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Cleaning up Manila Bay

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Cleaning Up Manila Bay: Mandamus as a Tool for Environmental Protection

“If there is lack of political will on the part of the government agencies, it is the function of the judiciary to supplant it with the will, the force, and the power of the law.”

Antonio Oposa, Jr., Lead Counsel for Concerned Residents of Manila Bay¹

INTRODUCTION

To the United States, Manila Bay signifies the location where it first showcased its naval strength pummeling its enemy in the Spanish-American War. In the 1898 Battle of Manila Bay, all major Spanish ships were destroyed and captured without significant damage to the Americans, making the United States “a recognized world power overnight.”² For the Philippines, Manila Bay is the ocean portal to its epicenter for government, economy, and industry — “a place with a proud historic past, once brimming with marine life and, for so many decades in the past, a spot for different contact recreation activities, but now a dirty and slowly dying expanse mainly because of the abject official indifference of people and institutions.”³

In the field of law, Manila Bay is the setting for a landmark case in environmental protection that has gained worldwide recognition.⁴ In December of 2008, the Philippine Supreme Court upheld the issuance of

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1. World Justice Project, Eco-Lawyer Presses Manila Bay Clean Up (Aug. 24, 2009), <http://www.worldjusticeproject.org/Eco-lawyer-presses-Manila-Bay-cleanup>.

2. Patrick McSherry, The Battle of Manila Bay (Cavite), <http://www.spanamwar.com/mbay.htm> (last visited Jan. 29, 2010). See A.B. FEUER, AMERICA AT WAR, THE PHILIPPINES 1898-1913, at 12–20 (2002).

3. Metro. Manila Dev. Auth. v. Concerned Residents of Manila Bay (*MMDA*), G.R. Nos. 171947–48, 574 SCRA 661, 665 (Dec. 18, 2008). (Phil.).

4. See The Oregon Review of International Law’s Third Annual Symposium: The Confluence of Human Rights and the Environment, <http://www.law.uoregon.edu/org/oril/symposium09.html> (last visited Jan. 30, 2009) (noting Justice Presbitero J. Velasco, Jr. Supreme Court of the Philippines, Address on Manila Bay: A Daunting Challenge in Environmental Rehabilitation and Protection); *PEMSEA Looking for Partners to Clean Up Manila Bay*, MANILA BULLETIN (Sept. 16, 2009) available at <http://www.mb.com.ph/articles/220828/pemsea-looking-partners-clean-manila-bay> (noting that the United Nations Development Programme is helping the Philippine government develop the Manila Bay Coastal Strategy and Operational Plan); World Justice Project, *supra* note 1.

a writ of mandamus against twelve government agencies to clean up Manila Bay. *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay (MMDA)* is important because it is evidence of the growing general state practice of recognizing the right to a balanced and healthful ecology.⁵ Such evidence may also support the recognition of this right as *opinio juris*,⁶ another element in establishing customary international environmental law.⁷ This case may be of particular interest to the United States because it involves mandamus, which the United States shares⁸ in common with its former colony.⁹

I. MANDAMUS AS A MODE FOR JUDICIAL REVIEW OF ADMINISTRATIVE AGENCIES

Mandamus is “a writ issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly.”¹⁰ In the context of *MMDA*, this piece focuses on mandamus in the United States as a mode of judicial review of administrative agencies (rather than as a means for appellate review). In particular, it looks at section 706 of the Administrative Procedure Act (APA), which allows federal courts to “order agencies to act where the agency fails to carry out a mandatory, nondiscretionary duty” under either the “unreasonably delayed” or “unlawfully withheld” standards.¹¹ This mandatory injunction is “essentially in the nature of mandamus relief,”¹² and is still governed by mandamus principles.¹³ These principles include:

[T]he party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires and [must] satisfy the burden of showing that his right to issuance of the writ is “clear and

5. *MMDA*, 574 SCRA at 661.

6. *Opinio juris* refers to the phrase “accepted as law” in Article 38(1)(b) of the Statute of the International Court of Justice, which is necessary to establish a legally binding custom in international law. It “denotes a subjective obligation, a sense by the state that it is bound to the law in question.” Cornell University Law School, Legal Information Institute, *opinio juris* (international law), http://topics.law.cornell.edu/wex/opinio_juris_international_law (last visited Mar. 10, 2010).

7. See I.C.J. Statute art. 38(1)(b) for the basis of customary international law.

8. The early mandamus provision (Act No. 190, § sec. 222 (1901)) enacted by the Philippine Legislature under American rule was copied verbatim from the California Code of Civil Procedure. See *Lamb v. Phipps*, G.R. No. 7806, 22 PHIL. REP. 456, 492 (S.C. July 12, 1912) (an American Associate Justice of the Philippine Supreme Court cited American cases and authors to deny the petition for a writ of mandamus).

9. See FEUER, *supra* note 2, at 73–77.

10. BLACK’S LAW DICTIONARY 980 (8th ed. 2004).

11. See *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1226 (10th Cir. 2002).

12. *Estate of Smith v. Heckler*, 747 F.2d 583, 591 (10th Cir. 1984); See *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (discussing FED. R. CIV. P. 81(b)).

13. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.7 (D.C. Cir. 1985).

indisputable.” Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed.¹⁴

However, while the issuance of a writ of mandamus is still discretionary even when its requisites are met, mandatory injunctions under section 706 of the APA are not.¹⁵ The availability of the latter technically precludes a writ of mandamus because the APA is an adequate means to attain the relief desired.¹⁶ Nevertheless, mandamus remains significant in U.S. federal administrative practice,¹⁷ and is considered codified in the APA.¹⁸ In addition, although the writ of mandamus has been abolished by Rule 81(b) of the Federal Rules of Civil Procedure,¹⁹ “federal courts may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”²⁰

Within this context, mandamus remains an extraordinary remedy in both the United States and the Philippines.²¹ The traditional view that mandamus functions much like an abuse of discretion standard under section 706(2) of the APA²² also coincides with the Filipino version.²³ Although section 706 of the APA is technically distinct from a writ of mandamus, its mandatory injunctive nature and the way courts have treated it²⁴ make it analogous and somewhat similar to the writ of mandamus issued by the Philippine Supreme Court in the *MMDA* case.

II. THE CASE

In January 1999, Concerned Residents of Manila Bay sued several government agencies for the clean up, rehabilitation, and protection of

14. *Kerr v. U.S. Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 403 (1976). These principles also apply to the Philippine mandamus. *See* R. Civ. P. 65, § 3 (Phil.); *BPI Family Savs. Bank Inc. v. Manikan*, G.R. No. 148789, 395 SCRA 373 (Jan. 16, 2003). (Phil.).

15. *S. Utah Wilderness Alliance*, 301 F.3d at 1226 n.6.

16. *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1059 (10th Cir. 1993).

17. PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW* 1110, 1112 (Rev. 10th ed. 2003) (citing *Buchanan v. Apfel*, 249 F.3d 485 (6th Cir. 2001); *Barron v. Reich*, 13 F.3d 1370 (9th Cir. 1994) as examples where mandamus was granted).

18. *Id.* (citing 28 U.S.C. § 1361 (2006)).

19. *See In re Cheney*, 406 F. 3d 723, 729 (D.C. Cir. 2005).

20. *Moye v. Clerk, DeKalb County Super. Ct.*, 474 F.2d 1275, 1275–76 (5th Cir. 1973).

21. *See In re Cheney*, 406 F. 3d at 729; *Akbayan-Youth v. COMELEC*, G.R. Nos. 147066, 355 SCRA 318, 342 (March 26, 2001). (Phil.).

22. STRAUSS, ET AL., *supra* note 17, at 1111. *See Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997).

23. *See* R. Civ. P. 65, § 3 (Phil.).

24. *See S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1226 n.6 (10th Cir. 2002).

Manila Bay,²⁵ invoking their Constitutional rights,²⁶ a plethora of statutes, and even international law.²⁷ At trial, the plaintiffs established that the fecal coliform content of waters in the beaches around Manila Bay ranged from five thousand to eight thousand most probable number (MPN) per ten milliliters, which far exceeds the prescribed two hundred MPN per ten milliliters safe level for bathing and other forms of contact recreational activities.²⁸ Government agencies presented evidence showing their efforts to reduce pollution along the shores of Manila Bay.²⁹ On September 13, 2002, the trial court issued a writ of mandamus commanding the government agencies to clean up Manila Bay.³⁰

The government agencies appealed to the Court of Appeals, which affirmed the trial court's decision in full, "stressing that the trial court's decision did not require petitioners to do tasks outside of their usual basic functions under existing laws."³¹ When the case reached the Philippine Supreme Court, two issues remained: whether the Philippine Environment Code provisions on Upgrading of Water Quality and Clean-up Operations³² envisage cleanup in general or pertain merely to specific pollution incidents, and whether mandamus can be issued to clean up and rehabilitate Manila Bay, focusing on the ministerial duty requirement. These would determine the propriety of issuing the writ of mandamus.

On the first issue, the Philippine Supreme Court found that the pertinent provisions of the Philippine Environment Code do not limit "containment, removal, and cleaning operations" to specific pollution

25. The suit was filed before the Regional Trial Court in Imus, Cavite against: (1) MMDA; (2) Department of Environment and Natural Resources; (3) Department of Education, Culture and Sports, now the Department of Education; (4) Department of Health; (5) Department of Agriculture; (6) Department of Public Works and Highways; (7) Department of Budget and Management; (8) Philippine Coast Guard; (9) Philippine National Police Maritime Group; and (10) Department of the Interior and Local Government. Metropolitan Waterworks and Sewerage System, Philippine Ports Authority, and the Local Water Utilities Administration also participated. See *MMDA*, G.R. Nos. 171947-48, 574 SCRA 661, 665 (Dec. 18, 2008). (Phil.).

26. CONST. (1987), Art. VI §§ 15-16, (Phil.) (noting the constitutional right to life, health and a balanced ecology).

27. See *MMDA*, 574 SCRA at 693-97. The continuing mandamus was granted based on various provisions of 15 statutes and the International Convention for the Prevention of Pollution from Ships of 1973. The Department of Budget and Management was even mandated to "consider incorporating an adequate budget in the General Appropriations Act of 2010 and succeeding years" to cleanup, restore and preserve the water quality of Manila Bay. *Id.* at 697.

28. *Id.* at 667. The Philippine Supreme Court actually mentioned 50,000 to 80,000 per ml, which is equivalent to 5,000 to 8,000 per 10 ml.

29. *Id.* (discussing evidence put forth by Metropolitan Waterworks and Sewerage System concerning its Manila Second Sewerage Project and by Philippine Ports Authority concerning its study on ship-generated waste treatment disposal and its *Linis Dagat* (Clean the Ocean) project.)

30. *Id.* at 666-69.

31. *Id.* at 669.

32. *Id.* at 670 (citing Pres. Dec. No. 1152, §§ 17, 20).

incidents.³³ The Court held that the underlying duty to upgrade the quality of water under the Code is not conditioned on any specific pollution incident “as long as water quality ‘has deteriorated to a degree where its state will adversely affect its best usage.’”³⁴ The government agencies, the Court held, are mandated “to take such measures as may be necessary to meet the prescribed water quality standards.”³⁵

The Philippine Supreme Court then emphasized that “it is well-nigh impossible to draw the line between a specific and a general pollution incident . . . [S]uch impossibility extends to pinpointing with reasonable certainty who the polluters are.”³⁶ The duty to clean up and maintain water standards thus extends to polluters in Manila Bay itself, those in adjoining lands and waters, and even to individual persons whose contaminants eventually end up in the bay.³⁷

The Court read Philippine Environment Code’s mandate in conjunction with various codes and statutes, including the charters of each government agency, which taken together reinforce the conclusion that cleaning up Manila Bay is their ministerial duty.³⁸ The Court emphasized that these laws were “clear, categorical, and complete” in obligating the government agencies to clean up Manila Bay and that they had no discretion otherwise.³⁹

In the *fallo*,⁴⁰ the Philippine Supreme Court used the principle of “continuing mandamus,” which was unheard of in the country before. This principle was adopted from *Vineet Narain v. Union of India*,⁴¹ an Indian Supreme Court case, where continuing mandamus was used to enforce the cleanup of the Ganges River from industrial and municipal pollution.⁴² Although rarely used, the Philippine Supreme Court merely exercised its constitutional power to “promulgate rules concerning the protection and enforcement of constitutional rights”⁴³—including the

33. *Id.* at 686–87 (citing Pres. Dec. No. 1152, §§ 17, 20).

34. *Id.* at 686 (citing Pres. Dec. 1152, §§ 17, 20).

35. *Id.* (citing Pres. Dec. No. 1152, § 17).

36. *Id.* at 687.

37. *Id.*

38. *Id.* at 683.

39. *Id.*

40. The last paragraph of the *fallo*, or dispositive portion, reads: “The heads of petitioners-agencies . . . in line with the principle of ‘continuing mandamus,’ shall, from finality of this Decision, each submit to the Court a quarterly progressive report of the activities undertaken in accordance with this Decision.” *Id.* at 697.

41. *MMDA*, 574 SCRA at 688 (citing *Vineet Narain v. Union of India*, 1 S.C.R. 226 (India 1998)).

42. See also *id.* at 688 (citing *M.C. Mehta v. Union of India*, 4 S.C.R. 463 (India 1987)).

43. CONST. (1987), Art. VIII § 5(5), (Phil.).

right to a healthful and balanced ecology.⁴⁴ Thus, heads of the government agencies involved were required to “each submit to the Court a quarterly progressive report of the activities undertaken in accordance with th[e] Decision.”⁴⁵

III. DIVERGENCE OF MANDAMUS IN THE UNITED STATES AND THE PHILIPPINES

By issuing continuing mandamus, the Philippine Supreme Court seems to be implementing a general program for cleaning up Manila Bay even though mandamus in the Philippines continues to be “available only to compel the doing of an act *specifically* enjoined by law as a duty.”⁴⁶ Perhaps this is because the decision was based on the sheer number of statutes involved. Undoubtedly, however, it is telling of the attitude of the Philippine Supreme Court for environmental protection.

Although mandamus was transplanted in the Philippines from the United States, it has evolved differently in practice. As previously mentioned, the APA displaced the writ of mandamus for courts reviewing administrative inaction or unreasonable delay in the United States.⁴⁷ These actions, in the nature of mandamus, continue to be “drastic” and are “hardly ever granted.”⁴⁸ The Philippines, on the other hand, generally retains the principles and doctrines of mandamus⁴⁹ but has exercised discretion liberally in judicial review. This liberality of discretion in judicial review is highlighted in the doctrines on standing and exhaustion of administrative remedies, which the Philippines adopted along with judicial review from the United States.

Aside from highlighting the Philippine Supreme Court’s liberality in judicial review, it is also important to discuss standing and exhaustion of administrative remedies since they could have been grounds to deny relief to the Concerned Residents of Manila Bay. The fact that they were not even considered in *MMDA* is an example of the stark contrast between the judicial review of administrative discretion in the Philippines and the United States.

44. CONST. (1987), Art. II §§ 15–16 (Phil.); *see also* *Oposa v. Factoran*, G.R. No. 101083, 224 SCRA 792, 804–05 (July 30, 1993). (Phil.).

45. *MMDA*, 574 SCRA at 697.

46. *Henares v. Land Transp. Franchising & Regulatory Bd.*, G.R. No. 158290, 505 SCRA 104, 117 (Oct. 23, 2006). (Phil.).

47. Note that writs of mandamus are allowed where the APA is unavailable. *See* STRAUSS ET AL., *supra* note 17, at 1111 (citing *R.I. Dep’t of Env’tl. Mgmt. v. United States*, 304 F.3d 31 (1st Cir. 2002); *Chamber of Commerce of U.S. v. Reich* 74 F.3d 1322 (D.C. Cir. 1996)).

48. *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005).

49. *See* R. CIV. P. 65, § 3 (Phil.); *BPI Family Savs. Bank Inc. v. Manikan*, G.R. No. 148789, 395 SCRA 373 (Jan. 16, 2003). (Phil.); *Henares*, 505 SCRA at 117 (2006).

As a requirement for “actual case or controversy” in judicial review,⁵⁰ the Philippine Supreme Court has granted standing on the amorphous ground of “transcendental importance.”⁵¹ Exceptions to “actual case or controversy” requirements even include “exceptional character of the situation” and “paramount public interest.”⁵² Perhaps the government agencies did not raise standing as a possible bar to suit because it was not practical, politically or legally, for them to question the “transcendental importance” of cleaning Manila Bay.

In the United States, on the other hand, the Supreme Court emphasizes that an “injury-in-fact” must be suffered by a plaintiff, which must be “fairly traceable” to the challenged action and redressable by judicial remedy.⁵³ Although these requirements are not impossible to meet, as in the exceptional case of *Massachusetts v. EPA*,⁵⁴ it remains to be seen whether citizen groups could attain standing in a case similar to *MMDA v. Concerned Residents*.

Exhaustion of administrative remedies was not raised as an issue by the Philippine government agencies in *MMDA v. Concerned Residents*, although there is also a Philippine version of the doctrine.⁵⁵ In any case, even if they had raised exhaustion, the Philippine Supreme Court could have easily fit the case into any of its many exceptions that have evolved doctrinally. It could have found the agencies’ failure to clean up Manila Bay “patently illegal amounting to lack or excess of jurisdiction,” causing further “irreparable injury” to Concerned Residents of Manila Bay, in which case “requiring exhaustion of administrative remedies would be unreasonable.”⁵⁶ Exceptions to the exhaustion doctrine even include the amorphous “circumstances indicating the urgency of judicial intervention,” which again boils down to the attitude and discretion of the court.⁵⁷

50. CONST. (1987), Art. VIII § 1, (Phil.). (requiring actual case and controversies for judicial review).

51. Integrated Bar of the Phil. v. Zamora, G.R. No. 141284, 338 SCRA 81, 102 n.18 (Aug. 15, 2000). (Phil.) (citations omitted).

52. See Quizon v. Comm’n on Elections, G.R. No. 177927, 545 SCRA 635, 640 (Feb. 15, 2008). (Phil.) (citing David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, 214 (May 3, 2006). (Phil.))

53. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1991).

54. See *Massachusetts v. EPA*, 549 U.S. 497, 516–27 (2007).

55. See, e.g., Province of Zamboanga del Norte v. Ct. of App., G.R. No. 109853, 342 SCRA 549, 557 (Oct. 11, 2000). (Phil.) (discussing the doctrine of exhaustion of administrative remedies in Philippine law).

56. See *id.* at 558–59 (describing various exceptions to the doctrine of exhaustion of administrative remedies under Philippine law).

57. *Id.* at 559 (citing Quisumbing v. Gumban, G.R. No. 85156, 193 SCRA 520, 521 (Feb. 5, 1991). (Phil.)).

The continuing mandamus in *MMDA* is indeed promising for the environment in the Philippines. However, there may be complications. Since government agencies are required to report their progress in implementing the law to the Supreme Court, not only to the President, the Philippine Supreme Court is ensuring execution of the law beyond mere adjudication. According to the Philippine Constitution, judicial power should extend only to resolution of “actual cases and controversies,”⁵⁸ and requiring government agencies to report to the Supreme Court may impede efficiency through division of labor—an important purpose of the doctrine of separation of powers.⁵⁹ It also remains to be seen whether continuing mandamus will be effective and result in the clean up of Manila Bay.⁶⁰

CONCLUSION

Philippine courts are inclined to grant judicial remedy for the environment. As a matter of fact, the Philippine Supreme Court has recently promulgated the Rules of Procedure for Environmental Cases,⁶¹ including the “Writ of Kalikasan (Nature)” specifically designed for environmental protection and preservation.⁶² The actions of the Filipino judiciary can be explained as an effort to make up for the failure of government agencies to safeguard the environment whether for lack of resources,⁶³ competence, or political will. While the difference in resources, competence, and political will has probably shaped judicial

58. CONST. (1987), Art. VIII § 1, (Phil.); *see also* GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 91 (2009).

59. *See* STONE ET AL., *supra* note 58, at 357.

60. After more than six months, contempt charges were filed against various department secretaries and agency heads since only the Department of Environment and Natural Resources and MMDA submitted their reports in compliance with the Supreme Court decision. *See* World Justice Project, *supra* note 1.

61. Rules of Procedure for Environmental Cases, Administrative Matter No. 09-6-8-SC (effective April 29, 2010). The rules codifies continuing mandamus and defines it as “a writ issued by a court in an environmental case directing any agency or instrumentality of the government or officer thereof to perform an act or series of acts decreed by final judgment which shall remain effective until judgment is fully satisfied.” *Id.* at R. 1, § 4(c); *see also id.* At R. 7.

62. *Id.* at R. 8.

63. *See* World Bank Group, Economy Rankings, <http://www.doingbusiness.org/EconomyRankings> (last visited Apr. 13, 2010) (ranking the Philippines 144th out of 183 countries in terms of ease of doing business, which is indicative of wealth and resources. The United States is ranked 4th.)

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attitude differently in both countries, there is indeed great potential for environmental protection in a modern and developed governmental structure if American courts would take a more active attitude towards environmental protection like their Philippine counterparts.

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