EN BANC

G.R. No. 249678 – QUEZON FOR ENVIRONMENT, ATIMONAN POWER TO THE PEOPLE, PHILIPPINE MOVEMENT FOR CLIMATE JUSTICE (PCMJ) INC., CENTER FOR ENERGY, ENVIRONMENT AND DEVELOPMENT (CEED) INC., SANLAKAS, MOSIGNOR EMMANUEL MA. L. VILLAREAL, REV. FR. WARREN R. PUNO, REYNALDO UPALDA, FR. EDWIN GARIGUEZ, GERARD ARANCES, BIBIANO RIVERA, JR., MARIE MARGUERITE LOPEZ, and ERWIN PUHAWAN, Petitioners, **v. HON. SALVADOR MEDIALDEA, in his capacity as EXECUTIVE SECRETARY, SENIOR UNDERSECRETARY JESUS CRISTINO P. POSADAS, in his capacity as Chair of the ENERGY INVESTMENT COORDINATING COUNCIL, and JOHN AND JANE DOES,** Respondents.

Promulgated:

November 5, 2024

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DISSENTING OPINION

LEONEN, *J.*:

I concur with the *ponencia*'s finding that the present action is not an environmental suit, thus, it is not covered by the Rules of Procedure for Environmental Cases. However,

Further, I would like to call attention to the propensity of environmental advocates to immediately resort to asking for a writ of *kalikasan* despite the availability of other remedies or, worse, the inappropriateness of the writ. It is well-settled that in a writ of *kalikasan* petition, the petitioner has the burden of proving the following:

> (1) [the] environmental law, rule[,] or regulation violated or threatened to be violated; (2) [the] act or omission complained of; and (3) the environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces.[1]

Here, petitioners failed to point to any environmental law, rule or regulation that was violated. Instead, they assailed the constitutionality of Executive Order No. 30[2] for, among others, being an *ultra-vires* issuance.

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1 *LNL Archipelago Minerals, Inc. v. Agham Party List*, 784 Phil. 456, 474 (2016) [Per J. Carpio, *En Banc*].

2 Executive Order No. 30 (2017), Creating the Energy Investment Coordinating Council in order to Streamline the Regulatory Procedures Affecting Energy Projects.

Clearly, this is not an environmental case from which a writ of *kalikasan* may be issued.

To stress, the writ of *kalikasan* is an extraordinary and equitable remedy in a special civil action[3] meant to address and prevent environmental catastrophes felt in at least two cities or provinces. Part III, Rule 7, Section 1 of the Rules of Procedure for Environmental Cases describes the nature of the writ:

> Section 1. *Nature of the writ.* – The writ is a remedy available to a natural or juridical person, entity authorized by law, people's organization, non-governmental organization, or any public interest group accredited by or registered with any government agency, on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation by an unlawful act or omission of a public official or employee, or private individual or entity, involving environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces.

The writ is intended to have a narrow application, as judicial intervention is meant to be exercised with restraint, with the judiciary only stepping in when it is suitably proven that the environmental damage contemplated possesses a magnitude "which transcends both political and territorial boundaries."[4] It does not subsume and does not substitute other remedies available for the protection of the environment as emphasized in my Concurring and Dissenting Opinion in *Paje v. Casiño*:[5]

> The function of the extraordinary and equitable remedy of a Writ of [*Kalikasan*] should not supplant other available remedies and the nature of the forums that they provide. The Writ of [*Kalikasan*] is a highly prerogative writ that issues only when there is a showing of actual or imminent threat and when there is such inaction on the part of the relevant administrative bodies that will make an environmental catastrophe inevitable. It is not a remedy that is available when there is no actual threat or when imminence of danger is not demonstrable. The Writ of [*Kalikasan*] thus is not an excuse to invoke judicial remedies when there still remain administrative forums to properly address the common concern to protect and advance ecological rights. After all, we cannot presume that only the Supreme Court can conscientiously fulfill the ecological duties required of the entire state.[6]

Hence, environmental advocates should not only be fueled by passion in their advocacy to save and protect the environment, but must likewise act

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3 ENVT'L. PROC. RULE, Part III.

4 J. Leonen, Concurring Opinion in *Arigo v. Swift*, 743 Phil. 8, 94 (2014) [Per J. Villarama, Jr., *En Banc*]. (Citation omitted)

5 752 Phil. 498 (2015) [Per J. Villarama, Jr., *En Banc*].

6 J. Leonen, Concurring and Dissenting Opinion in *Paje v. Casiño*, 752 Phil. 498, 714 (2015) [Per J. Villarama, Jr., *En Banc*].

with discernment and have a proven expertise of environmental laws and rules. Again in *Paje*:

> [E]nvironmental advocacy is not only about passion. It is also about responsibility. There are communities with almost no resources and are at a disadvantage against large projects that might impact on their livelihoods. Those that take the cudgels lead them as they assert their ecological rights must show that they have both the professionalism and the capability to carry their cause forward. When they file a case to protect the interests of those who they represent, they should be able to make both allegation and proof. The dangers from an improperly managed environmental case are as real to the communities sought to be represented as the dangers from a project by proponents who do not consider their interests.[7]

As it is though, parties are not the only ones who express overzealousness in their advocacy. It is worth noting that the Judiciary itself has utilized the writ of *kalayaan* beyond its intended bounds in some instances. In my dissent in *West Tower Condominium Corporation v. First Philippine Industrial Corporation*,[8] I observed that:

> The [w]rit of [*kalikasan*] has served its functions and, therefore, is *functus officio*. The leaks have been found and remedied. The various administrative agencies have identified the next steps that should ensure a viable level of risk that is sufficiently precautionary. In other words, they have shown that they know what to do to prevent future leaks. The rest should be left for them to execute.
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> The [*ponencia*], by asking the Department of Energy and respondent First Philippine Industrial Corporation to repeat their previous procedures, implies that our function is to doubt that the executive agencies will do what they have committed to undertake and are legally required to do. It implies that the Certification issued on October 25, 2013 is improper based on the irrational fear that disasters that have recently happened in other parts of the world that may also happen to us. We are asked to assume that executive agencies do not care as much as we do for the community and their ecologies.
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> This is not what we should do in cases involving writs of [*kalikasan*]. Nowhere in the Constitution or in the Rules are we authorized to breach the separation of powers. We do not endow ourselves with sufficient expertise and resources to check on administrative agencies' technical conclusions without basis.[9] (Citations omitted)

Considering that courts have little competence over technical matters and administrative agencies are the recognized experts over their fields of expertise, the conclusions and opinions of the latter deserve respect. The writ of *kalikasan* is meant to address "environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities

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7 *Id.* at 715.

8 *West Tower Condominium Corporation v. First Philippine Industrial Corporation*, 760 Phil. 304 (2015) [Per J. Velasco, Jr., *En Banc*].

9 *Id.* at 349–350.

or provinces."[10] Hence, once the environmental damage has been abated or precautions have been undertaken for its abatement, then the writ of *kalikasan* has served its purpose and should be considered functus officio.

I would also like to revisit the requirement of environmental damage that span "two or more cities or provinces" before a writ of *kalikasan* may be issued.

The Rules do not state with particularity the exact degree of environmental damage envisioned for the issuance of the extraordinary remedy of the writ of *kalikasan*, with the gravity of environmental damage decided on a case to case to basis.[11] What is constant, though, is that the environmental damage has to span at least two cities or provinces for a writ of *kalikasan* to be issued.

In *Dela Cruz v. Manila Electric Company*,[12] the Court sought to establish a scientific evidence of causation as a standard for the application of the Precautionary Principle:

> Reading Rule 20 and its interpretation in *Mosqueda*, it appears that our jurisdiction adopts the weak version of the precautionary principle, as opposed to its strong version.
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> In his article, *The Paralyzing Principle*, Professor Cass Sunstein (Prof. Sunstein) defined the weak version of the precautionary principle to mean "that a lack of decisive evidence of harm should not be a ground for refusing to regulate." On the other hand, the strong version of the precautionary principle requires governmental regulation "whenever there is a possible risk to health, safety, or the environment, even if the supporting evidence is speculative and even if the economic costs of regulation are high."[13] (Citations omitted)

A similar scientific approach should likewise be utilized when determining if an actual or imminent environmental damage is of such magnitude as to entitle the proponents to a writ of *kalikasan*.

It is proposed that aside from the cross-boundary requirement under the Rules on Procedure for Environmental Cases, the actual or impending damage to an ecosystem found exclusively within a city or province should also be considered as an alternative requirement.

An ecosystem is defined as "the complex of living organisms, their physical environment, and all their interrelationships in a particular unit of

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10 ENVT'L. PROC. RULE, Part III, Rule 7, sec. 1.

11 *Osmeña v. Garganera*, 828 Phil. 560, 569 (2018) [Per J. Tijam, *En Banc*], *citing Paje v. Casiño*, 752 Phil. 498, 539 (2015) [Per J. Villarama, Jr., *En Banc*].

12 889 Phil. 659 (2020) [Per J. Leonen, *En Banc*].

13 *Dela Cruz v. Manila Electric Company*, 889 Phil. 659, 695 (2020) [Per J. Leonen, *En Banc*].

space."[14] It is composed of both biotic and abiotic constituents, and is linked by the flow of energy and cycling of nutrients within the ecosystem. An ecosystem can be small enough to be contained within a water droplet or as large as entire landscapes and regions.[15] The importance of ecosystems cannot be discounted, as they "form a core component of biodiversity"[16] and provide humans with "a stable climate, water, food, materials[,] and protection from disaster and disease."[17]

The United Nations Environment Programme, recognizing the full importance of ecosystems in our environment, warns that "the degradation of ecosystems – such as forests, wetlands, drylands, and coastal and marine systems – is a major driver of disaster risk and a key component of communities' vulnerability to disasters."[18]

Justice Amy C. Lazaro-Javier's Dissenting Opinion in *Villar v. Alltech Contractors*,[19] citing a study made in Malaysia, touched on the biological impacts of reclamation activities on the coastal ecosystem. The study showed that reclamation activities result in the "destruction of ecosystems such as coral reefs, sea grass meadows[,] and mudflats"[20] leading to a decline in the endemic fauna and the destruction of the habitat of bottom dwellers, which disrupts the food chain. The loss of coastal ecosystems or natural buffer zones like mangroves, seagrasses, and mudflats also leave coastal ecosystems vulnerable to flooding, coastal erosion, and tsunami.[21] Finally, the study warned that "[o]nce the ecosystem is disturbed, it will take some time for it to recover to its original state, depending on the ecosystem's resilience."[22]

Without a doubt, the actual or imminent threat to a particular ecosystem, if sufficiently grave enough and with a wide-reaching effect, should lead to the issuance of a writ of *kalikasan*, even if the threatened ecosystem can only be found in a single city or province.

However, due to the patent unconstitutionality of Executive Order No. 30, I cannot join the *ponencia*'s dismissal of the petition for *certiorari*.

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14 Encyclopaedia Britannica, *ecosystem*, *available at* https://www.britannica.com/science/ecosystem. (last accessed on March 15, 2024).

15 *Id.*

16 International Union for Conservation of Nature and Natural Resources, *Using ecosystem risk assessment science for ecosystem restoration*, *available at* https://www.iucn.org/news/ecosystem-management/202112/using-ecosystem-risk-assessment-science-ecosystem-restoration (last accessed on March 19, 2024).

17 *Id.*

18 United Nations Environment Programme, *Ecosystem-based disaster risk reduction*, *available at* https://www.unep.org/topics/disasters-and-conflicts/disaster-risk-reduction/ecosystem-based-disaster-risk-reduction (last accessed on March 19, 2024).

19 902 Phil. 787 (2021) [Per J. Carandang, *En Banc*].

20 *Id.* at 874.

21 *Id.* at 874–875.

22 *Id.* at 874.

An executive order is an "[act] of the President providing for rules of a general or permanent character in implementation or execution of constitutional or statutory powers."[23] Being a delegated legislative authority, the power granted to the president is not actual lawmaking but is limited "to fill[ing] in the details of the execution, enforcement or administration of a law."[24] *Pelaez v. Auditor General*[25] instructs that in the exercise of the delegated legislative power, the executive should hew closely to the standards established in the law set to be enforced, to prevent violating the principle of separation of powers:

> Indeed, without a statutory declaration of policy, the delegate would, in effect, make or formulate such policy, which is the essence of every law; and, without the aforementioned standard, there would be no means to determine, with reasonable certainty, whether the delegate has acted within or beyond the scope of his authority. *Hence, he could thereby arrogate upon himself the power, not only to make the law, but, also — and this is worse — to unmake it, by adopting measures inconsistent with the end sought to be attained by the Act of Congress*, thus nullifying the principle of separation of powers and the system of checks and balances, and, consequently undermining the very foundation of our Republican system.[26] (Emphasis supplied, citation omitted)

Executive Order No. 30, which created the Energy Investment Coordinating Council, was issued for the government to "streamline its processes to ensure effective and timely implementation of projects to guarantee the immediate delivery of adequate and reliable government services."[27] Its declared policy is the development of "an efficient and effective administrative process for energy projects of national significance. . . to avoid unnecessary delays in the implementation of the Philippine Energy Plan (PEP)."[28]

Section 2 of Executive Order No. 30 attempts to impart a sense of the enormity and magnitude of the Energy Projects of National Significance (EPNS) with its repeated use of the word "significant." Nonetheless, aside from the required capital investment of PHP 3.5 billion, the listed attributes that supposedly serve to differentiate an EPNS from any other energy project are insufficient and overly ambiguous.

The Implementing Rules and Regulations[29] try to clarify the vague attributes created by Executive Order No. 30, but the uncertainty still persists:

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23 REV. ADM. CODE, Book III, Chapter 2, Section 2.
24 *Pelaez v. Auditor General*, 122 Phil. 965, 974 (1965) [Per J. Concepcion, *En Banc*].
25 122 Phil. 965 (1965) [Per J. Concepcion, *En Banc*].
26 *Id.* at 974–975.
27 Executive Order No. 30 (2017), Sixth Whereas Clause.
28 Executive Order No. 30 (2017), sec. 1.
29 Department of Energy, Implementing Rules and Regulations of Executive Order No. 30 (2017).

RULE 5 – SCOPE OF EPNS

EPNS are major Energy Projects for power generation, transmission, and/or ancillary services including those required to maintain grid stability and security for on and off-grid areas, identified and endorsed by the DOE as "projects of national significance" that are in consonance with the policy thrusts and specific goals of the PEP, and which possess any of the following attributes:

(a) It must have a significant capital investment of [PHP] 3.5 billion;
(b) It must have a significant contribution to the country's economic development: *Provided, That,* this pertains to the potential of the project to promote greater access to energy and energy supply security of the country;
(c) It must have a significant consequential economic impact: *Provided, That,* this pertains to the potential of the project to generate jobs, employment and increase revenues for the government, among others;
(d) It must have a significant potential contribution to the country's balance of payment: *Provided, That,* this pertains to the potential of the project to contribute to the inflow of foreign investment capital;
(e) It must have a significant impact on the environment: *Provided, That,* this pertains to the potential of the project to contribute to sustainability with minimal adverse effects to the environment;
(f) It must have a significant complex technical processes and/or engineering designs: *Provided, That,* these refer to projects involving newly developed or pioneering energy systems and/or technologies; and,
(g) It must have a significant infrastructure requirement: *Provided, That,* the project has associated infrastructure necessary for the delivery of energy services and/or supply such as transmission and distribution networks.

Adding the word "significant" does not clarify how an EPNS is supposed to differ from a regular energy project. Both contribute to the electrification of the country and provide employment and revenue to the government through taxes. Both projects can also bring in foreign capital through investments. Both utilize complex technical processes.

Affixing the word "significant" to every other sentence does not shed light on what energy projects can fall under an EPNS. As it is, when it comes to the approval of permits or the nomination of a project as an EPNS, the Executive must come up with its own interpretation and set of guidelines as to what constitutes an EPNS. This is clearly *ultra vires*, being within the exclusive domain of the Legislative.

Section 7 of Executive Order No. 30, which mandates government agencies and instrumentalities to act on applications by EPNS within 30 days from submission of complete documentary requirements, is likewise arbitrary. Specific permit applications may need different requirements with longer timelines in light of their complexity and/or environmental impact.

The issuance of permits is not a ministerial duty, since every agency tasked with the issuance of permits is mandated to scrutinize all applications before it. Further, there is a wide gap in the regulatory review required for each of the required permits. For example, the issuance of an Environmental Compliance Certificate by the Department of Environmental and Natural Resources involves an in-depth process with experts vetting the environmental impact of the project. While the issuance of a business permit by a local government unit does not require the same degree of review, both permits are expected to be processed within the same timeframe of 30 days.

While the courts usually defer to administrative discretion when it comes to the implementation of laws, regulation should have some rational basis. Regulation should take into account the nature and complexity of the permits involved, and then factor in those specifics when issuing baselines, instead of issuing a single timeline for all agencies involved. The prescribed period should be flexible enough to accommodate requests for permits that would require distinct and specialized requirements.

We do not object to the idea of a baseline period, but we are wary of the seeming lack of basis for the imposed timeframe. Further, it should be clarified if the baseline period applies to all kinds of processes and permits.

The exceptions to the 30-day processing baseline are very strictly construed and are only allowed for two scenarios: (1) to enable an agency to comply with a specific statutory directive; or (2) to avoid prejudicing public interest.[30] Even then, the onus is on the agency to prove the existence of the exception, otherwise, "the approving authority may no longer deny the application and shall issue the relevant permit within five (5) working days after the lapse of such processing timeframe."[31]

Be that as it may, the setting of baselines cannot be found in either the Electric Power Industry Reform Act of 2001[32] (EPIRA) or the Department of Energy Act of 1992, the very laws Executive Order No. 30 purportedly means to implement. The presumption of prior approval in favor of EPNS also cannot be found in either of those laws.

While the "[acceleration] of the total electrification of the country"[33] is indeed part of the EPIRA's declared policies, so is the assurance of "socially and environmentally compatible energy sources and infrastructure."[34] One

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30 Executive Order No. 30, sec. 7.
31 Executive Order No. 30, sec. 7(b).
32 Republic Act No. 9136 (2001), Electric Power Industry Reform Act (EPIRA).
33 EPIRA, sec. 2(a).
34 EPIRA, sec. 2(g).

should not be sacrificed for the other and every effort must be taken for all the declared policies to come to fruition.

ACCORDINGLY, I vote to **GRANT** the Petition.

MARVIC M.V.F LEONEN
Senior Associate Justice