected Ancestral Domain were consulted to facilitate approval of the mining project. But other Indigenous Peoples groups manifested their strong support for the project, and questioned the delay in the issuance of the Certificate Precondition.

Later, I will make the case why recognition of indigenous peoples and community rights to land and natural resources are enabling conditions for good and effective environmental law and governance.

Logging and Mining

Another area of concern is that of forests and mining. Since assuming office in 2010, President Benigno Aquino III has issued executive orders ("EOs") that address critical environmental concerns around two (2) of our country's biggest industries: EO 23 or the "logging ban," issued on 1 February 2011, and EO 79 or the "mining EO," issued on 6 July 2012. I welcome and congratulate the President on taking definitive action on issues which,

despite the clamor from various groups and actors for drastic reforms in these sectors, were left unresolved for years.

However I would argue that ultimately the EOs have come too late in the day. In the most practical terms, they respond to problems that have become extremely difficult to contain, whose consequences have become so complex and deep-rooted that what we are now engaged in is largely damage control. And even then, even over a significant amount of time, the harmful practices and structures associated with the logging and mining industries persist. Illegal logging remains an elusive – and often violent – threat, although efforts to combat it have been considerably ramped up. The same is true for mining, where not only illegal activities are causing major problems but also the unchecked environmental impacts of even legal activities.

We are, in fact, solving problems of past decades, when logging and mining concessions were wantonly issued and illegal activities were unchecked, up to the point where their impacts are no longer reversible, and the "inertia" of which continues to result in massive and often unpredictable damage to this day.

Air Pollution

The Clean Air Act was enacted in 1999, after years of public outcry for better air quality and breathable air, especially in the cities and urban localities.

More than a decade since the implementation of the Clean Air Act, however, a retired medical doctor now complains, by written affidavit, that she is experiencing a "slow death penalty" caused by breathing in toxic air in a place of communal residence and religious retreat. This retired doctor, together with about thirty (30) other members of a lay religious organization, live in a 20-hectare compound in Angat, Bulacan. I have personally been to their compound. The area is surrounded by rolling hills, green spaces, trees, and lush vegetation; certainly not the kind of place where we would imagine such toxic air quality.

In 2009, a facility for the extraction of oil from the thermal degradation of scrap rubber tires, or what they call "tire pyrolysis," was established in the area. Since then, residents in the area would rather not breath in the air, which has become contaminated by the smoke and soot coming from the facility. Throat irritation, chest congestion, excessive phlegm formation and even death, as in two particular cases of aggravated pneumonia, are alleged to have occurred due to the inhalation of contaminated air.

The so-called "tire pyrolysis" facility in Angat, Bulacan, where wood-fed fire heats a furnace containing the scrap tires, cannot be characterized as an industrial process. It is closer in concept to that of a backyard operation, and it is nonsensical to even think that the facility is compliant with the sophisticated standards under the Clean Air Act. What is shocking is that from the years 2009 to 2012, these sub-standard tire pyrolysis facilities numbered about fifteen (15) as per the DENR Region III Office, and were scattered all over the towns of Norzagaray, Angat, Guguinto and several more areas in Region III. Obviously, the spread of these facilities and its mockery of the Clean Air Act went unnoticed as the law had in mind mainly the emissions from automobiles and emissions from bona fide industrial facilities.

What is even more shocking in the Angat case is that we actually were able to secure a Cease and Desist Order (CDO) against the plant and have its ECC cancelled but still it remains open and government has been inutile in enforcing its own orders. We are now contemplating whether judicial options are feasible and desirable in this case.

Manila Bay

Interestingly, Angat forms part of the larger Manila Bay area. As we try to clean up Manila Bay, and we are faced by the further possibility of toxic wastes from the tire pyrolysis activities in Angat seeping towards the waters of Manila Bay.

Let us remind ourselves of the mandatory clean-up of the Bay and how this endeavour all started out. The Supreme Court promulgated the landmark case of ***MMDA vs. Concerned Residents of Manila Bay*** in 2008, where various government agencies were ordered by the Court under a continuing mandamus "to clean up, rehabilitate, and preserve Manila Bay, and restore and maintain its waters to SB level…to make them fit for swimming, skin-diving, and other forms of contact recreation." Three years after, the Supreme Court issued a resolution reiterating that "the Court exercises continuing jurisdiction over [the government agencies involved] until full execution of the judgment."

Here we are five years after the landmark MMDA decision, and the water quality of Manila Bay still hasn't reached recreational quality levels. The clean-up is far from done, and I say this even as I was part, until recently, of the Manila Bay Advisory Committee. I think the Supreme Court is faced in this case with a very serious possibility of a case remaining with it permanently without hope of final resolution. Later, I will propose a potential way out for the Supreme Court as it decides its next steps on this case.

Let me go now to climate change, which is perhaps the most over-arching environmental problem we are currently facing.

Climate Change and Disaster Risk Reduction

Our country's climate change and disaster risk reduction laws have received high praise; just last year United Nations special envoy Margareta Wahlström, UN Secretary General Ban Ki-moon's special DRR representative, referred to our Climate Change Act and Disaster Risk Management Act as "the best in the world."

In the World Bank's recently released Philippine Climate Public Expenditure and Institutional Review, or CPEIR, however, a number of gaps in the country's climate change policy and agenda were identified. These gaps include the only partial alignment of government development plans with the National Climate Change Action Plan, or NCCAP; an increase in government financing of climate action, but with few large scale PAPs taking priority; funding issues in relation to action-oriented LGUs, as sources of funding tend to be fragmented and limited; the fact that while our climate appropriations are focused on adaptation, funding for mitigation is rising faster; and the complexity of tools for planning and prioritization.

The 2012 World Risk Index ranked the Philippines as the third highest disaster risk hotspot in the world, after Vanuatu and Tonga, thanks to a combination of its high exposure

to natural hazards, climate change and a highly vulnerable society. This is reflected in the results of a recent SWS survey, which showed that 8 out of 10 people in the Philippines have already personally experienced the impacts of climate change.

A recent study projects that even if we were able to decrease and subsequently stabilize our greenhouse gas emissions globally, the climate would exceed the bounds of historical variability by 2069. If we continue on the path we are currently on without any effort to reduce our emissions, the tipping point is projected to arrive in 2047, a mere thirty-five years from now. Meanwhile, all the effects we are feeling now would only worsen, and as the study stated, "the tropics will experience the earliest emergence of historically unprecedented climates... because the relatively small natural climate variability in this region of the world generates narrow climate bounds that can be easily surpassed by relatively small climate changes."

Climate has far-reaching – and oftentimes understated – effects on human, plant and animal life. It affects "human welfare, through changes in the supply of food and water; human health, through wider spread of infectious vector-borne diseases, through heat stress and through mental illness; the economy, through changes in goods and services; and national security as a result of population shifts, heightened competition for natural resources, violent conflict and geopolitical instability."

It is apparent, therefore, that we cannot afford much delay in the implementation of laws and measures to deal with and adapt to climate change. And while, as a developing country, the priority of the Philippines is to adapt, we must not forget that mitigation, or limiting the emission of greenhouse gases into the atmosphere, must also be taken into account. In fact, our National Framework Strategy on Climate Change states that while we are emphasizing adaptation as an anchor strategy, "mitigation actions shall also be pursued as a function of adaptation." After all, not contributing much to global GHG emissions does not mean we should be given free reign to emit. We are, after all, already gravely suffering from the effects of emissions caused by countries, societies, and communities that were not ours, nor even still living.

Renewable Energy

Let me go now to energy. It is ironic that despite the existence of the Climate Change Act, Disaster Risk Reduction and Management Act, Framework Strategy on Climate Change, and Climate Change Action Plan; despite our international obligations under the United Nations Framework Convention on Climate Change, and our efforts to make developed countries commit to lowering their emissions because we are experiencing the brunt of their actions; despite the existence of our very own Renewable Energy Act --- we are currently in the middle of a coal power plant building binge.

Earlier this year there have been proposals for four more coal power plants in Central Luzon, adding to the two coal-fired facilities already operating in the region. A similar number of coal power plants, probably more, are also being proposed in Mindanao. In addition, a coal power plant has been proposed in Palawan, and should these plans push through, Palawan stands to lose its status as a UNESCO Man and Biosphere Reserve.

What makes this even more ironic is that we import more coal for our use than we produce, and we are steadily running out of sources to get coal from. As it now stands, our

country has the second-highest electric rates in Asia (after Japan) and they are likely to increase in trusting in coal, which is a finite resource. We deliberately ignore that which we are abundant in – sunlight, wind, heat from the earth, flowing water and waste.

Coastal/Marine Resources and Fisheries

As for coastal and marine resources and fisheries, management remains fragmented and conflict-ridden. Coastal habitats continue to be degraded because of unregulated development inland and in the coastal zone. The integrated coastal Mmanagement ("ICM") framework is not followed because there is no compulsory mechanism to make the various agencies comply with the framework.

The Constitutional mandate to provide preferential access rights to marginal fishers has been translated into law under the Fisheries Code, but it is not implemented in practice. Poor fisherfolk are marginalized in the grant of fishing rights – even if the law gives them priority – and they are often displaced when coastal areas are developed for tourism and other purposes.

Despite the continuing destruction of coastal habitats and depletion of fisheries resources, studies show that recovery is possible and achievable in the medium term (five (5) years) with effective fisheries law enforcement and basic conservation measures, such as spatial planning, marine protected area (MPA) network establishment, and "right-sizing" of fishing effort). However, the increase in productivity goes to fishers with means (commercial) and not to poor fisherfolk.

The biggest threats of climate change to the marine ecosystem are sea level rise, ocean acidification, and increase in sea surface temperature. We are seeing the impacts from coral bleaching and storm surges. We do not know their immediate and long-term impacts on fisheries productivity, but as a matter of precaution, we will need to further restrict fishing efforts, such as increasing enforcement against destructive fishing methods, adopting closed seasons, and increasing no-take areas, to ensure resiliency of our coastal and fishing resources. This means less harvest, lost income, and a less secure food supply.

Part II:
Progress

Let me now highlight – the progress we have made in the last five years.

The Supreme Court made an important leap in Philippine legal history in 2010 when it promulgated the ***Rules of Procedure for Environmental Cases*** ("Rules"). Under the impetus of then Chief Justice Reynato Puno, the Rules were crafted "to primarily protect and advance the constitutional right of the people to a balanced and healthful ecology" and "to provide a simplified, speedy, and inexpensive recourse for the enforcement of environmental rights and duties by introducing and adopting innovations and best practices to ensure the effective enforcement of remedies and redress for violation of environmental laws." More importantly, the Rules expressly enable "the courts to monitor and exact compliance with orders and judgments in environmental cases."

On a personal note, I co-chaired the Technical Working Group which prepared the first draft of the rules. I was motivated simply by the imperative of environmental justice.

Three years down the line and counting, we have witnessed how the Rules are being utilized by public interest groups, lawyers and even our own legislators to put a halt on projects that may have serious and irreversible impacts on human health and the environment. I would like to take this opportunity to highlight some of the important aspects of the Rules. Subsequently, I will give a concise narrative of how the application of the Rules have progressed in the environmental cases decided by the Court of Appeals and Supreme Court for the last three years.

The Rules: Liberalizing our Laws on Legal Standing

In the landmark 1993 case of ***Oposa vs. Factoran,*** our Supreme Court liberalized the rules on standing by recognizing the principle of intergenerational equity. The Rules carry on this tradition by further liberalizing the requirements on *locus standi*. Environmental cases for the enforcement of rights and obligations under environmental laws may be initiated through citizen suit filed by a Filipino citizen in representation of others, including minors or generations yet unborn.

The SLAPP Defense

A particularly interesting provision included in the Rules is the Strategic Lawsuit Against Public Participation ("SLAPP"). This refers to retaliatory suits filed to stifle a person or office that seeks to enforce environmental laws or assert environmental rights. The defendant, in such an action, can interpose that the case filed against him is a SLAPP, and pray for damages, attorney's fees and costs of suit. A responsibility is then placed upon the petitioner to prove that his complaints are not simply meant to discourage or dissuade the defendant from a separate legitimate action against him.

The inclusion of this provision in the Rules is an excellent example of an exercise in foresight on the part of the Court. It anticipates both delaying and retaliatory action from violators of environmental rights, and protects individuals and institutions that uphold these rights. It likewise safeguards the sanctity of the judicial process and the right of recourse to the courts.

The Remedy of Continuing Mandamus in Environmental Cases

Another useful remedy provided in the Rules is the continuing mandamus. I note that the concept of a continuing mandamus had already been articulated in the earlier case of ***MMDA v. Concerned Residents of Manila Bay*** in 2008 prior to the Supreme Court's promulgation of the Rules in 2010.

Under the Rules, a continuing mandamus is available as a remedy when a government agency or officer unlawfully neglects a duty imposed upon them by law in connection with the enforcement or violation of environmental laws, rules and regulations, or rights, or unlawfully excludes another from the use or enjoyment of such right.

This writ allows the court to require the government agency or officer to perform an act or series of acts until the judgment is fully satisfied and to submit periodic reports on its progress. The court may evaluate and monitor compliance with its judgment, by itself or through a commissioner or appropriate government agency. The remedy of continuing mandamus is further unique in that it allows the award of damages where government agencies or officers maliciously neglect to perform their duties.

The Supreme Court recently had occasion to issue a Writ of Continuing Mandamus in the case of ***Boracay Foundation Inc v. Province of Aklan,*** Petitioners in this case alleged that the Province of Aklan's reclamation of foreshore land and construction of a terminal and port in Caticlan on Boracay Island violated the procedures for the conduct of an EIA and did not comply with the requirement of consultations with the affected LGUs and stakeholders. In issuing the writ, the Supreme Court ordered the DENR to review the Province's ECC application, particularly as regards the project's classification and impact on the environment. The Province was ordered to cooperate with this review as well as to secure the approval of the affected barangay and municipal councils and conduct proper consultations with the sectors concerned.

One possible danger of the Writ of the Continuing Mandamus is that the judiciary might over-step and over-reach and violate separation of powers. In that sense, I think that its use is more strategic and reasonable in the context of environmental mediation which I will now turn to.

Summary Procedure and Environmental Mediation

Among the objectives of the Rules are "to provide a simplified, speedy and inexpensive procedure for the enforcement of environmental rights and duties" and "to introduce and adopt innovations and best practices ensuring the effective enforcement of remedies and redress for violation of environmental laws." The first objective lays down the over-arching characteristic of procedures as straightforward and expeditious, and this, together with the second objective, sets the stage for an environmental mediation process institutionalized here for the first time.

The pros of alternative dispute resolution ("ADR") is well-established, but the peculiar advantages of environmental mediation over litigation have been explored and expounded on by my LLM student in Ateneo Law School - Judge Teachie Lacandula-Rodriguez in her Ll. M. thesis, "Protection of Third Parties in Environmental Mediation and Consent Decrees: Its Particular Application to Mining Conflicts in the Philippines" where she argued that:

> *"In the Philippine context, litigation is an involuntary, formal and public process for dispute resolution, where a government-appointed judge determines facts and decrees an outcome to legal causes of action based on adversarial presentations of arguments and evidence by each party and after applying laws and rules.[1] Litigation is seen as a rights-based approach wherein a verdict is made in accordance with the rights*

[1] Carrie Menkel-Meadow, et al. Mediation: Practice, Policy, and Ethics 14 (2006) (hereinafter "Menkel-Meadow, Mediation").

protected under laws and rules whereas mediation is an interests-based approach of dispute resolution which seeks to unearth and deal with the interests of the parties."

Judge Lacandula-Rodriguez then enumerates nearly twenty (20) potential benefits of mediating environmental disputes, "if it is practiced well and the parties engage the process with good intentions." First of all, it is appropriate to Filipino culture and fits well with our values of neighborliness and solidarity. It helps preserve relationships and cultivates peaceful communities, as communication is improved and parties are encouraged to find common ground rather than focusing on differences. The process is economical, informal, understandable and flexible, enabling parties to participate meaningfully rather than leaving matters in the hands of lawyers. It is also suited to addressing multi-party disputes, which lodged in a court system are likely to be cumbersome and handled less efficiently.

In finding solutions, the more options there are, the better. Legal definitions and procedures are not hindrances so creative, comprehensive, mutually satisfactory and stable outcomes are arrived at, especially because parties are empowered to determine and control their desired solutions. While contributing to decongestion of court dockets, parties are also able to seek assistance from mediators with environmental expertise who may help frame the issues more clearly. Lastly, the confidentiality of proceedings encourages them to be more open about their actual interests, and their active engagement in the process and with one another leaves the door open for continuing dialogue and capacity to resolve future disputes outside an adversarial process.

In my view, an alternative to the Manila Bay decision would have been for the Court to have ordered mandatory mediation among the parties so they it would stay away from the actual crafting of the clean-up plan and instead would just issue a consent decree on whatever agreement is arrived at. The Court then only will intervene if the government violates the agreement and upon motion of the concerned citizen petitioners is asked to come in for a contempt or other ruling.

The Progress of Writ of Kalikasan Cases in Courts

Let me now go to the famous, or to some infamous, Writ of Kalikasan, a form of special civil action in environmental cases. At the onset, it bears stressing that the Writ of Kalikasan, if granted or issued by the Court only results to a command on named respondents to file their respective returns or answers on the petition for Writ of Kalikasan. It is rather the grant or denial of the *Privilege* of the Writ of Kalikasan that finally resolves the petition, and it is on this aspect where I would focus my discussion.

Several Petitions for Writ of Kalikasan, usually with a corresponding prayer for issuance of a Temporary Environmental Protection Order ("TEPO"), have been filed with the Supreme Court or the Court of Appeals ever since 2010 when the Environmental Rules was adopted. A survey of nine (9) Writ of Kalikasan petitions filed in the last three years is summarized in the table, viz:

Case Title	Subject	Actions Taken
Agham Party List v. Paje, et al.	Proliferation of Fish Cages at Taal Lake	- Writ of Kalikasan granted - Petition Remanded to CA (pending)
Agham Party List v. ALN Archipelago Minerals, Inc.	Levelling of Mountain in Zambales for Proposed Mining Site	- Writ of Kalikasan granted - Petition Remanded to CA - Privilege of Writ of Kalikasan granted by CA
Philippine Earth Justice Center Inc., et al. v. Secretary of DENR, et al.	Mining in Zamboanga Peninsula	- Writ of Kalikasan granted - Petition Remanded to CA - (pending)
Hernandez v. Placer Dome Inc.	Pollution of Land and Water in Marinduque due to Failure to Rehabilitate After Mining	- Writ of Kalikasan granted - Petition Remanded to CA - (pending)
West Tower Condominium Corp. v. FPIC	Continuous Operation of Leaking Pipeline	- Writ of Kalikasan granted - Petition Remanded to CA - (pending)
Villar v. Alltech Contractors, Inc., et al.	Manila Bay Reclamation	- Writ of Kalikasan granted - Petition Remanded to CA - Privilege of Writ of Kalikasan denied by CA
Casiño, et al. v. Paje et al.	Coal-Fired Powered Plant in Subic	- Writ of Kalikasan granted - Petition Remanded to CA - Privilege of Writ of Kalikasan denied by CA
Concerned Citizens of Obando v. EcoShield Development Corp., et al.	Land fill in Obando, Bulacan	- Writ of Kalikasan granted - Petition Remanded to CA - (pending)
Greenpeace Southeast Asia (Philippines), et al. v. Environmental Management	Bt Talong Field Testing	- Writ of Kalikasan granted - Petition Remanded to

Bureau of the Department of Environment and Natural Resources, et al.		CA - Privilege of Writ of Kalikasan granted by CA

Its amazing the range of cases and from all over the country filed under this rule. In that sense, it is a great innovation and something the Supreme Court should be proud of. We can infer however from this summary that the Supreme Court has yet to render a decision definitively resolving a petition in favor of granting a Writ of Kalikasan. Currently, the trend is for the Supreme Court to remand the petition to the Court of Appeals for reception of evidence and rendition of judgment; and so far none of the Court of Appeals' decisions have been brought up to and decided upon by the Supreme Court.

Of particular interest to me is how the Supreme Court would rule if it were to review a Court of Appeals decision granting the Privilege of the Writ of Kalikasan as exemplified by two decisions promulgated by the Court of Appeals just this September.

The case of ***Agham Party List v. ALN Archipelago Minerals, Inc***. is the very first petition for Writ of Kalikasan that was definitively resolved with the issuance of a permanent cease and desist order on a proposed mining project, as well as an issuance of a directive to the DENR Secretary to protect and restore the affected site. Here, the petitioners were able to prove that the respondent mining company scraped off the land formation in a small mountain and reclaimed portion of adjacent water. The Court of Appeals was eventually convinced that proposed mining site indeed poses an imminent danger and is an environmental hazard to the residents of Zambales as well as the nearby province of Pangasinan. Relying on the precautionary principle, the Court rationalized in this manner, viz:

> *"The land formation along coastal areas acts as buffers against fluctuations in sea level and storm surges. The danger is likely to occur since Zambales borders Pangasinan and the wind direction in the area is eastward coming from the China Sea. Thus, it is without doubt that if there are flooding in Sta. Cruz, Zambales, the nearby towns of Pangasinan will likely be affected."*

The second instance where the Court of Appeals had ruled to grant the privilege of the Writ of Kalikasan is in the well-publicized case of ***Greenpeace Southeast Asia (Philippines) v. EMB-DENR*** concerning the *Bt* (bacillus thuringiensis) eggplant. Despite the various assurances given by respondents UPLB, DENR and other involved government agencies that that the field trials had been conducted in a controlled and isolated environment, the Court of Appeals nonetheless issued a cease and desist order on the field testing, stating that:

> *"[t]he testing or introduction of Bt Talong in the Philippines, by its nature and intent, is a grave and present danger to a balanced ecology because in any book and by any yardstick, it is an ecologically imbalancing event…"*

In ruling this way, some would argue that the Court of Appeals has effectively put an end to the government's effort of developing genetically modified pest-resistant plants, unless of course the Supreme Court would rule otherwise since the case is sure to be

elevated to the highest court. Would the Supreme Court also treat these two cases from the lenses of the precautionary principle?

Meanwhile, the Court of Appeals decision in the case of ***Casiño, et al. v. Paje et al.*** is worth noting despite its finding on the absence of an imminent environmental damage. Even if the Court of Appeals denied the petitioners' application for a cease and desist order against the proposed power plant in Subic, since the "magnitude of environmental damage [which] is a condition *sine qua non* in a petition for the issuance of a writ of kalikasan" was not proven, still, the proposed building of the power plant was struck down due to the failure of the respondent's responsible officer to sign the Statement of Accountability portion of the ECC, failure to secure consent of the concerned Sanggunian, and lack of public consultations – matters which the Court considered as fatal errors of the respondent. The Casiño case demonstrates that proving potential environmental damage by relying on the precautionary principle is not always necessary, so long as violations of other integral laws are proven. This is good step forward. It raises the Writ of Kalikasan on the same level as other established special civil actions, wherein all issues involved in the case are thrown open for review upon the filing of the petition for the issuance of the writ.

Judicial Interpretation of the Precautionary Principle

Lets go now to he precautionary principle which is now the rule of evidence for environmental decisions as provided in Rule 20 of the environmental rules. The Court of Appeals have interpreted this evidenrtiary standard in two cases.

Villar vs. Alltech Contractors Inc. Aside from the issue of water pollution, the issue of a proposed reclamation of another 635 hectares of Manila Bay's waters by PEA-Amari and Alltech Contractors Inc. has recently taken the limelight in media and public debate just this year. Subsequently, Senator Cynthia Villar filed a petition for the issuance of a Writ of Kalikasan against said proposed reclamation of the Las Piñas – Parañaque area along the coasts of Manila Bay. In this case the Court of Appeals crafted a strict interpretation for the application pronouncement on when the precautionary principle should be applied (as it decided that it should not be applied in this case). It stated, thus:

> *"The application of the precautionary principle is triggered by the satisfaction of two condition precedents, namely: 1) a threat of serious or irreversible environmental damage; and 2) scientific uncertainty anent the nature and scope of the threat of environmental damage.* ***The first condition precedent may not be said to have been fully established, but even if we concede the existence of such a serious threat, the volumes of data generated by objective, expert analyses and redundant studies rule out the scientific uncertainty of the nature and scope of the anticipated threat****."*

Contrast this to how the Court of Appeals applied the precautionary principle in the very recent case of the *Bt e*ggplant field trials, where the Court of Appeals had ruled that said field trials of the genetically modified eggplant designed to resist the fruit borer pest were illegal. Based on the testimonial evidence from scientific expert witnesses in the case and through the liberal application of the precautionary principle as provided for in the Rules, the Court of Appeals reached the conclusion that it could not declare the *Bt* eggplant safe for human consumption and the environment. It ruled that the petition for a Writ of Kalikasan should be granted since "there is no full scientific certainty yet as to the effects of

the *bt talong* field trials to the environment and health of the people."[2] Respondents were henceforth directed to permanently cease and desist from further conducting the *bt* eggplant field trials.

I support the strict application of the precautionary principle. But I do think we need to address two questions:

First, does the application of the precautionary principle require the judge to have a basic understanding of the scientific issues involved in an environmental case? Second, should we take it to mean that the precautionary principle precludes this country from conducting activities that are already considered standard in the post-industrial world? Big mining projects like the Tampakan project, dam constructions, coal-fired power plants, GMOs, and any economically critical project all deal with toxics and hazardous substances. All of these activities pose health and environmental risks. Yet if we apply the precautionary principle in its strictest sense, some may argue that this could be a barrier for us to develop new technologies that we may need in the future.

SUMMARY

That we have the Rules is undeniably a good development for our legal system, but it may be too early for us to make a judgment on whether or not the differences it can bring are generally beneficial to all sectors of Philippine society. In this light, I am respectfully calling for a systematic study by the Supreme Court on the quality of the implementation by our judges of the Rules when deciding environmental cases.

The Rules can make a difference but only to a certain extent, since courts can only play the role of problem-solver for end-of-the-pipe problems. The court is a limited forum for environmental legal disputes that have already arisen. It can only solve problems of the "now" and, in spite of the "precautionary" stance involved in the application of the precautionary principle, we have to find a way to overtake the curve of environmental problems which increase exponentially and way faster than the speed at which legal disputes can be brought under the wheels of justice.

Part III:
Future

It has been said that one of the greatest weaknesses of our country is its lack of foresight, and when it comes to environmental issues – as with others – this is a dangerous and counterproductive thing. Most, if not all, environmental laws are designed to solve problems that are already in existence.

How then do we stay on top of our environmental problems? I would like to take this opportunity to answer this question by pointing out certain priorities that the three branches of government should focus on to address the exponential growth of environmental problems that we are facing now and will be facing in the years ahead.

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[2] *Id*.

a. Judicial Department

Rethinking the Regalian Doctrine

The Philippines has a long legal tradition of recognizing the exemption of Ancestral Domains and Ancestral Lands from the coverage of the Regalian Doctrine. This dates back to the Supreme Court's decision in ***Cariño v. Insular Government*** in 1909, which had established that "when, as far back as testimony or memory goes, land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land." This ruling laid the basis for the definition of Native Title in the IPRA. Under this principle, Indigenous Peoples claims to their Ancestral Domains based on these pre-conquest rights are recognized and respected.

Legal scholars who have written on the Philippine legal system have discussed the Regalian Doctrine as a colonial construct which justified the appropriation of land and natural resources and regulation of land ownership. The legal fiction of the Regalian Doctrine was carried over into national laws that are still used today. As such, even with the Cariño doctrine and the IPRA, legal recognition of Indigenous Peoples distinct kind of ownership over their Ancestral Domains and Ancestral Lands has been an uphill battle.

An absolute essential for effective environmental protection is the security of tenure of IPs and local communities in their ancestral domains and territories. Without such security, and with the Regalian doctrine weakening it, those communities will not be in a position to conserve and protect resources. The Supreme Court has the opportunity to narrow down the application of the Regalian Doctrine in its decisions on the cases brought before it.

Building Jurisprudence on Environmental Liability

Decisions of various courts in the United States have built a system of environmental jurisprudence that greatly informs the enforcement of liability for violations of environmental laws. For example, decisions of their Supreme Court in actions under the Comprehensive Environmental Response, Compensation and Liability Act (or Superfund Act) have clarified among others, the law's provisions on the apportionment of liability among various "potentially responsible parties" and the liability of parent corporations for clean up costs.

In the Philippines, the courts may clarify and build jurisprudence on liability in environmental cases, and the principle of strict liability in particular. This doctrine dispenses with the need for proof of negligence in activities described as "non-natural" or "potentially mischievous", later termed collectively as "ultrahazardous."

As industry continues to grow in the Philippines, there may be a need to determine where and when this doctrine can be applied. Many projects and activities in the country can be classified as ultrahazardous by the nature of their operations. The enforcement of environmental law will not only involve the implementation of stricter policies and regulations, but also the court's application of standards to ensure just and equitable redress.

Thinking on the Rights of Nature

Article II, Section 16 of the Constitution affirms the rights of Filipino citizens to a "balanced and healthful ecology in accord with the rhythm and harmony of nature." Legal discourse on this provision has tended to focus on the first phrase, or the right of the people to a "balanced and healthful ecology" dismissing the reference to the "rhythm and harmony of nature" as the surplusage of a drafter waxing poetic. Nonetheless, the very terms of the Constitutional provision recognize that nature has a rhythm – a cadence of organisms, processes and interactions that are integral to human health and well-being.

I submit that the second phrase of Article II, Section 16 – and with it, the possibility of rights of nature – is a penumbra of the law that deserves further reflection and discussion.

This concept is not as novel as it seems. In 2008, the Republic of Ecuador ratified a Constitution, which expressly recognized the rights of nature. Article 71 provides as follows:

> *"Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.*
> *All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. x x x"*

A similar measure was taken in New Zealand, where the Crown and Maori communities entered into an agreement to recognize the Whanganui River as a person with a legal voice. This agreement was part of a series of arrangements, which included collaborative efforts to determine the values to protect the river, the development of a whole river strategy and the settlement of historical claims.

And in the Philippines, the Supreme Court's ruling in ***Oposa v. Factoran,*** as codified in the Rules' provisions on citizen suits, has already created avenues for increased access to justice by recognizing the environmental rights of generations yet unborn. If these rights that refer to those of human beings who do not as yet exist now are clearly recognized by our laws, why shouldn't we apply the same treatment to the rights of nature, an entity which has existed before us, with us and will exist after us?

b. Legislative Department

Stricter Penalties

The Clean Air Act, Clean Water Act and Toxic Substances and Hazardous and Nuclear Wastes Control Act already contain penal provisions that may be used as the basis to hold individuals, including corporate officials, criminally liable for violations of their provisions. I think the amounts and the prison terms should be increased to enhance their deterrent and punitive value. Perhaps it is time to also think of amendments to the EIA law that impose stricter penalties, as well as similar provisions on criminal liability where violations are especially egregious.

Strengthening Enforcement of Land Use Policies

Any discussion of much needed pieces of legislation would not be complete without mention of the National Land Use Act ("NLUA")--which incidentally has suffered the all too familiar fate of having been filed in Congress for many years now, coming very close to being approved, and continuing to languish in the legislative mill. In this country where chaotic urban planning has been a source of so much conflicts of interest, such a law would be a crucial for rational, sustainable and equitable land and natural use development.

As I emphasize in my discussion on Forests and Forestland Management in Volume I of my book, "Philippine Law and Ecology", the legal status of land as "forest land," which is part of the public domain, determines what activities may or may not be conducted on the land and the natural resources therein. Delineation of forest limits, as provided in the Constitution, is therefore a matter of priority in prudently and sustainably managing our lands and natural resources.

Strengthening CC and DRRM

While we seem to be in a good place policy-wise with regard to climate change and disaster risk reduction, the current institutional structure might not be able to address our country's long-term needs. Is the President of the Philippines the proper person to head the Climate Change Commission, for instance? Our current structure seems to make climate change considerations too dependent on the President, who have to admit is not an expert on the subject and has a great many other pressing matters to concern himself with. In the same vein, is it right for disaster risk reduction and management operations to remain with the Office of Civil Defense? I believe that we have to start putting more emphasis on "risk reduction and management," instead of simply response.

. We have to understand what climate change really is and how it will impact our country. Climate change is not equal to just flooding, and disaster risk reduction and management is not equal to just rescuing flood victims and picking up after disasters. Among other things, climate change is also land use, agriculture, energy and budgets; DRRM is also urban planning and relocation. This makes me wonder if it is time to consider a Department of Climate Change and Disaster Risk Reduction, something with greater reach, more freedom of movement, more room for planning and integration, more resources to tap experience and expertise.

Freedom of Information

Meanwhile, a Freedom of Information ("FOI") Law is also needed if we were to give full meaning to community-based management of our natural resources – something which has been pushed, but is likely to never take off unless each and every individual in the community is able to readily access information of public interest and thereby satisfy for himself he and his predecessors has a stake in the decisions and resource utilizations affecting the country's natural wealth and patrimony. The Malampaya fund scandal in Palawan and the Gerry Ortega murder would have been prevented if we had an FOI Law.

Sustainable Forest Management Act

We need a new sustainable forest management act which must not be limited to our own forestlands and resources, however, but should also look at global developments in the sector, particularly in the context of the function of forests in addressing climate change. In the UN Framework Convention on Climate Change ("UNFCCC"), for example, the Philippines has been an active player in the REDD+ ("Reducing Emissions from Deforestation and Forest Degradation") negotiations. The goal of the REDD+ mechanism is to provide incentives for governments, private firms, and local stakeholders to preserve and enhance forests, as opposed to harvesting or converting them. The mechanism however, if designed or implemented badly, could negatively impact forest-dependent communities, including indigenous peoples, or the environment. That is why our consistent position in the negotiations has been for REDD+ to be accompanied by safeguards for the protection of stakeholder rights, environmental integrity, and governance. We have also stood firm on the assertion that REDD+ can only succeed if co-benefits (or "non-carbon benefits"), such as the conservation of biodiversity and ecosystem services and the alleviation of poverty, are also realized. All of these elements must be incorporated in the proposed SFM Act.

c. Executive Department

Reforming Environmental Governance System

My position is that the current functions of the DENR which are more local and less strategic in application should be devolved to the LGUs. We need an environmental institution that is smaller and lighter, faster, much more technologically adept, better equipped and better paid, and with wider room for mobility in field operations. A National Environmental Management Authority with employees ranging from 3,000 to 5,000 employees (as opposed to approximately 20,000 DENR employees at present), composed not only of foresters but also architects, scientists and economists, is what we need in order to move one-step ahead of the national environmental problems that seem to always catch us all off-guard every single day. This would then allow the National Environmental Management Authority to focus on national environmental issues such as energy efficiency, climate change adaptation, mitigation, deforestation and forest degradation

I am also or the localization of environmental management for issues that can be better solved at the LGU level. Of course, an important element in localization of environmental governance is the provision of mechanisms to ensure that LGUs will undergo the capacity-building required in local environmental management. In the same way that we have decentralized local governance, LGUs should be the main decision-maker when it comes to identifying and responding to environmental risks. This would localize environmental governance in areas like that of Environmental Impact Assessment and the assessment and maintenance of water and air pollution levels. This is all the more applicable in addressing land use issues and natural resource extraction since LGUs are presumed to be more aware of the peculiarities of their own environment. An example of this is the South Cotabato Environmental Code enacted in 2010 which had banned open-pit mining in said province. The ban was a decision of the LGU and I assume that this decision remains to be widely accepted by the constituents of South Cotabato up to now.[3]

[3] Bong S. Sarmiento, *Open-pit ban in S. Cotabato stays*, 20 May 2013, available at http://www.sunstar.com.ph/davao/business/2013/05/20/open-pit-ban-s-cotabato-stays-283353, accessed 10 October 2013.

Fisheries: Evidence-based Approach, Capacity-building and Enforcement

We know how to enforce do fisheries laws, but the problem is in ensuring consistency and sustainability of efforts. Concrete initiatives that could be undertaken to improve management of our coastal, marine and fisheries resources include the following:

- Adopt the ICM framework and provide incentives or compulsory mechanisms so that agencies with varying or conflicting interests will comply.
- Adopt an ecosystem-based approach to fisheries management, a holistic approach that considers habitat protection, sustainable production and equitable distribution of benefits.
- Empower Local governments for coastal management.

Climate Change Governance

As a whole, in order to address identified gaps in or barriers to climate action, and to ensure effective planning, decision-making and implementation with regard to climate policies, the CPEIR states that the current administration should strive to meet four particular goals, namely (a) to complete and implement the "remaining pieces of the core climate change reforms" in order to ensure that an enabling environment is solidly put in place, (b) to "formulate, enact and support complementary sector and local-level policy and institutional reforms," (c) to increase the effectiveness of climate change-related programs, activities and projects by improving on their planning, prioritization, design and reporting, and (d) increasing the efficiency of resource utilization and the provision of support for higher levels of financing through the aforementioned reforms.

CONCLUSION

At the beginning of this lecture, I said that three words will summarize my message.

Failure. Our environmental legal system has failed. Let's admit that.

Progress. We have made good progress in our Rules of Procedure for Environmental Cases. Let's celebrate that, but it is not enough.

Finally, the Future. There are things we can do to overtake the curve of environmental destruction. It does not take rocket science. For the judiciary, it involves rethinking the regalian doctrine, establishing environmental liability jurisprudence and exploring the rights of nature. For the legislature, there is the strengthening the enforcement of land use policies, strengthening the climate change and disaster risk reduction and management governance structure, passing a freedom of information bill and a sustainable forest management act, as well as decreeing stricter penalties for environmental violations. Finally, for the executive, there is a need to reform the environmental governance system, to solidify and integrate climate change governance, and to place emphasis on an evidence-based approach, capacity building and enforcement in the fisheries sector.

It is time for us to go beyond subjective, incremental and short-term sectoral responses; it is time for us to go beyond merely reacting. The only way to solve

environmental issues is to leapfrog over them, to outpace them, otherwise we will remain forever overwhelmed.

Thank you, and once again, good afternoon.