A BRIEF REVIEW OF THE PRECAUTIONARY PRINCIPLE AS OBSERVED FROM PHILIPPINE STATE PRACTICE*

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Introduction

The Precautionary Principle figures prominently in a growing number of laws and jurisprudence and has been the subject of much legal scholarship. Despite its prominence there is still disagreement as to its purpose and effect. While the idea of "precaution" may be universally accepted, the exact manner of operationalization of the precautionary principle is not.

This paper adds to the legal scholarship in the hope that its modest contribution can help bring clarity to the concept. This paper is intended to provide a basic understanding of the Precautionary Principle viewed primarily from the lens of Philippine laws and jurisprudence.

Part I of this paper briefly discusses the background and historical development of the Precautionary Principle. Part II reviews the various ways the principle is stated or defined. Part III identifies its rationale and effects. Part IV provides an overview of its status under International Law. Part V investigates how the principle is used under Philippine law and jurisprudence.

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As a brief review, this paper makes no claim on exhaustiveness. Neither is it a comprehensive discussion on precautionary principle as an international legal concept. This paper is intended merely to introduce the concept in the hopes of spurring further discussion of its more specific application under Philippine law. To this end the paper avoids discussing in depth opinions, both critical and supportive of the precautionary principle. As an introduction to the precautionary principle, this review merely provides a basic outline of the concept under international law in order to properly frame the discussion with respect to its application under Philippine law.

I. Background and Historical Development

Scholars trace the origin of the precautionary principle to *Vorsorgeprinzip*[1] which was incorporated in German domestic law in 1974.[2] Similar doctrines are said to have been introduced in Swedish and Swiss law.[3] Since then various states have incorporated the principle in their domestic laws.[4]

Sunstein and other scholars[5] identify the United Nations World Charter for Nature as giving the first international recognition to the principle in 1982, as it suggested that when "potential adverse effects are not fully understood, the activities should not proceed."[6] On the other hand, *Sirinskiene* says that the principle made its first appearance in international law in 1984 when an indirect reference to the precautionary principle was made in a non-binding international document–the Bremen Ministerial Declaration of the International Conference on the Protection of the North Sea.[7]

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[1] JONATHAN WIENER, PRECAUTION IN THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, 599 (2007); Steve Maguire and Jaye Ellis, Redistributing the Burden of Scientific Uncertainty: Implications of the Precautionary Principle for State and Nonstate Actors, 11 GLOBAL GOVERNANCE 505-526 (Oct.-Dec. 2005); Cass R. Sunstein, Beyond the Precautionary Principle, 151 UNIVERSITY OF PENNSYLVANIA L. REV. 1003-1058 (Jan. 2003).

[2] AGNE SIRINSKIENE, THE STATUS OF PRECAUTIONARY PRINCIPLE: MOVING TOWARDS A RULE OF CUSTOMARY LAW JURISPRUDENCE 350, 349-364 (2009).

[3] WIENER, *supra* note 1, at 599.

[4] *Id.,* at 599-601.

[5] Rabbi Deloso, *The Precautionary Principle: Relevance in International Law and Climate Change*, 80 PHIL. L.J. 660, 689-690 (2006)

[6] SUNSTEIN, *supra* note 1, at 1006.

[7] SIRINSKIENE, *supra* note 2, at 350.

In 1985, the Vienna Convention for the Protection of the Ozone Layer is said to be the first multilateral treaty to make explicit reference to precaution[8] or the first example of the acceptance of the "precautionary principle" in a major international negotiation.[9] But it merely states in its preamble that:

> Mindful also of the precautionary measures for the protection of the ozone layer which have already been taken at the national and international levels,

In 1987 the London Ministerial Declaration of the International Conference on the Protection of the North Sea expressly used the term *precautionary approach*.[10] *Deloso* adds:

> From the North Sea Ministerial Forum, the concept of precaution was integrated into global marine environmental regimes, global environmental regimes, and into negotiations for a global fisheries regime for straddling and highly migratory stocks. In the Declaration of the Third International Conference on the Protection of the North Sea (Hague Declaration), the principle was adopted as a key premise for subsequent works. During negotiations of the Oslo and Paris (OSPAR) Commissions, the precautionary concept found its way beyond the North Sea to include the North-East Atlantic. Not only did the OSPAR Commissions reiterate the principle, instruments were also established for implementation of the precautionary policies.[11]

In 1992, Rio Declaration was issued and its Principle 15 reflects the most prominent statement of the precautionary principle. The Convention on Biological Diversity, which also provided for precautionary concept, was also adopted in 1992 during the Earth Summit.[12]

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[8] Deloso, *supra* note 5, at 661.

[9] *Ozone Secretariat*, THE VIENNA CONVENTION FOR THE PROTECTION OF THE OZONE LAYER, available at http://mountainlex.alpconv.org/images/documents/international/convention_ozone_layer.pdf

[10] SIRINSKIENE, *supra* note 2, at 350.

[11] Deloso, *supra* note 5, at 661.

[12] *Id.,* at 663.

In 1994, the Guidelines to the Convention on International Trade in Endangered Species (CITES) which provided for a precautionary approach in determining whether species are threatened with extinction or are likely to withstand pressures of trade was adopted.[13]

In the years following, more and more international instruments invoke the precautionary principle. *Wiener* notes that the precautionary principle has been adopted in over 50 multilateral instruments relevant to international environmental law.[14]

II. Definition and Statement

There is no single statement defining the precautionary principle. As *Wiener* notes, "[d]espite the widespread endorsement of precaution as a *strategy* in many ... cases there is no single agreed statement of understanding of the [precautionary principle] as a *principle.*"[15] Some have noted at least 14 different definitions of the precautionary principle that exist in international law.[16]

The most well-known definition is Principle 15 of the Rio Declaration[17] which states:

> In order to protect the environment, the **precautionary approach** shall be widely applied by States according to their capabilities. *Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures* to prevent environmental degradation. (emphasis supplied)

The basic elements of Principle 15 can be seen in the United Nations Framework Convention on Climate Change which states:

> The Parties should take **precautionary** measures to anticipate, prevent or minimize the causes of climate change and mitigate its

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[13] *Id.,* at 66.

[14] WIENER, *supra* note 1, at 601.

[15] *Id.,* at 602.

[16] Vanderzwaag, D. *The Precautionary Principle in International Law and Policy: Elusive Rhetoric and First Embraces*, 8 J. OF ENV. L. & PRACTICE 355-375 (1999) cited in SIRINSKIENE at 351.

[17] SIRINSKIENE, *supra* note 2, at 351; Shirley V. Scott, *How Cautions is Precautious?: Antarctic Tourism and the Precautionary Principle*, 50 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 963-971 (Oct. 2001).

> adverse effects. *Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures*, taking into account that policies and measures to deal with climate change should be *cost-effective* so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.[18]

The preamble of the Convention on Biological Diversity provides:

> Noting also that where there is a threat of significant reduction or loss of biological diversity, *lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat*.

The preamble to the 1979 Protocol to the Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions[19] provides:

> Convinced that where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that such precautionary measures to deal with emissions of air pollutants should be cost-effective,

Article 5(a) of the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Water-Courses and International Lakes provides:

> (a) The precautionary principle, by virtue of which *action to prevent, control or reduce water-related disease shall not be postponed on the ground that scientific research has not fully proved a causal link* between the factor at which such action is aimed, on the one hand, and the potential contribution of that factor to the

[18] U.N. FCCC, art. 3, para. 3.

[19] Protocol to the Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions preamble, 2030 U.N.T.S. 122.

> prevalence of water-related disease and/or transboundary impacts, on the other hand;[20]

These statements correspond to what *Wiener* refers to as "Version 1" of the precautionary principle or that "uncertainty does not justify inaction."[21] He adds:

> all formulations have an essential element in common: rational decisions may and should be taken on the basis of uncertain science, despite a "lack of full scientific certainty" or of "conclusive evidence to prove a causal relation between input and their effects."[22]

On the other hand, the Wingspread Declaration states:

> Where an activity raises *threats of harm* to the environment or human health, precautionary measures **should be taken** even if some cause and effect relationships are not fully established scientifically.[23]

Wiener refers to this as a more aggressive statement of the principle and refers to it as "Version 2" or that "uncertainty justifies action."[24] He adds that "version 2 is more precautionary than version 1, insofar as version 2 affirmatively impels regulatory intervention rather than just permitting it."[25]

Despite the numerous ways the precautionary principle is stated, there appears elements common to most of them. *Deloso*, after surveying international agreements from 1984 to 2004 found that:

> it can be concluded that the precautionary principle under current international law formulations provides for three fundamental elements: (a) risk or threat of serious damage to human health, and/or environment; (b) lack of complete or absolute certainty as to causes and/or impacts; (c) reasonable action to address (a).[26]

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[20] Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Water-Courses and International Lakes, 2331 U.N.T.S. 202.

[21] WIENER, *supra* note 1, at 604.

[22] *Id.*

[23] *Wingspread Statement on the Precautionary Principle*, GLOBAL DEVELOPMENT RESEARCH CENTER, https://www.gdrc.org/u-gov/precaution-3.html.

[24] WIENER, *supra* note 1, at 605.

[25] *Id.*

[26] Deloso, *supra* note 5, at 671.

III. Rationale and Effects

A. The Need to Act Swiftly

One rationale for the precautionary principle is the ability to act quickly on grave threats to the environment.

John argues that despite the different ways the precautionary principle is stated they "share a common core ...[that] we should seek to prevent some threats of damage, particularly threats of serious environmental damage, even when we lack scientific certainty about their existence or magnitude."[27]

Kriebel points out that:

> The precautionary principle has arisen for several reasons; among them is the perception that the pace of efforts to fight problems like climate change, ecosystem degradation, and resource depletion is too slow. Another is that environmental and health problems continue to grow faster than the ability of the society to identify and correct them. Also, the potential for catastrophic effects on global ecological systems has decreased the confidence in the abilities of environmental science and policy to identify and control hazards.[28]

The precautionary principle is based on the premise that when it comes to dangers to the environment, preventive action should not wait.

B. Shifting the Burden of Proof

Maguire and *Ellis* argue that "a major function of the precautionary principle is the redistribution of the burden of scientific uncertainty."[29]

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[27] Stephen John, *In Defence of Bad Science and Irrational Policies: An Alternative Account of the Precautionary Principle*, 13 ETHICAL THEORY AND MORAL PRACTICE 4, 3-18 (Feb. 2010).

[28] David Kriebel et al., *The Precautionary Principle in Environmental Science*, 109 ENVIRONMENTAL HEALTH PERSPECTIVES, 871, 871-876 (Sept. 2001).

[29] Steve Maguire and Jaye Ellis, *Redistributing the Burden of Scientific Uncertainty: Implications of the Precautionary Principle for State and Nonstate Actors*, 2 GLOBAL GOVERNANCE 506, 505-526 (Oct.–Dec. 2005).

According to *Scott*, "[t]he precautionary principle places on those wishing to undertake an action the burden of proof that it will not harm the environment."[30]

Wills argues:

> In its non-absolute form, the essence of this approach is not a rejection of scientific and economic analyses; it reverses the burden of proof. The principle stems from the inadequacy of scientific knowledge, however, its qualified application logically requires the use of the best available science and economics in order to establish the appropriate standards of proof that should be met by would-be developers.[31]

IV. Status of the Principle Under International Law

The recognized sources of International Law are:

a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b) international custom, as evidence of a general practice accepted as law;
c) the general principles of law recognized by civilized nations;
d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[32]

In order to be binding on states, the precautionary principle must either be a conventional rule, a customary norm or a general principle of law.

A. The Precautionary Principle as Conventional Law

States are bound by the precautionary principle as stated in conventions they are a party to under the principle of *pacta sunt servanda*. The precautionary principle has been included, either explicitly or implicitly, in many environmental treaties.[33]

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[30] Shirley V. Scott, *How Cautions is Precautious?: Antarctic Tourism and the Precautionary Principle*, 50 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 964, 963-971 (Oct. 2001).

[31] Ian Wills, *The Environment, Information and the Precautionary Principle*, 4 AGENDA: A JOURNAL OF POLICY ANALYSIS AND REFORM 52-53, 51-62 (1997).

[32] ICJ Statute, art. 38.

[33] SCOTT, *supra* note 30, at 964.

Writing in 2006, *Deloso* lists 30 international environmental agreements and seven (7) international declarations which include the precautionary principle although each of the said instruments contains its own version of the precautionary principle.[34]

However, as will be noted below, in most of these treaties, the precautionary principle does not by itself prescribe an obligation but merely guidance in the application of treaty provisions.

B. The Precautionary Principle as Customary Law

Custom has two elements: state practice, and *opinio juris*. For the precautionary principle to be considered customary law, there must be both widespread and virtually uniform state practice in conformity with it, and evidence that said practice is brought about by a belief in the existence of a rule requiring such practice.

The precautionary principle's status as customary law is not universally accepted. Some scholars argue that it is[35] customary while others do not.[36]

It has been argued that there is a general and consistent state practice to adopt a precautionary approach in multilateral treaties of general application.[37] *Deloso* lists several multilateral treaties which allegedly incorporate the precautionary principle, though he admits that most of them provide for it in the preamble.[38] He argues, however, that the obligations embodied in the treaties would have to be interpreted in light of such preambular statements.[39] Still, some of these preambular statements merely refer to the taking of precautionary measures only. For instance, in the Montreal Protocol,[40] the preambular statement merely states:

> Determined to protect the ozone layer by taking **precautionary measures** to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the

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[34] DELOSO, *supra* note 5, at 671.

[35] *See* WIENER, *supra* note 1, at 601.

[36] *See Id.,* at 602; SIRINSKIENE, *supra* note 2, at 353.

[37] Deloso, *supra* note 5, at 689.

[38] *Id.,* at 689-690.

[39] *Id.*

[40] Montreal Protocol on Substances that Deplete the Ozone Layer, 1522 U.N.T.S. 3.

> basis of developments in scientific knowledge, taking into account technical and economic considerations,

Also some of those listed merely makes reference to Principle 15 of the Rio Declaration.[41] But some do provide that in taking measures to implement the treaty the Parties shall be guided in particular by the Precautionary Principle.[42]

Apart from multilateral treaties, *Deloso* identifies several multilateral declarations supporting or adopting the precautionary principle.[43] He argues that these declarations "suggest that states have affirmed the precautionary principle on matters involving human health and protection from any serious or irreversible harm.[44] *Sirinskiene* identifies "more than 90 international declarations and agreements."[45] *Sirinskiene* also argues that:

> State practice is further rejected in the applications and decisions of national and international courts where legal parties defend their legal interests based on the precautionary principle. Classical examples of such application of the precautionary principle are the *Gabčikovo-Nagymaros Project (The Danube Dams)* and *French underground nuclear tests* cases in the ICJ.[46]

Deloso argues that the increase in the number of signed and ratified treaties containing the precautionary principle "can be proof of a sense of obligation on the part of the states to adopt the precautionary principle."[47]

Deloso also argues that additional "evidence of the emergence of a customary norm of international law... is the adoption of the norm in national policies.[48] *Sirinskiene* identifies domestic law as another indicator of state practice.

As such, while there may be widespread practice or at least mention of the precautionary principle in numerous international instruments, evidence of *opinio*

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[41] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2226 U.N.T.S. 208; Stockholm Convention on Persistent Organic Pollutants, 2556 U.N.T.S. 119.

[42] Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Water-Courses and International Lakes, art. 5 (a), 2331 U.N.T.S. 202.

[43] Deloso, *supra* note 5, at 690.

[44] *Id.*

[45] SIRINSKIENE, *supra* note 2, at 355.

[46] *Id.,* at 357.

[47] DELOSO, *supra* note 5, at 691.

[48] *Id.,* at 692.

juris is not as plentiful, unless the same instruments used to determine state practice is also used to determine *opinio juris.*

C. The Precautionary Principle as a General Principle of Law

A general principle of law is "a general principle recognized in the legal systems of independent states."[49] These are principles "which can be derived from a comparison of the various systems of municipal law, and the extraction of such principles as appear to be shared by all, or a majority, of them."[50] Thus, if a sufficient number of states adopt the precautionary principle in their domestic law, it may be regarded as a general principle of law.

Deloso identified domestic legislation in Germany, United Kingdom, Canada and India pertaining to the precautionary principle.[51]

Sirinskienne notes that:

> The precautionary principle is widely used in the domestic environmental law of Germany, Belgium, and the Nordic countries (Denmark, Norway, Sweden, Finland and Island). In 2005, the principle was incorporated into the Preamble of the Constitution of France and is now part of the "Environmental charter" of the Constitution (another part of this preamble is the 1789 Declaration of the Rights of Man and the Citizen). Therefore, in French domestic law the precautionary principle is treated as a constitutional principle, which claims to be on the same level as the principles of the Declaration of the Rights of Man and the Citizen. A systematic analysis of the French Constitution reveals that the relationship between articles 1 and 5 may be interpreted as giving broader application for the pre-cautionary principle and that the principle may also be applied in certain areas of public health.
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> The precautionary principle is found not only in the domestic laws of European countries. For example, in 1992 the principle became part of the National Strategy for Ecologically Sustainable Development in

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[49] Waldock, *General Course on Public International Law*, *IN* INTERNATIONAL LAW (DJ Harris ed., 2011).

[50] Hugh Thirlway, *The Sources of International Law*, *IN* INTERNATIONAL LAW 128 (Malcolm Evans ed., 2006).

[51] DELOSO, *supra* note 5, at 693-694.

> Australia. In 1993, the principle was incorporated into Australia's Environmental Protection Act. In 1996, the precautionary principle was defined in the oceans Act of Canada. In 1999, the Environmental Protection Act of Canada, which also regulates the activities of public administration institutions, was also supplemented with the precautionary principle. Even US law makes some indirect allusions to the precautionary principle (as measures) when dealing with questions of food safety and air pollution. Furthermore, as part of environmental impact assessment, the precautionary principle may be found in the local laws of about fifty countries.

Sirinskiene gave the reasons stated above as examples of state practice in order to justify that the precautionary principle is custom. However, they can also be understood as proof that, in domestic legal systems of independent states, the principle enjoys general recognition.

V. The Precautionary Principle Under Philippine Law

A. Statutes and Administrative Issuances

1. Statutes

a. Republic Act No. 9729 (RA 9729)

RA 9729, also known as "The Climate Change Act of 2009" is intended to mainstream climate change into government policy formulations by establishing the framework strategy and program on climate change and creating for this purpose the Climate Change Commission.

Section 2 of RA 9729 provides:

> SEC. 2. *Declaration of Policy*. – It is the policy of the State to afford full protection and the advancement of the right of the people to a healthful ecology in accord with the rhythm and harmony of nature. In this light, the State has adopted the Philippine Agenda 21 framework which espouses sustainable development, to fulfill human needs while maintaining the quality of the natural environment for current and future generations.
>
> Towards this end, the State adopts the principle of protecting the climate system for the benefit of humankind, on the basis of climate

> justice or common but differentiated responsibilities and the Precautionary Principle *to guide decision-making in climate risk management*...[52]

Thus, while the precautionary principle was mentioned in the declaration of policy, its use is identified for a specific purpose, that is "to guide decision-making in climate risk management."

b. Republic Act No. 10067 (RA 10067)

RA 10067 is also known as the "Tubbataha Reefs Natural Park (TRNP) Act of 2009." It established the TRNP in the province of Palawan as a protected area under the NIPAS Act and the Strategic Environmental Plan for Palawan Act.

Section 13(q) of RA 10067 provides that the powers and functions of the Tubbataha Protected Area Management Board (TPAMB)[53] include:

> Determine, based on existing scientific evidence, laws, rules and regulations, international instruments, traditional resource utilization, management modalities in the area, carrying capacity, *and observing precautionary principle, the modes of utilization of the TRNP and all the resources found therein*. Permits shall only be issued for such modes of utilization and enjoyment as the TPAMB and this Act shall allow;

Thus, the TPAMB is supposed to observe the precautionary principle in determining the modes of utilization and enjoyment of the TRNP.

c. Republic Act No. 10654 (RA 10654)

RA 10654 amends Republic Act No. 8550, otherwise known as "The Philippine Fisheries Code of 1998," provides that it is the policy of the State:

> (f) *To adopt the precautionary principle* and manage fishery and aquatic resources, in a manner consistent with the concept of an ecosystem-based approach to fisheries management and integrated coastal area management in specific natural fishery

[52] The Climate Change Act of 2009, Rep. Act No. 9729.

[53] Under Sec. 10, RA 10067, the TPAMB is the sole the policy-making and permit-granting body of the Tubbataha Reefs National Park.

> management areas, appropriately supported by research, technical services and guidance provided by the State; and xxx

Presumably the adoption of the precautionary principle is in connection with the management of fishery and aquatic resources.

2. *Administrative Issuances*

Under Philippine Law, administrative issuances are issued to support the implementation of statutes issued by Congress. These issuances fill in the details which the statutes may not have identified. They are also useful to understand how the law is operationalized. The Precautionary Principle is mentioned in a number of administrative issuances and it serves particular purposes.

One purpose is to serve as a guiding principle. For example, Executive Order 514[54] provides that the precautionary approach shall guide biosafety decisions.

DOH Administrative Order No. 0009-13 provides:

> *Precautionary Principle and Prevention.* As embodied in the Rio Declaration under Principle 15 states that where there are threats of serious or irreversible damage to the environment, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. *In the development of policies and guidelines on chemicals safety, agencies shall consider the importance of precautionary measures* in avoiding human health and environmental impacts of new, existing or future chemicals use. Furthermore, concerned agencies shall contribute to the scientific understanding of the links between environmental exposure and human health impacts, and the need to ensure the participation and protection of vulnerable groups, such as women, children, older persons, indigenous populations and socially and economically disadvantaged groups, including equitable provision of comprehensible information.[55]

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[54] Establishing the National Biosafety Framework, Prescribing Guidelines for Its Implementation, Strengthening the National Committee on Biosafety of the Philippines, and for Other Purposes, Exec. Ord. No. 514 (2006).

[55] National Chemical Safety Management and Toxicology Policy, DOH Administrative Order No. 0009-13 (2013).

Another purpose is to have the principle as one of the basic considerations in specific processes. For instance, EMB Memorandum Circular No. 005-11 provides that the principles of precautionary approach should be applied in incorporating Disaster Risk Reduction/Climate Change Adaptation into the Environmental Impact Assessment process.[56] It further states:

> The precautionary approach recognizes that the absence of full scientific certainty should not be used as a reason to postpone decisions where there is a risk of serious or irreversible harm, and that precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.
>
> Thus, this circular adopts "Version 1" of the precautionary principle.

Sometimes, similar to its role in certain statutes, the precautionary principle is included in the preambular clauses explaining the rationale for the issuance.[57]

The precautionary principle is also used to guide planners in the planning process[58] or in the validation of the safety and efficacy of certain products and derivatives.[59]

3. Ordinances

The precautionary principle has been incorporated into the environmental legislation of several cities and municipalities. These local government units are mandated to apply a precautionary approach in the assessment of risk of environmental harm,[60] and to take immediate preventive action, using the best available knowledge, in situations where there is reason that something is causing

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[56] Incorporating Disaster Risk Reduction (DRR) and Climate Change Adaptation (CCA) Concerns in the Philippine EIS System, EMB Mem. Circular No. 005-11 (2011).

[57] FISHERIES Administrative Order No. 223-03 Moratorium on the Issuance of New Commercial Fishing Vessel and Gear License (2003).

[58] HLURB Guidelines for the Application of the Strategic Planning Process in the Preparation of the Comprehensive Land Use Plan (CLUP) and to Import Urban Area and Problems (2001).

[59] Rules and Regulations Implementing the Traditional and Alternative Medicine Act of 1997 (2000).

[60] Aleosan Municipal Ordinance No. 058 – 11, An Ordinance Enacting the Environment Code of the City of Aleosan, Province of Cotabato (2011); San Carlos City Ordinance No. 08-12 San Carlos City Environment Code (2012); Kalibo General Ordinance No. 005-09 sec. 4 (2009); A Resolution Enacting the Masbate Provincial Environment Code of 2000 sec. 2 (2000).

a potentially severe or irreparable environment harm even in the absence of conclusive scientific evidence establishing a causal link.[61]

Specific applications include climate-related measures. A Quezon City ordinance on the open burning of refuse[62] makes specific reference to Sec. 2 of the Climate Change Act of 2009, adopting the precautionary principle to guide decision-making in climate risk management.[63] Similarly, the Environment Code of Cebu mandates the use of the precautionary principle as the guide of all decision-making in climate risk management.[64] The principle has also been applied to the regulation of genetic-based erosion and genetic pollution vis-à-vis transgenic organisms through genetic engineering,[65] waste-water treatment,[66] and land-degradation.[67]

B. Judicial Rules and Jurisprudence

1. Rules of Procedure for Environmental Cases (RPEC)

Rule 1 Section 4(f) of the RPEC provides:

> (f) Precautionary principle states that when human activities may lead to threats of serious and irreversible damage to the environment that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that threat.

This definition seems to follow Version 2 of the Precautionary Principle as described by *Wiener*[68] requiring action despite uncertainty. This rule therefore seems to provide for a substantive duty and not merely a rule of procedure as described in Rule 20.

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[61] Lingayen Municipal Ordinance No. 012-14 An Ordinance Enacting the Municipal Environment Code of the Municipality of Lingayen, Pangasinan.

[62] Quezon City Ordinance No. Sp-2122-11, An Ordinance Prohibiting the Open Burning of Garbage, Trash or Any Other Refuse Materials Within the Territorial Jurisdiction of Quezon City and for Other Purposes preamble (2011); Carmona Municipal Ordinance No. 007-06 (2006).

[63] Climate Change Act, Republic Act No. 9729, sec. 2 (2009).

[64] Cebu Provincial Ordinance No. 13-12, sec. 1, art. XIII (2012).

[65] Cebu Provincial Ordinance No. 13-12 (2012).

[66] San Carlos City Ordinance No. 08-12 San Carlos City Environment Code, sec. 4F.02 (2012).

[67] Tubungan Municipal Ordinance No. 09-09 (2009).

[68] *See* Part II infra.

Rule 20 of the RPEC states:

> SECTION 1. *Applicability*.—When there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it.
>
> The constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt.
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> SECTION 2. *Standards for Application.*—In applying the precautionary principle, the following factors, among others, may be considered: (1) threats to human life or health; (2) inequity to present or future generations; or (3) prejudice to the environment without legal consideration of the environmental rights of those affected.

2. *Supreme Court Cases*

While few in number, the Philippine Supreme Court cases that discuss the precautionary principle are high profile cases of primordial importance.

a. West Tower Condominium v. First Philippine Industrial Corporation et al[69]

i. The Facts of the Case

The First Philippine Industrial Corporation (FPIC) operates two pipelines: (1) the White Oil Pipeline (WOPL) System, which covers a 117-kilometer stretch and transports diesel, gasoline, jet fuel and kerosene; and (b) the Black Oil Pipeline (BOPL) System, which extends 105 kilometers and transports bunker. A Petition for the Issuance of a *Writ of Kalikasan* was filed following the leak in the WOPL system owned by First Philippine Industrial Corporation (FPIC) in Makati City. At one point the petitioners invoked the precautionary principle and asserted that the possibility of a leak in the BOPL System leading to catastrophic environmental damage is enough reason to order the closure of its operation. The Court defined the principle in accordance with Sec. 4(f), Rule 1 of the Rules of Procedure for Environmental Cases:

> the precautionary principle states that when human activities may lead to threats of serious and irreversible damage to the environment that

[69] G.R. No. 194239 (June 16, 2015).

> is scientifically plausible but uncertain, actions shall be taken to avoid or diminish the threat.

The Court ordered the Department of Energy (DOE) to oversee the implementation of its orders to the FPIC. Particularly, the Court was concerned about the management of the pipelines. Upon confirmation of the DOE that the pipelines were ready for commercial operations, the Court will issue an order to resume its operations. The Court also directed FPIC to undertake and continue the remediation, rehabilitation and restoration of the affected Barangay Bangkal environment until full restoration of the affected area to its condition prior to the leakage is achieved.

ii. Application of the Principle

The Leonen Dissenting Opinion

In his dissent, Justice *Leonen* argued:

> The *Writ 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. (emphasis supplied)

Furthermore, *Leonen* said:

> This need for "balance" and the incidence of oil pipeline tragedies prompted the majority to further delay the lifting of the temporary environmental protection order despite findings that support the pipeline's integrity/safety. The majority also ruled that the procedures already conducted in the presence of the Department of Energy should be repeated in light of the uncertainty and fear caused by the cited oil pipeline disasters. In trying to achieve "balance," therefore, and in adopting the Court of Appeals' findings, **the majority adopted a strict application of the precautionary principle. This may result to situations inconsistent with environmental protection.**

Under the Rules, the precautionary principle shall be applied in resolving environmental cases when the causal link between human

activity and an environmental effect cannot be established with certainty. Based on this principle, an uncertain scientific plausibility of serious and irreversible damage to the environment justifies actions to avoid the threat of damage. Avoidance of threat or damage, as in this case, usually comes in the form of inhibition of action or activity.

Strict application of the precautionary principle means that the mere presence of uncertainty renders the degree of scientific plausibility for environmental damage irrelevant. Speculations may be sufficient causes for the grant of either a temporary environmental protection order or a permanent environmental protection order, regardless of the extent of losses and risks resulting from it.

This interpretation may be inconsistent with the purpose of avoiding threat or damage to the environment and to the people's general welfare. It was argued that:

> If [the precautionary principle] is taken for all that it is worth, it leads in no direction at all. The reason is that risks of one kind or another are on all sides of regulatory choices, and it is therefore impossible, in most real-world cases, to avoid running afoul of the principle. Frequently, risk regulation creates a (speculative) risk from substitute risks or from foregone risk-reduction opportunities. And because of the (speculative) mortality and morbidity effects of costly regulation, any regulation—if it is costly—threatens to run afoul of the Precautionary Principle.

In the end, the inhibition of pipeline activities may in itself be a plausible and equally harmful threat to the general welfare compared to the threat posed by the pipeline. Permitting the increase of air pollution and unnecessary use of public resources may be inconsistent with the precautionary principle that the majority tried to apply in resolving the case.

Thus, dealing with environmental issues is not as simple as applying the precautionary principle in its strict sense when faced with uncertainty. We must recognize the interconnectedness of variables and issues so that we can address them more effectively and truly in

accordance with our policy of taking care of the people's general welfare through environmental protection. (citations omitted)

The Velasco Ponencia

Justice *Velasco* responded to the dissent in this way:

Justice Leonen, in his dissent, is of the view that the petition should be denied and the TEPO immediately lifted in light of the DOE's issuance of a certification attesting to the safety of the WOPL for continued commercial operations, thereby rendering the instant petition moot and academic, seeking, as it does, the checking of the pipeline's structural integrity. According to his dissent, the *writ of kalikasan* issued by the Court has already served its functions and, therefore, is *functus officio*. Moreover, he argues that directing the DOE and FPIC to repeat their previous procedures is tantamount to doubting the agency's performance of its statutorily-mandated tasks, over which they have the necessary expertise, and implies that said DOE certification is improper, a breach, allegedly, of the principle of separation of powers.

He also contends that the majority ordered the repetition of the procedures and tests already conducted on the WOPL because of the fear and uncertainty on its safeness despite the finding of the DOE in favor of its reopening, taking into consideration the occurrence of numerous pipeline incidents worldwide. The dissent argues that the precautionary principle should not be so strictly applied as to unjustifiably deprive the public of the benefits of the activity to be inhibited, and to unduly create other risks.

The dissent's contentions that the case is already moot and academic, that the *writ of kalikasan* has already served its function, and that the delay in the lifting of the TEPO may do more harm than good are anchored on the mistaken premise that the precautionary principle was applied in order to justify the order to the DOE and the FPIC for the conduct of the various tests anew. The following reasons easily debunk these arguments:

1. The precautionary principle is not applicable to the instant case;

2. The DOE certification is not an absolute attestation as to the WOPL's structural integrity and in fact imposes several conditions for FPIC's compliance;
3. The DOE itself, in consultation with FPIC and the other concerned agencies, proposed the activities to be conducted preparatory to the reopening of the pipeline; and
4. There are no conclusive findings yet on the WOPL's structural integrity.

> Section 1, Rule 20 of A.M. No. 09-6-8-SC or the Rules of Procedure for Environmental Cases, on the Precautionary Principle, provides that "[w]hen there is lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it."
>
> According to the dissent, the directive for the repetition of the tests is based on speculations, justified by the application of said principle. This, however, is not the case. Nowhere did We apply the precautionary principle in deciding the issue on the WOPL's structural integrity.
>
> The precautionary principle only applies when the link between the cause, that is the human activity sought to be inhibited, and the effect, that is the damage to the environment, cannot be established with full scientific certainty. Here, however, such absence of a link is not an issue. Detecting the existence of a leak or the presence of defects in the WOPL, which is the issue in the case at bar, is different from determining whether the spillage of hazardous materials into the surroundings will cause environmental damage or will harm human health or that of other organisms. As a matter of fact, the petroleum leak and the harm that it caused to the environment and to the residents of the affected areas is not even questioned by FPIC.

Thus, while the dissent argued that the strict application of the precautionary principle may result in greater environmental harm, the majority countered by stating that the precautionary principle did not apply at all.

b. International Service v. Greenpeace[70]

i. The Facts of the Case

Petitioners and other institutions agreed to undertake a collaborative research and development project on eggplants that are resistant to the fruit and shoot borer later described as "Bt Talong." A contained experiment was started in 2007 and officially completed on March 3, 2009. Thereafter, field testing of Bt talong commenced on various dates in the several approved trial sites in Davao City and Laguna.

Subsequently, Greenpeace, MASIPAG and individual respondents (Greenpeace, et al.) filed a petition for *writ of kalikasan* and writ of continuing *mandamus* with prayer for the issuance of a Temporary Environmental Protection Order (TEPO). Greenpeace, et al. argued that this case called for the application of the precautionary principle, the *Bt talong* field testing being a classic environmental case where scientific evidence as to the health, environmental and socio-economic safety is insufficient or uncertain and preliminary scientific evaluation indicates reasonable grounds for concern that there are potentially dangerous effects on human health and the environment. In response, it was argued that the precautionary principle is not applicable considering that the field testing is only a part of a continuing study being done to ensure that the field trials have no significant and negative impact on the environment. There was no resulting environmental damage of such magnitude as to prejudice the life, health, property of inhabitants in two or more cities or provinces.

The appellate court concluded that the precautionary principle set forth in Section 1, Rule 20 of the Rules of Procedure for Environmental Cases was relevant, stressing the fact that the "over-all safety guarantee of the *Bt talong* remained unknown. In its Resolution denying the Motion for Reconsideration the appellate court said:

> Of course, the *bt talong's* threat to the human health of the Filipinos as of now remains **uncertain**. This is because while, on one hand, no Filipinos has ever eaten it yet, and so, there is no factual evidence of it actually causing acute or chronic harm to any or a number of ostensibly identifiable perms, on the other hand, there is correspondingly no factual evidence either of it not causing harm to anyone. However, in a study published on September 20, 2012 in *"Food*

[70] G.R. No. 209271 (Dec. 8, 2015).

> *and Chemical Toxicology,"* a team of scientists led by Professor Gilles-Eric Seralini from the University of Caen and backed by the France-based Committee of Independent Research and Information on Genetic Engineering came up with a finding that rats fed with Roundup-tolerant genetically modified corn for two years developed cancers, tumors and multiple organ damage. The seven expert witnesses who testified in this Court in the hearing conducted on November 20, 2012 were duly confronted with this finding and they were not able to convincingly rebut it. **That is why we, in deciding this case, applied the precautionary principle** in granting the petition filed in the case at bench. (emphasis supplied)

ii. Application of the Principle

The Court began by explaining its understanding of the background of the precautionary principle:

> The precautionary principle originated in Germany in the 1960s, expressing the normative idea that governments are obligated to "foresee and forestall" harm to the environment. In the following decades, the precautionary principle has served as the normative guideline for policymaking by many national governments. The Rio Declaration on Environment and Development, the outcome of the 1992 United Nations Conference on Environment and Development held in Rio de Janeiro, defines the rights of the people to be involved in the development of their economies, and the responsibilities of human beings to safeguard the common environment. It states that the long term economic progress is only ensured if it is linked with the protection of the environment. For the first time, the precautionary approach was codified under Principle 15, which reads:
>
> > In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
> >
> > Principle 15 codified for the first time at the global level the precautionary approach, which indicates that lack of scientific certainty is no reason to postpone action to

> avoid potentially serious or irreversible harm to the environment. It has been incorporated in various international legal instruments.

The Court then explained the connection between the Cartagena Protocol and the Precautionary Principle:

> The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, finalized and adopted in Montreal on January 29, 2000, establishes an international regime primarily aimed at regulating trade in GMOs intended for release into the environment, in accordance with Principle 15 of the Rio Declaration on Environment and Development.

After quoting Part V, Rule 20 of the Environmental Rules of Procedure the Court said:

> Under this Rule, the precautionary principle finds direct application **in the evaluation of evidence** in cases before the courts. The precautionary principle bridges the gap in cases where scientific certainty in factual findings cannot be achieved. By applying the precautionary principle, **the court may construe a set of facts as warranting either judicial action or inaction, with the goal of preserving and protecting the environment**. This may be further evinced from the second paragraph where bias is created in favor of the constitutional right of the people to a balanced and healthful ecology. In effect, **the precautionary principle shifts the burden of evidence of harm away from those likely to suffer harm and onto those desiring to change the status quo**. An application of the precautionary principle to the rules on evidence will enable courts to tackle future environmental problems before ironclad scientific consensus emerges.
>
> For purposes of evidence, the precautionary principle should be treated as a principle of last resort, where application of the regular Rules of Evidence would cause in an inequitable result for the environmental plaintiff—(a) settings in which the risks of harm are uncertain; (b) settings in which harm might be irreversible and what is lost is irreplaceable; and (c) settings in which the harm that might result would be serious. When these features—**uncertainty**, the **possibility of irreversible harm**, and the **possibility of serious**

> **harm**—coincide, the case for the precautionary principle is strongest. When in doubt, cases must be resolved in favor of the constitutional right to a balanced and healthful ecology. Parenthetically, judicial adjudication is one of the strongest fora in which the precautionary principle may find applicability. (Citations omitted)

The Court found that all the three conditions were present in this case—uncertainty, the possibility of irreversible harm and the possibility of serious harm. It further explained that although "the goal of increasing crop yields to raise farm incomes is laudable, independent scientific studies revealed uncertainties due to unfulfilled economic benefits from *Bt* crops and plants, adverse effects on the environment associated with use of GE technology in agriculture, and serious health hazards from consumption of GM foods." It further explained:

> Alongside the aforesaid uncertainties, the non-implementation of the [National Biosafety Framework (NBF)] in the crucial stages of risk assessment and public consultation, including the determination of the applicability of the [Environmental Impact Statements] requirements to GMO field testing, are compelling reasons for the application of the precautionary principle. There exists a preponderance of evidence that the release of GMOs into the environment *threatens* to damage our ecosystems and not just the field trial sites, and eventually the health of our people once the *Bt* eggplants are consumed as food. Adopting the precautionary approach, the Court rules that the principles of the NBF need to be operationalized first by the coordinated actions of the concerned departments and agencies before allowing the release into the environment of genetically modified eggplant. The more prudent course is to immediately enjoin the *Bt talong* field trials and approval for its propagation or commercialization until the said government offices shall have performed their respective mandates to implement the NBF.
>
> The Court stated further that:
>
> the precautionary approach entailed inputs from all stakeholders, including the marginalized farmers, not just the scientific community. This proceeds from the realization that acceptance of uncertainty is not only a scientific issue, but is related to public policy and involves an ethical dimension. For scientific research alone will not resolve all

> the problems, but participation of different stakeholders from scientists to industry, NGOs, farmers and the public will provide a needed variety of perspective foci, and knowledge. (citations omitted)

Thus, the Court in this case applied the Precautionary Principle merely as a rule on evidence which shifts the burden of proof.

c. SJS Officers v. Lim[71]

i. The Facts of the Case

The case involved consolidated petitions, assailing the validity of Ordinance No. 8187 amending the Manila Comprehensive Land Use Plan and Zoning Ordinance of 2006, by creating a Medium Industrial Zone (MIZ) and Heavy Industrial Zone (HIZ) enacted by the Sangguniang Panlungsod of Manila. The creation of a MIZ and the HIZ effectively lifted the prohibition against owners and operators of businesses, including the oil companies who intervened in this case, from operating in the designated commercial zone.

The petitions were a sequel to the case of *Social Justice Society v. Mayor Atienza, Jr.*[72] where the Court ordered the relocation and transfer of the Pandacan oil terminals.

The Court declared the ordinance unconstitutional.

ii. Application of the Principle

Justice *Leonen* in his concurring and dissenting opinion said that:

> The precautionary principle certainly does not sanction a suspension of judicial rules with respect to evidence, reason, and legal interpretation.

In response to an argument made by Mayor Atienza that Ordinance 8187 violates the precautionary principle, Justice *Leonen* said:

> The precautionary principle applies when it can be shown that there is plausible risk, and its causes cannot be determined with scientific

[71] G.R. No. 187836 (Nov. 25, 2014).
[72] G.R. No. 156052 (March 7, 2007).

> certainty. It is not available simply on the basis of imagined fears or imagined causes. Otherwise, it will be absurd. Rather than a reactive approach to fear, the precautionary principle is evolving as a proactive approach in protecting the environment." Furthermore, being only a principle, it does not trump the requirements for proper invocation of remedies or act to repeal existing laws.

d. Mosqueda v. Pilipino Banana Growers and Exporters Association[73]

i. Facts of the case

The Sangguniang Panlungsod of Davao City enacted Ordinance No. 0309, Series of 2007, imposing a ban against aerial spraying as an agricultural practice by all agricultural entities within Davao City. The Pilipino Banana Growers and Exporters Association, Inc. (PBGEA) and two of its members, namely: Davao Fruits Corporation and Lapanday Agricultural and Development Corporation (PBGEA, et al.), filed their petition in the trial court to challenge the constitutionality of the ordinance, and to seek the issuance of provisional reliefs through a temporary restraining order alleging that the ordinance exemplified the unreasonable exercise of police power; violated the equal protection clause; amounted to the confiscation of property without due process of law. The trial court upheld the validity of the ordinance but was reversed by the appellate court.

This case consists of consolidated petitions for review assailing the appellate court's decision.

The Court affirmed the ruling of the appellate court.

ii. Application of the principle

The petitioners argued that the appellate court failed to apply the precautionary principle, by which the State was allowed to take positive actions to prevent harm to the environment and to human health despite the lack of scientific certainty. The respondents countered that that the precautionary principle cannot be applied blindly, because its application still requires some scientific basis; that the principle is also based on a mere declaration that has not even reached the level of customary international law and was not on a treaty binding on the Government.

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[73] G.R. No. 189185 (Aug. 16, 2016).

The petitioners pleaded that the Court should look at the merits of the ordinance based on the precautionary principle arguing that under the principle, the City of Davao is justified in enacting Ordinance No. 0309-07 in order to prevent harm to the environment and human health despite the lack of scientific certainty.

The Court disagreed. It began its explanation by explaining its understanding of the background of the principle:

> The principle of precaution originated as a social planning principle in Germany. In the 1980s, the Federal Republic of Germany used the *Vorsogeprinzip* ("foresight principle") to justify the implementation of vigorous policies to tackle acid rain, global warming and pollution of the North Sea. It has since emerged from a need to protect humans and the environment from increasingly unpredictable, uncertain, and unquantifiable but possibly catastrophic risks such as those associated with Genetically Modified Organisms and climate change, among others. The oft-cited Principle 15 of the 1992 Rio Declaration on Environment and Development (1992 Rio Agenda), first embodied this principle, as follows:
>
> > Principle 15
> >
> > In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The Court then explained the principle's application under Philippine law:

> In this jurisdiction, the principle of precaution appearing in the *Rules of Procedure for Environmental Cases* (A.M. No. 09-6-8-SC) involves matters of evidence in cases where there is lack of full scientific certainty in establishing a causal link between human activity and environmental effect. In such an event, the courts may construe a set of facts as warranting either judicial action or inaction with the goal of preserving and protecting the environment.

> It is notable, therefore, that the precautionary principle shall only be relevant if there is concurrence of three elements, namely: *uncertainty, threat of environmental damage* and *serious or irreversible harm*. In situations where the threat is relatively certain, or that the causal link between an action and environmental damage can be established, or the probability of occurrence can be calculated, only preventive, not precautionary measures, may be taken. Neither will the precautionary principle apply if there is no indication of a threat of environmental harm, or if the threatened harm is trivial or easily reversible.
>
> The Court held that the elements were not present. It said:
>
> To begin with, there has been no scientific study. Although the precautionary principle allows lack of full scientific certainty in establishing a connection between the serious or irreversible harm and the human activity, its application is still premised on empirical studies. Scientific analysis is still a necessary basis for effective policy choices under the precautionary principle.
>
> Precaution is a risk management principle invoked after scientific inquiry takes place. This scientific stage is often considered synonymous with risk assessment. As such, resort to the principle shall not be based on anxiety or emotion, but from a rational decision rule, based in ethics. As much as possible, a complete and objective scientific evaluation of the risk to the environment or health should be conducted and made available to decision-makers for them to choose the most appropriate course of action. Furthermore, the positive and negative effects of an activity is also important in the application of the principle. The potential harm resulting from certain activities should always be judged in view of the potential benefits they offer, while the positive and negative effects of potential precautionary measures should be considered. (citations omitted)

The Court found that the only study conducted to validate the effects of aerial spraying was the *Summary Report on the Assessment and Fact-Finding Activities on the Issue of Aerial Spraying in Banana Plantations* but said that this was not a scientific study that could justify the resort to the precautionary principle. It said that in fact, the Sangguniang Bayan ignored the findings and conclusions of

the fact-finding team that recommended only a regulation, not a ban, against aerial spraying.

The Court held that it should not apply the precautionary approach in sustaining the ban against aerial spraying:

> if little or nothing is known of the exact or potential dangers that aerial spraying may bring to the health of the residents within and near the plantations and to the integrity and balance of the environment. It is dangerous to quickly presume that the effects of aerial spraying would be adverse even in the absence of evidence. Accordingly, for lack of scientific data supporting a ban on aerial spraying, Ordinance No. 0309-07 should be struck down for being unreasonable.

e. Spouses Imbong v. Ochoa, Jr.[74]

i. Facts of the Case

This case questions the constitutionality of Republic Act No. 10354, otherwise known as the Responsible Parenthood and Reproductive Health Act of 2012 or RH Law. The Court declared the RH Law constitutional.

ii. Application of the Principle

In Justice *Leonardo-DeCastro's* Concurring Opinion, she said:

> ... in cases involving the environment, there is a precautionary principle which states that "when human activities may lead to threats of serious and irreversible damage to the environment that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that threat. (citations omitted)

[74] G.R. Nos. 204819, 204934, 204957, 204988, 205003, 205043, 205138, 205478, 205491, 205720, 206355, 207111, 207172 & 207563 (April 8, 2014).

After quoting Rule 20 of the Rules of Procedure for Environmental Cases, she added:

> The precautionary principle seeks to protect the rights of the present generation as well as to enforce intergenerational responsibility, that is, the present generation should promote sustainable development and act as stewards or caretakers of the environment for the benefit of generations yet unborn. In its essence, the precautionary principle calls for the exercise of caution in the face of risk and uncertainty. It acknowledges the peculiar circumstances surrounding environmental cases in that "scientific evidence is usually insufficient, inconclusive or uncertain and preliminary scientific evaluation indicates that there are reasonable grounds for concern" that there are potentially dangerous effects on the environment, human, animal, or planet health. For this reason, the precautionary principle requires those who have the means, knowledge, power, and resources to take action to prevent or mitigate the harm to the environment or to act when conclusively ascertained understanding by science is not yet available.
>
> The right to health, which is an indispensable element of the right to life, deserves the same or even higher degree of protection. Thus, if it is scientifically plausible but uncertain that any foreign substance or material ingested or implanted in the woman's body may lead to threats of serious and irreversible damage to her or her unborn child's right life or health, care should be taken to avoid or diminish that threat. The principle of prudence requires that such a rule be adopted in matters concerning the right to life and health. In the face of the conflicting claims and findings presented by the parties, and considering that the right to health is inextricably intertwined with the right to life, it is proper to refer to the principle of prudence, which is the principle relied on by the framers of the 1987 Constitution on matters affecting the right to life. Thus, any uncertainty on the adverse effects of making contraceptives universally accessible on the life and health of the people, especially of women, should be resolved in a way that will promote life and health.

De Castro argued that "the application by logical and actual necessity of the precautionary principle also gains relevance in the discussion of the implications of the RH Law on the people's right to health" because the "unresolved medical

issue on the potentially life-threatening effects of hormonal contraceptives and IUDs demands a cautious approach in the face of risk and uncertainty so as to prevent or mitigate the harm or threat of harm to the people, particularly to women." Thus, she believed that "[t]he principle of prudence and the precautionary principle in matters concerning the right to life and health may be better promoted by continuing the regulation of the sale, dispensation and distribution of contraceptive drugs and devices under Republic Act No. 4729."

Justice *De Castro* said finally:

> Considering the relevant medical issues and health concerns in connection with contraceptives and devices, the regulated framework under Republic Act No. 4729 where contraceptive drugs and devices are sold, dispensed or distributed only by duly licensed drug stores or pharmaceutical companies pursuant to a doctor's prescription is no doubt more in harmony with the principle of prudence and the precautionary principle than the apparently unrestricted or universal access approach under the RH Law. This is so as the bodies of women may react differently to said drugs or devices depending on many factors that only a licensed doctor is capable of determining. Thus, the universal access policy should be read as qualified by the regulated framework under Republic Act No. 4729 rather than as impliedly repealing the said law.

Thus, similar to its application in international law, the precautionary principle has moved from environmental law to public health concerns and human rights.

VII. Conclusion

Similar to its popularity in international law, the precautionary principle figures prominently in Philippine law and jurisprudence. It can be found in most, if not all sources of domestic legislation. Not only has Congress seen it fit to include it in statutes, the executive branch has also incorporated it in local government and administrative issuances. The judiciary has likewise incorporated it in rules of procedure and applied it in landmark cases. Clearly, the precautionary principle is permanently etched in Philippine practice.

But similar to its status under international law, the application of the precautionary principle under Philippine law is also unclear. It is ironic that while the precautionary principle seeks to overcome the problem of scientific uncertainty, it nevertheless creates uncertainty as to its application. In statutes and administrative issuances, the precautionary principle is used as a guide to interpretation or operationalization of the obligations stated therein. But without a clearly defined statement of the precautionary principle in most of these issuances, it will always be uncertain whether or not it is applied as it should. Without a clear statement in these laws themselves of what the precautionary principle requires, there is a danger that it would simply become an admonition to "be careful" and nothing more.

However, it may be said that it is exactly the lack definite statement of the precautionary principle which makes it so attractive to the lawmaker. It has been argued that:

> Paradoxically, we conclude that the application of precaution will remain politically potent so long as it continues to be tantalizingly ill-defined and imperfectly translatable into codes of conduct, while capturing emotions of misgivings and guilt.[74]

But the absence of exact meaning may also mean that Philippine practice as such contributes little as state practice. If all Philippine legislation does is pay lip service to the concept, state practice would simply be a recognition that the principle exists and nothing more.

In the case of judicial practice, there appears to be more certainty. The RPEC provides for a definition of the precautionary principle and some guidelines on when it applies. The jurisprudence as well provides for more insight on the Court's attitude towards the precautionary principle.

Clearly, the application of the precautionary principle under Philippine law requires further study. By doing so, Philippine practice may influence the development of this principle under international law.

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[75] Jonathan and Riordan, *The Precautionary Principle in Contemporary Environmental Policy and Politics* quoted in Wiener, *supra* note 1, at 602.