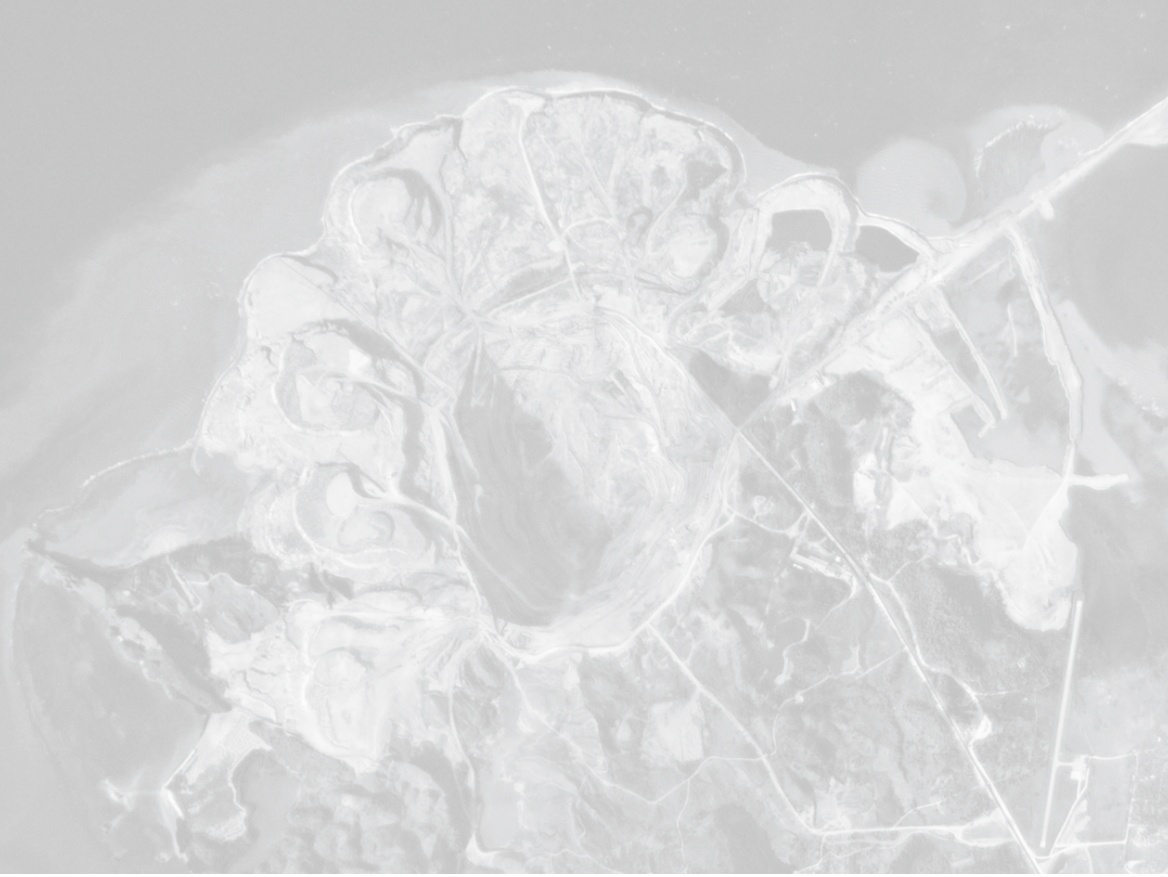

A HANDBOOK ON LOCAL ENVIRONMENTAL GOVERNANCE

Dante B. Gatmaytan

BantayKita

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PREFACE

The tension between national and local governments over resource extraction issues has escalated in recent years. Local governments have resisted large-scale mining operations and enacted ordinances that impose strict environmental standards or ban harmful mining practices. The national government has threatened local officials with administrative sanctions, sometimes violating the constitutional provisions on local autonomy.

This tension has generated many legal issues that require resolution. But despite the apparent refit between the national and local governments, it would be incorrect to say that the latter are violating the law. There is a legal regime that empowers local officials and other stakeholders to stand their ground and to protect their interests. The Constitution, the Local Government Code, The Mining Act of 1995 and other laws provide the legal bases for resistance to mining.

This legal framework was developed to ensure that local governments not only to share in the proceeds of the resources from their territories, but to ensure that the environmental and social issues that follow resource extraction are adequately addressed. The law requires the national government to consult with stakeholders. The law requires the national government to secure the consent of local officials before they can proceed with their projects. Indigenous peoples also enjoy other rights over their ancestral domains.

This Handbook provides the outline of this legal framework. It is designed to provide the reader with an understanding of what stakeholders can do to protect themselves in the face of large-scale resource extraction activities.

We hope this effort contributes to the empowerment of local governments and communities in the hopes that all stakeholders can use the law towards a peaceful and mutually beneficial solution to the issues brought about by resource extraction.

ACKNOWLEDGMENTS

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This work benefited immensely from the work of Dean Antonio Gabriel La Vina and his co-authors Alaya M. de Leon and Gregorio Rafael P. Bueta, for their work entitled "Legal Responses to the Environmental Impact of Mining."[1] This Article which appeared in the Philippine Law Journal covered many of the points I wanted to raise in this book and made my work so much easier.

Hannah Manaligod designed the cover and the layout of this book. I continue to rely on her talents for obvious reasons.

Finally I want to thank the staff of Bantay Kita for their support in this project.

1 Antonio G.M. La Vina, Alaya M. de Leon and Gregorio Rafael P. Bueta, *Legal Responses to the Environmental Impact of Mining*, 86 PHIL. L.J. 284, (2012).

THE AUTHOR

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Before he entered the academe in 1998, he practiced law through public interest law offices working with rural poor communities involved in environment and natural resources law, indigenous peoples' rights, agrarian reform, and local governance.

He is a professorial lecturer and vice-chair of the Department of Legal Method and Research at the Philippine Judicial Academy.

Professor Gatmaytan writes on a wide range of issues which include the environment, gender, the judiciary, and the intersection of law and politics. His works have appeared in the Asian Journal of Comparative Law, the Oregon Review of International Law, the UCLA Pacific Basin Law Journal, the Georgetown International Environmental Law Review, and the Harvard Women's Law Journal among others. He is author of Legal Method Essentials 2.0 (2014) and Local Government Law and Jurisprudence (2014).

BANTAY KITA

Bantay Kita is a coalition of organizations advocating for transparency and accountability in the extractive industry. Many international organizations, institutions and even governments believe that utilizing a country's natural resources is necessary to enhance national growth. However, experiences in many countries show that utilization of natural resources does not automatically translate to development and poverty alleviation.

Exiting policies and processes that govern the extractive industry do not ensure the rationalization of benefits for the country nor the protection and welfare of affected communities. The lack of transparency in the extractive industry hinders people's organizations and concerned citizens from holding the government and mining companies accountable for environmental damages and the absence of development from these projects.

Bantay Kita believes that it is important to identify and monitor who gains from the extraction of natural resources to ensure that the Philippines and its people get the fair share from the utilization of these resources. Bantay Kita advocates the need to institute comprehensive transparency and accountability mechanisms in the entire value chain of the extractive industry.

INTRODUCTION: A TOXIC TERRAIN

The Philippines is rich in mineral resources. In 1994, metallic and non-metallic mineral reserves in the Philippines were estimated at 7 billion and 50 billion metric tons respectively.[2] Copper constituted 72 percent of metallic mineral resources, followed by nickel, which was estimated at 16 percent. Among the non-metallic minerals, limestone and marble accounted for about 39 and 29 percent, respectively.[3] The untapped mineral wealth of the country is estimated to be worth at more than $840 billion.[4] The Philippine's copper, gold, and chromate deposits are among the largest in the world. Nickel, silver, coal, and sulfur are also found in the country. The Philippines also has significant deposits of clay, limestone, marble, silica, and phosphate.[5]

Mining is not a mere industry in the Philippines. While it generates jobs and income for the country, mining is also the center of a long conflict between the extractive industry and the rural communities who either occupy these lands or depend on the minerals themselves. This conflict has led to the death of many individuals who lead the opposition to mining operations.

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2 Philippine Economic-Environmental and Natural Resources Accounting (Philippine National Statistical Coordination Board), ENRA Report No. 2: Philippine Asset Accounts, Chapter IV: Philippine Mineral Resources, (1998), http://www.nscb.gov.ph/peenra/Publications/Asset/AssetAccounts.pdf.

3 *Id*.

4 United States Department of State Bureau of East Asian and Pacific Affairs, *U.S. Relations with the Philippines*, U.S. Department of State (January 31, 2014), http://www.state.gov/r/pa/ei/bgn/2794.htm.

5 *Id*.

Those opposing mining activities in media[6] and in potential host communities[7] have been killed. Families of anti-mining leaders have been killed in this conflict.[8] In one example, army soldiers strafed the house of B'laan leader Dagil Capion resulting in the death of Capion's pregnant wife, and two of their children. Another child was wounded.[9]

A series of mining accidents has also made Filipinos wary of large-scale mining operations. In 2012, a mine spill in Benguet became the "biggest mining disaster" in the Philippines. Some 20 million metric tons of sediments have flowed into water channels from the Philex Company's tailings pond in Itogon. This is ten times more than the volume of mine tailings that spilled out of the Marcopper mine in Marinduque in 1996, which dumped some two million metric tons of waste into the Boac River and is still considered the worst mining disaster in terms of toxicity. Residents along the 27-kilometer Boac River lost their fishing livelihood and diseases afflicted the community after the incident.[10]

In February 2013, the west wall of the open mine pit operated by Semirara Mining Corporation collapsed after a landslide hit Antique. Out of the thirteen

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6 Cecille Suerte Felipie, *Anti-Mining Radio Commentator Shot Dead in Palawan*, Philippine Star, January 25, 2011, http://www.philstar.com/headlines/650846/anti-mining-radio-commentator-shot-dead-palawan.

7 Artemio Dumlao, *Anti-Mining Activist, Kin Killed in Nueva Vizcaya*, Philippine Star, December 10, 2012, http://www.philstar.com/nation/2012/12/10/884131/anti-mining-activist-kin-killed-nueva-vizcaya; Pia Lee Brago, *Rights Group Urges Noy to Stop Killing of Anti-Mining Activists*, Philippine Star, July 19, 2012, http://www.philstar.com/headlines/2012/07/19/829298/rights-group-urges-noy-stop-killings-anti-mining-activists. Human Rights Watch (HRW), a global rights body, has urged President Aquino to stop the killings of anti-mining activists in the Philippines pushes to revitalize the mining sector. HRW said it had documented three cases anti-mining and environmental activists allegedly killed by paramilitary forces that might have links to the military.

8 Orlando Dinoy, *Wife and 2 Children of Tribal Anti-Mining Activist Killed by Gov't Forces*, Philippine Daily Inquirer, October 18, 2012, http://newsinfo.inquirer.net/291424/wife-and-2-children-of-tribal-anti-mining-activist-killed-by-govt-forces.

9 Germelina Lacorte, *Tribal uprising feared after killings*, Philippine Daily Inquirer, October 21, 2012, available at http://newsinfo.inquirer.net/292816/tribal-uprising-feared-after-killings.

10 Rouchelle R. Dinglasan, *Philex Spill 'Biggest Mining Disaster' in PHL, Surpassing Marcopper—DENR*, GMA News, November 12, 2012 http://www.gmanetwork.com/news/story/281988/news/nation/philex-spill-biggest-mining-disaster-in-phl-surpassing-marcopper-denr.

people trapped in the mine, four people were confirmed dead, three were rescued and six remain missing.[11]

In the early 1980s, the mining sector accounted for twenty percent of the country's total exports. More recently, this figure has slid down to five percent. To address this problem, the Philippine Congress enacted The Mining Act of 1995 and provided generous terms for claim ownership by foreign investment companies in the Philippines and improved certainty and predictability in the permitting process necessary to attract foreign investment. This drive to revive the mining industry ran into problems with the Indigenous Peoples' Right Act. IPRA recognizes the indigenous peoples' ownership of their ancestral domains, and prevented the Philippine government from awarding mining claims to foreign mining companies.[12]

There is a matrix of laws that apply to the mining industry and its potential impacts on the human life and the environment. Stakeholders—indigenous peoples, community members, national and local government officials, mining companies—need to negotiate these laws to minimize conflict and to protect human life and the environment.

This book provides an overview of the legal framework available to local governments in dealing with extractive industries like mining.

11 *Aquino Orders Probe on Mining Accident*, Philippine Star, February 14, 2013, http://www.philstar.com/headlines/2013/02/14/908836/aquino-orders-probe-antique-mining-accident.

12 Patricia Thompson, *Philippines Indigenous Peoples Rights Act*, 1998 Colo. J. Int'l Envtl. L. & Pol'y. 179, 180 (1998).

THE LEGAL FRAMEWORK FOR NATURAL RESOURCES

There are certain rules that govern the management of natural resources. These are:

a. All natural resources, as a rule, are owned by the State (Regalian doctrine)

b. Of these, only public agricultural lands may be owned by individuals

c. If land registration applicants can show that they have been in possession of the land since time immemorial, they can have it registered. The land was never public land. This is also known as the "*Cariño* Doctrine."

A. THE OWNERSHIP OF RESOURCES

The law on natural resources has constitutional foundations. The Constitution is clear that the State owns the mineral resources of the country. No person can own the mineral resources. Mining companies cannot own these resources. They enter into an agreement with the government to provide service to the government by extracting the resources. In return, they get a share in the extraction as payment for their service.

This doctrine is found in Article XII of the Constitution.[13]

13 The section provides:

> SECTION 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development,

State ownership of natural resources (also referred to as the *Regalian Doctrine*) is a necessary to establish the state's power to control their exploitation or development and utilization.[14]

The *Regalian Doctrine* was written into the 1935 Constitution in Section 1 of Article XIII on "Conservation and Utilization of Natural Resources." This was again adopted in the 1973 Constitution under Article XIV on the "National Economy and the Patrimony of the Nation," and reaffirmed in the 1987 Constitution in Section 2 of Article XII on "National Economy and Patrimony."[15]

> and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty *per centum* of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.
>
> The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.
>
> The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fishworkers in rivers, lakes, bays, and lagoons.
>
> The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.
>
> The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.

14 Cruz v. Secretary of the Environment and Natural Resources, G.R. No. 135385, December 6, 2000.

15 Province of Rizal v. Executive Secretary, G.R. No. 129546, December 13, 2005.

Both the 1935 and 1973 Constitutions prohibited the ownership of all natural resources except agricultural lands of the public domain. The 1987 Constitution readopted this policy and the rule remain the same: all lands of the public domain as well as all natural resources enumerated in the Philippine Constitution belong to the State.[16]

The *Regalian Doctrine* does not mean that there can be no private rights over land. What the doctrine provides is that public lands which are not shown to have been reclassified or released as alienable agricultural land or alienated to a private person by the State remain part of the inalienable public domain. Applicants for land registration must establish that the land is alienable or disposable.[17] Only agricultural lands may be alienated or owned.[18] All lands not appearing to be private are presumed to belong to the State. As such, public lands not shown to have been reclassified or released as alienable agricultural land or alienated to a private person by the State remain part of the inalienable public domain.[19]

Mineral and forest lands are not subject to private ownership unless they are first reclassified as agricultural lands and so released for alienation. In the absence of such classification, the land remains as unclassified land until released and rendered open to disposition.[20]

The law identifies the person or agency that implements policies over these resources. In the Philippines, the Administrative Code of 1987 gives this task to the Department of Environment and Natural Resources. The Code provides:

> SECTION 1. *Declaration of Policy.* — (1) The State shall ensure, for the benefit of the Filipino people, the full exploration and development as well as the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources, consistent with

16 Collado v. Court of Appeals, G.R. No. 107764, October 4, 2002.

17 Republic v. Medida, G.R. No. 195097, August 13, 2012. See also Republic v. Bantigue Point Development Corporation, G.R. No. 163322, March 14, 2012.

18 Republic v. AFP Retirement and Separation Benefits System, G.R. No. 180463, January 16, 2013. *See also* Krivenko v. Register of Deeds, G.R. No. L-630, November 15, 1947.

19 Republic v. Naguiat, G.R. No. 134209, January 24, 2006.

20 Director of Lands v. Intermediate Appellate Court, G.R. No. 73246, March 2, 1993.

> the necessity of maintaining a sound ecological balance and protecting and enhancing the quality of the environment and the objective of making the exploration, development and utilization of such natural resources equitably accessible to the different segments of the present as well as future generations.
>
> (2) The State shall likewise recognize and apply a true value system that takes into account social and environmental cost implications relative to the utilization, development and conservation of our natural resources.
>
> SECTION 2. *Mandate.* — (1) The Department of Environment and Natural Resources shall be primarily responsible for the implementation of the foregoing policy.
>
> (2) It shall, subject to law and higher authority, be in charge of carrying out the State's constitutional mandate to control and supervise the exploration, development, utilization, and conservation of the country's natural resources.

These sections do not govern natural resources completely. For generations, laws written by colonizers inspired by the idea of conquest of peoples discriminated against indigenous peoples. Fortunately, the 1987 Constitution attempted to address the problem of their marginalization by providing for the recognition of the rights over their ancestral domains. The rule is found in Article XII, Sections 5 and 6.[21]

---

21 The provisions read as follows:

> SECTION 5. The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being.
>
> The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.
>
> SECTION 6. The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the

The constitutional recognition of ancestral domain rights is not the only way by which ancestral domains are recognized. The U.S. Supreme Court (exercising appellate jurisdiction over the Philippine Supreme Court during the colonial period) recognized ownership of land based on "time immemorial possession" by the claimant in *Cariño v. Insular Government*.[22]

B. The *Cariño* Doctrine

There is a common misconception that because of the adoption of the *Regalian Doctrine* in the Constitution, there can be no recognition of ancestral domain rights under Philippine law. The misconception stems from the misunderstanding that these ancestral domains are part of the public domain. They are not. Under Philippine law, they are private lands. This is the conclusion reached by the United States Supreme Court in the case of *Cariño v. Insular Government*. (See p. 10)

The *Cariño* doctrine was adopted by the Indigenous People's Rights Act (IPRA) and upheld by the Supreme Court.

Large-scale displacement, whether by force or under some legal pretext, can be addressed by recognizing private rights over ancestral domains or lands held since time immemorial. The framework can be found in the IPRA, although there is no legal impediment to recognizing alternative modes or enacting new laws that can restore these rights to those who were displaced when negotiating peace with the MILF.

State to promote distributive justice and to intervene when the common good so demands.

22 212 US 449 (1909).

The Case of Cariño v. Insular Government
A Summary

Cariño was a land registration case involving land in Benguet. The applicant Mateo Cariño was an Igorot. His ancestors held the land as owners. His grandfather had lived upon it and cultivated and used parts for pasturing cattle, and he had used it for pasture in his turn. They were all recognized as owners by the Igorots, and he had inherited or received the land from his father in accordance with Igorot custom. But Cariño had no title issued by the Spanish government although he made prior attempts to have the land registered. The Court of First Instance dismissed his petition for registration and the Philippine Supreme Court affirmed that decision.

The issue before the United States Supreme Court was simple: whether the plaintiff owns the land.

The Government argued that Spain had title to all the land in the Philippines except those over which it issued titles. It also argued that prescription did not run against the State, and that even if it did, there was a decree in 1880 that required registration within a limited time to make the title good. It argued that since the land was not registered, it "became, if it was not always, public land." Since the government never brought the Igorots "under the civil or military government of the Spanish Crown," the Court surmised that it was possible that Spanish officials would not have granted registration to anyone in that province.

The US Supreme Court disagreed with the Government, saying that regardless of what Spain's laws might have mandated, it did not mean that Cariño lost his rights under U.S. rule. It held that the government's position would deny native title because of the absence of ceremonies "which the Spaniards would not have permitted and had not the power to enforce."

The acquisition of the Philippines, said the Court, was not like the settlement of the white race in the United States where the dominant purpose "was to occupy the land." In the case of the Philippines, the "first object in the internal administration of the islands is to do justice to the natives, not to exploit their country for private gain" and all the property and rights acquired there by the United States are to be administered "for the benefit of the inhabitants thereof."

The Organic Act (The Philippine Bill of 1902) contained a Bill of Rights, which embodies the safeguards of the Constitution, and, like the US Constitution, extends those safeguards to all. It provides that "no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws."

A "person" under the Bill of Rights included the natives of Benguet and "property" included not only that which had undergone processes "which presumably a large part of the inhabitants never had heard." In the Court's view, the United States could not have meant to regard as "public land" what the Igorots, "by native custom and by long association—one of the profoundest factors in human thought—regarded as their own."

The Court then proceeded to explain the basis for Cariño's ownership:

> [E]very presumption is and ought to be against the government in a case like the present. It might, perhaps, be proper and sufficient to say that when, as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land. Certainly, in a case like this, if there is doubt

> or ambiguity in the Spanish law, we ought to give the applicant the benefit of the doubt.

The land, therefore, was private and Carino was well within his rights to have it registered in his name.

The Court went on to state that the older decrees and laws cited by the Government seem to indicate pretty clearly that the natives were recognized as owning some lands, irrespective of any royal grant. In other words, Spain did not assume to convert all the native inhabitants of the Philippines into trespassers, or even into tenants at will.

LOCAL AUTONOMY

The People Power phenomenon which ended the Marcos government allowed Filipinos to promulgate a new Constitution. The 1987 Constitution in large measure was designed to prevent a repetition of the excesses of the Marcos regime and now includes a very long provision on the autonomy of local governments in Article X. (See p. 18)

Section 25, Article II of the Constitution further provides that "[t]he State shall ensure the autonomy of local governments."

Pursuant to Section 3, Article X, Congress enacted Republic Act No. 7160. Section 2 of the law provides as follows:

> SECTION 2. *Declaration of Policy.* — (a) It is hereby declared the policy of the State that the territorial and political subdivisions of the State shall enjoy genuine and meaningful local autonomy to enable them to attain their fullest development as self-reliant communities and make them more effective partners in the attainment of national goals. Toward this end, the State shall provide for a more responsive and accountable local government structure instituted through a system of decentralization whereby local government units shall be given more powers, authority, responsibilities, and resources. The process of decentralization shall proceed from the national government to the local government units.

Local autonomy is the means by which local governments become self-reliant partners in the attainment of national goals. The State will ensure local autonomy by establishing a local government structure that provides more

ARTICLE X

Local Government

General Provisions

SECTION 1. The territorial and political subdivisions of the Republic of the Philippines are the provinces, cities, municipalities, and barangays. There shall be autonomous regions in Muslim Mindanao and the Cordilleras as hereinafter provided.

SECTION 2. The territorial and political subdivisions shall enjoy local autonomy.

SECTION 3. The Congress shall enact a local government code which shall provide for a more responsive and accountable local government structure instituted through a system of decentralization with effective mechanisms of recall, initiative, and referendum, allocate among the different local government units their powers, responsibilities, and resources, and provide for the qualifications, election, appointment and removal, term, salaries, powers and functions and duties of local officials, and all other matters relating to the organization and operation of the local units.

SECTION 4. The President of the Philippines shall exercise general supervision over local governments. Provinces with respect to component cities and municipalities, and cities and municipalities with respect to component barangays shall ensure that the acts of their component units are within the scope of their prescribed powers and functions.

SECTION 5. Each local government unit shall have the power to create its own sources of revenues and to levy taxes, fees, and charges subject to such guidelines and limitations as the Congress may provide, consistent with the basic policy of local autonomy. Such taxes, fees, and charges shall accrue exclusively to the local governments.

SECTION 6. Local government units shall have a just share, as determined by law, in the national taxes which shall be automatically released to them.

SECTION 7. Local governments shall be entitled to an equitable share in the proceeds of the utilization and development of the national wealth within their respective areas, in the manner provided by law, including sharing the same with the inhabitants by way of direct benefits.

SECTION 8. The term of office of elective local officials, except barangay officials, which shall be determined by law, shall be three years and no such official shall serve for more than three consecutive terms. Voluntary renunciation of the office for any length of time shall not be considered as an interruption in the continuity of his service for the full term for which he was elected.

SECTION 9. Legislative bodies of local governments shall have sectoral representation as may be prescribed by law.

SECTION 10. No province, city, municipality, or barangay may be created, divided, merged, abolished, or its boundary substantially altered, except in accordance with the criteria established in the Local Government Code and subject to approval by a majority of the votes cast in a plebiscite in the political units directly affected.

SECTION 11. The Congress may, by law, create special metropolitan political subdivisions, subject to a plebiscite as set forth in Section 10 hereof. The component cities and municipalities shall retain their basic autonomy and shall be entitled to their own local executives and legislative assemblies. The jurisdiction of the metropolitan authority that will hereby be created shall be limited to basic services requiring coordination.

SECTION 12. Cities that are highly urbanized, as determined by law, and component cities whose charters prohibit their voters from voting for provincial elective officials, shall be independent of the province. The voters of component cities within a province, whose charters contain no such prohibition, shall not be deprived of their right to vote for elective provincial officials.

SECTION 13. Local government units may group themselves, consolidate or coordinate their efforts, services, and resources for purposes commonly beneficial to them in accordance with law.

SECTION 14. The President shall provide for regional development councils or other similar bodies composed of local government officials, regional heads of departments and other government offices, and representatives from non-governmental organizations within the regions for purposes of administrative decentralization to strengthen the autonomy of the units therein and to accelerate the economic and social growth and development of the units in the region.

Autonomous Region

SECTION 15. There shall be created autonomous regions in Muslim Mindanao and in the Cordilleras consisting of provinces, cities, municipalities, and geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines.

SECTION 16. The President shall exercise general supervision over autonomous regions to ensure that the laws are faithfully executed.

SECTION 17. All powers, functions, and responsibilities not granted by this Constitution or by law to the autonomous regions shall be vested in the National Government.

SECTION 18. The Congress shall enact an organic act for each autonomous region with the assistance and participation of the regional consultative commission composed of representatives appointed by the President from a list of nominees from multisectoral bodies. The organic act shall define the basic structure of government for the region consisting of the executive department and legislative assembly, both of which shall be elective and representative of the constituent political units. The organic acts shall likewise provide for special courts with personal, family, and property law jurisdiction consistent with the provisions of this Constitution and national laws.

The creation of the autonomous region shall be effective when approved by majority of the votes cast by the constituent units in

a plebiscite called for the purpose, provided that only provinces, cities, and geographic areas voting favorably in such plebiscite shall be included in the autonomous region.

SECTION 19. The first Congress elected under this Constitution shall, within eighteen months from the time of organization of both Houses, pass the organic acts for the autonomous regions in Muslim Mindanao and the Cordilleras.

SECTION 20. Within its territorial jurisdiction and subject to the provisions of this Constitution and national laws, the organic act of autonomous regions shall provide for legislative powers over:

(1) Administrative organization;

(2) Creation of sources of revenues;

(3) Ancestral domain and natural resources;

(4) Personal, family, and property relations;

(5) Regional urban and rural planning development;

(6) Economic, social, and tourism development;

(7) Educational policies;

(8) Preservation and development of the cultural heritage; and

(9) Such other matters as may be authorized by law for the promotion of the general welfare of the people of the region.

SECTION 21. The preservation of peace and order within the regions shall be the responsibility of the local police agencies which shall be organized, maintained, supervised, and utilized in accordance with applicable laws. The defense and security of the regions shall be the responsibility of the National Government.

power, authority, responsibility, and resources to local government units.[23] The Code, however, not only established a decentralized government; it also devolved powers to local government units. Decentralization is akin to deconcentration where some functions of the central government are transferred to the regions but whose officials remain under the control of the central government. The Code accomplishes more than mere deconcentration of functions—it mandates the devolution of services to local government units. Devolution, as defined by the Code, is "the act by which the National government confers power and authority upon the various local government units to perform specific functions and responsibilities."[24]

It is important to understand the different concepts implicated by this field of political law:

> Decentralization is a decision by the central government authorizing its subordinates, whether geographically or functionally defined, to exercise authority in certain areas. It involves decision-making by subnational units. It is typically a delegated power, wherein a larger government chooses to delegate certain authority to more local governments. Federalism implies some measure of decentralization, but unitary systems may also decentralize. Decentralization differs intrinsically from federalism in that the sub-units that have been authorized to act (by delegation) do not possess any claim of right against the central government.
>
> Decentralization comes in two forms—deconcentration and devolution. Deconcentration is administrative in nature; it involves the transfer of functions or the delegation of authority and responsibility from the national office to the regional and local offices. This mode of decentralization is also referred to as administrative decentralization.
>
> Devolution, on the other hand, connotes political decentralization, or the transfer of powers, responsibilities, and resources for the performance of certain functions from

23 Aquilino Q. Pimentel, Jr., The Local Government Code of 1991: The Key to National Development 2 (1993).

24 Republic Act No. 7160, § 17 (e).

> the central government to local government units. This is a more liberal form of decentralization since there is an actual transfer of powers and responsibilities. It aims to grant greater autonomy to local government units in cognizance of their right to self-government, to make them self-reliant, and to improve their administrative and technical capabilities.[25]
>
> Devolution is indispensable to decentralization. Devolution is a prominent feature of the Code and is premised on the theory that local governments may assess and provide the needs of their constituents better than the national government can. Section 5 of the Code provides in part that "any question thereon shall be resolved in favor of devolution of powers and of the lower local government unit."[26]

A. CONSULTATIONS

One of the significant features of the Local Government Code is the introduction of consultation mechanisms in governance. There are three provisions that emphasize this innovation. The first is found in the declaration of policy:

> SECTION 2. *Declaration of Policy.* — (a) It is hereby declared the policy of the State that the territorial and political subdivisions of the State shall enjoy genuine and meaningful local autonomy to enable them to attain their fullest development as self-reliant communities and make them more effective partners in the attainment of national goals. Toward this end, the State shall provide for a more responsive and accountable local government structure instituted through a system of decentralization whereby local government units shall be given more powers, authority, responsibilities, and resources..

25 *See* Disomangcop v. The Secretary of the Department of Public Works and Highways, GR No. 149848, November 25, 2004.

26 Tano v. Socrates, G.R. No. 110249, August 21, 1997.

> The process of decentralization shall proceed from the National Government to the local government units.
>
> (b) It is also the policy of the State to ensure the accountability of local government units through the institution of effective mechanisms of recall, initiative and referendum.
>
> (c) It is likewise the policy of the State to require all national agencies and offices to conduct periodic consultations with appropriate local government units, nongovernmental and people's organizations, and other concerned sectors of the community before any project or program is implemented in their respective jurisdictions.

The other sections provide as follows:

> SECTION 26. *Duty of National Government Agencies in the Maintenance of Ecological Balance.* — It shall be the duty of every national agency or government-owned or controlled corporation authorizing or involved in the planning and implementation of any project or program that may cause pollution, climatic change, depletion of non-renewable resources, loss of crop land, rangeland, or forest cover, and extinction of animal or plant species, to consult with the local government units, nongovernmental organizations, and other sectors concerned and explain the goals and objectives of the project or program, its impact upon the people and the community in terms of environmental or ecological balance, and the measures that will be undertaken to prevent or minimize the adverse effects thereof.
>
> SECTION 27. *Prior Consultations Required.* — No project or program shall be implemented by government authorities unless the consultations mentioned in Sections 2 (c) and 26 hereof are complied with, and prior approval of the sanggunian concerned is obtained: Provided, That occupants in areas where such projects are to be implemented shall not be evicted unless appropriate relocation sites have been provided, in accordance with the provisions of the Constitution.

These provisions are meant to create smoother relations between the national and local governments concerned and also between the government and the people in general. It will be noted that under Section 2 (c) of the Code, consultations are required not only with the local government units, but also with "non-governmental and people's organizations, and other concerned sectors of the community before any project or program is implemented in their respective jurisdictions."[27]

In the case of *Lina v. Paño*,[28] an agent of the Philippine Charity Sweepstakes Office (PCSO) asked Mayor Calixto Cataquiz, Mayor of San Pedro, Laguna, for a permit to open the lotto outlet. The mayor denied his request citing an ordinance— Kapasiyahan Blg. 508, T. 1995—passed by the Sangguniang Panlalawigan of Laguna supposedly banning lotto operations in the province.

The Supreme Court held, however, that Kapasiyahan Blg. 508, T. 1995 of the Sangguniang Panlalawigan of Laguna merely stated the "objection" of the council to the said game. Because it is a mere policy statement on the part of the local council which is not self-executing, it could not serve as a valid ground to prohibit the operation of the lotto system in the province of Laguna. Lotto is authorized by the national government through Republic Act No. 1169. While lotto is a game of chance, the national government deems it wise and proper to permit it. Hence, the Sangguniang Panlalawigan of Laguna, a local government unit, cannot issue a resolution or an ordinance that would seek to prohibit the issuance of permits.

On the second issue, the Court ruled that Sections 2 (c) and 27 of the Local Government Code of 1991 do not apply mandatorily in the setting up of lotto outlets around the country. The Court explained that the provisions apply only to national programs and/or projects which are to be implemented in a particular local community. Lotto is neither a program nor a project of the national government, but of a charitable institution, the PCSO. Though sanctioned by the national government, it is farfetched to say that lotto falls within the contemplation of Sections 2 (c) and 27 of the Local Government Code.

The Court held that Section 27 should be read in conjunction with Section 26 but concludes that:

27 Pimentel, *supra* note 23.

28 G.R. No. 129093, August 30, 2001.

> Thus, the projects and programs mentioned in Section 27 should be interpreted to mean projects and programs whose effects are among those enumerated in Section 26 and 27, to wit, those that: (1) may cause pollution; (2) may bring about climatic change; (3) may cause the depletion of non-renewable resources; (4) may result in loss of crop land, range-land, or forest cover; (5) may eradicate certain animal or plant species from the face of the planet; and (6) other projects or programs that may call for the eviction of a particular group of people residing in the locality where these will be implemented. Obviously, none of these effects will be produced by the introduction of lotto in the province of Laguna.

This is an unfortunate statement from the Supreme Court because Section 27 is not limited only to those instances that are enumerated under Section 26 of the Code. It makes an express reference to Section 2 (c) of the Code—which is broader in scope. In other words, the restrictive and erroneous interpretation of the Code in Lina suggests that both approval of the sanggunian concerned and the restraints on eviction that may be caused by a government project or program apply only to cases where there is an adverse impact on the environment.

B. SHARE IN THE NATIONAL WEALTH

The other feature of the Code pertinent to resource extraction pertains to local government shares in the national wealth. The key provisions provide:

> SECTION 289. *Share in the Proceeds from the Development and Utilization of the National Wealth.* — Local government units shall have an equitable share in the proceeds derived from the utilization and development of the national wealth within their respective areas, including sharing the same with the inhabitants by way of direct benefits.
>
> SECTION 290. *Amount of Share of Local Government Units.* — Local government units shall, in addition to the internal revenue allotment, have a share of forty percent (40%) of the gross collection derived by the national government

from the preceding fiscal year from mining taxes, royalties, forestry and fishery charges, and such other taxes, fees, or charges, including related surcharges, interests, or fines, and from its share in any co-production, Joint venture or production sharing agreement in the utilization and development of the national wealth within their territorial jurisdiction.[29]

29 Incidentally, the national government also takes a share in the exploitation of natural resources. The Philippine Mining Act of 1995 provides:

SECTION 80. *Government Share in Mineral Production Sharing Agreement*. — The total government share in a mineral production sharing agreement shall be the excise tax on mineral products as provided in Republic Act No. 7729, amending Section 151(a) of the National Internal Revenue Code, as amended.

SECTION 81. *Government Share in Other Mineral Agreements*. — The share of the Government in co-production and joint-venture agreements shall be negotiated by the Government and the contractor taking into consideration the: (a) capital investment of the project, (b) risks involved, (c) contribution of the project to the economy, and (d) other factors that will provide for a fair and equitable sharing between the Government and the contractor. The Government shall also be entitled to compensations for its other contributions which shall be agreed upon by the parties, and shall consist, among other things, the contractor's income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholders, in case of a foreign national, and all such other taxes, duties and fees as provided for under existing laws.

The Government share in financial or technical assistance agreement shall consist of, among other things, the contractor's corporate income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws.

The collection of Government share in financial or technical assistance agreement shall commence after the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive.

SECTION 82. *Allocation of Government Share*. — The Government share as referred to in the preceding sections shall be shared and allocated in accordance with Sections 290 and 292 of Republic Act No. 7160 otherwise known as the Local Government Code of 1991. In case the development and utilization of mineral resources is undertaken by a government-owned or controlled corporation, the sharing and allocation shall be in accordance with Sections 291 and 292 of the said Code.

SECTION 291. *Share of the Local Governments from any Government Agency or Government-Owned or -Controlled Corporation.* — Local government units shall have a share based on the preceding fiscal year from the proceeds derived by any government agency or government-owned or -controlled corporation engaged in the utilization and development of the national wealth based on the following formula whichever will produce a higher share for the local government unit:

(a) One percent (1%) of the gross sales or receipts of the preceding calendar year; or

(b) Forty percent (40%) of the mining taxes, royalties, forestry and fishery charges and such other taxes, fees or charges, including related surcharges, interests, or fines the government agency or government-owned or -controlled corporation would have paid if it were not otherwise exempt.

SECTION 292. *Allocation of Shares.* — The share in the preceding section shall be distributed in the following manner:

(a) Where the natural resources are located in the province:

(1) Province — Twenty percent (20%);

(2) Component City/Municipality — Forty-five percent (45%); and

(3) Barangay — Thirty-five percent (35%)

Provided, however, That where the natural resources are located in two (2) or more provinces, or in two (2) or more component cities or municipalities or in two (2) or more barangays, their respective shares shall be computed on the basis of:

(1) Population — Seventy percent (70%); and

(2) Land area — Thirty percent (30%)

(b) Where the natural resources are located in a highly urbanized or independent component city:

(1) City — Sixty-five percent (65%); and

(2) Barangay — Thirty-five percent (35%)

Provided, however, That where the natural resources are located in such two (2) or more cities, the allocation of shares shall be based on the formula on population and land area as specified in paragraph (a) of this section.

C. MUSLIM AUTONOMY

The Philippines created the Autonomous Regions was meant to accommodate the demands of Muslims for meaningful autonomy in the governance of their affairs. A similar remedy is available for the Cordillera Region where similar sentiments for autonomy exist but previous attempts to ratify the creation of an autonomous region in that region failed.[30]

The conflict in Mindanao is rooted in the displacement of millions of indigenous peoples who used to dominate Mindanao, Sulu, and Palawan. The displacement was complemented by a legal regime imposed by Spanish and American colonizers that did not recognize private ownership rights of indigenous communities. This regime continues to be implemented even after the Philippines became independent in 1946.[31]

Land-grabbing was augmented by resettlement programs that began during the American colonial period and continued until the 1960s where lands were distributed as incentives for military careers, for land reform programs, for rebel returnees, among others. Muslims resentment turned into organized resistance after it was discovered that the military had killed

30 See Ordillo v. Commission on Elections, G.R. No. 93054, December 4, 1990. This section is based on DANTE B. GATMAYTAN, LEGAL METHOD ESSENTIALS 13-15 (2014)

31 Astrid S. Tuminez, This Land is Our Land: Moro Ancestral Domain and its Implication for Peace and Development in the Southern Philippines, 27:2 SAIS REVIEW OF INTERNATIONAL AFFAIRS, 77, 78-9 (2007).

dozens of Muslim trainees who were being prepared for an invasion of Sabah, Malaysia.[32] Muslims began to take up arms and the Moro National Liberation Front was formed to establish a Muslim state. Ferdinand Marcos cited this movement as one of the reasons why he imposed martial law in 1972.[33]

In 1976, the Philippine government entered into a peace treaty with the MNLF called the Tripoli Agreement but the Agreement was never implemented. While Marcos carved out two autonomous regions in Mindanao, he never relinquished political control over these regions to the Muslims.[34] It has been suggested that the Marcos government entered into the agreement only to stave off political pressure particularly from the Middle East, and to relieve itself of the economic strain brought on by war.[35]

After Marcos was deposed, Filipinos ratified a new Constitution that contains broad provisions on Muslim political autonomy that are subject to a charter to be drafted by Congress and approved in a plebiscite. Four (Muslim dominated) provinces opted to join the Autonomous Region for Muslim Mindanao (ARMM) initially.

In the meantime, a split had occurred among the leaders of the MNLF and in 1984, the Moro Islamic Liberation Front broke away from the MNLF. The MILF took a more uncompromising position and abandoned the more secular approach adopted by the MNLF.

The Government of the Republic of the Philippines succeeded in crafting the Final Peace Agreement with the MNLF in 1996. The agreement created transitional bodies such as the Southern Philippines Council for Peace and Development (SPCPD) to oversee economic development in Mindanao and the Special Zone for Peace and Development (SZOPAD). Both bodies ran into popular and congressional opposition and lacked support from the central government. Again, autonomy became illusory under the agreement. So the ARMM continued to be the government's main response to Muslim grievances but it had little support from Manila. Congress amended its charter without consulting the ARMM or Muslim leadership. ARMM remained largely

32 *Id.* at 79-80.

33 *Id.*

34 *Id.* at 81.

35 Jacques Bertrand, *Peace and Conflict in the Southern Philippines: Why the 1996 Peace Agreement is Fragile,* 73:1 PACIFIC AFFAIRS 37, 39 (2000).

dependent on grants from Manila that were irregular in amount and timing that reinforced Muslim dependency.[36]

Since 2001, Malaysia officially facilitated the Government of the Republic of the Philippines-MILF talks, which began with a three-item agenda: 1) security, 2) rehabilitation, and 3) ancestral domain. Interim agreements were signed on the first two items, but ancestral domain proved thorny ground and remains unresolved. Ancestral domain demands include territory to constitute a Moro homeland, sufficient control over economic resources on that land, and a structure of governance consistent with Moro culture.[37]

To prevent the collapse of talks with the MILF, a new framework was adopted: A GRP-MILF peace agreement would govern the enabling law for the Moro homeland, preventing Congress from emasculating Moro gains from negotiations. ARMM enlargement and the creation of a genuine Moro autonomy could theoretically happen without opposition from Congress or local anti-Moro groups.[38] The framework produced a document called the Memorandum of Agreement-Ancestral Domain (MOA-AD). Unfortunately, local governments challenged the constitutionality of the MOA-AD and prevailed in the Supreme Court.[39]

Unfazed the government continued to pursue a peace agreement with the MILF. On March 27, 2014, the Government of the Philippines and the MILF signed the Comprehensive Agreement on the Bangsamoro (CAB), which ended decades of hostilities.[40] The CAB will be the basis for the Bangsamoro Basic Law that will then govern the Bangsamoro.[41]

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36 Tuminez, *supra* note 31 at 82-83.

37 *Id.* at 83.

38 *Id.* at 85.

39 See Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain, G.R. No. 183591, October 14, 2008. *See also* Peter Kreuzer, *Protracted Civil War in Mindanao: Can Civil Society Help Cut the Gordian Knot?, in* THE POLITICS OF CHANGE IN THE PHILIPPINES 313-335 (Yuko Kasuya & Nathan Gilbert Quimpo eds., 2010) on the human and social costs of the conflict in Mindanao.

40 Kristine Angeli Sabillo, Bangsamoro Peace Pact Signed, PHILIPPINE DAILY INQUIRER, March 27, 2014, http://newsinfo.inquirer.net/589568/bangsamoro-peace-pact-signed#ixzz2xCatYZIM.

41 A transition commission will submit a draft of the Bangsamoro Basic Law to Congress. Once enacted by Congress, the law will be subjected to a plebiscite in areas identified as core

territory of the Bangsamoro in early 2015. Genalyn D. Kabiling & Edd K. Usman, *No More War,* MANILA BULLETIN, March 28, 2014, http://www.mb.com.ph/no-more-war/. For contrasting views on recent developments with the MILF, see Renato Cruz de Castro, *The Philippines in 2012: ''Easygoing, Do-Nothing'' President Delivers,* 53:1 ASIAN SURVEY 109–116 (2013) and John T. Sidel, *The Philippines in 2013: Disappointment, Disgrace, Disaster,* 54:1 ASIAN SURVEY 64–70 (2014).

THE HIERARCHY OF ENVIRONMENTAL LAWS

The Philippines has a hierarchy of laws that can be used to address environmental concerns. At the top of the hierarchy is the Constitution, followed by statutes enacted by Congress (now called Republic Acts), implementing rules and regulations promulgated by administrative agencies, such as the Department of Environment and Natural Resources (DENR), and local government ordinances. Supreme Court decisions also become part of the law. [42]

The Constitution is the supreme law to which all other laws must conform. "Courts have the inherent authority to determine whether a statute enacted by the legislature [exceeds] the limit[s] [provided] by the fundamental law. [In such cases,] courts will strike down such laws as unconstitutional.[43]

Rules and regulations issued by administrative agencies like the DENR are laws. A "rule or regulation" is the part of the administrative process *that resembles* a legislature's enactment of a statute. In this jurisdiction, administrative authorities are vested with the power to promulgate rules and regulations to implement a given statute and to effectuate its policies and when promulgated, such administrative rules or regulations become laws.[44]

Implementing rules are not of the same caliber as an enactment of Congress. While rules and regulation have the force and effect of law and are entitled to great respect, courts interpret administrative regulations[45] It is a

42 Dante Gatmaytan-Magno, *Artificial Judicial Environmental Activism: Oposa v. Factoran as Aberation*, 17 Ind. Int'l & Comp. L. Rev. 1, 3-6 (2007).

43 Manalo v. Sistoza, G.R. No. 107369, August 11, 1999.

44 Balmaceda v. Corominas & Company, Inc., G.R. No. L-21971, September 5, 1975, *citing* Macailing v. Andrada, G.R. No. L-21607, January 30, 1970.

45 Land Bank of the Philippines v. Obias, G.R. No. 184406, March 14, 2012.

cardinal rule in statutory construction that statutory provisions control the rules and regulations that may be issued pursuant thereto. Such rules and regulations must be consistent with and must not defeat the purpose of the statute.[46] There is a hierarchy of laws, and regulations cannot be inconsistent with either the Constitution or the enactments of the legislature.[47] Administrative regulations are intended to supplement the law and cannot prevail over the law itself.

> It is axiomatic that the delegate, in exercising the power to promulgate implementing regulations, cannot contradict the law from which the regulations derive their very existence. The courts, for their part, interpret the administrative regulations in harmony with the law that authorized them in the first place and avoid as much as possible any construction that would annul them as an invalid exercise of legislative power.[48]

Rules and regulations cannot supersede statutes, not only in what they command but also in what they omit. In the hierarchy of legal norms, rules and standards definitely occupy an inferior status.[49] Administrative regulations must be in harmony with the provisions of the law. In case of discrepancy between the basic law and an implementing rule or regulation, the former prevails.[50]

If an implementing rule or regulation has a provision that was not expressly stated or contained in the statute, it does not necessarily contradict the statute. All that is required is that the regulation should be germane to the objects and purposes of the law; that the regulation be not in contradiction to but in conformity with the standards prescribed by the law.[51]

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46 Philippine International Trading Corporation v. Commission on Audit, G.R. No. 152688, November 19, 2003.

47 United BF Homeowner's Association and Home Insurance and Guaranty Corporation v. BF Homes, Inc., G.R. No. 124873, July 14, 1999.

48 Granger Associates v. Microwave Systems, Inc. G.R. No. 79987, September 14, 1990.

49 Villegas v. Subido, G.R. No. L-26534, November 28, 1969.

50 Philippine Petroleum Corporation v. Municipality of Pililia, G.R. No. 90776, June 3, 1991, *citing* Shell Philippines, Inc. v. Central Bank of the Philippines, G.R. No. L-51353, June 27, 1988.

51 Holy Spirit Homeowners' Association, Inc. v. Defensor, G.R. No. 163980, August 3, 2006.

While Congress enacts the laws, the DENR carries out the state's constitutional mandate to control and supervise the exploration, development, utilization, and conservation of the country's natural resources.[52] The DENR supplements statutes by promulgating rules and regulations, which should be within the scope of the statutory authority granted by the legislature to the administrative agency.[53] These "[r]egulations are not . . . substitute[s] for the general policy-making that Congress enacts in the form of a law. . . . [T]he authority to prescribe rules and regulations is not an independent source of power to make laws.[54]

Under the Local Government Code of 1991, local governments may enact ordinances to protect the environment.[55] The power of local government units to legislate and enact ordinances and resolutions is delegated by Congress,[56] subject to the limitation that ordinances cannot contravene a statute Congress has enacted.[57]

The judiciary settles controversies arising from the implementation of these laws. It exercises judicial power which is defined as "the right to determine actual controversies arising between adverse litigants.[58] Courts merely interpret the laws; they do not enact them. Its sole function is to apply or interpret the laws, particularly where there are gaps or ambiguities.[59] By express provision of law, "[j]udicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines.[60]

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52 *See* Executive Order No. 292, Bk. IV, tit. XIV, ch. 1, sec. 1, 2 (1987) 83 O.G. 1, vol. 38 (Phil.).

53 Smart Communication, Inc. v. National Telecommunication Commission, G.R. No. 151908, August 12, 2003. The regulation should be germane to the objects and purposes of the law, and be not in contradiction to, but in conformity with, the standards prescribed by law. They must conform to and be consistent with the provisions of the enabling statute in order for such rule or regulation to be valid. Constitutional and statutory provisions control with respect to what rules and regulations may be promulgated by an administrative body, as well as with respect to what fields are subject to regulation by it. It may not make rules and regulations which are inconsistent with the provisions of the Constitution or a statute, particularly the statute it is administering or which created it, or which are in derogation of, or defeat, the purpose of a statute. In case of conflict between a statute and an administrative order, the former must prevail.

54 Ople v. Torres, G.R. No. 127685, July 23, 1998.

55 Republic Act No. 7160 (1991), §§16-17.

56 Lina v. Pano, G.R. No. 129093, August 30, 2001.

57 Tatel v. Virac, G.R. No. 40243, March 11, 1992.

58 Allied Broad. Ctr., Inc. v. Republic, G.R. No. 91500, October18, 1990.

59 Pagpalain Haulers, Inc. v. Trajano, G.R. No. 133215, July 15, 1999.

60 Civil Code, Article 8.

A. THE CONSTITUTION AND NATIONAL LAWS

President Ferdinand Marcos laid the foundation of environmental legislation in the Philippines in the 1970s. The president promulgated the Philippine Environmental Policy[61] "which is the national blueprint for environmental protection."[62] He also implemented the Philippine Environment Code[63] which contains general principles dealing with the major environmental and natural resource concerns of the Philippines. These laws are very broad and contain few substantive provisions.[64] At best, these decrees established the basic framework for laws on the environment in the Philippines.

The Environmental Impact Statement (EIS) required by Presidential Decree No. 1151 was expanded by Presidential Decree No. 1586, or the Environmental Impact Statement System (EISS). The current implementing rules and regulations for the EISS is found in DAO 2003-30. The system authorizes the President of the Philippines to proclaim certain projects or areas environmentally critical, and prohibits these projects, or operations in such areas, without the prior issuance of an Environmental Compliance Certificate (ECC) from the President or his authorized representative.[65] Environmentally critical projects and areas are currently listed under Proclamation No. 2146, Series of 1981 and Presidential Proclamation No. 803, Series of 1996.[66]

In 1978, Marcos issued Presidential Decree No. 1586 which established an environmental impact statement system.[67] It is almost a complete reproduction of the U.S. National Environmental Policy Act.[68] Marcos also promulgated

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61 Philippine Environmental Policy, Presidential Decree No. 1151 (1979).

62 *See* Alan K.J. Tan, *Preliminary Assessment of Philippines' Environmental Law*, http://sunsite.nus.sg/apcel/dbase/filipino/reportp.html (last visited Oct. 31, 2006). United States Department of State Bureau of East Asian and Pacific Affairs, *U.S. Relations with the Philippines*, U.S. Department of State (January 31, 2014), http://www.state.gov/r/pa/ei/bgn/2794.htm.

63 Philippine Environment Code, Presidential Decree No. 1152 (1977)

64 Tan, *supra* note 62.

65 Presidential Decree No. 1151 (1979), § 4.

66 Antonio G.M. La Vina, Alaya M. de Leon and Gregorio Rafael P. Bueta, *Legal Responses to the Environmental Impact of Mining*, 86 Phil. L.J. 284, (2012).

67 The implementing rules of this Decree are now embodied in Interim Implementing Rules and Regulations of Republic Act No. 8749, otherwise known as The Philippine Clean Air Act of 1999, DENR Administrative Order No. 2000-03 (2003).

68 See 42 U.S.C. §§ 4321-4370 (2006).

the Revised Forestry Code of 1975[69] and the Pollution Control Decree of 1976,[70] among other statutes.

After successfully removing Marcos,[71] President Corazon Aquino promulgated a new Administrative Code that laid out a blueprint for the exploitation of resources.[72] The Code, in part, provides:

> Sec. 1. *Declaration of Policy.* - (1) The State shall ensure, for the benefit of the Filipino people, the full exploration and development as well as the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources, consistent with the necessity of maintaining a sound ecological balance and protecting and enhancing the quality of the environment and the objective of making the exploration, development and utilization of such natural resources equitably accessible to the different segments of the present as well as future generations. (2) The State shall likewise recognize and apply a true value system that takes into account social and environmental cost implications relative to the utilization, development and conservation of our natural resources.[73]

The state policy on the protection of the environment was clear. The Code mandated the development of the country's resources for the Filipino people. It also mandated the judicious use of these resources so that they would be accessible to all segments of present and future generations.

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69 Revising Presidential Decree No. 389, Otherwise Known as the Forestry Reform Code of the Philippines, Presidential Decree No. 705 (1975).

70 Providing for the Revision of Republic Act No. 3931, commonly known as the Pollution Control Law, and for Other Purposes, Presidential Decree No. 984 (1992), repealed by Philippine Clean Water Act of 2004, Republic Act No. 9275, § 34 (2004).

71 For a discussion on the fall of the Marcos regime, see generally Dante B. Gatmaytan, *It's All the Rage: Popular Uprisings and Philippine Democracy*, 15 Pac. Rim L. & Pol'y J. 1, 3-6 (2006).

72 Administrative Code of 1987, Executive Ordinance No. 292 (1987).

73 Administrative Code of 1987, Executive Ordinance No. 292 (1987).

Thereafter, the framers of the 1987 Constitution of the Philippines incorporated environmental provisions. The 1987 Constitution provides that "[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."[74]

B. ENVIRONMENTAL LAWS APPLICABLE TO MINING[75]

The primary law which now governs mining is Republic Act No. 7942, the Philippine Mining Act of 1995. The law was enacted to respond to the problems of the struggling mining industry in the 70s through the early 90s. It was intended to create a more favorable climate for investments and to boost an industry seen as a potential driver of economic growth and development.

Compared to the law that preceded it (Presidential Decree No. 463), The Mining Act is an improvement although it has its own weaknesses. The quantity and quality of the Act's environment-related provisions shows an effort to substantially address the harmful impacts of mining operations. Together with its recently-issued Consolidated Implementing Rules and Regulations, DENR Administrative Order No. 2010-21, the Act provides concrete measures to address the negative environmental effects of mining from the inception of operations and even past its termination. The Act and the IRR also require that mining activities be conducted within the purview of a comprehensive environmental plan.

A crucial point in understanding these provisions is that they must be implemented with a consideration of *all* the environmental impacts of mining operations. The application of any provision on its own, detached from a broader view of how it ties in with other measures designed to prevent, minimize, or alleviate environmental degradation that may result from mining, is akin to paying attention only to individual components of an ecosystem in danger of degradation. Attention to any one component may achieve specific positive results, but failure to consider the ecosystem as a whole will eventually lead to its collapse.

In the same vein, the requirements of the Mining Act must be taken in the context of the entire environmental legal system. Implementation of the

74 Const., art. II, §16.

75 This section draws heavily from Antonio G.M. La Vina, Alaya M. de Leon and Gregorio Rafael P. Bueta, *Legal Responses to the Environmental Impact of Mining*, 86 Phil. L.J. 284, (2012).

Act alone, especially if done for mere compliance, is likely to produce other environmental problems in the long term. A narrow view of the law cannot become a foundation for sustainable mining. This is why it is important for mining practitioners and advocates, to gain an understanding of environmental laws, particularly those directed at natural resource protection and pollution control. These are the policies that primarily address the "environmental externalities" of mining activities, and may find application at the same time as the Mining Act, or when the Act falls short of the needs of environmental protection.

Executive Order No. 79

One topic that generates heated debate pertains to the mining policy of the Aquino Administration. The government's mining policy is embodied in Executive Order No. 79[76] which was issued by President Benigno S. Aquino III. This policy is already generating concerns in Mindanao because it is viewed as a tool through which the national government can access natural resources of local governments over the latter's objections.

The Order is riddled with serious constitutional issues. These defects may be summarized as follows:

- The President's policy amounts to control, and not mere supervision, of local governments and, therefore, violates Article X, Section 4 of the Constitution which provides that "[t]he President of the Philippines shall exercise general supervision over local governments."[77]

- The President's Order usurps legislative functions as well. It is amending national laws by making certain types of ordinances—those that hamper the mining industry—illegal. It directs local governments to abide by every decision or policy made by the national government. This amounts to legislation because there simply is no law that requires local governments to follow the national government blindly on mining.

76 Executive Order No. 79 (2012).

77 Const., art. X, § 4

- The President, through the Executive Order, also usurps judicial functions—particularly the power to decide the constitutionality of laws. This violates Article VIII, Section 5(2)(a) of the Constitution which gives the Supreme Court the power to "[r]eview, revise, reverse, modify, or affirm on appeal or certiorari, as the law or the Rules of Court may provide, final judgments and orders of lower courts" in all cases in which the constitutionality or validity of any ordinance is in question.[78]

- Altogether, the Order violates the state policy mandating that the State shall ensure the autonomy of local governments.[79]

The policy embodied in Executive Order No. 79 had been crafted long before the President issued the order. Environment and Natural Resources Secretary Ramon Paje commented on the new mining executive order that the President was expected to sign. In a statement to the press, he said that the new policy would reiterate the "primacy of national law" over anti-mining ordinances. Paje added that the ordinances would remain valid until rendered illegal by a "national government agency."[80]

This position is consistent with the Aquino Administration's policy preferences. In 2010, DILG Secretary Jesse Robredo made similar statements in response to South Cotabato's resistance to mining. He opined that the province did not have the power to ban open-pit minin. In a Memorandum Circular dated November 9, 2010, Robredo directed the provincial government of South Cotabato to review its Environmental Code which prohibited such mining method. According to the Memorandum Circular, "[i]n view thereof, you are hereby enjoined to cause the immediate suspension of the implementation of said ordinance pending its review."[81]

The Circular portrayed the Aquino government's failure to understand the nature and extent of local autonomy in the Philippines.

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78 Const., art. VIII, § 5 (2) (a).

79 Const., art. II, § 2.

80 Dino Balabo, *Paje: Nat'l Mining Laws have Primacy*, Philippine Star, June 24, 2012, http://www.philstar.com/Article.aspx?publicationSubCategoryId=63&articleId=820357.

81 *South Cotabato Guv Junks Local Government Chief's Order*, Sun Star Davao, December 3, 2010, http://www.sunstar.com.ph/davao/local-news/south-cotabato-guv-junks-local-government-chief-s-order.

There is no law which prevents local governments from imposing additional strictures to safeguard the environment so long as it does not contradict an express provision of law. The Mining Act of 1995 does not prevent local governments from banning open-pit mining or from adopting measures that protect the environment. The efforts of South Cotabato and other local governments in banning open-pit mining may be justified as police power measures under the Local Government Code.[82] It is true that local ordinances must be consistent with the Constitution and national laws. But if national law does not prohibit a course of action, it may be prohibited by an ordinance.

Local governments are allowed to add requirements before businesses, otherwise satisfying national laws, can operate at the local level. In *Newsound Broadcasting Network Inc. v. Dy*,[83] the Supreme Court held that:

> Nothing in national law exempts media entities that also operate as businesses such as newspapers and broadcast stations such as petitioners from being required to obtain permits or licenses from local governments in the same manner as other businesses are expected to do so. While this may lead to some concern that requiring media entities to secure licenses or permits from local government units infringes on the constitutional right to a free press, we see no concern so long as such requirement has been duly ordained through local legislation and content-neutral in character, *i.e.*, applicable to all other similarly situated businesses.

In another case, the Supreme Court recognized the power of local gove rnment units to prevent the operation of drug stores authorized by the Food and Drug Administration to operate. In that case,[84] the Court held that (then) Mayor Richard Gordon could not disallow the operation of a drugstore after it was allowed to operate by the FDA. "However," the Court continued, "it was competent for the petitioner (Gordon) to suspend Mayor's Permit No. 1955 for the transfer of the Olongapo City Drug Store in violation of the permit." In other words, while the applicant has complied with the pertinent national laws and policies,

82 Republic Act No. 7160 (1991), §16.

83 G.R. Nos. 170270 & 179411, April 2, 2009.

84 Gordon v. Verdiano II, G.R. No. L-55230, November 8, 1988.

> this fact alone will not signify compliance with the particular conditions laid down by the local authorities like zoning, building, health, sanitation, and safety regulations, and other municipal ordinances enacted under the general welfare clause. This compliance still has to be ascertained by the mayor if the permit is to be issued by his office. Should he find that the local requirements have not been observed, the mayor must then, in the exercise of his own authority under the charter, refuse to grant the permit sought.

What is more curious is that both cabinet Secretaries refer to the executive power to declare these ordinances illegal. The President does not have the power of control over local government officials, only the power of supervision. Supervision means overseeing or the power or authority of an officer to see that subordinate officers perform their duties. Control, on the other hand, means the power of an officer to *alter or modify or nullify or set aside* what a subordinate officer had done in the performance of his duties and *to substitute* the judgment of the former for that of the latter.[85] The President's authority is limited to seeing to it that rules are followed and laws are faithfully executed. The President may only point out that rules have not been followed but the President cannot lay down the rules, neither does he have the discretion to modify or replace the rules.[86] Any directive by the President which seeks to alter the wisdom of a law-conforming judgment on local affairs of a local government unit is a patent nullity "because it violates the principle of local autonomy and separation of powers of the executive and legislative departments in governing municipal corporations."[87]

Robredo's actions and Paje's statement suggest that the President has the power to declare ordinances unconstitutional. The President cannot declare ordinances unconstitutional as that power is reserved by the Constitution to the courts. As the Supreme Court explained in one case, paragraph 2 (a) of Section 5, Article VIII of the Constitution impliedly recognizes the original jurisdiction of lower courts over cases involving the constitutionality or validity of an ordinance:

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85 Hebron v. Reyes, G.R. No. L-9124, July 28, 1958.

86 Province of Negros Occidental v. Commissioners of Commission on Audit, G.R. No. 182574, September 28, 2010.

87 Dadole v. Commission on Audit, G.R. No. 125350, December 3, 2002.

> Section 5. The Supreme Court shall have the following powers…
>
> (2) Review, revise, reverse, modify or affirm on appeal or certiorari, as the law or the Rules of Court may provide, final judgments and orders of lower courts in:
>
> > (a) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.[88]

On the eve of the release of the Administration's mining policy, local government officials, environmental activists, and other stakeholders were rightfully apprehensive that the President could be flirting with the boundaries of the law. As it turns out, these concerns were valid. Executive Order No. 79 was worse than Secretary Paje had suggested.

The Order

When the President finally released his administration's policy on mining, the controversial statements made by his Secretaries became policy. On one hand, the carefully crafted Order seems to have steered clear of potentially unconstitutional issues. The policy is embodied in Executive Order No. 79[89] that lists its goals which includes increasing returns from mining activities and joining the Extractive Industry Transparency Initiative (EITI).

An analysis of his Order shows, however, that the President violated the Constitution in many ways.

Official rhetoric glossed over other sections of the Order, particularly Section 12 which was interestingly captioned "Consistency of Local Ordinances with the Constitution and National Laws/LGU Cooperation." It provides:

> SECTION 12. *Consistency of Local Ordinances with the Constitution and National Laws/LGU Cooperation*. The Department of the Interior and Local Government (DILG) and the LGUs

88 See discussion in Ongsuco v. Malones, G.R. No. 182065, October 27, 2009.

89 Executive Order No. 79 (2012).

> are hereby directed to ensure that the exercise of the latter's powers and functions is consistent with and conform to the regulations, decisions, and policies already promulgated and taken by the National Government relating to the conservation, management, development, and proper utilization of the State's mineral resources, particularly RA No. 7942 and its implementing rules and regulations, while recognizing the need for social acceptance of proposed mining projects and activities.
>
> LGUs shall confine themselves only to the imposition of reasonable limitations on mining activities conducted within their respective territorial jurisdictions that are consistent with national laws and regulations.

The Order is correct in one respect. Local ordinances have to be consistent with the Constitution and national laws. This is an old rule in this jurisdiction. In *Tatel v. The Municipality of Virac*,[90] the Court explained that for an ordinance to be valid, it must follow the procedures for enactment and must be in consistent with basic principles of a substantive nature.

Thus the Court explained that for a municipal ordinance to be valid, it:

1. must not contravene the Constitution or any statute
2. must not be unfair or oppressive
3. must not be partial or discriminatory
4. must not prohibit but may regulate trade
5. must be general and consistent with public policy, and
6. must not be unreasonable.

Courts have consistently applied these requirements and the Supreme Court occasionally strikes down ordinances when they violate these standards.[91]

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90 G.R. No. 40243, March 11, 1992.

91 *See* Lagcao v. Labra, G.R. No. 155746, October 13, 2004. There, the Court invalidated a Cebu City ordinance because it was inconsistent with Republic Act No. 7279 and the Local Government Code of 1991. In *White Light Corporation v. City of Manila* (G.R. No. 122846, January 29, 2009), the Court struck down an ordinance that attempted to ease out certain businesses that were allegedly immoral. The Court found that the ordinance amounted to a deprivation of property without due process of law.

In certain cases, ordinances are struck down because they "clash" with national laws. In these cases, however, "national laws were clearly and expressly in conflict with the ordinances/resolutions of the local governments. The inconsistencies were so patent that there was no room for doubt."[92] When national laws are ambiguous and are pitted against "the unequivocal power of the LGU to enact police power and zoning ordinances for the general welfare of its constituents, it is not difficult to rule in favor of the latter."[93] The Supreme Court has upheld the power of local governments to enact zoning ordinances out of respect for Manila's autonomy:

> The least we can do to ensure genuine and meaningful local autonomy is not to force an interpretation that negates powers explicitly granted to local governments. To rule against the power of LGUs to reclassify areas within their jurisdiction will subvert the principle of local autonomy guaranteed by the Constitution. As we have noted in earlier decisions, our national officials should not only comply with the constitutional provisions on local autonomy but should also appreciate the spirit and liberty upon which these provisions are based.[94]

As explained earlier, local governments argue that bans on certain forms of mining are not inconsistent with the law and in fact may be justified as a police power measure that promotes a balanced and healthful ecology—a constitutional right of Filipinos.[95] They should be able to enact police power measures to protect the health and welfare of their constituents.

The Executive Order requires more from local governments. Section 12 is not an act of supervision where the national government points out potential inconsistencies between local government ordinances and national law. It reads like an act of control because it requires local governments to conform to "the regulations, decisions, and policies already promulgated and taken by the National Government relating to the conservation, management, development, and proper utilization of the State's mineral resources, particularly

92 Social Justice Society v. Atienza, G.R. No. 156052, February 13, 2008.

93 Social Justice Society v. Atienza, G.R. No. 156052, February 13, 2008.

94 Social Justice Society v. Atienza, G.R. No. 156052, February 13, 2008. This is also sanctioned under Republic Act No. 7160 (1991), §5 (a) & (c).

95 Const (1987), art. II, § 16.

Republic Act No. 7942 and its implementing rules and regulations." The Order directs local officials to enact ordinances that are consistent not only with laws, but with every decision of the national government on mining.

In effect, local governments are instructed to toe the line. Under this Order, they cannot depart from decisions and policies of the national government on the utilization of mineral resources. Under this Order, a government committed to extracting resources by whatever means cannot be stopped or delayed by local governments. If the national government decides to exploit resources in a certain local government, the latter cannot refuse access. The national government has already started to instruct local governments to "align" local ordinances with national law.[96]

The President's attempts to ban certain types of mining become illegal under this policy. This could be viewed as an attempt to legislate a ban on certain forms of ordinances that hamper the mining sector. This is unconstitutional because legislative power is distinct from executive power. Congress makes laws but it is the President who executes the laws. The executive power is vested in the President; it is the power to enforce and administer the laws or the power of carrying the laws into practical operation and enforcing their due observance.[97]

Let us suppose that a local government continues to ban open mining within their jurisdiction. Would the act be illegal under the Order? Would the DILG then "rule" that the ordinance is invalid? Again, the President cannot declare ordinances inconsistent with Executive Order No. 79 as illegal. This would be unconstitutional because an ordinance is presumed valid unless declared invalid by courts.[98]

More importantly, however, is the fact that the President's directive simply undermines local autonomy. His directive for local governments to toe the official "national" line cannot be justified under the Constitution that denies him the power of control and invigorates local governments with meaningful autonomy.

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96 Madeline Cabrera & Jocelyn Montemayor, *MICC Asks Local Gov't Units to Align Conflicting Mining Laws*, Malaya Business Insight, July 31, 2010, http://www.malaya.com.ph/index.php/business/business-news/9612-micc-asks-local-govt-units-to-align-conflicting-mining-laws.

97 Ople v. Torres, G.R. No. 127685, July 23, 1998.

98 Lagcao v. Irineo, A.M. No. RTJ-04-1840, August 2, 2007.

The Philippines accommodates within its unitary system the operation of local governments units "with enhanced administrative autonomy and autonomous regions with limited political autonomy."[99] In one case, the Supreme Court held that the Department of Budget and Management could not make provisions in national budgetary laws automatically incorporated in local budgetary ordinances. This position reduced local legislative councils "to mere extensions of Congress" and was inconsistent with the present vertical structure of Philippine government and to any notion of local autonomy under the Constitution.[100]

Aquino's mining policy seems to do exactly that: make local governments extensions of the national government. This is an affront to the Constitution because "[t]he principle of local autonomy is no mere passing dalliance but a constitutionally enshrined precept that deserves respect and appropriate enforcement by the Supreme Court."[101]

C. International Environmental Law[102]

International agreements to which the Philippines is a party are part of the law of the land.[103] They are thus subject to implementation with the same force and effect as domestic laws, and the Philippines is bound to perform the obligations imposed by these treaties.[104]

Mining has been the subject of few international standards.[105] Like energy, mining is regulated by international law only to the extent that it is incidentally addressed by environmental impact assessments and rules that address

99 Department of Budget and Management v. Leones, G.R. No.169726, March 18, 2010.

100 Department of Budget and Management v. Leones, G.R. No.169726, March 18, 2010.

101 City of Davao v. Regional Trial Court of Davao, G.R. No. 127383, August 18, 2005.

102 Antonio G.M. La Vina, Alaya M. de Leon and Gregorio Rafael P. Bueta, *Legal Responses to the Environmental Impact of Mining*, 86 Phil. L.J. 284, (2012).

103 Const., art. VII, § 21. *See* Pharmaceutical and Health Care Association of the Philippines v. Duque, G.R. No. 173034, Oct. 9, 2007, 535 SCRA 625. *See also* Magallona and Malayang at 18.

104 Cathal Doyle, Clive Wicks and Frank Nally, *Mining in the Philippines: Concerns and Conflicts*, Society of St. Columban 15 (2007), http://www.envirosecurity.org/sustainability/presentations/Wicks.pdf.

105 Philippe Sands, Principles of International Environmental Law (2nd ed., 2003).

the protection of flora and fauna, the disposal of waste, and air pollution.[106] The following international instruments may have particular application to the mining industry:

- The *Stockholm Declaration* is the product of the United Nations (UN) Conference on the Human Environment held on June 5-16, 1972. It was the first UN conference held specifically to consider problems in the environment, adopting a Declaration and Action Plan.[107]

- The *Rio Declaration*[108] is one of the outputs of the UN Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, to elaborate strategies and measures to halt and reverse the effects of environmental degradation in the context of strengthened national and international efforts to promote sustainable and environmentally sound development in all countries (Sands 2003). It comprises 27 principles that set out the basis on which states and people are to cooperate and further develop international law in the field of sustainable development. The Rio Declaration provides a benchmark to measure future developments, provides a basis for defining sustainable development and its application, and provides a framework for development of environmental law at the national and international level to guide decision-making.[109]

- The *UN Framework Convention on Climate Change* (UNFCCC)[110] establishes a framework for elaborating measures to address the causes of climate change. It is an important example of the principles of common but differentiated responsibilities and precautionary action under the Rio Declaration,[111] of the special needs and circumstances of developing countries, and of sustainable development and international trade.[112]

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106 *Id*. at 665.

107 Patricia Birnie and Alan Boyle, International Law and the Environment (2nd ed., 2002).

108 United Nations Rio Declaration on Environment and Development.

109 Philippe Sands, Principles of International Environmental Law 54 (2nd ed., 2003).

110 United Nations Framework Convention on Climate Change.

111 Patricia Birnie and Alan Boyle, International Law and the Environment (2nd ed., 2002).

112 Peter Malanczuk, Akehurst's Modern Introduction to International Law (1997).

- The *Kyoto Protocol*[113] was adopted in December, 1997 after it was established that States' commitments under the UNFCCC were not adequate, and is regarded as a tool for the implementation and enforcement of concrete goals in accordance with the aspirational objectives set forth in the UNFCCC.[114] The major achievement of the Protocol was the commitment of developed countries to achieve quantified emissions reduction targets within a timetable. It also proposed to allow developed countries, otherwise referred to as Annex 1 states, to meet their commitments by purchasing or acquiring credits representing greenhouse gas reductions in other countries. The Clean Development Mechanism further established a means for Annex 1 parties to gain emission reductions credits to assist them in achieving compliance with their quantified emissions limitation and reduction commitments.[115]

- The UNFCCC and the Kyoto Protocol have a particular implication on mining because of the potential contribution of mineral activities to climate change. The International Council of Mining and Metals has identified climate change and the impact of greenhouse gases (GHG) "as 'the most important [environmental] issue, without a doubt' to face the mining industry."[116] The mining industry faces such climate-related challenges as "compliance with local regulatory regimes restricting carbon emissions . . . supply chain risks (higher costs due to the activities of suppliers); product and technology risks (being left behind by changing technology standards); reputational risks related to sustainability concerns; physical risks to operations due to extreme weather and litigation risks."[117]

- Thus, the Philippines' commitments under the UNFCCC and the Kyoto Protocol, now embodied in the Republic Act No. 9729,[118] must

113 United Nations Framework Convention on Climate Change.

114 Kara K. Davis, *The United States Obligation to Lower Greenhouse Gas emissions: An American Perspective of the Kyoto Protocol*, 10 U. Miami Int'l & Comp. L. Rev. 97 (2002).

115 Philippe Sands, Principles of International Environmental Law 373 (2nd ed., 2003).

116 Barbara Hendrickson and Marty Venalainen, *Climate Change: Risks and Opportunities for the Mining Industry*, *in* Emissions Trading & Climate Change Bulletin (McMillan Binch Mendelsohn ed., 2008).

117 *Id.*

118 Entitled "Climate Change Act of 2009." Enacted on October 23, 2009.

be considered integral components of the national policy on mining and their objectives incorporated in the environmental programs of mining contractors and permit holders.

- The *Convention on Biological Diversity* (CBD)[119] aims at the conservation and sustainable use of biological diversity, the fair and equitable sharing of benefits from its use, and the regulation of biotechnology.[120] A significant provision of the CBD which relates to the mining industry is found in Article 3 on *Principle* which calls on member States, such as the Philippines, to ensure that use and exploitation of natural resources carries with it a responsibility to ensure the protection of the environment and the preservation of biological diversity.

119 Full text of the Convention is available at http://www.cbd.int/convention/text/.

120 Peter Malanczuk, Akehurst's Modern Introduction to International Law (1997).

NATIONAL LAWS THAT IMPLICATE MINING

THE MINING ACT OF 1995

The Mining Act of 1995[121] is not purely a revenue raising measure. It contains provisions that address environmental and social issues implicated by mining. These provisions are discussed by Dean Antonio G.M. La Vina, Alaya M. de Leon and Gregorio Rafael P. Bueta in an article entitled *Legal Responses to the Environmental Impact of Mining*.[122] Their Article is comprehensive and outlined here in the following pages.

A. GENERAL ENVIRONMENTAL REQUIREMENTS

Chapter XI of the Mining Act is dedicated to "Safety and Environmental Protection." It generally refers to safe and sanitary working conditions in mining areas, and to "waste-free and efficient mine development".[123] It is the declared policy of the DENR that mining permits, agreements and leases be managed responsibly, so as to promote the general welfare and sustainable development objectives and responsibilities.[124] These objectives are:

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121 The Supreme Court declared this law unconstitutional but the Supreme Court reversed itself a few months later. *See* Alan Khee-Jin Tan, *All That Glitters: Foreign Investment in Mining Trumps the Environment in the Philippines*, 23 Pace Envtl. L. Rev. 183 (2006).

122 Antonio G.M. La Vina, Alaya M. de Leon and Gregorio Rafael P. Bueta, *Legal Responses to the Environmental Impact of Mining*, 86 Phil. L.J. 284, (2012).

123 Mining Act, §63.

124 DAO No. 2010-21, §166.

- Sustainable environmental conditions at every stage of mining operations;
- Progressive rehabilitation of all areas and sites affected by mining operations;
- Preservation of freshwater and seawater quality and natural marine habitats;
- Prevention of air and noise pollution; and
- Respect for sustainable management practices of ICCs and other communities.[125]

I. Environmental Plans and Programs

In line with the objective of providing sustainable conditions at every stage of mining operations, mineral contractors or permittees must carry out environmental programs in conjunction with their mineral activities. The programs must also contain pre- and post-mining provisions. The programs required under the Act and IRR are the Environmental Work Program (EWP), Environmental Protection and Enhancement Program (EPEP), and Annual Environmental Protection and Enhancement Program (AEPEP).

An Environmental Work Program (EWP) is required in conjunction with applications for exploration permits, and mineral agreements and FTAAs with exploration activities. The plan must describe the expected acceptable impacts of exploration, and environmental protection and enhancement strategies for their management. It must also detail the permittee's proposed environmental impact control and rehabilitation activities and their costs, so that funds may be allocated for their conduct. Post-exploration rehabilitation must be provided for, together with implementation schedules, compliance guarantees, and provisions on monitoring and reporting. The EWP shall then be submitted to the concerned Sangguniang Panlalawigan, and a bi-annual compliance report submitted to the concerned Bureau or Regional Office.[126]

125 DAO No. 2010-21, §167. Emphasis supplied.

126 DAO No. 2010-21, §168.

On the other hand, mineral agreement or FTAA contractors and other permit holders are required to undertake an Environmental Protection and Enhancement Program (EPEP) throughout the development and operation of their mine or quarry. It is not meant as a substitute for, but rather a complement to, the contractor or permit holder's Environmental Compliance Certificate (ECC),[127] which shall be the basis for preparing the EPEP. The preparation, submission and approval of the Program shall be a mandatory condition in the ECC to be issued the contractor or permit holder.[128]

Containing provisions similar to an EWP, the program is designed to provide an "operational link" between the contractor or permittee's EPE commitments under the IRR, the Environmental Compliance Certificate (ECC) required by PD 1586, and the contractor's mining operation plan. The program must cover all areas that will be affected by mining development, utilization, and processing.[129]

Section 71 of the Act requires the technical and biological rehabilitation of all excavated, mined-out, tailings-covered, and disturbed areas to an environmentally-safe condition. For this purpose, the EPEP must integrate a Final Mine Rehabilitation/ Decommissioning Plan (FMR/DP), which addresses all mine closure scenarios such as decommissioning, rehabilitation, maintenance, and monitoring; and employee and other social costs, over a ten-year period, and provides cost estimates for its implementation.[130] Its submission and approval are a mandatory part of the ECC.[131] The Plan is subject to review and/or revision two (2) years from its approval and every two (2) years thereafter, or whenever it is warranted by changes in mining activities. The review and/or revision may be done "on the Contractor's/Permit Holder's initiative or at the request of the Director/Regional Director concerned".[132]

The EPEP shall be submitted within thirty (30) days upon the contractor's receipt of the ECC, subject to approval of the Mine Rehabilitation Fund (MRF) and Contingent Liability and Rehabilitation Fund (CLRF) Steering Committees.[133]

127 DAO No. 2010-21, §169.

128 DAO No. 2010-21, §178.

129 DAO No. 2010-21, §169.

130 DAO No. 2010-21, §187.

131 DAO No. 2010-21, §187-A.

132 DAO No. 2010-21, §187-E.

133 DAO No. 2010-21, §169.

A copy of the approved program must then be provided the concerned LGU at least thirty days prior to the intended commencement date of operation.[134] The scope and requirements of the EPEP makes it one of the key environmental provisions of the Mining Act.[135]

Lastly, the contractor or permit holder must submit an Annual Environmental Protection and Enhancement Program (AEPEP) to the Bureau or concerned Regional Office at least thirty days before the start of every calendar year. It shall be based on the approved EPEP and implemented during the incoming year. It shall include provisions on exploration, development, utilization, rehabilitation, regeneration, re-vegetation, reforestation, and slope stabilization of mineralized, mined-out, waste dumps, or tailings-covered areas; aquaculture, watershed development, and water conservation; and socioeconomic development.[136]

A Multipartite Monitoring Team (MMT) shall monitor compliance with the EPEP and AEPEP, and check the environmental performance of contractors or permittees on at least a quarterly basis.[137] The MMT is deputized by the MRF Committee, discussed below, and is composed of a representative from the MGB Regional Office, who shall head the MMT; and as members, representatives from the Department Regional Office, the EMB Regional Office, of the Contractor/ Permit Holder, affected communities, affected ICCs, if any, and an environmental NGO. The MMT may seek technical assistance from the MRF Committee, to whom the MMT shall submit a report on the status or results of its monitoring activities at least five (5) working days from the Committee's regular meetings. The CLRF Steering Committee shall be furnished a copy of the report.[138]

At the end of the life of the mine and during the implementation of the FMR/ DP, the contractor or permit holder must submit a progress report of its rehabilitation activities, if applicable to its operation. The report is subject to review and evaluation by the MRF Committee.[139] Once the objectives of mine closure are achieved in accordance with the FMR/DP based on the contractor or permit

134 DAO No. 2010-21, §170.

135 The Wallace Business Forum, Inc. *Philippine Mining: It Can Play a Positive Role*, 13, December 2003.

136 Mining Act, §69; DAO No. 2010-21, §171.

137 DAO No. 2010-21, §174.

138 DAO No. 2010-21, §185.

139 DAO No. 2010-21, §187-D.

holder's assessment, it shall prepare and submit a Final Rehabilitation Report with third party Environmental Audit (FRR with EA) to be pre-evaluated by the MRF Committee. If the CLRF Steering Committee approves the FRR with EA, it shall issue a Certificate of Final Relinquishment to signify approval and free the contractor or permit holder from further obligations related to the rehabilitated mine areas. However, if residual care is needed based on the Committees' review and evaluation, the contractor or permit holder shall submit a corresponding Site Management Plan to cover the areas that still need rehabilitation. Remaining amounts from the Final Mine Rehabilitation and Decommissioning Fund and Mining Waste and Tailings Fee payments, discussed below, shall be returned. However, the contractor or permit holder shall remain liable for any budgetary shortfall to achieve mine closure objectives and to implement the Site Management Plan.[140]

ii. Environmental Funds and Fund Steering Committees

The Mining Act IRR requires the setting aside and/or creation of several funds to provide the necessary monies to prevent, mitigate, and remediate the harmful environmental effects of mineral operations. Specific funds required under the rules include the Contingent Liability and Rehabilitation Fund (CLRF), the Mine Rehabilitation Fund (MRF), and the Final Mine Rehabilitation and Decommissioning Fund. The MRF, in turn, is composed of the Monitoring Trust Fund (MTF) and Rehabilitation Cash Fund (RCF).[141]

First of all, ten percent (10%) of the total capital/project cost, or other amount depending on the conditions, nature, or scale of operations, shall be allocated for the contractor or permittee's initial environment-related capital expenditures.[142] The contractor shall also allocate a minimum of approximately three to five percent (3% - 5%) of its mining and milling costs towards its annual environment-related expenses.[143]

140 DAO No. 2010-21, §187-F.

141 DAO No. 2010-21, §181.

142 DAO No. 2010-21, §169.

143 DAO No. 2010-21, §171.

The MGB is authorized to institutionalize a Contingent Liability and Rehabilitation Fund (CLRF), which is designed as an environmental guarantee fund mechanism "to ensure just and timely compensation for damages and progressive and sustainable rehabilitation for any adverse effect a mining operation or activity." The CLRF is composed of the MRF, Mine Waste and Tailings Fees (MWTF), and Final Mine Rehabilitation and Decommissioning Fund (FMRDF).[144] It is under the administration of the CLRF Steering Committee.[145] Section 197 of the IRR establishes an administrative fund to cover the maintenance and operational expenses of the Committee.

The Contingent Liability and Rehabilitation Fund (CLRF) Steering Committee has the broadest power among the committees, teams, and working groups under the Rules, with the critical duty to evaluate and approve or disapprove EPEPs and FMR/DPs. The inter-agency committee has as members the Directors of the Bureaus on Lands Management, Forest Management, Soils and Water Management, Plant Industry, and Fisheries and Aquatic Resources; and the Administrator of the National Irrigation Administration. The Directors of the MGB and EMB respectively chair and vice-chair the Committee, while the Assistant Director of MGB coordinates.[146]

The Committee is empowered to hire and consult with experts and advisors for this purpose and other technical research if necessary. It is also tasked to monitor and/or administer other funds comprising the CLRF, together with applications and awards for compensation for damages. Claims for damages are investigated and assessed with the assistance of Regional Investigation and Assessment Teams (RIATs).[147] Issues involving the FMR/DP, the performance of MRF Committees, and formation of Technical Working Groups – which serve as technical staff of the Committee and the RIATs – are also among the Committee's responsibilities. Lastly, it implements relevant guidelines, rules, and regulations, makes policy recommendations, and prepares the necessary annual and periodic reports of activities to the DENR Secretary.[148]

144 DAO No. 2010-21, §180.

145 DAO No. 2010-21, §194.

146 DAO No. 2010-21, §194.

147 DAO No. 2010-21, §198

148 DAO No. 2010-21, §193.

While the CLRF is a system-wide fund mechanism that may be applied to various mineral areas and operations, a Mine Rehabilitation Fund (MRF) is established by individual contractors or permit holder as an environmental deposit, "to ensure availability of funds for the satisfactory compliance with the commitments and performance of the activities stipulated in the EPEP/AEPEP." It is deposited with a government depository bank as a trust fund, specifically to be used for physical and social rehabilitation of mining-affected areas and communities, and related research.[149]

The MRF includes a Monitoring Trust Fund (MTF), which shall not be less than PhP150,000.00, for the exclusive use of the monitoring program approved by the MRF Committee and carried out by the MMT. On the other hand, the Rehabilitation Cash Fund (RCF), which is equivalent to 10% of the amount needed to implement the EPEP, or PhP5,000,000.00, whichever is lower, shall be applied towards compliance with approved rehabilitation activities, schedules, and research. Withdrawals from the MRF shall be replenished annually to maintain the required minimum amount. At the end of the operating life of the mine, the remaining amount in the RCF shall be returned to the contractor or permit holder, and the Final Mine Rehabilitation and Decommissioning Fund shall be instated in its place, and shall be in effect until mine closure objectives have been achieved.[150]

There shall be a Mine Rehabilitation Fund (MRF) Committee in each Region where there are active mining operations. It shall be composed of the MGB Regional Director as Chair and Regional Executive Director as Co-chair; the EMB Regional Director, and representatives of the Autonomous Regional Government, LGU, local NGOs and community organizations, and of the contractor or permit holder, as members.[151]

The MRF Committee is tasked with initially evaluating the EPEP and the environmental, engineering, and socio-cultural impacts of projects, with authority to hire and/or consult experts if necessary. The Committee must then monitor strict compliance with the approved EPEPs and AEPEPs, while deputizing an MMT as its monitoring arm. The MMT's performance is evaluated and its assessments reported by the MRF Committee to the CLRF Steering Committee. The

149 DAO No. 2010-21, §181.

150 DAO No. 2010-21, §181.

151 DAO No. 2010-21, §183.

MRF Committee also monitors and administers the MRF and FMRDF, resolves issues on the progressive mine rehabilitation program of the contractor or permit holder, ensures that MTFs, RCFs, and FMRDFs are kept separate, with specific books of record for each contractor and permit holder, and submits an annual report to the DENR Secretary or MGB Director.[152]

A Mine Waste and Tailings Fees Reserve Fund shall be collected from the contractor, lessee, or permit holder semi-annually, based on its Mine Waste and Tailings (MWT) fees shall be collected semiannually from each operating Contractor/Lessee/Permit Holder based on the amounts of mine waste and mill tailings it generated for the said period. The amount of fees collected shall accrue to a MWT Reserve Fund and shall be deposited in a Government depository bank to be used for payment of compensation for damages caused by any mining operations. The MWT Reserve Fund shall also be utilized for research projects duly approved by the CLRF Steering Committee, which are deemed necessary for the promotion and furtherance of its objectives.[153]

The contractor or permittee shall set up a Final Mine Rehabilitation and Decommissioning Fund (FMRDF) solely for the purpose of implementing the FMR/DP, that is, "to fund all decommissioning and/or rehabilitation activities" approved therein.[154] The contractor or permittee shall ensure that the full cost of the FMR/DP is accrued before the operating life of the mine ends.[155] Annual cash provisions shall be made to the fund, which may be increased or decreased in conjunction with the review or revision of the FMR/DP.[156]

iii. Miscellaneous Provisions

The Act requires that any applicant for a mineral agreement who has previously been engaged in the industry must "possess a satisfactory environmental track record," determined by the MGB in consultation with the Environmental

152 DAO No. 2010-21, §182.

153 DAO No. 2010-21, §189.

154 DAO No. 2010-21, §181.

155 DAO No. 2010-21, §187-B.

156 DAO No. 2010-21, §187-B.

Management Bureau (EMB) of the DENR.[157] For this purpose, applicants for agreements and permits under the Act must secure a Certificate of Environmental Management and Community Relations Record (CEMCRR) for past mineral resource use ventures. Applicants with no such past ventures are issued a Certificate of Exemption (COE) instead.[158]

Contractors and permit holders are required to integrate a Mine Environmental Protection and Enhancement Office (MEPEO) into its mine organizational structure. The Office is tasked with setting priorities and managing resources to implement the contractor or permittee's environmental programs.[159] The contractor or permit holder shall also conduct a regular independent audit of environmental risks affecting its operations, to develop an effective environmental management system.[160]

The Act and IRR provide various incentives to encourage and recognize the efforts of contractors and permittees towards environmental safety. Pollution control devices that they install on their lands and buildings are exempted from real property taxes and other assessments, although mine wastes and tailing fees still have to be paid.[161] Based on their yearly performance and accomplishments, deserving mineral companies may also be given a Presidential Mineral Industry Environmental Award.[162]

B. "NO-GO" AREAS

The Mining Act delimits areas open to mining operations to "all mineral resources in public or private lands, including timber or forestlands as defined in existing laws," subject to existing rights or reservations and prior agreements.[163] Section 19 enumerates areas where mining applications are disallowed, or are

157 Mining Act, §27.

158 DAO No. 2010-21, §167-A.

159 DAO No. 2010-21, §173.

160 DAO No. 2010-21, §174.

161 Mining Act, §91; DAO No. 2010-21, §224.

162 Mining Act, §91; DAO No. 2010-21, §176.

163 Mining Act, §18; DAO No. 2010-21, §14.

allowed only under certain conditions. Among the areas where mining applications are absolutely prohibited are ecologically significant or environmentally sensitive areas, to wit:

Old growth or virgin forests, proclaimed watershed forest reserves, wilderness areas, mangrove forests, mossy forests, national parks provincial/municipal forests, parks, greenbelts, game refuge and bird sanctuaries as defined by law and in areas expressly prohibited under the National Integrated Protected Areas System (NIPAS) under Republic Act No. 7586, Department Administrative Order No. 25, series of 1992 and other laws.[164]

Mining applications are also prohibited in areas excluded by the Secretary, based on his assessment of their environmental impacts on sustainable land uses, via an ordinance delineating the area issued by the concerned Sanggunian. The Act also excludes from mining applications areas expressly prohibited by law.[165]

i. Areas "Expressly Prohibited by Law"

The reference of the Mining Act to other laws designated areas where mining applications are prohibited merits a review of these laws. What laws on natural resource protection and conservation effectively impose restrictions on mining in the country? Major statutes in this field include, but are not limited to, the National Integrated Protected Areas System (NIPAS) Act of 1992,[166] the Wildlife Resources Conservation and Protection Act,[167] the National Caves and Cave Resources Management and Protection Act,[168] and the Strategic Environmental Plan for Palawan.[169] Additionally, mineral operations are restricted in declared Environmentally Critical Areas (ECA) unless such operations have been issued an ECC.

164 Mining Act, §19; DAO No. 2010-21, §15 (a) (2).

165 DAO No. 2010-21, §15 (a) (3) & (a) (6).

166 Rep. Act No. 7586 enacted on Jun. 1, 1992.

167 Rep. Act No. 9147 enacted on Jul. 30, 2001.

168 Rep. Act No. 9072 enacted on Apr. 8, 2001.

169 Rep. Act No. 7611 enacted on Jun. 19, 1992.

Established in 1992, NIPAS is a system of classifying and administering, at the national level, outstanding remarkable areas, biologically important public lands, biogeographic zones, and related ecosystems.[170] It is specifically mentioned in the Mining Act as an area where mineral applications are prohibited. As such, it is useful to be aware of the natural resources covered by the Act and how the system works.

A protected area is established through proclamation or designation by law, presidential decree, presidential proclamation, or executive order. It may be classified either as a strict nature reserve, natural park, natural monument, wildlife sanctuary, protected landscape and seascape, resource reserve, natural biotic area, or other category established by law, convention, or international agreement.[171] Once a protected area is established as such, it is managed with the goal of enhancing biodiversity and protecting it from destructive human behavior.[172] Buffer zones are also identified around the protected area, and these shall be subject to special development control to minimize harm to the protected area.[173] NIPAS is currently under the administration of the Protected Areas and Wildlife Bureau (PAWB).[174]

Some prohibited acts within protected areas may find application in the context of mineral operations, where these are undertaken in locations sufficiently proximate to or biologically connected with these areas, to wit:

- Destroying or disturbing plants or animals or products derived therefrom without a permit from the Management Board;
- Dumping of any waste products detrimental to the protected area, or to the plants and animals or inhabitants therein;
- Damaging and leaving roads and trails in a damaged condition;
- Mineral locating or otherwise occupying any land;
- Constructing or maintaining any kind of structure, fence or enclosures, conducting any business enterprise without a permit; and
- Leaving in exposed or unsanitary conditions refuse or debris, or depositing in ground or in bodies of water.[175]

170 Rep. Act No. 7586, §2.

171 Rep. Act No. 7586, §3.

172 Rep. Act No. 7586, §4 (b).

173 Rep. Act No. 7586, §4 (c).

174 Rep. Act No. 7586, §10. *See also* The Revised Implementing Rules and Regulations of the NIPAS Act as embodied by DAO No. 2008-26.

175 Rep. Act No. 7586, §20.

The Wildlife Resources Conservation and Protection Act is another major statute that has a bearing on the environmental impacts of mineral activities. It was enacted in 2001 with the policy of conserving "the country's wildlife resources and their habitats for sustainability".[176] Its provisions apply to all wildlife species in all areas, including those covered by NIPAS, to critical habitats, and to exotic species traded or propagated in the country.[177] Of particular import in the context of mining are the critical habitats that have been or may be established under the act. These are habitats outside protected areas where threatened species are found. They are designated by the DENR Secretary based on, among other considerations, man-made pressures and threats to the survival of wildlife species in the area.[178]

Similar to the treatment of protected areas under NIPAS, critical habitats are protected "from any form of exploitation or destruction which may be detrimental to the survival of the threatened species dependent therein." In this wise, the DENR Secretary is authorized to acquire lands or interests therein to protect the critical habitat.[179] The DENR has jurisdiction over terrestrial species and habitats, while the Department of Agriculture administers matters related to aquatic habitats and resources. In the province of Palawan, it is the Palawan Council for Sustainable Development (PCSD), formed under the Strategic Environmental Plan for Palawan, that has jurisdiction over wildlife species, resources, and habitats.[180]

The Act declares unlawful the willful exploitation of wildlife resources and their habitats. In specific relation to mineral activities, it is also illegal in critical habitats to:

- Dump waste products detrimental to wildlife;
- Occupy any portion of the critical habitat;
- Explore for or extract minerals;
- Burning and logging; and
- Quarrying[181]

176 Rep. Act No. 9147, §2.

177 Rep. Act No. 9147, §3.

178 Rep. Act No. 9147, §25.

179 Rep. Act No. 9147, §25.

180 Rep. Act No. 9147, §4 *in relation with* Rep. Act No. 7611, §4.

181 Rep. Act No. 9147, §27.

The National Caves and Cave Resources Management and Protection Act, also enacted in 2001, aims to conserve, protect, and manage caves and cave resources "as part of the country's national wealth".[182] Caves refer to naturally-occurring cavities or recesses in the earth, and not to man-made excavations, such as mine tunnels.[183] Cave resources are materials or substances occurring naturally in caves, such as animals, plants, paleontological and archaeological deposits, sediments, and minerals, among others.[184] The Act distinguishes "significant caves" as those with materials or features "that have archaeological, cultural, ecological, historical or scientific value".[185]

The DENR is the lead implementing agency of the Act, in coordination with the Department of Tourism (DOT), the National Museum, the National Historical Institute and concerned LGUs. In Palawan, it is again the PCSD who has jurisdiction over local caves and cave resources.[186] Where mineral activities are undertaken in caves or affecting cave resources, it is important to note that the Act prohibits the gathering, collecting, possessing, consuming, selling, bartering or exchanging or offering for sale without authority any cave resource,[187] which necessarily includes minerals found therein.

Finally, Environmentally Critical Areas (ECA) under Presidential Proclamation (PP) No. 2146 might be off-limits to mineral operations if an ECC for such has not been issued. Under the Environmental Impact Statement System, discussed below, projects may not be undertaken in areas declared environmentally critical by the President of the Philippines or his representative, unless he issues an ECC upon satisfactory review of the project proponent's Environmental Impact Statement. ECAs include protected areas, potential tourist spots, critical habitats, areas of unique historic archeological or scientific interest, those traditionally occupied by ICCs, geohazard zones, those with critical slopes, prime agricultural lands, aquifer recharge areas, and certain water bodies, mangrove areas, and coral reefs.[188]

182 Rep. Act No. 9072, §2.

183 Rep. Act No. 9072, §3 (a).

184 Rep. Act No. 9072, §3 (b).

185 Rep. Act No. 9072, §3 (f).

186 Rep. Act No. 9072, §4.

187 Rep. Act No. 9072, §7 (b).

188 Pres. Proc. No. 2146; §1 (b). *See also* DAO No. 96-37.

The environmentally critical areas identified under the Mining Act and related environmental laws are commonly referred to as "no go" areas. It is crucial to identify and set aside these areas, when the risks posed by mineral development are too high compared with the environmental or socio-cultural value of the area. Other critical areas where mining may have to be prohibited are those with high seismicity, and geohazard zones or those prone to landslides and floods.[189]

C. ENVIRONMENTAL VIOLATIONS[190]

The following table lists salient provisions of the Mining Act and its IRR which directly or indirectly apply to environmental violations related to mineral operations, and the corresponding penalties or relief therefor.

Section	Violation	Relief / Penalty
PHILIPPINE MINING ACT OF 1995		
95	Failure of permittee or contractor to comply with any of the requirements in the Act or IRR, without a valid reason	Suspension of any permit or agreement provided under the Act
96	Violation of terms and conditions of permits or agreements	Cancellation of permit or agreement
97	Failure to pay taxes and fees due the Government for two (2) consecutive years	• Cancellation of EP, MA, FTAA, and other agreements, and • Re-opening of area to new applicants
98	Failure to abide by terms and conditions of tax incentive and credits	Suspension or cancellation of tax incentive and credit
99	False statements in EP, MA, and FTAA which may alter, change or affect substantially the facts set forth therein	Revocation and termination of permit or agreement

189 Alyansa Tigil Mina, *Alternative Mining Bill: In Brief*, 2009 *available at*: http://www.alyansatigilmina.net/files/AMB_in%20brief.pdf (accessed on Mar. 16, 2012).

190 Antonio G.M. La Vina, Alaya M. de Leon and Gregorio Rafael P. Bueta, *Legal Responses to the Environmental Impact of Mining*, 86 Phil. L.J. 284, (2012).

108	Violation of terms and conditions of ECC, which causes environmental damage through pollution	• Imprisonment of six (6) months to six (6) years, or a • fine of PhP 50,000.00 to PhP 200,000.00, or • both, at discretion of the court
110	Any other violation of the Act and IRR	Fine not exceeding PhP 5,000.00
DENR AO 2010-12		
172	Operation of mining project without an approved EPEP/revised EPEP	Penalty prescribed in penal provisions of the Act
179	Operation of mining project without an ECC, or willful violation and gross neglect to abide by the terms and conditions of the ECC	Penalty prescribed in the penal provisions of the Act and other pertinent environmental laws
188	Failure to establish an MRF and FMRDF	Suspension or cancellation of mineral operations
190 (c)	Tailings impoundment/disposal system found to have discharged and/or to be discharging solid fractions of tailings into areas other than the approved tailings disposal area	Payment of PhP 50.00/MT, without prejudice to other penalties and liabilities under other existing laws, rules and regulations
192	Non-submission of semi-annual reports on the non-generation of mine wastes and mill tailings	• Disqualification from availing of MWT fee exemption, and • PhP 5,000.00 penalty
	Failure to pay MWT fees	10% surcharge on the principal MWT Fee for every month of delay
199	Damages caused by any mining operation on: • Lives and personal safety • Lands, agricultural crops and forest products • Marine life and aquatic resources • Cultural and human resources • Infrastructure • Re-vegetation and rehabilitation of silted farm lands and other areas devoted to agriculture and fishing	Payment of compensatory damages[191] (See Sec. 200 on evaluating the amounts of damages)

191 The following are qualified to apply for compensation for damages:
- Any individual, in the event of loss or damage to his/her life, personal safety or property;
- Any private owners of damaged infrastructures, forest products, marine, aquatic and inland resources;

230	• Falsehood or omission of facts in the application for EP, MA, FTAA, or other permits which may alter, change or affect substantially the facts set forth therein • Non-payment of taxes and fees due the Government for two (2) consecutive years • Failure to perform all other obligations under the permits or agreements • Violation of the terms and conditions of the Permits or Agreements, and/or • Violation of existing laws, policies, and rules and regulations	Cancellation, revocation and termination of permit or agreement
231 (a) (1) & (2)	• Any violation of the Act, IRR, or the terms and conditions in the MA or FTAA • Any material misrepresentation or false statements made to the Bureau at any time before or after the approval/conclusion of its MA or FTAA	Whole or partial cancellation or suspension of any incentive granted under the rules and regulations

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- Any applicant or successor-in-interest for damage to private lands who holds title or any evidence of ownership;
- Any applicant or successor-in-interest for damage to alienable and disposable lands;
- Any agricultural lessors, lessees and share tenants for damage to crops; and
- Any ICC in case of damage to burial grounds and cultural resources.

Any damage caused to the property of a surface owner, occupant, or concessionaire shall be governed by the pertinent provisions of Chapter X on Surface Rights. DAO No. 2010-21, §199.

B. EXECUTIVE ORDER NO. 79

Institutionalizing and Implementing Reforms in the Philippine Mining Sector, Providing Policies and Guidelines to ensure Environmental Protections and Responsible Mining in the Utilization of Mineral Resources.

a. *Implementing and Governing Bodies Involved*

Implementing Body:

The Mining Industry Coordinating Council (MICC) shall be an inter-agency forum constituted by the Climate Change Adaptation and Mitigation and Economic Development Cabinet Cluster.[192] It shall be co-chaired by two clusters and shall have the following additional members: the Secretary of the Department of Justice, the Chairperson of the National Commission on Indigenous Peoples, and the President of the Union Local Authorities.

E.O. No. 79 and its Implementing Rules and Regulations (IRR)[193] provide for the powers and functions of the Council, one of which is to promulgate, together with the DENR,[194] rules and regulations implementing the Order.[195]

The DENR is also directed to establish an inter-agency one-stop shop for all mining related applications and processes,[196] and to create a centralized database of all mining related information.[197] An integrated map system for the common and uniform use of all government agencies is also being created for better planning and decision-making processes.[198]

192 Executive Order No. 79 (2012), §9.

193 DAO No. 2012-07 §13.

194 Executive Order No. 79 (2012), §19.

195 *See* DAO No. 2012-07, DAO No. 2012-07A.

196 Executive Order No. 79 (2012), §13.

197 Executive Order No. 79 (2012), §15.

198 Executive Order No. 79 (2012), §16.

The DENR is also mandated to participate and implement the global standards provided by the Extractive Industries Transparency Initiative (EITI) to improve transparency, accountability, and governance.

However, the enforcement of environmental standards in mining shall be with the government in general and the DENR in particular, in coordination with the Local Government Units (LGUs).[199]

The LGUs are also tasked to work together with the DENR and the MGB, to strictly implement R.A. No. 7076, to ensure the protection of the environment and to ensure that violators are subjected to appropriate administrative and criminal liability.[200]

Local Governments:

Local government units (LGUs) are confined to impose only reasonable limitations on mining activities conducted within their territorial jurisdictions that are consistent with national laws and regulations.[201]

Furthermore, their share in the National Wealth pursuant to Section 289 of R.A. No. 7160 (Local Government Code of 1991) is directed to be timely released.

b. *Mineral Agreements*

Existing Mineral Agreements:

E.O. No. 79 provides that mining contracts, agreements and concessions approved before the effectivity of the Order shall remain valid and enforceable so long as they strictly comply with existing laws, rules and regulations and with the terms and conditions to the grant thereof.[202]

199 DAO No. 2012-07 §5.

200 Executive Order No. 79 (2012), §12.

201 Executive Order No. 79 (2012), §12.

202 Executive Order No. 79 (2012), §1

The IRR further clarifies that 'all pending mining applications situated within [any of the above] areas closed to mining shall be deemed denied upon the effectivity of the E.O.'[203]

Under the IRR, a multi-stakeholder team led by the DENR shall be created to conduct a review of the performance of existing mining operations which shall be undertaken within six (6) months from the effectivity of the E.O. and every two (2) years thereafter.[204] This review shall also be done to enter into possible renegotiations of the terms and conditions of the contracts which shall be mutually acceptable to the government and the mining contractor.[205]

Grant of Mineral Agreements:

No new mineral agreements shall be entered into until a new legislation rationalizing existing revenue sharing schemes and mechanisms shall have taken effect.[206] This is further clarified by the amended IRR which states that no expansion of existing contract areas shall be allowed by the DENR Secretary unless there is an imminent and/or threatened economic disruption, such as a shortage of critical commodities and raw materials, that could adversely affect priority government projects and/or economic activities as determined by the Economic Development Cabinet Cluster.[207]

However, the DENR may still grant Exploration Permits (EPs) under existing laws and regulations.[208] Though the EPs are not allowed in the National Government-Owned Mining Assets, it may be subject to the Financial or Technical Assistance Agreement (FTAA) through competitive bidding. An EP application must be approved or disapproved within six (6) months from the date of its acceptance by the MGB, subject to the compliance of all the pertinent requirements.[209]

203 DAO No. 2012-07 §4.

204 DAO No. 2012-07 §6.

205 Executive Order No. 79 (2012), §4.

206 Executive Order No. 79 (2012), §4.

207 DAO No. 2012-07A §2.

208 DAO No. 2012-07A §2.

209 DAO No. 2012-07 § 7.

Furthermore, the DENR may continue to grant other forms of mining permits such as Mineral Processing Permits, Government Seabed Quarry Permits, Special Minerals Extraction Permit and Industrial Sand and Gravel Permits, as provided for in the Mining Act, subject to Section 4 of the IRR and existing laws and regulations.[210]

c. *Mining Areas*

Mineral Reservations:

Potential and future mining areas with known strategic mineral reserves and resources shall be declared as Mineral Reservations pursuant to the Mining Act after proper consultation with all concerned stakeholders.[211]

Areas Closed to Mining:

a) Areas expressly enumerated under Section 19 of R.A. No. 7942;

b) Protected areas categorized and established under the National Integrated Protected Areas System (NIPAS) under R.A. No. 7586;

c) Prime agricultural lands, in addition to lands covered by R.A. No. 6657, or the Comprehensive Agrarian Reform Law of 1988, as amended, including plantations and areas devoted to valuable crops, and strategic agriculture and fisheries development zones and fish refuge and sanctuaries declared as such by the Secretary of the Department of Agriculture (DA);

d) Tourism development areas, as identified in the National Tourism Development Plan (NTDP); and,

e) Other critical areas, island ecosystems and impact areas of mining as determined by current and existing mapping technologies which the DENR may hereafter identify pursuant to existing laws, rules and regulations such as, but not limited to, the NIPAS Act.[212]

210 DAO No. 2012-07 § 7.

211 Executive Order No. 79 (2012), §5.

212 Executive Order No. 79 (2012), §1.

d. *Requirements and Procedure*

Competitive Public Bidding:

The competitive public bidding shall be the process used to grant mining rights and mining tenements over areas with known and verified mineral resources and reserves, including those owned by the Government and all expired tenements.[213]

The Mining and Geosciences Bureau (MGB) shall prepare the necessary competitive bid packages and formulate the proper guidelines and procedures to conduct the bidding.

However, Section 7[214] states that all valuable metals in abandoned ores and mine wastes and/or mill tailings by previous and now defunct mining operations, as well as that of existing mining operations, shall automatically belong to the State upon the expiration of their contracts.

Value-Adding Activities and the Development of Downstream Industries for the Mineral Sector:[215]

Within six (6) months, a national program and road-map based on the Philippine Development Plan and the National Industrialization Plan prepared by the government agencies (DENR, DTI, DOST, DOF, NEDA and ULAP), the mining industry and other stakeholders shall be submitted to the MICC for review and endorsement to the President.[216]

213 Executive Order No. 79 (2012), §6.

214 Executive Order No. 79 (2012), §7.

215 Executive Order No. 79 (2012), §8.

216 DAO No. 2012-07 §11.

e. *Environmental Precautions*

Violations of Environmental Standards in Mining:[217]

The IRR[218] provides that the MGB Director/Regional Director shall require the mining contractor/permittee/permit holder/operator concerned to undertake the necessary remediation measures for the affected areas and shall summarily issue pertinent suspension order/s until the danger is removed.

The Environmental Management Bureau (EMB) Director/Regional Director shall issue Notice of Violation/s and Cease and Desist Order/s, and/or impose fines and penalties for violation of the ECC and/or the provisions of P.D. No. 1586, DAO No. 2003-30 and other environmental laws.

All mining applicants who did not implement the required remediation measures for the affected areas under applicable laws and regulations shall be permanently disqualified from acquiring mining rights and operating mining projects. However, this shall not be required in cases where the mining applicant has no previous experience in resource use ventures.

Environmental Impact Assessment:

The DENR and the Environmental Management Bureau (EMB) are mandated to study the adoption of the Programmatic Environmental Impact Assessment (PEIA) in the implementation of the Philippine Environmental Impact Statement System (PEISS) under P.D. No. 1586 for mining projects and related activities.[219]

f. *Small-Scale Mining*

The Order aims to improve and address issues on small-scale mining by reiterating compliance with R.A. No. 7076 (The People's Small-Scale Mining Act of 1991) and DAO No. 34 Series of 1992 (IRR).[220]

217 Executive Order No. 79 (2012), §2.

218 DAO No. 2012-07 §5.

219 Executive Order No. 79 (2012), §17.

220 Executive Order No. 79 (2012), §11.

The IRR further requires compliance with Environmental Impact Statement System under P.D. No. 1586 (Establishing an Environmental Impact Statement System including other Environmental Related Measures and for other Purposes) and other applicable environmental laws, rules and regulations. It also requires the submission of certain documents prior to the issuance of a Small-Scale Mining Contract (SSMC).

Under the IRR, operations under Small-Scale Mining Permits (SSMP) issued under P.D. No. 1899 (Establishing Small-Scale Mining as a New Dimension in Mineral Development) shall be recognized until their expiration. [221]

The E.O. also provides that the undertaking shall be allowed only within the declared Minahang Bayan (People's Small-Scale Mining Areas) and prohibits small-scale mining for metallic minerals except gold, silver and chromite. However, the IRR states that affected small-scale miners operating under SSMPs involving gold, silver and chromite and non-metallic minerals may have the option to continue small-scale mining operations thru a SSMC. The IRR also provides that the sale of gold shall only be to the Bangko Sentral ng Pilipinas and its accredited buyers.[222]

Furthermore, the IRR provides that holders of SSMPs with a remaining term of less than one (1) year may be given a temporary SSMC by the Governor/City Mayor upon the recommendation of the P/CMRB concerned to continue their operations within a period of six (6) months or until the area is declared as a Minahang Bayan, or whichever comes first.

The IRR also prohibits large-scale mining tenement holders from undertaking small-scale mining operations in their contract areas.

The IRR also prohibits hydraulicking, compressor mining and the use of mercury in small-scale mining. Any violation is penalized by the cancellation of the small-scale mining contract or permit.[223]

It also directs the creation of P/CMRBs in provinces where they have not been constituted. Furthermore, training and capacity building measures for small-scale mining cooperatives and associations is to be conducted.

221 DAO No. 2012-07 §14.

222 DAO No. 2012-07 §14 (f).

223 DAO No. 2012-07 §14 (c).

THE INDUSTRIES TRANSPARENCY INITIATIVE

In November 2013, President Aquino signed Executive Order No. 147 and created the Philippine Extractive Industries Transparency Initiative (EITI). The EITI is a multi-stakeholder organization made up of dozens of governments, resource extraction companies, and civil society groups. The initiative was launched by British Prime Minister Tony Blair at the 2002 World Summit on Sustainable Development in Johannesburg, South Africa. Its objective is to "increase transparency over payments and revenues in the extractives sector in countries heavily dependent on these resources." The framers of the EITI hoped not only to increase transparency *per se* but also to lift the resource curse by countering corruption, one of its root causes.[224]

The EITI is a global standard of transparency that requires the extractive industries to publish what they pay to the government and the government to publish what they collect from these industries. The EITI does not measure corruption directly but it allows individuals and advocacy groups to monitor the flow of funds with the aim of benefitting the citizens of countries with valuable resources. This effort grew out of the Publish What You Pay initiative that targeted only multi-national firms. Under EITI, countries can become candidate countries, and then have two and half years to propose plans that are compliant with EITI standards. These standards focus on transparent reporting and auditing of payments from firms to countries. Firms that support the initiative must publish what they pay to compliant countries and submit a self-assessment to EITI.[225]

These efforts respond to the possibility that, for some international deals, neither host country elites nor their counterparts in the capital-providing nations have an interest in revealing and limiting corruption unless pressured by outsiders. Both buyers and sellers benefit from the weak

224 Daniel M. Firger, *Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd-Frank Wall Street Reform Act of 2010*, 41 Geo. J. Int'l L., 1043, 1064 (2010).

225 Susan Rose Ackerman, *International Actors and the Promises and Pitfalls of Anti-Corruption Reform*, 34 U. Pa. J. Int'l L. 447 (2013).

legal environment in host countries. The leaders of host countries enrich themselves, and home countries support the business operations of their multinational firms.

Generally, these monitoring mechanisms have no legal force, but they can produce public relations difficulties for lagging firms and countries.[226]

EITI exposes corporate tax payments to ensure that the recipient governments are honest with their own peoples about revenues under their control; and to expose the effect of global tax competition on revenues. The first goal aims at accountability in foreign state governance: the targets are unscrupulous officials who may divert payments meant for national revenues to their own private offshore accounts. The second is an indirect response to perceptions among various activist groups that income tax systems of rich countries are becoming increasingly generous to multinationals and elites, and in turn increasingly burdensome on the working class in societies across the globe.[227] It is too soon to tell whether the EITI will produce any real improvements in governance in resource-rich countries. Even its strongest proponents agree that the EITI, in part because of its voluntary nature, will always have limited effectiveness. For this reason, advocates have long pushed for a binding version of the initiative, claiming that the EITI's weaknesses "help[ ] make the case" for a statutory approach.[228]

226 Id.

227 Allison Christians, *Putting the Rein Back in Sovereign*, 40 Pepp. L. Rev. 1373 1386-1387 (2013).

228 Daniel M. Firger, *Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd-Frank Wall Street Reform Act of 2010*, 41 Geo. J. Int'l L. 1043, 1068-1069 (2010).

MALACAÑAN PALACE
MANILA

BY THE PRESIDENT OF THE PHILIPPINES

EXECUTIVE ORDER NO. 147

CREATING THE PHILIPPINE EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE

WHEREAS, Section 28, Article II of the Philippine Constitution states that subject to reasonable conditions prescribed by law, the State shall adopt and implement a policy of full public disclosure of all its transactions involving public interest;

WHEREAS, Section 2 of Republic Act No. 7942, or the "Philippine Mining Act of 1995," provides that it shall be the responsibility of the State to promote the rational exploration, development, utilization, and conservation of the country's mineral resources through the combined efforts of government and the private sector in order to enhance national growth in a way that effectively safeguards the environment and protects the rights of affected communities;

WHEREAS, pursuant to Section 14 of the Executive Order (EO) No. 79 (s. 2012), the Philippine government commits to participate in the Extractive Industries Transparency Initiative (EITI) that sets international standards for transparency and accountability in the extractive industries and in government;

WHEREAS, the Philippine government is committed to ensure greater transparency and accountability in the extractive

industries, specifically in the way the government collects, and companies pay taxes from extractive industries;

WHEREAS, the EITI requires the creation of a body that will perform all the necessary functions and complete all the requirements of the EITI process to be a "compliant country"; and

WHEREAS, the duty of the President under Section 17, Article VII of the Constitution includes the faithful execution of fundamental laws on public accountability and transparency.

NOW, THEREFORE, I, BENIGNO S. AQUINO III, President of the Philippines, by virtue of the powers vested in me by law, do hereby order:

SECTION 1. Instituting the Philippine Extractive Industries Transparency Initiative. The Philippine Extractive Industries Transparency Initiative (hereinafter referred to as PH-EITI) is hereby instituted.

SECTION 2. Creation and Composition of the PH-EITI Multi-stakeholder Group. In accordance with the EITI International Guidelines, the PH-EITI shall be implemented and operationalized through a multi-stakeholder group (MSG) and decision making body (hereinafter referred to as PH-EITI-MSG). It shall be headed by the Secretary of the DOF as the Chairperson who will be responsible for convening the group. It shall specifically consist of the following members:

a. Five (5) Government Representatives chosen by the Mining Industry Coordinating Council (MICC), created pursuant to Section 9 of EO No. 79, which will include senior officials, duly deputized to represent their respective Secretaries; *provided that*, local government units shall be represented by the Union of Local Authorities of the Philippines;

b. Five (5) Business Group Representatives; and

c. Five (5) Civil Society Organizations (CSOs) Representatives.

The Business Group and the CSOs shall each designate five (5) full and five (5) alternate representatives to the PH-EITI-MSG. Each organization, upon the decision of its members and through its own independent processes and governance mechanisms, can at any time replace their representatives in the PH-EITI-MSG; *provided that* such replacement shall only serve for the unexpired term of the representative replaced. Permanent and alternate members shall attend and participate in the PH-EITI-MSG meetings.

SECTION 3. Terms of the Members of PH-EITI MSG and Meetings. All members of the PH-EITI-MSG shall serve for a term of three (3) years. Representatives may be re-appointed subject to the independent processes and governance mechanisms of their respective organizations. It shall be the responsibility of each sector to ensure the continuity of representation and institutional memory within the PH-EITI-MSG.

The PH-EITI-MSG shall meet quarterly or as often as it may deem necessary. The quorum for such meetings shall require the presence of at least three (3) representatives each from the Government, the Business Group and the CSOs. The MSG shall make decisions by consensus.

SECTION 4. Mandates of the PH-EITI-MSG. The PH-EITI-MSG shall have the following mandates:

a. Ensure sustained political commitment for the initiative and mobilize resources to sustain its activities and goals;

b. Set the strategic direction required for effectively implementing the initiative in the Philippines;

c. Assess and seek the removal of barriers to its implementation;

d. Set the scope of the EITI process; and

e. Ensure that the initiative is effectively integrated in the reform process outlined under EO No. 79 and any other related government reform agenda.

SECTION 5. Powers and Functions of the PH-EITI MSG. The PH-EITI-MSG shall have the following powers and functions:

a. Ensure the commitment of the different stakeholders to the implementation of EITI;

b. Define the strategic direction and scope of EITI in the Philippines;

c. Craft, publish, review, and update a fully costed Country Work Plan in consultation with key PH-EITI stakeholders and oversee the implementation of the same;

d. Produce all regular reports with contextual information about the extractive industries as may be required by PH-EITI implementation;

e. Establish a mechanism for the EITI reconciliation process;

f. Select and appoint an independent administrator/auditor to reconcile the government and industry reports;

g. Direct and supervise the PH-EITI Secretariat in its various activities and establish its internal rules of procedure;

h. Through its various members, conduct outreach to, and capability-building of, various sectors in support of the PH-EITI implementation at national and sub-national levels and communicate and build awareness about EITI and the progress of its implementation in the Philippines; and

i. Perform such other functions as may be germane to the purpose for which it was created and consistent with this Order and the EITI Principles.

SECTION 6. PH-EITI Secretariat. The PH-EITI shall be assisted by a PH-EITI Secretariat whose composition shall be determined by the Secretary of Finance, in consultation with the PH-EITI-MSG. It shall hold office in the DOF, or such other government or private facilities as may be determined by the PH-EITI-MSG.

The PH-EITI Secretariat shall be composed of administrative and technical personnel as the PH-EITI-MSG may deem necessary to assist the PH-EITI-MSG in efficiently and effectively carrying out its powers and functions. The creation of additional *plantilla* positions and hiring of additional personnel to carry out the functions enumerated herein shall be authorized in coordination with, and subject to the approval of the Department of Budget and Management (DBM).

SECTION 7. Engagement of Consultants. The PH-EITI shall have the authority to engage the services of consultants or advisers as it may deem necessary to accomplish its objectives.

SECTION 8. Creation of the PH-EITI Technical Working Group and Assistance to PH-EITI. PH-EITI may create Technical Working Groups composed of departments, bureaus, offices, agencies or instrumentalities of the Government, including government-owned and controlled corporations, and representatives of the business sector and CSOs. All such agencies, offices, and representatives are hereby directed to extend such assistance and cooperation as the PH-EITI may need in the exercise of its powers, execution of its functions, and discharge of its duties and responsibilities.

SECTION 9. Funding. Upon the effectivity of this Order, the amount necessary to carry out its implementation shall be charged against the budget of the DOF. Thereafter, appropriations for the PH-EITI implementation shall be included in the budget of the DOF.

The PH-EITI shall have the authority to receive, disburse, and manage financial aid or grants from foreign and domestic entities to be utilized for the implementation of its objectives subject to the usual accounting and auditing rules and regulations.

SECTION 10. Separability. If any provision of this Order is declared invalid or unconstitutional, the other provisions unaffected shall remain valid and subsisting.

SECTION 11. Repealing Clause. All orders, proclamations, rules, regulations, or parts thereof, which are inconsistent with any of the provisions of this Order are hereby repealed or modified accordingly.

SECTION 12. Effectivity. This Order shall take effect immediately upon publication in a newspaper of general circulation.

DONE, in the City of Manila, this 26th day of November, in the year of our Lord, Two Thousand and Thirteen.

(Sgd.) BENIGNO S. AQUINO III

By the President:
(Sgd.) PAQUITO N OCHOA, JR.
Executive Secretary

THE INDIGENOUS PEOPLES' RIGHTS ACT

Republic Act No. 8371, also known as the Indigenous Peoples' Rights Act ("IPRA"), was enacted to recognize, protect and promote the rights of indigenous cultural communities/indigenous peoples. It was modeled after the provisions of the UN Draft Declaration on Indigenous Peoples' Rights. It is one of the most enlightened laws recognizing the free prior and informed consent of the Indigenous Peoples with respect to projects affecting their properties and rights.[229] The policy of the state in enacting the law is set out in Section 2 thereof:

> Section 2. *Declaration of State Policies*. - The State shall recognize and promote all the rights of Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs) hereunder enumerated within the framework of the Constitution:
>
> a) The State shall recognize and promote the rights of ICCs/IPs within the framework of national unity and development;
>
> b) The State shall protect the rights of ICCs/IPs to their ancestral domains to ensure their economic, social and cultural well being and shall recognize the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain;
>
> c) The State shall recognize, respect and protect the rights of ICCs/IPs to preserve and develop their cultures, traditions and institutions. It shall consider these rights in the formulation of national laws and policies;
>
> d) The State shall guarantee that members of the ICCs/IPs regardless of sex, shall equally enjoy the full measure of human rights and freedoms without distinctions or discriminations;

229 Piplinks, Indigenous People's Rights Act (IPRA), http://www.piplinks.org/indigenous_rights/Indigenous+People's+Rights+Act+(IPRA)

e) The State shall take measures, with the participation of the ICCs/IPs concerned, to protect their rights and guarantee respect for their cultural integrity, and to ensure that members of the ICCs/IPs benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population and

f) The State recognizes its obligations to respond to the strong expression of the ICCs/IPs for cultural integrity by assuring maximum ICC/IP participation in the direction of education, health, as well as other services of ICCs/IPs, in order to render such services more responsive to the needs and desires of these communities.

Towards these ends, the State shall institute and establish the necessary mechanisms to enforce and guarantee the realization of these rights, taking into consideration their customs, traditions, values, beliefs, their rights to their ancestral domains.

While the Declaration of State Policies of Republic Act No. 8371, by itself, cannot be used as legal basis to address social and environmental impacts of mining, it can aid in the construction of the provisions of the IPRA. The Declaration of State Policies will serve as a guide in the interpretation of the pertinent provisions of said law.

One of the major innovations brought about by the IPRA is the recognition of the indigenous concept of ownership. Section 5 of the IPRA provides:

Section 5. *Indigenous Concept of Ownership*. - Indigenous concept of ownership sustains the view that ancestral domains and all resources found therein shall serve as the material bases of their cultural integrity. The indigenous concept of ownership generally holds that ancestral domains are the ICC's/IP's private but community property which belongs to all generations and therefore cannot be sold, disposed or destroyed. It likewise covers sustainable traditional resource rights.

The second sentence provides that ancestral domains cannot be sold, disposed or destroyed. In relation to mining, the provision implies that in ancestral domains, mining cannot be sustained or allowed if it necessitates that the property in question be sold, disposed, or destroyed.

The subsequent provisions of the IPRA enumerate certain rights of the indigenous cultural communities and indigenous peoples. These provisions outline rights that are geared towards the preservation of the ancestral lands/domains in concurrence with the protection of the cultural as well as personal rights of the ICCs and IPs.

> Section 7. *Rights to Ancestral Domains*. - The rights of ownership and possession of ICCs/IPs to their ancestral domains shall be recognized and protected. Such rights shall include:
>
> a. *Rights of Ownership.*- The right to claim ownership over lands, bodies of water traditionally and actually occupied by ICCs/IPs, sacred places, traditional hunting and fishing grounds, and all improvements made by them at any time within the domains;
>
> b. *Right to Develop Lands and Natural Resources*. - Subject to Section 56 hereof, right to develop, control and use lands and territories traditionally occupied, owned, or used; to manage and conserve natural resources within the territories and uphold the responsibilities for future generations; to benefit and share the profits from allocation and utilization of the natural resources found therein; the right to negotiate the terms and conditions for the exploration of natural resources in the areas for the purpose of ensuring ecological, environmental protection and the conservation measures, pursuant to national and customary laws; the right to an informed and intelligent participation in the formulation and implementation of any project, government or private, that will affect or impact upon the ancestral domains and to receive just and fair compensation for any damages which they sustain as a result of the project; and the right to effective measures by the government to prevent any interference with, alienation and encroachment upon these rights;

c. *Right to Stay in the Territories*- The right to stay in the territory and not be removed therefrom. No ICCs/IPs will be relocated without their free and prior informed consent, nor through any means other than eminent domain. Where relocation is considered necessary as an exceptional measure, such relocation shall take place only with the free and prior informed consent of the ICCs/IPs concerned and whenever possible, they shall be guaranteed the right to return to their ancestral domains, as soon as the grounds for relocation cease to exist. When such return is not possible, as determined by agreement or through appropriate procedures, ICCs/IPs shall be provided in all possible cases with lands of quality and legal status at least equal to that of the land previously occupied by them, suitable to provide for their present needs and future development. Persons thus relocated shall likewise be fully compensated for any resulting loss or injury;

d. *Right in Case of Displacement*. - In case displacement occurs as a result of natural catastrophes, the State shall endeavor to resettle the displaced ICCs/IPs in suitable areas where they can have temporary life support system: Provided, That the displaced ICCs/IPs shall have the right to return to their abandoned lands until such time that the normalcy and safety of such lands shall be determined: Provided, further, That should their ancestral domain cease to exist and normalcy and safety of the previous settlements are not possible, displaced ICCs/IPs shall enjoy security of tenure over lands to which they have been resettled: Provided, furthermore, That basic services and livelihood shall be provided to them to ensure that their needs are adequately addressed:

e. *Right to Regulate Entry of Migrants*. - Right to regulate the entry of migrant settlers and organizations into the domains;

f. *Right to Safe and Clean Air and Water*. - For this purpose, the ICCs/IPs shall have access to integrated systems for the management of their inland waters and air space;

g. *Right to Claim Parts of Reservations*. - The right to claim parts of the ancestral domains which have been reserved for various purposes, except those reserved and intended for common and public welfare and service; and

h. *Right to Resolve Conflict*. - Right to resolve land conflicts in accordance with customary laws of the area where the land is located, and only in default thereof shall the complaints be submitted to amicable settlement and to the Courts of Justice whenever necessary.

Section 7 enumerates certain rights to ancestral domains of the ICCs and IPs. Section 7 (b) recognizes the rights of ICCs/IPs in case of utilization of natural resources in their territories. Under said provision, they are given the right to benefit and share from the profits, to renegotiate terms and conditions of the exploration, and to be informed in the formulation and implementation of any project that will affect or impact upon their ancestral domain. The provision further expands these rights by giving the ICCs/IPs the right to effective measures by the government to prevent any interference to these rights. Thus, it can easily be seen that the statute provides for a wide discretion or control to be exercised by ICCs/IPs, in cases which include mining.

Section 7 (c) of the IPRA states that ICCs/IPs shall have the "right to stay in the territory and not to be removed therefrom" and that "no ICCs/IPs will be relocated without their free and prior informed consent, nor through any means other than eminent domain." This is particularly relevant in addressing the "displacement" problems brought about by mining. In mining, the likelihood that ICCs/IPs will be displaced or relocated is high. Mining companies often drive out, inadvertently or not, the ICCs/IPs and other settlers in the area to clear the way for the mining operations. Said provision provides further that:

> Section 7(c) … Where relocation is considered necessary as an exceptional measure, such relocation shall take place only with the free and prior informed consent of the

> ICCs/IPs concerned and whenever possible, they shall be guaranteed the right to return to their ancestral domains, as soon as the grounds for relocation cease to exist. When such return is not possible, as determined by agreement or through appropriate procedures, ICCs/IPs shall be provided in all possible cases with lands of quality and legal status at least equal to that of the land previously occupied by them, suitable to provide for their present needs and future development. Persons thus relocated shall likewise be fully compensated for any resulting loss or injury.
>
> Section 10. *Unauthorized and Unlawful Intrusion*. - Unauthorized and unlawful intrusion upon, or use of any portion of the ancestral domain, or any violation of the rights herein before enumerated, shall be punishable under this law. Furthermore, the Government shall take measures to prevent non-ICCs/IPs from taking advantage of the ICCs/IPs customs or lack of understanding of laws to secure ownership, possession of land belonging to said ICCs/IPs.

Section 10 of the law provides for a general penal provision which will subject a violator of any of the provisions of the statute to penal proseuction. Furthermore, the government is mandated to enact measures to prevent the undue taking of advantage of ICCs/IPs.

> Section 33. *Rights to Religious, Cultural Sites and Ceremonies*. - ICCs/IPs shall have the right to manifest, practice, develop teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access to their religious and cultural sites; the right to use and control of ceremonial object; and the right to the repatriation of human remains. Accordingly, the State shall take effective measures, in cooperation with the burial sites, be preserved, respected and protected. To achieve this purpose, it shall be unlawful to:
>
> a. Explore, excavate or make diggings on archaeological sites of the ICCs/IPs for the purpose of obtaining

materials of cultural values without the free and prior informed consent of the community concerned; and

b. Deface, remove or otherwise destroy artifacts which are of great importance to the ICCs/IPs for the preservation of their cultural heritage.

Section 33 expressly provides the right to religious, cultural sites and ceremonies to ICCs and IPs. Under this provision, it is unlawful to:

"Section 33….

a. Explore, excavate or make diggings on archaeological sites of the ICCs/IPs for the purpose of obtaining materials of cultural values without the free and prior informed consent of the community concerned; and

b. Deface, remove or otherwise destroy artifacts which are of great importance to the ICCs/IPs for the preservation of their cultural heritage."

This is particularly important in cases where mining operations lead to the defacement, removal or the destruction of significant cultural artifacts of the ICCs/IPs. In construing the prohibition under Section 33(b), the purpose for which the artifacts were defaced, removed or destroyed need not be the same as in Section 33(a). And so, mining operations that result in defacement, removal or the destruction of significant cultural artifacts of the ICCs/IPs is considered unlawful under Section 33.

Section 57. *Natural Resources within Ancestral Domains*. - The ICCs/IPs shall have the priority rights in the harvesting, extraction, development or exploitation of any natural resources within the ancestral domains. A non-member of the ICCs/IPs concerned may be allowed to take part in the development and utilization of the natural resources for a period of not exceeding twenty-five (25) years renewable for not more than twenty-five (25) years: Provided, That a formal and written agreement is entered into with the ICCs/

> IPs concerned or that the community, pursuant to its own decision making process, has agreed to allow such operation: Provided, finally, That the all extractions shall be used to facilitate the development and improvement of the ancestral domains.

Under Section 57, ICCs/IPs were given the primordial right to engage in mining within their ancestral domains. Should a non-member of the ICC/IP community desire to do so, a formal agreement must be entered into by the non-member and the ICC/IP concerned, which must be for a period not exceeding twenty-five (25) years. Furthermore, the statute mandates that all extractions are to be used to facilitate the development and improvement of the ancestral domains.

The conditions provided by the IPRA in Section 57 are of utmost importance as this ensures that the ICCs/IPs have the necessary independence in terms of deciding cases that concern their well-being as indigenous individuals and the community in its entirety. Furthermore, in the final condition, the law makes sure that "all extractions shall be used to facilitate the development and improvement of the ancestral domains". This necessarily means that benefits should accrue to the ICCs/IPs.

However, not all portions of ancestral domains may be developed, exploited or be harvested from (ICC/IP or not). Section 58 entitled "Environmental Considerations" provides constraints. According to said provision,

> Section 58. *Environmental Consideration*. - Ancestral domains or portion thereof, which are found necessary for critical watersheds, mangroves wildlife sanctuaries, wilderness, protected areas, forest cover, or reforestation as determined by the appropriate agencies with the full participation of the ICCs/IPs concerned shall be maintained, managed and developed for such purposes. The ICCs/IPs concerned shall be given the responsibility to maintain, develop, protect and conserve such areas with the full and effective assistance of the government agencies. Should the ICCs/IPs decide to transfer the responsibility over the areas, said decision must be made in writing. The consent of the ICCs/IPs should be

> arrived at in accordance with its customary laws without prejudice to the basic requirement of the existing laws on free and prior informed consent: Provided, That the transfer shall be temporary and will ultimately revert to the ICCs/IPs in accordance with a program for technology transfer: Provided, further, That no ICCs/IPs shall be displaced or relocated for the purpose enumerated under this section without the written consent of the specific persons authorized to give consent.

To reiterate, the provision quoted above provides that ancestral domains which are determined as necessary for critical watersheds, mangroves, wildlife sanctuaries, wilderness, protected areas, forest cover, or reforestation shall be maintained as such. In short, they shall be kept and maintained for such purposes alone. Mining, logging and other exploitative activities in these areas are not sanctioned.

A. FREE PRIOR INFORMED CONSENT

One of the features of IPRA is the inclusion of the requirement of Free Prior Informed Consent.[230] The IPRA defines FPIC as:

> [T]he consensus of all members of the ICCs/IPs [indigenous peoples] to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.

230 This section of the book draws heavily from Cielo Magno & Dante Gatmaytan, *Free Prior and Informed Consent in the Philippines: Regulations and Realities*, Oxfam America Briefing Paper, 4-6 (September 2013) available at http://alyansatigilmina.net/wp-content/uploads/2013/10/FPIC-in-the-Philippines-September-2013_Oxfam-Policy-Briefing-Paper_Mago-and-Gatmaytan.pdf.

FPIC is mentioned repeatedly in the IPRA for purposes of protecting indigenous peoples' interests in their ancestral domains. Specifically, FPIC in the context of the IPRA refers to indigenous peoples' right to stay in their territories; right to religious, cultural sites, and ceremonies; right to give or withhold access to their biological and genetic resources and indigenous knowledge related to the conservation, use, and enhancement of these resources; and right to redemption in cases where land/property rights have been transferred without their consent. The IPRA also requires FPIC to "explore, excavate or make diggings on archeological sites" of indigenous peoples and "prior to the grant of any license, lease or permit for the exploitation of natural resources" which would affect indigenous peoples' interests.[231] For these purposes, the law requires that the consent of affected peoples be secured before these activities may be undertaken.

The IPRA also stipulates a role for government in identifying and demarcating ancestral lands through the National Commission on Indigenous Peoples (NCIP). The NCIP is the government agency responsible for developing and implementing policies and programs to protect and promote indigenous peoples' rights. The NCIP is responsible for issuing certificates of ancestral domain titles and certification as a pre-condition to the award of any permits, leases, or grants (to companies, government, or any other entity) for use of any portion of an ancestral domain. The IPRA requires that the NCIP certify that the communities gave their consent to the exploitation of natural resources in their ancestral domains as a condition of project approval (Section 46 (a)).

These advances triggered a backlash where large mining firms threatened to bolt the Philippines and take their investments with them.[232] A legal challenge to the validity of IPRA lost in the Supreme Court. Mining companies have never stopped challenging the implementation of IPRA and have used the investments card to the present. The Chamber of Mines recently claimed that the if FPIC rules are implemented, "we are certain that the country will again lose hard-fought investments larger than the P10.4-billion foreign direct investments outflow in the mining sector in 2011, aside from delaying a number of key exploration and mining projects."[233]

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231 Id.

232 *See* Patricia Thompson, *Philippines Indigenous Peoples Rights Act*, 10 Colo. J. Int'l Envtl. L. & Pol'y 179-186 (1999).

233 Othel V. Campos, *Ancestral land regulations bucked*, Manila Standard, May 21, 2012.

New implementing rules are now embodied in National Commission on Indigenous Peoples' Administrative Order No. 03-12 or the "THE REVISED GUIDELINES ON FREE AND PRIOR INFORMED CONSENT (FPIC) AND RELATED PROCESSES OF 2012." The new guidelines are long and we feature some of its features here.

> SECTION 3 embodies the Declaration of Policy, to wit:
>
> a) The FPIC actualizes and strengthens the exercise by ICCs/IPs of their rights to Ancestral Domains, Social Justice and Human Rights, Self-Governance and Empowerment, and Cultural Integrity;
>
> b) The right of ICCs/IPs to the management, development, use and utilization of their land and resources within their own ancestral domains shall be given utmost regard;
>
> c) No concession, license, permit or lease, production-sharing agreement, or other undertakings affecting ancestral domains shall be granted or renewed without going through the process laid down by law and these Guidelines.[234]

234 The Guidelines also embody the following operating principles:

a. Empowerment. The ICCs/IPs shall freely pursue their economic, social and cultural development through their participation in decision-making, determination of priorities, as well as the practice of their justice system and peace-building processes.
b. Consensus-Building and Decision-Making Process. The ICC/IPs shall participate in the decision-making processes primarily through their indigenous socio-political structures. They shall likewise affirm the decisions of their duly authorized representatives.
c. Peace-Building. The decision-making of the ICCs/IPs in the conduct of the FPIC is a measure to promote peace, harmony, understanding, unity and security.
d. Cultural Integrity. In the implementation or operation of plans, programs, projects or activities in Ancestral Domains, due regard must be given not only to the physical environment but the total environment including the spiritual and cultural bonds to the areas.
e. Inter-generational Responsibility. The Indigenous concept of ownership sustains the view that ancestral domains are considered community property which belong to all generations and therefore cannot be sold, disposed, or destroyed. The ICCs/IPs shall have priority rights to manage and pursue sustainable and responsible development plans, programs, projects or activities within their ancestral domain.

The enactment of the Indigenous Peoples' Rights Act in 1997 and the inclusion of FPIC in many of its provisions did not automatically translate into a more peaceful and respectful resolution of the conflict between extractive industries and local communities. Mining companies immediately found ways to sidestep the processes to the communities' consternation. At the very least, the constant revision of the implementing rules shows that the National Commission on Indigenous Peoples is aware of the issues and is attempting to address them.

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f. Primacy of Customary Law. In the conduct of FBI, FPIC and other processes provided under this Guidelines, including but not limited to dispute resolutions in relation thereto, the primacy of customary law and decision-making processes as determined by the ICCs/IPs shall be observed and adhered to.

g. Transparency and Clarity. The processes under this Guidelines shall be transparent to all stakeholders. The applicant shall make a full and accurate disclosure of information concerning the proposed program, project or activity in a manner that is both accessible and understandable to the concerned community.

h. Existing Property Regimes. Existing and/or vested rights shall continue to be recognized pursuant to Section 56 of R.A. 8371 and its Implementing Rules and Regulations.

i. Ancestral Domain as a Single Unit. An Ancestral Domain shall be recognized and treated, as one or undivided unit.

THE PEOPLE'S SMALL-SCALE MINING ACT

Republic Act No. 7076, also known as "People's Small-Scale Mining Act of 1991," was enacted by Congress during the term of President Aquino. It aims to promote, develop, protect and rationalize viable small-scale mining activities in order to generate more employment opportunities and to provide an equitable sharing of the nation's resources, while giving due regard to existing rights as provided under the act.[235]

Small-scale mining refers to mining activities which rely heavily on manual labor, using simple implements and methods and do not use explosives or heavy mining equipment.[236] Hence, the law is intended to benefit individuals who do not have the financial capability to engage in economically demanding and highly technological mining activities.

The Department of Environment and Natural Resources, in coordination with other concerned government agencies, is mandated to carry out the policy of the law by establishing a People's Small-Scale Mining Program that shall include the following features:

(a) The identification, segregation and reservation of certain mineral lands as people's small-scale mining areas;

(b) The recognition of prior existing rights and productivity;

(c) The encouragement of the formation of cooperatives;

(d) The extension of technical and financial assistance, and other social services;

(e) The extension of assistance in processing and marketing;

(f) The generation of ancillary livelihood activities;

(g) The regulation of the small-scale mining industry with the view to encourage growth and productivity; and

(h) The efficient collection of government revenue.[237]

235 Republic Act No. 7076 (1991), §2.

236 Republic Act No. 7076 (1991), §3 (b).

237 Republic Act No. 7076 (1991), §4.

The law also provides for recognition of ancestral land, rules on award of People's Small-scale Mining Contracts, and rights of private landowners. It also delineates the powers and functions of the Provincial/City Mining Regulatory Board.[238] It also states that the revenue derived by the government from operation of mining programs established therein shall be subject to the sharing provided under the Local Government Code.[239] A penalty has also been provided for violations of the provisions of the act or its implementing rules.[240]

Notwithstanding the benefits that the law intends to provide for the greater majority of the underprivileged Filipino masses, it is not without shortcomings. Small-scale mining has been the target of opposition in the Philippines due to the environmental and social side-effects caused by mercury pollution.[241] Numerous studies show that high levels of mercury concentration have been found in blood and hair samples of miners and people in many communities in close proximity to activities, as well as to ecosystems in mining regions.[242] Another study[243] has also found that small-scale mining operations in the Philippines threaten the environment due to the fact that a majority of the operations are illegal and the facilities are substandard because of weak enforcement of laws. It has also been found to have commonly caused floods and landslides.

Furthermore, small-scale mining is the way of life of the community in some indigenous communities. This makes government regulation even more difficult in those places.[244] It has also been noted that in places where

238 Republic Act No. 7076, (1991), §24.

239 Republic Act No. 7076, (1991), §19.

240 Republic Act No. 7076, (1991), §27.

241 Danilo C. Israel & Jasminda P. Asirot, *Managing Mercury Pollution Emanating From Philippine Small-Scale Gold Mining Activities: An Economic Analysis, in* The Socio-Economic Impacts of Artisanal and Small-Scale Mining in Developing Countries 517 (G.M. Hilson ed., 2003).

242 *Id*.

243 Alternate Forum for Research in Mindanao, Inc., A Background Study on the Small-scale Gold Mining Operations in Benguet and South Cotabato and Their Impact on the Economy, the Environment and the Community 31 (2012).

244 *Id*.

small-scale mining has been helpful in generating additional revenue, there was an absence of a proportionate increase in necessary social services.[245]

Civil society groups have become important actors for the delivery of social services and the implementation of other development programs as a complement to government action, especially in regions where government presence is weak.[246] Throughout mining history, civil society groups had sought to intervene in these mining operations by protesting the same for being hazardous to health and to the environment and by causing displacement of indigenous communities.[247] On the other hand, civil society groups can also swing to the opposite extreme by providing for the basic governmental support that can better the operation of mining in this country.

Civil society groups can be the catalyst in enforcing the policy of law to rationalize small-scale mining operations, while at the same time striking the balance to an environmentally amiable operation. In areas where the government is unable to police illegal activities and substandard facilities of small-scale miners, civil society groups can actually work hand-in-hand with the government as the former possesses the technical know-how and first-hand presence in communities that the latter does not have.

Through their research and expertise in the matter, civil society groups have a better chance of discovering and developing mining technology that can improve mining operation in this country. Hence, they can alleviate the mining situation by educating the small-scale miners of the methods that are less harmful to the environment and to people's health, especially in cases where small-scale mining has become a way of life. The financial resources of the civil service groups can also be utilized in enabling the small-scale miners to loan in order to purchase better equipments for their mining operations.

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245 *Id*.

246 The World Bank, *Defining Civil Society* (Jul. 22, 2013), http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20101499~menuPK:244752~pagePK:220503~piPK:220476~theSitePK:228717,00.html.

247 Lira Dalangin-Fernandez, *300 Civil Society Groups Oppose Mining EO 79* (Jul. 16, 2012, 10:49 am), http://www.interaksyon.com/article/37595/300-civil-society-groups-oppose-mining-eo-79.

In communities that have become prone to landslide and flooding, and also in areas where the government is unable to provide for the necessary social services, civil society groups can discharge the obligations which the government has been unable to promptly address. With its resources, it can readily provide evacuation centers and facilitate the relief operations for the affected communities.

Civil society groups can also introduce mining communities to alternative livelihoods to provide options to the residents. This would provide additional economic activities in the mining areas and alleviate stress imposed on the environment.[248]

248 Alternate Forum for Research in Mindanao, Inc., A Background Study on the Small-scale Gold Mining Operations in Benguet and South Cotabato and Their Impact on the Economy, the Environment and the Community 34 (2012).

THE LOCAL GOVERNMENT CODE

A. LOCAL LEGISLATION[249]

Local legislative councils or sanggunians create laws by enacting ordinances. An ordinance is not the same as a resolution. An ordinance is a law, but a resolution is merely a declaration of the sentiment or opinion of a lawmaking body on a specific matter. An ordinance possesses a general and permanent character, but a resolution is temporary in nature. Additionally, the two are enacted differently — a third reading is necessary for an ordinance, but not for a resolution, unless decided otherwise by a majority of all the *Sanggunian* members.[250]

These ordinances cover a range of issues. Marikina City for example enacted an ordinance to collect fees for the installation of advertising signs during the annual Sapatos Festival. The pertinent provisions provide:

> SECTION 2. Installation or Mount ing Fee. The City Govemment of Marikina hereby imposes a fee in the amount of Phpl,000.00 per installation for every advertisement sign on the City's lamp posts.
>
> SECTION 3. Applicability Clause. The installation or mounting of advertisement signs, banners, billboards, signboards or streamers and other commercial materials on lamp posts within the city shall be exclusively for the promotion of the celebration of the Sapatos Festival this year and every year thereafter;
>
> SECTION 4. Penalty clause. Any person violating the provisions of this ordinance shall be directed to remove his/her unauthorized advertisement signs, banners, billboards,

249 This section draws heavily from Dante B. Gatmaytan, Local Government Law and Jurisprudence (2014).

250 Municipality of Parañaque v. V.M. Realty Corporation, G.R. No., G.R. No. 127820, July 20, 1998.

> signboards or streamers and other commercial materials mounted or installed on lampposts within the city at no cost to the City Government of Marikina or by the City Government of Marikina the cost of which shall be shouldered by the violator.

Motorists, who allow children to sit on a moving vehicle's front passenger seat, now face fines of as much as P3,000 and the suspension of their driver's licenses in Quezon City. The ordinance fills in sanctions for the prohibition under Republic Act No. 8750 or the seat belt law, which discourages motorists from allowing infants and children six years old and below from sitting on the front seat of any running motor vehicle.[251]

Not all ordinances are validly enacted. Those affected by these ordinances can challenge their validity in court. For example, a resident of Marikina City has gone to court to stop the city government from prohibiting those living in resettlement areas from owning pets. Alma Manzano, who lives in a resettlement area at Barangay Fortune, asked the Marikina Regional Trial Court on Friday to nullify Section 2 of Ordinance 13, Series of 1997; Sections 14 and 37 of Ordinance 67, Series of 2003; Sections 34 and 52 of Ordinance 62, Series of 2007; and Section 146 of Ordinance 188, Series of 2008.[252]

For an ordinance to be valid, it must be:

1. within the corporate powers of the municipality to enact
2. passed according to the procedure prescribed by law, and
3. it must be in consonance with certain well-established and basic principles of substantive nature.[253]

The Supreme Court explained that these tests are divided into the formal (whether the ordinance was enacted within the corporate powers of the local government, and whether it was passed in accordance with the procedure

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251 Jeannette I. Andrade, *Honey, they banned the kids!*, Philippine Daily Inquirer, December 6, 2012, available at http://newsinfo.inquirer.net/515323/animal-lover-filses-case-vs-marikina-govt#ixzz36soUf2SA.

252 Kristine Felisse Mangunay, *Animal lover files case vs Marikina gov't*, Philippine Daily Inquirer, October 28, 2013 available at http://newsinfo.inquirer.net/515323/animal-lover-files-case-vs-marikina-govt#ixzz36soUf2SA.

253 Tatel v. Municipality of Virac, G.R. No. 40243, March 11, 1992.

prescribed by law), and the substantive (involving inherent merit, like the conformity of the ordinance with the limitations under the Constitution and the statutes, as well as with the requirements of fairness and reason, and its consistency with public policy).[254]

i. Enacted within the Corporate Powers of the Local Government

When the validity of an ordinance is raised, Courts examine the Local Government Code and other statutes to determine whether the local government is expressly empowered to enact the challenged ordinance. The Supreme Court, for example, upheld an ordinance granting allowances and other benefits to judges stationed in its territory because it is sanctioned by Section 447 (a) (1) (xi) of the Code.[255]

Local governments can also invoke its police power as a basis for enacting ordinances. The exercise of police power by the local government is valid unless it contravenes the fundamental law of the land, or an act of the legislature, or unless it is against public policy, or is unreasonable, oppressive, partial, discriminating, or in derogation of a common right.[256] An Ordinance that authorizes the establishment of not more than three cockpits contravenes Presidential Decree No. 449, otherwise known as the Cockfighting Law of 1974.[257]

The Supreme Court also invalidated Ordinances that prohibited the operation of all bus and jeepney terminals within Lucena City, including those already existing, and allowed the operation of only one common terminal located outside the city. The common carriers plying routes to and from Lucena City were compelled to close down their existing terminals and use the facilities of petitioner.[258] In that case the Court explained that the local government may be considered as having properly exercised its police power only if (1) the interests of the public generally, and not those of a particular class, require the interference of the State, and (2) the means employed are

254 Legaspi v. City of Cebu, G.R. No. 159110, December 10. 2013.

255 Leynes v. Commission on Audit, G.R. No. 143596, December 11, 2003.

256 Tayaban v. People of the Philippines, G.R. No. 150194, March 6, 2007.

257 Tan v. Pereña, G.R. No. 149743, February 18, 2005.

258 Lucena Grand Central Terminal, Inc. v. JAC Liner, Inc., G.R. No. 148339, February 23, 2005.

reasonably necessary for the attainment of the object sought to be accomplished and not unduly oppressive upon individuals. Otherwise stated, there must be a concurrence of a lawful subject and lawful method.[259]

ii. Procedural Requirements

The constitutionality or legality of an ordinance should be upheld in the absence of any controverting evidence that the procedure prescribed by law was not observed in its enactment.[260]

The implementing rules of the Local Government Code provide that an ordinance or resolution passed by the sanggunian shall be valid if approved by a majority of the members present, there being a quorum. An ordinance or resolution authorizing or directing the payment of money or creating liability shall require the affirmative vote of a majority of all the sanggunian members for its passage.[261] A majority of all the elective and appointive members of the sanggunian shall constitute a quorum to transact official business.[262]

Public Hearings

Public hearings are conducted by legislative bodies to allow interested parties to ventilate their views on a proposed law or ordinance. In one case, the Court explained that these views are not binding on the legislative body and it is not compelled by law to adopt them. Sanggunian members are elected by the people to make laws that will promote the general interest of their constituents. They are mandated to use their discretion and best judgment in serving the people. Parties who participate in public hearings to give their opinions on a proposed ordinance should not expect that their views would be patronized by their lawmakers.[263]

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259 Lucena Grand Central Terminal, Inc. v. JAC Liner, Inc., G.R. No. 148339, February 23, 2005.

260 Acaac v. Azcuna, Jr. v. G.R. No. 187378, September 30, 2013.

261 Rule VII, Sec. 14 (g).

262 Rule VII, Sec. 13 (a).

263 Hagonoy Market Vendor Association v. Municipality of Hagonoy, Bulacan, G.R. No. 137621, February 6, 2002.

The Local Government Code mandates public hearings for the enactment of certain ordinances:

> SECTION 186. *Power to Levy Other Taxes, Fees or Charges*. — Local government units may exercise the power to levy taxes, fees or charges on any base or subject not otherwise specifically enumerated herein or taxed under the provisions of the National Internal Revenue Code, as amended, or other applicable laws: *Provided*, That the taxes, fees, or charges shall not be unjust, excessive, oppressive, confiscatory or contrary to declared national policy: *Provided, further*, That the ordinance levying such taxes, fees or charges shall not be enacted without any prior public hearing conducted for the purpose.
>
> SECTION 187. *Procedure for Approval and Effectivity of Tax Ordinances and Revenue Measures*; *Mandatory Public Hearings*. — The procedure for approval of local tax ordinances and revenue measures shall be in accordance with the provisions of this Code: *Provided*, That public hearings shall be conducted for the purpose prior to the enactment thereof: *Provided, further*, That any question on the constitutionality or legality of tax ordinances or revenue measures may be raised on appeal within thirty (30) days from the effectivity thereof to the Secretary of Justice who shall render a decision within sixty (60) days from the date of receipt of the appeal: *Provided, however*, That such appeal shall not have the effect of suspending the effectivity of the ordinance and the accrual and payment of the tax, fee, or charge levied therein: *Provided, finally*, That within thirty (30) days after receipt of the decision or the lapse of the sixty-day period without the Secretary of Justice acting upon the appeal, the aggrieved party may file appropriate proceedings with a court of competent jurisdiction.

A public hearing should be held prior to the enactment of an ordinance levying taxes, fees, or charges; and that such public hearing be conducted as provided under Section 277 of the Implementing Rules and Regulations of the Local Government Code.[264]

264 Ongsuco v. Malones, G.R. No. 182065, October 27, 2009.

Publication

Section 188 of the Local Government Code provides a publication requirement in local newspapers for all provincial, city, and municipal tax ordinances or revenue measures. It provides:

> Section 188. *Publication of Tax Ordinance and Revenue Measures*. — Within ten (10) days after their approval, certified true copies of all provincial, city, and municipal tax ordinances or revenue measures shall be published in full for three (3) consecutive days in a newspaper of local circulation; Provided, however, That in provinces, cities and municipalities where there are no newspapers of local circulation, the same may be posted in at least two (2) conspicuous and publicly accessible places.

The Code requires posting and publication of ordinances with penal sanctions under Section 511:

> SECTION 511. *Posting and Publication of Ordinances with Penal Sanctions*. — (a) Ordinances with penal sanctions shall be posted at prominent places in the provincial capitol, city, municipal or *barangay* hall, as the case may be, for a minimum period of three (3) consecutive weeks. Such ordinances shall also be published in a newspaper of general circulation, where available, within the territorial jurisdiction of the local government unit concerned, except in the case of *barangay* ordinances. Unless otherwise provided therein, said ordinances shall take effect on the day following its publication, or at the end of the period of posting, whichever occurs later.
>
> (b) Any public officer or employee who violates an ordinance may be meted administrative disciplinary action, without prejudice to the filing of the appropriate civil or criminal action.
>
> (c) The secretary to the sanggunian concerned shall transmit official copies of such ordinances to the chief executive officer of the Office Gazette within seven (7) days following the approval of the said ordinance for publication purposes. The Official Gazette may publish ordinances with penal sanctions for archival and reference purposes.

iii. Substantive Requirements

The Supreme Court held that to be valid, an ordinance must conform to the following substantive requirements:

1. It must not contravene the constitution or any statute.
2. It must not be unfair or oppressive.
3. It must not be partial or discriminatory.
4. It must not prohibit but may regulate trade.
5. It must be general and consistent with public policy.
6. It must not be unreasonable.[265]

The rationale for the first requirement is obvious. The Supreme Court has explained that municipal governments are only agents of the national government. Local councils exercise *delegated* legislative powers conferred on them by Congress as the national lawmaking body. The delegate cannot be superior to the principal nor can it exercise powers higher than those of the latter. It is a heresy to suggest that the local government units can undo the acts of Congress, from which they have derived their power in the first place, and negate by mere ordinance the mandate of the statute.[266]

The Court went on to explain that municipal corporations owe their origin to and derive their powers and rights wholly from the legislature. Because Congress creates local governments, it may destroy, abridge, and control them. According to the Court, "unless there is some constitutional limitation on the right, the legislature might, by a single act, and if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, the corporation could not prevent it. They are, so to phrase it, the mere tenants at will of the legislature."

How then do we interpret the invigorated provisions of the Constitution on local autonomy? The Court held that:

> This basic relationship between the national legislature and the local government units has not been enfeebled by the new provisions in the Constitution strengthening the policy

265 Magtajas v. Pryce Properties Corporation, Inc., G.R. No. 111097, July 20, 1994.

266 Magtajas v. Pryce Properties Corporation, Inc., G.R. No. 111097, July 20, 1994.

> of local autonomy. Without meaning to detract from that policy, we here confirm that Congress retains control of the local government units although in significantly reduced degree now than under our previous Constitutions. The power to create still includes the power to destroy. The power to grant still includes the power to withhold or recall. True, there are certain notable innovations in the Constitution, like the direct conferment on the local government units of the power to tax, which cannot now be withdrawn by mere statute. By and large, however, the national legislature is still the principal of the local government units, which cannot defy its will or modify or violate it.[267]

Although an ordinance may not contravene the Constitution or a statute and may be within the scope of charter powers, if they seem to the Court oppressive, unfair, partial, or discriminating, they are declared unreasonable and void, whether this appear from their face or from proof *aliunde*.[268]

Aside from procedural defects, ordinances may also be void because they are unconstitutional. In *City of Manila v. Laguio*,[269] the Supreme Court upheld the Manila City Regional Trial Court decision which declared City *Ordinance* No. 7783 void. The ordinance gave owners and operators of prohibited establishments three months from its approval to wind up business operations, to transfer to any place outside the Ermita-Malate area, or to convert to other kinds of allowable business.

The Court said that the *ordinance* is so replete with constitutional infirmities that almost every sentence thereof violates a constitutional provision. The prohibitions and sanctions therein transgress the cardinal rights of persons enshrined by the Constitution. The *ordinance*, it said, invaded fundamental personal and property rights and impaired personal privileges, and was discriminatory and unreasonable in its operation.

The Court said that the City Council had no power to enact the *ordinance*, which was, therefore, void. The Court said that local legislative bodies cannot

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267 Magtajas v. Pryce Properties Corporation, Inc., G.R. No. 111097, July 20, 1994.

268 United States v. Abendan, G.R. No. L-7830, January 24, 1913.

269 *City of Manila v. Laguio, Jr.,* GR No. 118127, April 12, 2005.

prohibit the operation of the enumerated establishments under Section 1 of the ordinance or order their transfer or conversion without infringing the constitutional guarantees of due process and equal protection of laws – not even under the guise of police power.

The Court held that for an *ordinance* to valid it must not contravene the Constitution or any statute, must not be unfair or oppressive, and must not be partial or discriminatory.

The ordinance in this case violated the equal protection clause which "requires that all persons or things similarly situated should be treated alike, both as to rights conferred and responsibilities imposed" and contradicted the provisions of Presidential Decree No. 499 (Declaring Portions of the Ermita-Malate Area as Commercial Zones with Certain Restrictions). That Presidential Decree converted the residential Ermita-Malate area into a commercial area and allowed the establishment and operation of all kinds of commercial establishments except warehouses or open storage depots, and dumps or yards, among others.

While Manila is duty-bound to make all reasonable regulations to promote community's moral and social values, the Court said that the eradication of the community's social ills can be achieved through reasonable restrictions rather than by an absolute prohibition. The Court said that the *ordinance* sought to legislate morality but should instead regulate human conduct occurring inside the establishments.

In the subsequent case of *White Light Corporation v. City of Manila*,[270] the Court dealt with a similarly motivated city ordinance that prohibits the same establishments from offering short-time admission, as well as pro-rated or "wash up" rates for such abbreviated stays. The Court in this case declared the ordinance as unconstitutional. According to the Court, the right at stake in the case falls within the same fundamental rights to liberty which it upheld in the precedent case of *City of Manila v. Laguio*.

270 G.R. No. 122846, January 20, 2009.

B. THE GENERAL WELFARE CLAUSE

Local governments can enact ordinances for the benefit of their constituents. This power is granted through section 16 of the Local Government Code which is also called the general welfare clause. The Code provides:

> SECTION 16. *General Welfare*. — Every local government unit shall exercise the powers expressly granted, those necessarily implied therefrom, as well as powers necessary, appropriate, or incidental for its efficient and effective governance, and those which are essential to the promotion of the general welfare. Within their respective territorial jurisdictions, local government units shall ensure and support, among other things, the preservation and enrichment of culture, promote health and safety, enhance the right of the people to a balanced ecology, encourage and support the development of appropriate and self-reliant scientific and technological capabilities, improve public morals, enhance economic prosperity and social justice, promote full employment among their residents, maintain peace and order, and preserve the comfort and convenience of their inhabitants.

The concept of police power is well-established in this jurisdiction. It is defined as the "state authority to enact legislation that may interfere with personal liberty or property in order to promote the general welfare."[271] It consists of (1) an imposition or restraint upon liberty or property (2) in order to foster the common good. It is veiled in general terms to underscore its all-comprehensive embrace.[272]

In *Basco v. PAGCOR*,[273] the Supreme Court explained that police power:

> …finds no specific Constitutional grant for the plain reason that it does not owe its origin to the charter. Along

271 Edu v. Ericta, 35 SCRA 481, 487 (1970).

272 Philippine Association of Service Exporters, Inc. v. Drilon, 163 SCRA 386 (1988).

273 197 SCRA 52 (1991).

> with the taxing power and eminent domain, it is inborn in the very fact of statehood and sovereignty. It is a fundamental attribute of government that has enabled it to perform the most vital functions of governance. Marshall, to whom the expression has been credited, refers to it succinctly as the plenary power of the state "to govern its citizens". (Tribe, American Constitutional Law, 323, 1978). The police power of the State is a power co-extensive with self-protection, and is most aptly termed the "law of overwhelming necessity." (Rubi v. Provincial Board of Mindoro, 39 Phil. 660, 708) It is "the most essential, insistent, and illimitable of powers." (Smith Bell & Co. v. National, 40 Phil. 136) It is a dynamic force that enables the state to meet the exigencies of the winds of change.[274]

The police power is based on the maxim "salus populi est suprema lex" — the welfare of the people is the first law. It extends "to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals."[275] Like the State, the police power of a municipal corporation extends to all matters affecting the peace, order, health, morals, convenience, comfort, and safety of its citizens — the security of social order — the best and highest interests of the municipality.[276] The Philippine Legislature delegated the general power of a municipal council to enact ordinances and make regulations through the general welfare clause. Now found in Section 16 of the Code, the general welfare clause has two branches. One branch attaches itself to the main trunk of municipal authority, and relates to such ordinances and regulations as may be necessary to carry into effect and discharge the powers and duties conferred upon the municipal council by law. The second branch is much more independent of the specific functions of the council which are enumerated by law. It authorizes such ordinances as shall seem necessary and proper to provide for the health and safety, promote the prosperity, improve the morals, peace, good order, comfort, and convenience of the municipality and the inhabitants thereof, and for the protection of property therein.[277]

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274 Basco v. PAGCOR, 197 SCRA 52 (1991).

275 United States v. Salaveria, 39 Phil. 103 (1918) *citing* Beer Co. vs. Massachusetts, 97 U.S. 25 (1878) and Barbier vs. Connolly, 113 U.S. 27 (1885).

276 United States v. Salaveria, 39 Phil. 103 (1918) *citing* Case vs. Board of Health of Manila and Heiser, 24 Phil. 250 (1913).

277 United States v. Salaveria, 39 Phil. 103 (1918).

Local governments may be considered as having properly exercised their police power only if the following requisites are met: (1) the interests of the public generally, as distinguished from those of a particular class, require its exercise and (2) the means employed are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. In short, there must be a concurrence of a lawful subject and a lawful method.[278]

In *Viray v. Caloocan*,[279] the Supreme Court struck down a Caloocan City Ordinance, which required the payment of an entrance fee for burials at the La Loma cemetery. There, the City defended the ordinance as a valid exercise of police power because it "involves the assignment of police officers to insure that the funeral procession… is orderly so as not to cause great and serious inconvenience to the public. During the procession traffic has to be re-routed at times; policemen have to use the city's motorcycles or cars; the streets and other City property have to suffer certain degree of depreciation."

But the Court held that while this may be true, the City did not explain why the Ordinance imposes the fees solely in the case of cadavers coming from places outside the territory of Caloocan City for burial in private cemeteries within the City. The Court said that the police must regulate traffic, use their vehicles to maintain order, and suffer some degree of property depreciation "whether the corpse comes from without or within the City limits, and whether interment is to be made in private or public cemeteries." The Court concluded that the ordinance unjustifiably discriminates against private cemeteries, in violation of the equal protection clause of the Constitution, a defect adequate to invalidate the questioned portion of the measure.

Similarly, in *Balacuit v. Court of First Instance of Agusan del Norte*,[280] the Court held that an ordinance requiring theater owners to charge only half prices for children was unconstitutional. The City of Butuan invoked the police power to justify the enactment of said ordinance. But the Court said that the valid exercise of police power requires that the interest of the public generally requires an interference with private rights, and that the means

278 Social Justice Society v. Atienza, G.R. No. 156052, February 13, 2008.

279 20 SCRA 791 (1967).

280 163 SCRA 182 (1988).

adopted must be reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. It added that "[t]he legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." It was an invalid exercise of police power because:

> While it is true that a business may be regulated, it is equally true that such regulation must be within the bounds of reason, that is, the regulatory ordinance must be reasonable, and its provisions cannot be oppressive amounting to an arbitrary interference with the business or calling subject of regulation. A lawful business or calling may not, under the guise of regulation, be unreasonably interfered with even by the exercise of police power. A police measure for the regulation of the conduct, control and operation of a business should not encroach upon the legitimate and lawful exercise by the citizens of their property rights. The right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself and, as such, within the protection of the due process clause. Hence, the proprietors of a theater have a right to manage their property in their own way, to fix what prices of admission they think most for their own advantage, and that any person who did not approve could stay away.[281]

There are cases where the Supreme Court did find a local government's exercise of police power to be valid. In *Binay v. Domingo*,[282] the Supreme Court upheld Makati's Burial Assistance Program, where bereaved families of Makati whose gross family income does not exceed two thousand pesos a month qualified to receive five hundred pesos cash relief from Makati. In that case, the Court said Makati had authority to "enact such ordinances and issue such regulations as may be necessary to carry out and discharge the responsibilities conferred upon it by law, and such as shall be necessary and proper to provide for the health, safety, comfort and convenience, maintain

281 Balacuit v. Court of First Instance Agusan Del Norte, 163 SCRA 182 (1988).

282 201 SCRA 508 (1991).

peace and order, improve public morals, promote the prosperity and general welfare of the municipality and the inhabitants thereof, and insure the protection of property therein."

The Court added that the exercise of the power is not unconstitutional merely because it incidentally benefits a limited number of persons. The Court held that the care for the poor is generally recognized as a public duty and support for the poor has long been an accepted exercise of police power in the promotion of the common good.

> There is no violation of the equal protection clause in classifying paupers as subject of legislation. Paupers may be reasonably classified. Different groups may receive varying treatment. Precious to the hearts of our legislators, down to our local councilors, is the welfare of the paupers. Thus, statutes have been passed giving rights and benefits to the disabled, emancipating the tenant-farmer from the bondage of the soil, housing the urban poor….

The Court hastened to add, however, that their ruling must not be taken as a precedent, or as an official go-signal for municipal governments "to embark on a philanthropic orgy of inordinate dole-outs for motives political or otherwise." In fact in *City Government of Quezon City v. Ericta*,[283] the Supreme Court struck down an ordinance requiring at least six percent of the total area of cemeteries to be "set aside for charity burial of deceased persons who are paupers and have been residents of Quezon City for at least 5 years prior to their death."

There, the Court held that there was no reasonable relation between the setting aside of at least six percent of the total area of all private cemeteries for charity burial grounds of deceased paupers and the promotion of health, morals, good order, safety, or the general welfare of the people. It concluded that the ordinance is actually a taking without compensation of a certain area from a private cemetery to benefit paupers who are charges of the municipal corporation. Instead of building or maintaining a public cemetery for this purpose, the city passes the burden to private cemeteries.

283 122 SCRA 759 (1983).

C. ZONING AS A POLICE POWER MEASURE

The declaration of an area as a commercial zone thru a municipal ordinance is an exercise of police power to promote the good order and general welfare of the people in the locality. The state, in order to promote the general welfare, may interfere with personal liberty, with property, and with business and occupations. Thus, persons may be subjected to certain kinds of restraints and burdens in order to secure the general welfare of the state and to this fundamental aim of government; the rights of the individual may be subordinated.[284]

D. ENVIRONMENTAL LAWS

Section 16 of the Local Government Code creates a duty of local governments to promote the people's right to a balanced ecology. Pursuant to this, the City of Davao cannot claim exemption from complying with the environmental impact statement system under Presidential Decree No. 1586. A local government has the duty to ensure the quality of the environment, which is the very same objective of Presidential Decree No. 1586.

Section 4 of Presidential Decree No. 1586 states that "no person, partnership or corporation shall undertake or operate any such declared environmentally critical project or area without first securing an Environmental Compliance Certificate issued by the President or his duly authorized representative." The Civil Code defines a person as either natural or juridical. The state and its political subdivisions, i.e., the local government units are juridical persons. Undoubtedly therefore, local government units are not excluded from the coverage of Presidential Decree No. 1586.[285]

In one case, the Supreme Court held that the information dissemination about a reclamation project conducted by a province months after an ECC was issued was insufficient to comply with the consultation requirement

284 *See* Patalinghug v. Court of Appeals, 229 SCRA 554 (1994).

285 Republic of the Philippines v. The City of Davao, G.R. No. 148622, 388 SCRA 691 (2002).

under the Local Government Code. Prior public consultation should have considered the ecological or environmental concerns of the stakeholders and studied measures alternative to the project, to avoid or minimize adverse environmental impact or damage. [286] The lack of prior public consultation and approval is not corrected by the subsequent endorsement of the reclamation project by municipalities or barangays "which were both undoubtedly achieved at the urging and insistence of respondent Province."[287]

E. POLLUTION

Another problematic case is *Technology Developers, Inc. v. Court of Appeals*,[288] which involved a corporation that manufactured charcoal briquettes. Technology Developers, Inc. (TDI) received a letter from the acting mayor of Sta. Maria Bulacan, ordering it to stop operations of its plant in Guyong, Sta. Maria, Bulacan and to present various local and national government permits to the office of the mayor. TDI did not have a mayor's permit and its request for one was denied. Without providing notice to TDI, the acting mayor ordered TDI's local station commander to close the plant.

TDI sued, claiming that the closure order was issued in error. Consequently, the judge issued a writ of preliminary mandatory injunction on April 28, 1989. Counsel for defendant, however, subsequently filed a motion for reconsideration, and the court set aside the writ of preliminary mandatory injunction. On appeal, the lower court's ruling was upheld. TDI filed a petition for review on certiorari with the Supreme Court, but the Supreme Court also ruled against TDI.

In upholding the decision of the court of appeals, the Supreme Court held that the decision to issue a writ of preliminary injunction rests on the discretion of the trial court. As such, the Court will not disturb that order unless the

286 Boracay Foundation, Inc. v. The Province of Aklan, G.R. No. 196870, June 26, 2012.

287 Boracay Foundation, Inc. v. The Province of Aklan, G.R. No. 196870, June 26, 2012.

288 193 SCRA 147 (1991) and 201 SCRA xi (1991). This summary is reproduced from Dante Gatmaytan-Magno *Artificial Judicial Environmental Activism: Oposa v. Factoran as Aberration*, 17 Ind. Int'l & Comp. L. Rev. 1-28 (2007).

trial court acted without jurisdiction, in excess of jurisdiction, or in grave abuse of its discretion. Accordingly, "the court that issued such a preliminary relief may recall or dissolve the writ as the circumstances may warrant."

Technology Developers, Inc. was a simple case and was settled by simple reference to case law. TDI filed a motion for reconsideration of the Supreme Court's decision, however, and the decision was reversed a few months later.

In its motion for reconsideration, TDI presented a completely different set of facts-an act that is highly irregular. Generally, the Supreme Court is not called upon to try facts. The findings of fact of a trial court, particularly when affirmed by the court of appeals, are generally conclusive and binding on the Supreme Court. There was no showing in this case, however, that the factual bases of the lower courts' decisions were erroneous. Factual issues are beyond the ambit of the Court's authority to review upon certiorari. On grant of certiorari, the Supreme Court looks to the issues of jurisdiction or a grave abuse of discretion. A recent decision of the Supreme Court explains this rule:

The rule in appellate procedure is that a factual question may not be raised for the first time on appeal, and documents forming no part of the proofs before the appellate court will not be considered in disposing of the issues of an action. This is true whether the decision elevated for review originated from a regular court or an administrative agency or quasi-judicial body, and whether it was rendered in a civil case, a special proceeding, or a criminal case. Piecemeal presentation of evidence is simply not in accord with orderly justice.

The same rules apply with greater force in certiorari proceedings. Indeed, it would be absurd to hold public respondent guilty of grave abuse of discretion for not considering evidence not presented before it. The patent unfairness of petitioner's plea, prejudicing as it would public and private respondents alike, militates against the admission and consideration of the subject documents.

Incredibly, the Supreme Court in Technology Developers, Inc., accepted the new facts submitted by TDI and substituted them for the facts established by the lower courts reasoning that the new facts "knocked down [the] factual moorings of our decision."

Additionally, TDI claimed that it actually had a mayor's permit-one issued by a different local government. Regardless of the validity of this claim, TDI did not have the required mayor's permit from Bulacan, where the plant was operating.

TDI also raised a new issue in its motion for reconsideration: whether a mayor may close a place of business for lack of a mayor's permit and for alleged violation of anti-pollution laws. This, too, is anomalous. Usually, the issues in each case are limited to those presented in the pleadings; "[f]or an appellate tribunal to consider a legal question it should have been raised in the court below." "Fair play, justice, and due process dictate that parties should not raise, for the first time on appeal, issues that they could have raised but never did during trial [or] . . . before the Court of Appeals."

Under Philippine law, there are occasions when an appellate court may consider issues that are raised for the first time on appeal. Among others, the issue of lack of jurisdiction over the subject matter may be raised at any stage. A reviewing court may also consider an issue not raised during trial when there is plain error or when there are jurisprudential developments affecting the issues, or when the issues raised present a matter of public policy. In the instant case, however, TDI was no longer filing an appeal. When TDI introduced the new issue for consideration, it was asking the Supreme Court to reconsider a ruling denying their petition for certiorari. In other words, TDI introduced a new issue after they had exhausted the appeals process and had been rebuffed by the court of appeals and the Supreme Court. Changing the issue at this late in the judicial process is unprecedented.

Moreover, the Court here did not simply consider a new issue: it completely changed the issue to whether the acting mayor had jurisdiction to order the closure of the plant. In order to decide this issue, the Court applied Presidential Decree No. 984, which created and established the National Pollution Control Commission (presently the Environmental Management Bureau). This Decree, according to the Court, superseded the provisions of the Civil Code which had authorized the local officials to abate pollution. The Court then made the following pronouncement: "Inasmuch as the petitioner had been issued a permit by the E[nvironmental] M[anagement] B [ureau] to operate its charcoal briquette manufacturing plant . . . the acting municipal mayor may not capriciously deny a permit to operate petitioner's otherwise legitimate business on the ground that its plant was causing excessive air pollution."

This pronouncement from the Court is puzzling. Under Philippine case law, businesses may be required to satisfy local government requirements before they can operate, even if in compliance with national law. Accordingly, TDI was subject to local government requirements despite its compliance with requirements of national government agencies. Local governments have the power to refuse to issue business permits and licenses and to suspend or revoke these licenses and permits for violations of their conditions. The acting mayor closed the plant because it did not have a mayor's permit and it was allegedly causing pollution. TDI had been allowed to show that it had all the necessary documents relative to its operation. There was nothing capricious about the closure.

Additionally, the Court noted, "it is beyond a municipal mayor's ken and competence to review, revise, reverse, or set aside a permit to operate the petitioner's . . . plant issued by the EMB." The acting mayor did not "review, revise, reverse, or set aside" any order issued by the EMB. The plant was closed down because it did not have a mayor's permit. The Supreme Court seems to have confused the roles of the national and local governments in issuing permits. While the EMB should have addressed complaints against TDI for violating pollution laws, compliance with local laws was a matter for local government authorities to address. Ultimately, the Supreme Court ordered the "immediate reopening of the plant" despite the fact that it did not have a permit from Bulacan.

Technology Developers, Inc. is one of the most poorly-reasoned decisions of the Philippine Supreme Court. It is fraught with procedural anomalies and factual inaccuracies. It also contradicted established doctrines of the Philippine judicial system. The case forces local governments to allow businesses to operate within the "jurisdictions" despite their failure to comply with local laws. Thus, this decision seems to severely undermine the power of local governments to address noncompliance.

Notably, the Court's new resolution was a "minute resolution." The Philippine Supreme Court uses minute resolutions in the majority of its cases (1) where a case is patently without merits (2) where the issues raised are factual in nature, (3) where the decision appealed from is supported by: substantial evidence and, is in accord with the facts of the case and the applicable laws, (4) where it is clear from the records that the petition is filed merely to forestall the early execution of judgment and for non-compliance with the rules.

The substance of the Court's ruling in Technology Developers, Inc., however, does not fall within the aforementioned circumstances. In fact, it seems that minute resolutions are used to shut down frivolous suits. Thus, if the Supreme Court believed that the suit was frivolous, it could have easily dismissed TDI's petition. Instead, the Court admitted new facts, addressed a new issue, and declared several provisions of the Civil Code inoperative.

F. ABATEMENT OF NUISANCE

Sections 447 and 458 of the Code in relation to the Civil Code govern the abatement of nuisances.

Section 447 (a) (4) (i) provides that the sangguniang bayan shall "Declare, prevent or abate any nuisance." Section 458 (a) (4) (i) provides that the sangguniang panglunsod shall "Declare, prevent or abate any nuisance."

The civil code defines a nuisance as any act, omission, establishment, business, condition of property, or anything else which:

1) Injures or endangers the health or safety of others; or
2) Annoys or offends the senses; or
3) Shocks, defies or disregards decency or morality; or
4) Obstructs or interferes with the free passage of any public highway or street, or any body of water; or
5) Hinders or impairs the use of property.[289]

A nuisance is either public or private. A public nuisance affects a community or neighborhood or any considerable number of persons, although the extent of the annoyance, danger or damage upon individuals may be unequal. A private nuisance is one that is not included in the foregoing definition.[290] The remedies against a nuisance is provided for by the Civil Code:

289 Civil Code, art. 694.

290 Civil Code, art. 695.

ARTICLE 699. The remedies against a public nuisance are:

(1) A prosecution under the Penal Code or any local ordinance: or

(2) A civil action; or

(3) Abatement, without judicial proceedings.

Nuisances are pertinent to local government law because local governments have been granted the power to abate nuisances.[291] Under the old Local Government Code, the sangguniang bayan had the power to "provide for the abatement of nuisance."[292] The sangguniang panglungsod, also had the power to "declare, prevent and abate nuisance."[293] The Supreme Court interpreted these broad provisions together with the provisions of the Civil Code.

Special laws such as the Comprehensive Dangerous Drugs Act of 2002[294] may provide specific provisions that can apply to local governments. That law provides:

> SECTION 52. *Abatement of Drug Related Public Nuisances*. — Any place or premises which have been used on two or more occasions as the site of the unlawful sale or delivery of dangerous drugs may be declared to be a public nuisance, and such nuisance may be abated, pursuant to the following procedures:
>
> (1) Any city or municipality may, by ordinance, create an administrative board to hear complaints regarding the nuisances;
>
> (2) Any employee, officer, or resident of the city or municipality may bring a complaint before the Board after giving not less than three (3) days written notice of such complaint to the owner of the place or premises at his/her last known address; and

291 *See* Republic Act No. 1515 (1956), §2631 (r) and charters of most local governments.

292 Batas Pambansa Blg., 337 (1983), §149 (ee).

293 Batas Pambansa Blg., 337 (1983), §177 (t).

294 Republic Act No. 9165 (2002).

(3) After hearing in which the Board may consider any evidence, including evidence of the general reputation of the place or premises, and at which the owner of the premises shall have an opportunity to present evidence in his/her defense, the Board may declare the place or premises to be a public nuisance.

SECTION 53. *Effect of Board Declaration*. — If the Board declares a place or premises to be a public nuisance, it may declare an order immediately prohibiting the conduct, operation, or maintenance of any business or activity on the premises which is conducive to such nuisance.

An order entered under this Section shall expire after one (1) year or at such earlier time as stated in the order. The Board may bring a complaint seeking a permanent injunction against any nuisance described under this Section.

This Article does not restrict the right of any person to proceed under the Civil Code against any public nuisance.

The language of the Comprehensive Dangerous Drugs Act of 2002 suggests that it operates simultaneously with the Civil Code. It is limited to the abatement of any place or premises that have been the site of the unlawful sale or delivery of dangerous drugs, and only according to the procedures laid out in Section 52. The abatement also has a one-year life span at most. The property owner may avail of the remedies found under the Civil Code.

In *Tatel v. Municipality of Virac*,[295] the Court held that an ordinance prohibiting the construction of warehouses near a block of houses either in the poblacion or barrios without maintaining the necessary distance of 200 meters from said block of houses to avoid loss of lives and properties by accidental fire was a valid exercise of its police power.

There, the Court explained that for an ordinance to be valid, it must not a) be within the corporate powers of the municipality to enact; b) but must also be passed according to the procedure prescribed by law, and c) must be

295 207 SCRA 157 (1991).

in consonance with certain well established and basic principles of a substantive nature. These principles require that a municipal ordinance (1) must not contravene the Constitution or any statue (2) must not be unfair or oppressive (3) must not be partial or discriminatory (4) must not prohibit but may regulate trade (5) must be general and consistent with public policy, and (6) must not be unreasonable. Ordinance No. 13, Series of 1952, meets these criteria.

In *Estate of Gregoria Francisco v. Court of Appeals*,[296] the municipal mayor of Isabela ordered the demolition of a quonset building in the Port Area, Strong Boulevard, Isabela, Basilan. The demolition was justified as an exercise of police power and for reasons of health, safety and general welfare, pursuant to Ordinance No. 147 of the Municipality of Isabela. The Court held that the demolition was improper and that while the building was located outside the zone for warehouses and was a non-conforming structure, the ordinance "should not be interpreted as authorizing the summary removal of a non-conforming building by the municipal government" because it must be struck down for being in contravention of the requirements of due process.

Moreover, the ordinance itself provides that the Zoning Administrator may call upon the City Fiscal to institute the necessary legal proceedings to enforce the provisions of the Ordinance. It also provides that any person aggrieved by the decision of the Zoning Administrator regarding the enforcement of the Ordinance may appeal to the Board of Zoning Appeals. The Court also noted that the ordinance itself requires conviction for violation of the provisions thereof. The Court added that the violation of a municipal ordinance neither empowers the Municipal Mayor to avail of extra-judicial remedies. On the contrary, the Local Government Code imposes upon him the duty "to cause to be instituted judicial proceedings in connection with the violation of ordinances."[297]

The Court held that the municipality cannot use the general welfare clause authorizing the abatement of nuisances without judicial proceedings. "That tenet applies to a nuisance *per se*, or one which affects the immediate safety of persons and property and may be summarily abated under the undefined law of necessity." The Court added that the storage of copra in the

296 Estate of Gregoria Francisco v. Court of Appeals, 199 SCRA 595 (1991).

297 The Court cited Section 141 of Batas Pambansa Blg. 337 (1985), but there does not seem to be a parallel provision under the present Code.

quonset building is a legitimate business and is not injurious to the rights of property, health or comfort of the community. "If it be a nuisance per accidens it may be so proven in a hearing conducted for that purpose. It is not per se a nuisance warranting its summary abatement without judicial intervention."

If city officials find that a fence encroached on the sidewalk, their remedy is not to demolish the fence summarily after respondents failed to heed his request to remove it. They should go to court and prove respondents' supposed violations in the construction of the concrete fence. Indeed, unless a thing is a nuisance per se, it may not be abated summarily without judicial intervention.[298]

A demolition of a public market is a not a valid exercise of police power. The exercise of police power by the local government is valid unless it contravenes the fundamental law of the land, or an act of the legislature, or unless it is against public policy, or is unreasonable, oppressive, partial, discriminating, or in derogation of a common right. In the present case, the acts of petitioner have been established as a violation of law, particularly of the provisions of Section 3 (e) of Republic Act No. 3019. A local government cannot seek use the general welfare clause to authorizing the abatement of nuisances without judicial proceedings. This principle applies to nuisances *per se*, or those which affect the immediate safety of persons and property and may be summarily abated under the undefined law of necessity. Petitioners claim that the public market would pose danger to the safety and health of schoolchildren if it were built on the place being contested. However, petitioners never made known their supposed concerns either to the local officials and took the law into their own hands and precipitately demolished the subject structures that were built without the benefit of any hearing or consultation with the proper authority.[299]

The Court interpreted the municipality's power to abate a nuisance under section 149 (ee) of the old Local Government Code, to mean "it cannot declare a particular thing as a nuisance per se and order its condemnation. The nuisance can only be so adjudged by judicial determination." The Court reiterated the rule that:

> [Municipal councils] do not have the power to find as a fact that a particular thing is a nuisance when such thing is not

298 Perez v. Spouses Madrona, G.R. No. 184478, March 21, 2012.

299 Tayaban v. People of the Philippines, G.R. No. 150194, 517 SCRA 488 (2007).

> a nuisance *per se*; nor can they authorize the extra judicial condemnation and destruction of that as a nuisance which, in its nature, situation or use is not such. These things must be determined in the ordinary courts of law. In the present case… the ice factory of the plaintiff is not a nuisance *per se*. It is a legitimate industry… If it be in fact a nuisance due to the manner of its operation, that question cannot be determined by a mere resolution of the board. The petitioner is entitled to a fair and impartial hearing before a judicial tribunal. (Iloilo Cold Storage v. Municipal Council, 24 Phil. 47 [1913]).

Under the present Code, the abatement of nuisance is mentioned in Book Three. The sangguniang bayan has the power under Section 447 to regulate activities relative to the use of land, buildings and structures within the municipality in order to promote the general welfare and for said purpose shall, "Declare, prevent or abate any nuisance."[300] The sangguniang panglungsod has a similar power under Section 458.[301]

The issue that is raised by the enactment of the 1991 Code is whether Congress intended to supplant existing rules and allow municipalities and cities to abate *any* nuisance. The Supreme Court, however, seems reluctant to acknowledge the change in the law's language. In one case, it held that the present Local Government Code "does not expressly provide for the abatement of nuisance."[302]

The abatement of a nuisance without judicial proceedings is possible only if it is a nuisance *per se*. A gas station is not a nuisance *per se* or one affecting the immediate safety of persons and property and it cannot be summarily closed down or transferred to another location.[303] The Metropolitan Manila Development Authority does not have the power to determine a thing a nuisance. Only courts have the power to determine whether a thing is a nuisance.[304]

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300 Republic Act No. 7160 (1991), §447 (4) (i).

301 Republic Act No. 7160 (1991), §458 (4) (i).

302 Asilo, Jr. v. People of the Philippines, G.R. No. 159017-18, March 9, 2011.

303 Parayno v. Jovellanos, G.R. No. 148408, July 14 2006.

304 Gancayco v. City Government of Quezon City, G.R. No. 177807, October 11, 2011.

G. ON THE VALIDITY OF ORDINANCES

In *Tatel v. Municipality of Virac*,[305] the Supreme Court held that for an ordinance to be valid, it must:

a) be within the corporate powers of the municipality to enact;
b) be passed according to the procedure prescribed by law, and
c) be in consonance with certain well established and basic principles of a substantive nature. These principles require that a municipal ordinance
    a. must not contravene the Constitution or any statue
    b. must not be unfair or oppressive
    c. must not be partial or discriminatory
    d. must not prohibit but may regulate trade
    e. must be general and consistent with public policy, and
    f. must not be unreasonable.

This does not mean, however, that all ordinances that purport to promote the general welfare are valid. To invoke the exercise of police power, the interest of the public generally requires an interference with private rights, and the means adopted must be reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals.[306] Thus, an ordinance that sets aside at least six percent of the total area of all private cemeteries for charity burial grounds of deceased paupers and the promotion of health, morals, good order, safety, or the general welfare of the people is void. The ordinance constitutes a taking without compensation from a private cemetery to benefit paupers who are charges of the municipal corporation. The City should have built a public cemetery for their charges but instead passed the burden to private cemeteries.[307]

305 207 SCRA 157 (1991).

306 Balacuit v. Court of First Instance, 163 SCRA 182 (1988). In that case the Supreme Court explained that The police power legislation must be firmly grounded on public interest and welfare, and a reasonable relation must exist between purposes and means.

307 City Government of Quezon City v. Ericta, G.R. No. L-34915, June 24, 1983.

H. LOCAL INITIATIVE

Local initiative is the process whereby the registered voters of a local government unit may directly propose, enact, or amend any ordinance.[308] If the proposition is approved by a majority of the votes cast, it shall take effect 15 days after certification by the COMELEC as if affirmative action thereon had been made by the sanggunian and local chief executive concerned. If it fails to obtain said number of votes, the proposition is defeated.[309]

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308 Republic Act No, 7160 (1991), § 120. The pertinent provisions read:

> Not less than 1,000 registered voters in case of provinces and cities, 100 in case of municipalities, and 50 in case of barangays, may file a petition with the sanggunian proposing the adoption, enactment, repeal, or amendment of an ordinance. If no favorable action is taken by the sanggunian concerned within 30 days from its presentation, the proponents, through their duly authorized and registered representatives, may invoke their power of initiative, giving notice thereof to the sanggunian concerned.
>
> The proponents shall have 90 days in case of provinces and cities, 60 days in case of municipalities, and 30 days in case of barangays to collect the required number of signatures.
>
> The petition shall be signed before the election registrar, or his designated representatives, in the presence of a representative of the proponent, and a representative of the sanggunian concerned in a public place in the local government unit, as the case may be. Stations for collecting signatures may be established in as many places as may be warranted.
>
> Upon the lapse of the period herein provided, the Comelec, through its office in the local government unit concerned, shall certify as to whether or not the required number of signatures has been obtained. Failure to obtain the required number defeats the proposition.
>
> If the required number of signatures is obtained, the Comelec shall then set a date for the initiative during which the proposition shall be submitted to the registered voters in the local government unit concerned for their approval within sixty (60) days from the date of certification by the Comelec, as provided in subsection (g) hereof, in case of provinces and cities, forty-five (45) days in case of municipalities, and thirty (30) days in case of barangays. The initiative shall then be held on the date set, after which the results thereof shall be certified and proclaimed by the Comelec.

See Republic Act No. 7160 (1991), §122.

309 Republic Act No, 7160 (1991), §123.

There are limitations on the exercise of this power. Local initiative shall not be exercised more than once a year and will extend only to subjects or matters, which are within the legal powers of the sanggunians to enact. If at any time before the initiative is held, the sanggunian adopts in toto the proposition presented and the local chief executive approves the same, the initiative shall be canceled.[310] The courts are not precluded from declaring void any proposition approved pursuant to an initiative for violation of the Constitution or want of capacity of the sanggunian to enact the said measure.[311]

Any proposition or ordinance approved through the system of initiative and referendum shall not be repealed, modified or amended by the sangguniannian concerned within six (6) months from the date of the approval thereof, and may be amended, modified or repealed by the sanggunian within three (3) years thereafter by a vote of three-fourths (3/4) of all its members. In case of barangays, the period shall be eighteen (18) months after the approval thereof.[312]

This power can complicate the legal terrain in local governments because initiative covers all "subjects or matters which are within the legal powers of the sanggunians to enact."[313] People themselves may enact laws that impose additional requirements geared towards the protection of the environment. Local government efforts to protect the environment have been upheld by the Supreme Court as valid exercises of police power.[314]

310 Republic Act No, 7160 (1991), §124.

311 Republic Act No, 7160 (1991), §127.

312 Republic Act No, 7160 (1991), §125.

313 Garcia v. COMELEC, 237 SCRA 279 (1994).

314 See Tano v. Socrates, 278 SCRA 154 (1997).

OTHER PROVISIONS OF THE LOCAL GOVERNMENT CODE ADDRESSING THE ENVIRONMENTAL AND SOCIAL TRAUMA CAUSED BY MINING

Aside from legislation, there are other provisions of the Code that may be used to address the impacts of resource extraction. These provisions are triggered by calamities—which could in turn be triggered by resource extraction.

These powers can be invoked to ease the impacts of these calamities on the land owners whose properties were damaged by calamities. Local governments can condone or reduce taxes over real property if agriculture is adversely affected by a calamity. A calamity is not restricted to a natural calamity and it may be argued that According to Section 276:

> Section 276. *Condonation or Reduction of Real Property Tax and Interest*. - In case of a general failure of crops or substantial decrease in the price of agricultural or agribased products, or calamity in any province, city or municipality, the sanggunian concerned, by ordinance passed prior to the first (1st) day of January of any year and upon recommendation of the Local Disaster Coordinating Council, may condone or reduce, wholly or partially, the taxes and interest thereon for the succeeding year or years in the city or municipality affected by the calamity.

Local governments can also exempt idle lands from taxes if extraction activities prevent the land owner from using her land. Section 238 of the Code provides:

> Section 238. *Idle Lands Exempt from Tax*. – A province or city or a municipality within the Metropolitan Manila Area may exempt idle lands from the additional levy by reason of force majeure, civil disturbance, natural calamity or any cause or circumstance which physically or legally prevents the owner of the property or person having legal interest therein from improving, utilizing or cultivating the same.

Local governments may also enact a supplemental budget to address the effects of a public calamity. Section 321 of the Code grants this power. This section does not require the calamity to be "natural" one and, therefore, may be invoked to cover costs that are "exceptionally urgent or absolutely indispensable to prevent imminent danger to, or loss of, life or property." The section provides:

> Section 321. *Changes in the Annual Budget*. – ….A supplemental budget may also be enacted in times of public calamity by way of budgetary realignment to set aside appropriations for the purchase of supplies and materials or the payment of services which are exceptionally urgent or absolutely indispensable to prevent imminent danger to, or loss of, life or property, in the jurisdiction of the local government unit or in other areas declared by the President in a state of calamity. Such ordinance shall clearly indicate the sources of funds available for appropriations, as certified under oath by the local treasurer and local accountant and attested by the local chief executive, and the various items of appropriations affected and the reasons for the change.

Besides, Local Government budgets are supposed to provide for these emergencies. Section 324

> Section 324. *Budgetary Requirements*. - The budgets of local government units for any fiscal year shall comply with the following requirements….
>
> (d) Five percent (5%) of the estimated revenue from regular sources shall be set aside as an annual lump sum appropriation for unforeseen expenditures arising from the occurrence of calamities: Provided, however, That such appropriation shall be used only in the area, or a portion thereof, of the local government unit or other areas declared by the President in a state of calamity.

A. FINANCIAL RESTRICTIONS

> Section 337. *Restriction upon Limit of Disbursements*. – xxx In case of emergency arising from a typhoon, earthquake, or any other calamity, the sanggunian concerned may authorize the local treasurer to continue making disbursements from any local fund in his possession in excess of the limitations herein provided, but only for such purposes and amounts included in the approved annual budgets. xxx

B. DUTIES OF OFFICIALS

Of course, local officials are expected to respond to calamities. Punong barangays, under Section 389 for example, have the power to "[o]rganize and lead an emergency group whenever the same may be necessary for the maintenance of peace and order or on occasions of emergency or calamity within the barangay."

The Municipal Mayor for her part has the following powers:

> Section 444. The Chief Executive: Powers, Duties, Functions and Compensation.
>
> (b) For efficient, effective and economical governance the purpose of which is the general welfare of the municipality and its inhabitants pursuant to Section 16 of this Code, the municipal mayor shall:
>
> > (1) Exercise general supervision and control over all programs, projects, services, and activities of the municipal government, and in this connection, shall....
> >
> > > (vii) Carry out such emergency measures as may be necessary during and in the aftermath of man-made and natural disasters and calamities....

The same is true for the City Mayor, who has the following powers:

> Section 455. Chief Executive; Powers, Duties and Compensation. (City Mayor)
>
> (b) For efficient, effective and economical governance the purpose of which is the general welfare of the city and its inhabitants pursuant to Section 16 of this Code, the city mayor shall:
>
> (1) Exercise general supervision and control over all programs, projects, services, and activities of the city government. and in this connection, shall:
>
> (vii) Carry out such emergency measures as may be necessary during and in the aftermath of man-made and natural disasters and calamities....

There is also a similar provision for Governors:

> Section 465. The Chief Executive: Powers, Duties, Functions, and Compensation.
>
> (b) For efficient, effective and economical governance the purpose of which is the general welfare of the province and its inhabitants pursuant to Section 16 of this Code, the provincial governor shall:
>
> (1) Exercise general supervision and control over all programs, projects, services, and activities of the provincial government, and in this connection, shall....
>
> (vii) Carry out such emergency measures as may be necessary during and in the aftermath of man-made and natural disasters and calamities....

Appointive local officials have duties that geared towards preventing disasters or addressing its impacts. The Environment and Natural Resources Management Officer's duties are specified under Section 484:

> Section 484. *Qualifications, Powers and Duties*.
>
> (b) The environment and natural resources management officer shall take charge of the office on environment and natural resources and shall:
>
> (1) Formulate measures for the consideration of the sanggunian and provide technical assistance and support to the governor or mayor, as the case may be, in carrying out measures to ensure the delivery of basic services and provision of adequate facilities relative to environment and natural resources services as provided for under Section 17 of this Code;
>
> (2) Develop plans and strategies and upon approval thereof, by the governor or mayor, as the case may be, implement the same, particularly those which have to do with environment and natural resources programs and projects which the governor or mayor is empowered to implement and which the sanggunian is empowered to provide for under this Code;
>
> (3) In addition to the foregoing duties and functions, the environment and natural resources officer shall:
>
> (i) Establish, maintain, protect and preserve communal forests, watersheds, tree parks, mangroves, greenbelts and similar forest projects and commercial forest, like industrial tree farms and agro-forestry projects....

> (vi) Coordinate with government agencies and non-governmental organizations in the implementation of measures to prevent and control land, air and water pollution with the assistance of the Department of Environment and Natural Resources;
>
> (4) Be in the frontline of the delivery of services concerning the environment and natural resources, particularly in the renewal and rehabilitation of the environment during and in the aftermath of man-made and natural calamities and disasters....

The Health Officer under Section 478, shall "be in the frontline of health services, delivery, particularly during and in the aftermath of man-made and natural disasters and calamities." In case of widespread public health dangers, the National Government may step in for a maximum period of six months

> Section 105. Direct National Supervision and Control by the Secretary of Health. - In cases of epidemics, pestilence, and other widespread public health dangers, the Secretary of Health may, upon the direction of the President and in consultation with the local government unit concerned, temporarily assume direct supervision and control over health operations in any local government unit for the duration of the emergency, but in no case exceeding a cumulative period of six (6) months. With the concurrence of the government unit concerned, the period for such direct national control and supervision may be further extended.

The Administrator under Section 480 shall be "in the frontline of the delivery of administrative support services, particularly those related to the situations during and in the aftermath of man-made and natural disasters and calamities."

> Section 481 provides that the Legal Officer shall "be in the frontline of protecting human rights and prosecuting any

> violations thereof, particularly those which occur during and in the aftermath of man-made or natural disasters or calamities."

The Architect too, under Section 485 shall be "be in the frontline of the delivery of services involving architectural planning and design, particularly those related to the redesigning of spatial distribution of basic facilities and physical structures during and in the aftermath of man-made and natural calamities and disasters."

Not surprisingly, the Agriculturist under Section 482 shall "be in the frontline of delivery of basic agricultural services, particularly those needed for the survival of the inhabitants during and in the aftermath of man-made and natural disasters."

C. LEGISLATIVE POWERS

To reiterate, local legislative councils have a mandate to protect the environment. An examination of Section 17 shows that a Province's duties include:

Pursuant to national policies and subject to supervision, control and review of the DENR, enforcement of forestry laws limited to community-based forestry projects, pollution control law, small-scale mining law, and other laws on the protection of the environment; and mini-hydroelectric projects for local purposes…

Again, virtually every local government has duties pertaining to the protection of the environment. A Municipal Council has the following functions under Section 447:

> Adopt measures to protect the inhabitants of the municipality from the harmful effects of man-made or natural disasters and calamities and to provide relief services and assistance for victims during and in the aftermath of said disasters or calamities and their return to productive livelihood following said events....

City Councils are mandated by Section 458 to:

> Adopt measures to protect the inhabitants of the city from the harmful effects of man-made or natural disasters and calamities, and to provide relief services and assistance for victims during and in the aftermath of said disasters or calamities and their return to productive livelihood following said events…

The Provincial legislators under Section 468 shall:

> Adopt measures to protect the inhabitants of the province from harmful effects of man-made or natural disasters and calamities, and to provide relief services and assistance for victims during and in the aftermath of said disasters and calamities and their return to productive livelihood following said events.

REMEDIES UNDER OTHER ENVIRONMENTAL LAWS AND RULES

La Vina, et al.[315] point to other laws that afford legal remedies to those who suffer the impacts of mining. They list the following:

Under the Clean Air Act and the Solid Waste Management Act, citizens may seek relief for environmental violations through "citizen suits," even though they may not be directly affected or damaged by the prohibited act or omission. "Any citizen" may thus file "an appropriate civil, criminal or administrative action in the proper courts or bodies for violation of these Acts or their IRR."

Both statutes also provide for the dismissal of "Suits and Strategic Legal Actions Against Public Participation" or SLAPPs, which are suits brought against a person "to harass, vex, exert undue pressure or stifle such legal recourses of the person complaining of or enforcing the provisions" of either Act. Many cases filed by large-scale mining companies against anti-mining activists have been identified as SLAPPs. Persons against whom a SLAPP is filed, upon determination of the nature of the suit as such, are entitled to an award of attorney's fees and double damages aside from having the case against them dismissed. These provisions enable "ordinary" persons and organizations – those who may otherwise not have legal standing to sue – to do so in the general interest of the public to a healthful environment, and to be protected from false and malicious lawsuits in doing so.

Persons may turn directly to the judiciary for relief in cases of environmental damage arising from mineral operations. The Rules of Procedure for

315 Antonio G.M. La Vina, Alaya M. de Leon and Gregorio Rafael P. Bueta, *Legal Responses to the Environmental Impact of Mining*, 86 PHIL. L.J. 284, 327-328 (2012).

Environmental Cases[316] "govern the procedure in civil, criminal and special civil actions before [Trial Courts] involving enforcement or violations of environmental and other related laws, rules and regulations.

The Rules for Environmental Cases introduced several concepts and remedies which tilt the balance of "environmental justice" in favor of environmental advocates and ordinary citizens. These may be utilized to address mining-related violations in conjunction with remedies under other laws, or as an alternative to such:

> The *Precautionary Principle* is made applicable to the rules of evidence in environmental cases "[w]hen there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect. The constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt". This is a unique instance where evidentiary uncertainty does not work against a litigant but instead may be invoked to "avoid or diminish" "threats of serious and irreversible damage to the environment".
>
> The Rules for Environmental Cases allow the invocation of *SLAPP* as a defense in cases filed against "a person involved in the enforcement of environmental laws, protection of the environment, or assertion of environmental rights". The Rules make SLAPP available as a defense in the enforcement of *any* environmental policy, law, rule, or regulation.
>
> The *Citizen Suit* provision, as formulated in the Rules for Environmental Cases, essentially lowers the standing requirements for filing environmental lawsuits. The provision allows "any Filipino citizen, in representation of others, including minors and generations yet unborn, [to] file an action to enforce rights or obligations under environmental laws". It addresses the usual difficulty of fulfilling standing requirements in environmental cases, for example in showing that the injury suffered by a plaintiff due to

316 A.M. No. 09-6-8-SC, effective on April 29, 2010 (hereafter referred to as the "Rules for Environmental Cases").

climate change is "fairly traceable to the action" of a mineral contractor or permittee….

The Rules for Environmental Cases institutionalize the *Writ of Continuing Mandamus* first laid down by the Court in *MMDA v. Concerned Residents of Manila Bay*. This provision authorizes courts to require agencies, instrumentalities, or officers of the government, who fail to fulfill their mandates under environmental laws, "to perform an act or series of acts until the judgment is fully satisfied," and to submit periodic reports to the court regarding compliance with its order

Through an *Environmental Protection Order* (EPO), plaintiffs may petition a court to direct or enjoin "any person or government agency to perform or desist from performing an act in order to protect, preserve or rehabilitate the environment". In matters of "extreme urgency" where the victim is bound to "suffer grave injustice and irreparable injury," the court is authorized to issue a Temporary EPO *ex parte*, effective for 72 hours, within which it must conduct a summary hearing to determine whether or not the order may be extended.

The Rules also introduced the *Writ of Kalikasan*, a special civil action brought directly to the Court of Appeals or the Supreme Court, available to persons or entities "whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation by an unlawful actor omission of a public official or employee, or private individual or entity, involving environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces".

The *Writ of Kalikasan* established by the Rules is particularly significant because it is applicable to cases that "transcend geographical boundaries," overcoming the limitation of trial courts only being able to hear and decide on violations within their territorial jurisdictions. The Writ also provides a very generalized basis for its invocation, allowing the redress of a wide range of violations, including those resulting

> from mining operations. Upon grant of the writ, the issuing court may direct the respondent to cease acts or omissions resulting in environmental damage; to protect, preserve, rehabilitate or restore the environment; to monitor strict compliance with the decision and orders of the court; to make periodic reports on the execution of the final judgment; and such other reliefs related to the protection of the environment or people's environmental rights.[317]

The Environmental Rules were "a response to the long felt need for more specific rules that can sufficiently address the procedural concerns that are peculiar to environmental cases." The Environmental Rules apply to cases concerning environmental law in most trial courts across the country, including 117 trial courts specifically designated as "Special Courts" for environmental cases in 2008.[318] Ristroph writes:

> The Environmental Rules are designed to expedite proceedings. Courts must prioritize the adjudication of environmental cases over other kinds of cases, and timeframes for pleadings and decisions are truncated. The effort to expedite cases is notable, since litigation in Philippine courts can drag on for years.
>
> The Environmental Rules allow citizen suits to be filed in any environmental case. Citizen plaintiffs can defer payment of filing fees until after the judgment, and they may recover attorneys fees and litigation expenses if successful. They typically cannot recover damages, although the defendant may be required to pay for restoration.
>
> Plaintiffs can seek injunctive relief in the form of ex parte Temporary Environmental Protection Orders (TEPOs), as well as long-term Environmental Protection Orders (EPOs).

317 Antonio G.M. La Vina, Alaya M. de Leon and Gregorio Rafael P. Bueta, *Legal Responses to the Environmental Impact of Mining*, 86 Phil. L.J. 284, 328-330(2012) citations omitted.

318 Elizabeth Barrett Ristroph, *The Role of Courts in Establishing the Environmental Rule of Law*, 42 Envtl. L. Rep. News & Analysis 10866, 10879-10880 (2012).

Orders can require defendants to take action to protect or restore the environment.

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

Another innovation of the Environmental Rules is the writ of *kalikasan* (nature), a special civil action for indefinite injunctive relief designed to address unlawful acts or omissions by anyone that threaten to violate the constitutional right to a balanced and healthful ecology. The unlawful act or omission must involve environmental damage that prejudices the life, health, or the property of inhabitants in two or more cities or provinces. A petition for the writ can be filed with the Supreme Court or the Court of Appeals by anyone for no fee. Relief may include monitoring and periodic reports to ensure enforcement of the judgment of the court. The writ may also be used by environmental litigants to compel information necessary to prove their case. Thus, it can serve a function similar to a motion to compel in the United States, or a request under the U.S. Freedom of Information Act….

By itself, the writ of *kalikasan* may be mostly symbolic, since it does not impose substantial costs on defendants. Still, the symbolism of a "Writ of Nature" is important, and the writ can allow for quick relief while actions with more significant consequences are pending.[319]

319 Id. at 10879-10880.

CONCLUSIONS

Local stakeholders have access to a legal arsenal that they can exploit to protect the environmental and social impacts of mining. The legal regime was a response to the highly centralized approach to resource extraction adopted by the Marcos regime. Today, stakeholders should be consulted before these activities can proceed. They can legislate to protect their interests. They share in the proceeds from the exploitation of resources found within their territories. The whole idea behind the post-Marcos framework was to build a partnership between the national and the local governments. It is intended to reduce animosity. If properly executed, the legal system should raise the issues that local communities want addressed.

Local communicates have been asked to bear the burden of resource extraction. Irresponsible mining practices have poisoned our waters, displaced communities, or threatened our wildlife. The new paradigm

These laws are relatively new; their implementation is far from perfect. There is obvious resistance from mining companies and even the national government has displayed a reluctance to implement the legal regime fully. The task then is for everyone else—local officials, communities, non-government and peoples' organizations to step up and enforce the system. The task at hand is to force the industry and the national government to play by the new rules.

The good news is that this pro-environment, pro-autonomy, and pro-people interpretation of the law is finding an ally in the judiciary. The last section of this book illustrates how recent the Supreme Court is ruling consistently in favor of local governments when the environment is at stake. We have added a separate section just to discuss these decisions.

ALLOCATIONS FOR LGUS
Special Shares of LGUs

The Department of Budget and Management (DBM) has released a total of P836.8 million to different regions nationwide as part of the 40 percent share of local government units (LGUs) from national wealth collected from mining taxes and government collections for the use of the country's energy resources.[320]

Of the P836.8-million-release, LGU shares from the utilization of the country's energy resources—namely, petroleum, coal, geothermal, hydrothermal, and wind operations—amount to P720.2 million. Another P116.6 million was derived from the collection of excise taxes in mining.

The releases were charged under the Allocations for LGU - Special Shares of LGUs in the Proceeds of National Taxes, in the 2014 General Appropriations Act.

"Primarily, the fund release will augment the income of our LGUs, complementing their local tax revenues and their Internal Revenue Allotment (IRA) shares from the national government. Besides that, the LGU share from mining taxes and collections from energy resources will boost our local governments' capacity to fund programs and projects that will benefit their constituents. This is especially true in terms of health, education, and infrastructure services," Sec. Florencio "Butch" Abad said.

320 *Energy, mining taxes tapped for P837-M release to LGUs*, Official Gazette, May 18, 2014 available at http://www.gov.ph/2014/05/18/energy-mining-taxes-tapped-for-p837-m-release-to-lgus/.

To the right is the breakdown of the amount received by LGUs from taxes collected from energy resources:

Of the 12 regions, the province of Antique in Region VI (Western Visayas) will receive the largest energy resource shares at P580.9 million, covering the municipality of Caluya and barangay Semirara. This is followed by the province of Leyte in Region VIII (Eastern Visayas) which will receive P55.5 million, covering the city of Ormoc and the municipality of Kanang and, effectively, the barangays respectively under them: Hiluctugan, Lim-ao, Rizal, Tongonan (Ormoc City), Lake Danao, and Tongonan (Kananga).

On the next page is the breakdown of the amount received by LGUs from mining taxes collected in the 1st quarter of FY 2013:

Region	Amount
I	P119,840
II	112,766
IV-A	5,242,632
IV-B	39,648,691
V	4,649,507
VI	580,863,489
VII	27,064,482
VIII	55,543,864
IX	902,867
X	107,876
XII	4,050,580
CARAGA	1,903,646
TOTAL	**P720,210,240**

Table I Amount received by LGUs from taxes colltected from energy resources:

Region V (Bicol Region) will receive P37.8 million, covering the provinces of Albay and Masbate, and benefiting two municipalities and nine barangays: Pagcolbon (Albay), Amoroy, Balawing, Bangon, Capsay, Lanang, Panique, Puro, and Syndicate (Masbate). This is closely followed by Region VII (Western Visayas), which will receive P30.3 million for the provinces of Bohol and Cebu, benefiting two cities, three municipalities, and five barangays in total.

"It bears noting that through the Open Government Partnership (OGP), we have embarked on the Philippine Extractive Industries Transparency Initiative (PH-EITI) so we can become even more transparent about how public funds move in and across the country's extractive industries. For example, we now disclose the revenues received by the government from extractive industries and the contribution of these industries to local economies.

"Through EITI, we intend to reinforce trust and openness between firms and host communities and, ultimately, empower our LGUs to fully own and take part in the process of inclusive growth and development," the budget chief added.

Region	Amount
CAR	P 4,661,221
I	176,105
III	2,295,358
IV-A	2,630,854
IV-B	9,496,609
V	37,815,235
VII	30,349,030
IX	4,051,904
X	284,623
XI	2,852,107
XIII	22,025,602
TOTAL	**P116, 638, 648**

Table II Amount received by LGUs from mining taxes collected in the 1st quarter of FY 2013

RECENT JURISPRUDENCE

A. LEAGUE OF PROVINCES V. DEPARTMENT OF ENVIRONMENT[321]

Though local autonomy has been granted by the Constitution to the local government units (LGUs), this is limited to administrative autonomy only. This was discussed in the case of *League of Provinces v. Department of Environment.*[322]

The *League of Provinces* case began with an application for Financial Technical Assistance Agreement (FTAA) by Golden Falcon Corporation (Golden Falcon). Such application was denied by both the Regional Office of the Mines and Geosciences Bureau (MGB) and on appeal by its Central Office.

However, while Golden Falcon's appeal was pending, Eduardo Mercado, Bendicto Cruz, Gerardo Cruz, and Liberato Sembrano filed their respective Applications for Quarry Permits (AQP) with the Provincial Environment and Natural Resources Officer (PENRO) of Bulacan which covered the same area of Golden Falcon's FTAA Application.

Subsequently, Atlantic Mines and Trading Corporation (AMTC) filed an Application for Exploration Permit with the PENRO of Bulacan which also covered the same area of Golden Falcon's FTAA Application.

When the decision on Golden Falcon's application became final, the AQPs (which were converted to Applications for Small – Scale Mining Permits or

321 G.R. No. 175368, April 11, 2013

322 *Id.*

SSMPs) were deliberated by the Provincial Mining Regulatory Board (PMRB) and were endorsed to the Governor of Bulacan who issued the small-scale mining permits.

AMTC appealed this decision to the DENR Secretary. It argued that the small-scale mining permits could not be issued because at the time the applications were filed, the area was not yet open for application. The DENR Secretary agreed with this and consequently nullified the permits issued by the Provincial Governor.

The League of Provinces (League) questioned this decision and filed a petition for certiorari, prohibition and mandamus with the Supreme Court.

The League argued that both Section 17 (b) (3) (iii) of R.A. No. 7061[323] (The Local Government Code of 1991) and Section 24 of R.A. No. 7076[324] (People's Small-Scale Mining Act of 1991) are unconstitutional for granting the DENR and the DENR Secretary the power of control over local government units (LGUs).

It cited Article X, Section 4 of the 1987 Constitution and Section 25 of R.A. No. 7061 and stated that these provisions only gave the President (and

323 Republic Act No. 7160 (1991) §17 (b) (3) (iii). The provision reads:
Basic Services and Facilities –
(b) Such basic services and facilities include, but are not limited to the following:
(3) For a Province:
(iii) Pursuant to national policies and subject to supervision, control and review of the DENR, enforcement of forestry laws limited to community – based forestry projects, pollution control law, small - scale mining law, and other laws on the protection of the environment; and mini – hydro electric projects for local purposes

324 Republic Act No. 7076 (1991) § 24. The provision reads:
Provincial/City Mining Regulatory Board – There is hereby created under the direct supervision and control of the Secretary a provincial/city mining regulatory board, herein called the Board, which shall be the implementing agency of the Department, and shall exercise the following powers and functions, subject to the review by the Secretary:
(a) Declare and segregate existing gold – rush areas for small – scale mining;
(b) Reserve future gold and other mining areas for small – scale mining;
(c) Award contracts to small – scale miners
(d) Formulate and implement rules and regulations related to small – scale mining
(e) Settle disputes, conflicts or litigations over conflicting claims within a people's small – scale mining area, an area that is declared a small – mining; and
(f) Perform such other functions as may be necessary to achieve the goals and objective of this Act.

Executive Department and her alter-egos) the power of supervision over LGUs. Such power was defined as the power of a superior officer to see to it that lower officers perform their function in accordance with the law. In contrast, the power of control was defined as the power of an officer to alter or modify what a subordinate officer has done in performance of his duties and to substitute the judgment of the former for the latter. The League argued that the DENR Secretary acted beyond mere executive supervision when he nullified the permits granted by the Provincial Governor.

The League further claimed that the power to regulate small-scale mining was a devolved power granted to all provinces under the Local Government Code. Therefore, its exercise did not require departmental approval.

However, the Supreme Court ruled otherwise.

Under Article XII, Section 2, Paragraph 1 of the Constitution, "the exploration, development and utilization of natural resources shall be under the full control and supervision of the State." Section 3 of the same provision states that "the Congress may, by law, allow small – scale utilization of natural resources by Filipino citizens." The department tasked to carry out this constitutional mandate has been given to the DENR under Title XIV, Chapter 1 Section 2 of the Administrative Code of 1987.

In construing these laws together, the Court ruled that the enforcement of small-scale mining laws in the provinces is made subject to the supervision, control and review of the DENR. This is clear under both the Local Government Code and the People's Small-Scale Mining Act as implemented by the DENR Secretary in coordination with other local government agencies.

Contrary to the claim of the League, this power did not encroach on the constitutional guarantee of local autonomy because the Constitution only grants administrative autonomy of LGUs, or the decentralization of autonomy. The Constitution did not make local governments sovereign with the State. Although administrative autonomy may involve devolution of powers, this was made subject to the limitations as provided in national policies and those provided under the Local Government Code.

The Court also agreed with the DENR Secretary's decision. It held that the area was open for application only fifteen (15) days after the receipt of

Golden Falcon of the resolution of their appeal. Since the AQPs were filed when the area was still closed to mining operations, the permits issued were void. Furthermore, the conversion of the AQPs to SSMPs was done in violation of Section 4 of R.A. No. 7076 since these are two different applications. It was also beyond the authority of the Provincial Governor to issue the permits because the area was never proclaimed as part of the 'People's Small-Scale Mining Program' under Section 43 of R.A. No. 7942.

B. PROVINCE OF CAGAYAN V. LARA[325]

The case of *Province of Cagayan v. Lara*[326] emphasized the importance of securing local government permits before mining operations may commence.

In this case, Joseph Lara's representative (Jovy Balisi) went to the Cagayan Provincial Treasurer's Office to pay for extraction and other fees for Lara's quarrying operations. However, she was directed to first secure an order of payment from the Environmental Natural Resources Officer, Robert Adap (ENRO Adap). ENRO Adap also refused to issue an order, which prompted Lara's counsel (Atty. Casauay) to pay the extraction and other fees to the Treasurer's Office.

Lara commenced his quarrying operations but trucks loaded with sand and gravel were extracted from the Permit Area and impounded by local officials. As a result, Lara filed an action for injuction and for the issuance of a writ of preliminary injunction against the officials.

Despite this, Lara received a Stoppage Order from the Provincial Governor Alvaro Antonio (Gov. Antonio). Lara was directed to stop his quarrying operations for the following reasons: (a) the ISAG Permit was not in accordance with R.A. No. 7942 (Philippine Mining Act of 1995) and its IRR, (b) Lara failed to pay the fees under Provincial Ordinance No. 2005 – 07 and (c) Lara failed to secure all the necessary permits from the local government unit as required by the ECC.

325 G.R. No. 188500, July 24, 2013.v

326 Province of Cagayan v. Lara, G.R. No. 188500, July 24, 2013.

Lara thus filed an action for injuction and damages with an urgent and ex-parte motion for the issuance of a temporary restraining order and/or preliminary injunction before the Regional Trial Court.

The RTC made permanent the writ of preliminary injuction. It ruled that Lara legally acquired the right to operate his quarrying business, as evidenced by the ISAG Permit and ECC.

Consequently, Gov. Antonio and ENRO Adap filed this Petition for Review with the Supreme Court.

The Court began by stating the two requisites to issue a writ of injunction. These are (a) the existence of a right to be protected and (b) acts which are violative of the said right.

In this case, Lara acquired no right to operate his quarrying business.

Section 138 (2) of R.A. No. 7160 (Local Government Code of 1991) required that before an entity may commence a quarrying business, such entity must irst secure a governor's permit. This was reinforced by Article H Section 2.04 of Provincial Ordinance No. 2005-07.

It was clear in the records that Lara failed to secure such permit, Therefore, he had no right to conduct his quarrying business.

C. RUZOL V. SANDIGANBAYAN[327]

The case of *Ruzol v. Sandiganbayan*[328] involved permits to transport to be issued by then Mayor Leovegildo Ruzol of General Nakar, Quezon.

During his term, he organized a Multi-Sectoral Consultative Assembly with the purpose of regulating and monitoring the transportation of salvaged forest products within the vicinity of General Nakar. It was agreed upon by the

327 G.R. No. 186739-960, April 17, 2013.

328 Ruzol v. Sandiganbayan, G.R. No. 186739-960, April 17, 2013.

participants that the Mayor should issue a Permit to Transport after payment of the corresponding fees to the municipal treasurer.

Accordingly, two hundred twenty-one permits were issued. Forty-three were signed by Mayor Ruzol while the reset were signed by the municipal administrator, Guillermo Saiduria. Subsequently, 221 Informations against them were filed with the Sandiganbayan for a violation of Article 177 of the Revised Penal Code for Usurpation of Authority or Official Functions. It was alleged in the Informations that the authority to issue the permits were with the Department of Environment and Natural Resources (DENR).

Former Mayor Ruzol argued that R.A. No. 7160 (Local Government Code of 1991) granted him, as Chief Executive of the municipality, the express and necessary implied powers for the efficient and effective governance of the local government unit (LGU). Furthermore, the general welfare clause in Section 16 of R.A. No. 7160 was a 'massive grant of authority that enables LGUs to perform or exercise just about any power that will benefit their local constituencies.'

He claimed that R.A. No. 7160 has devolved certain DENR functions to the LGU and that the subject permits in this case were issued pursuant to such function.

In addition, he argued that the permits were issued as an incident to the payment of Transport Fees levied by the municipality for the use of local public roads for the transport of salvaged products. He stated that Article X, Section 5 of the 1987 Constitution and Sections 129 and 186 of R.A. No. 7160 granted the municipality the power to levy these fees.

He asserted that these permits were never meant to be a substitute for the Certificate of Timber Origin or Certificate of Lumber Origin which the DENR had to issue for the transport of timber and lumber. He also claimed that the DENR expressly authorized the issuance of the transport permits.

The Sandiganbayan acquitted Sabiduria but found Ruzol guilty.

The Sandiganbayan invoked Section 5 of Presidential Decree No. 705 (Revised Forestry Code of the Philippines) and Sections 4 and 5 (d), (j), (k) and (n) of Executive Order No. 192, Series of 1987 (Reorganization Act of the Department of Environment and Natural Resources) in ruling that the DENR had the

authority to issue transportation permits. It also cited DENR Administrative Order No. 2000-78 (DAO 2000-78) which required a permittee to secure a Wood Recovery Permit from the DENR to gather/retrieve and dispose abandoned logs and held that this illustrates that the DENR is the sole agency vested with authority to regulate the transportation of salvaged forest products.

The court also stated that the monitoring and regulating of salvaged forest products is not one of the functions devolved upon LGUs under Section 17 (a) (2) (ii) of R.A. No. 7160. It also referred to DENR Administrative Order No. 30, Series of 1992 (DAO 1992-30) which enumerates the functions of the DENR devolved upon LGUs which does not include the subject permits of this case.

However, the Supreme Court disagreed with the Sandiganbayan's ruling and refused to 'subscribe to this postulate suggesting exclusivity.'

While the DENR is the primary government instrumentality charged with the mandate of promulgating rules and regulations for the protection of the environment and conservation of natural resources, this cannot be taken to mean that they are the sole or exclusive instrumentality that may do so.

It is clear under the general welfare clause provided in Section 16 of R.A. No. 7160 that municipal governments have the authority to enact ordinances and issue regulations which are necessary to carry out the responsibilities conferred upon them by law and to promote the general welfare of the municipality and its inhabitants.

Furthermore, DAO 1992-30 provided that the monitoring and regulation of salvaged forest products through the issuance of appropriate permits is a shared responsibility of the DENR and the LGUs. This is also reiterated under Section 1 of the Joint Memorandum Circular No. 98-01 (JMC 1998-01).

Accordingly, the Permit to Transport was not a usurpation of the DENR's authority rather, an additional measure which was meant to complement DENR's duty to regulate and monitor the resources within the LGU's territorial jurisdiction.

Despite such grant of authority, the Permits to Transport were still invalid because former Mayor Ruzol failed to comply with the procedural requirements of law for its enforcement. As provided in Section 17 of R.A. No. 7160, the

LGU's authority to manage and control communal forests should be 'pursuant to national policies and is subject to supervision, control and review of DENR.'

Under Section 8.4 of JMC 1990-01, the following requirements must be accomplished before an area is declared a communal forest: (1) an identification of potential communal forest areas within the geographic jurisdiction of the concerned city/municipality, (2) a forest land use plan which shall indicated the site and location of the communal forest, (3) a request to the DENR Secretary through a resolution passed by the Sangguniang Bayan concerned, and (4) an administrative order issued by the DENR Secretary declaring the identified area as a communal forest.

In this case, the records did not show that these requirements were complied with. Assuming these were complied with, it was still necessary to obtain the Wood Recovery Permit from the DENR before obtaining the Permit to Transport issued by the LGU.

However, former Mayor Ruzol cannot be held guilty for Usurpation of Official Functions under the Revised Penal Code. The Court discussed the two ways to commit this crime: (1) by knowingly and falsely representing himself to be an officer, agent or representative of any department or agency of the Philippine Government or of any foreign government; or (2) under pretense of official position, shall perform any act pertaining to any person in authority or public officer of the Philippine Government or any foreign government, or any agency thereof, without being lawfully entitled to do so. The former constitutes the crime of usurpation of authority, while the latter act constitutes the crime of usurpation of official functions

The accusation was based on the theory that the DENR was the only government instrumentality that can issue permits to transport salvage forest products. As was discussed, this theory is wrong. Furthermore, former Mayor Ruzol acted in good faith which, in the case of *People v. Hilvano*, was ruled to be a defense in criminal prosecutions for usurpation of official functions. The Court stated that the country's judicial system follows the principle that "evil intent must unite with the unlawful act for a crime to exist" because "there can be no crime when the criminal mind is wanting."

It is important to note that the Court expressly stated that the issue of the validity of the Permits to Transport is only subsidiary and resolved this case only in this instance, *pro hac vice*, in favor of former Mayor Ruzol's acquittal.

D. BORACAY FOUNDATION, INC. V. THE PROVINCE OF AKLAN[329]

The case of *Boracay Foundation, Inc. v. The Province of Aklan*[330] discussed the necessity of prior consultation and prior approval by local government units (LGUs) over projects to be implemented by the national government in their respective territories.

In this case, the Province of Aklan built the Caticlan Jetty Port and Passenger Terminal at Barangay Caticlan to be the main gateway to Boracay. It also built the Cagban Jetty Port and Passenger Terminal to be the receiving end for tourists in Boracay. Subsequently, the Province filed an application with the DENR for a foreshore lease of areas along the shorelines of Barangay Caticlan.

However, the Sangguniang Baarangay of Caticlan, Malay Municipality issued Resolution No. 12, s. 2008 which manifested their opposition to the application and the fact that that the Province failed to conduct any consultations on the matter.

Subsequently, the Sangguniang Panlalawigan of Aklan approved Resolution No. 2008-369 which authorized Governor Marquez to enter into negotiations under Section 299 of R.A. No. 7160 with the following priority projects: (a) renovation/rehabilitation of the Caticlan/Cagban Passenger Terminal Building and Jetty Ports and (b) reclamation of a portion of Caticlan foreshore for commercial purposes.

Gov. Marquez then sent a letter to the Philippine Reclamation Authority (PRA) which expressed the interest of the Province to reclaim 2.64 hectares of land along the foreshores of Barangay Caticlan. The Province also entered into an agreement with the Financial Advisor/Consultant that won in the bidding process to conduct the necessary feasibility study (Environmental Impact Assessment or EIA) of the Renovation/Rehabilitation of the Caticlan Passenger Terminal Building and Jetty Port, Enhancement and Recovery of Old Caticlan Coastline, and Reclamation of a Portion of Foreshore for

329 G.R. No. 196870, June 26, 2012.

330 Boracay Foundation, Inc. v. The Province of Aklan, G.R. No. 196870, June 26, 2012.

Commercial Purposes (The Marina Project). The study was completed and Gov. Marquez submitted an Environmental Report and Monitoring Program (EPRMP) to DENR-EMB RVI as the initial step to secure an Environmental Compliance Certificate (ECC).

However, the Sangguniang Bayan of the Municipality of Malay issued Resolution No. 044, which manifested their opposition to the foreshore lease application. It said that the application was for the benefit of the Province at the expense of the Municipality of Malay.

As a result of the feasibility study, the Province then decided to change the proposed reclamation area from 2.64 hectares to 40 hectares in the areas adjacent to the jetty ports to maximize the utilization of resources. Its Sangguniang Panlalawigan enacted Resolution 2009-299 which authorized Governor Marquez to enter into a Memorandum of Agreement (MOA) with the PRA for the reclamation of 40 hectares.

The PRA approved the reclamation project in Resolution No. 4094. The DENR also issued the necessary ECC.

The Province then conducted "information education campaigns" which provided the venue for interaction and dialogue with the public.

However, the Municipality of Malay enacted Resolution No. 046, Series of 2010 which reiterated its strong opposition to the Marina Project and denied the Province' request for a favorable endorsement.

The Boracay Foundation (a non-stock domestic corporation with members consisting of owners of resorts, restaurants and hotels, residents, and community organizations) informed PRA of its opposition to the Marina Project through a letter. It claimed that the documents submitted by the Province to obtain the ECC failed to deal with coastal erosion concerns in Boracay, according to University of the Philippines Marine Science Institute expert, Dr. Porfirio Alinio.

Despite this, the MOA was confirmed by the PRA Board of Directors and wrote to the Province to proceed with the reclamation phase 1 of site 1 of it proposed project.

Consequently, the Boracay Foundation filed a Petition for Environmental Protection Order/Issuance of the Writ of Continuing Mandamus to stop its implementation. As a result, the Supreme Court issued a Temporary Environmental Protection Order (TEPO).

The Boracay Foundation claimed that the classification of the projects is not single but is in fact co-located because it is on two sites and the Province only applied for an ECC to conduct Phase 1. As such, the Province abused the Revised Procedural Manual for DENR Administrative Order No. 3, Series of 2003 (DENR DAO 2003-30) which required a Programmatic Environmental Impact Statement (PEIS) or Programmatic Environmental Performance Report Management Plan (PEPRMP) for projects within Environmentally Critical Areas (ECA). The Province also failed to perform a full EIA which was required for any project involving Boracay because it is an ECA.

The Boracay Foundation also argued that the DENR-EMBRVI disregarded its duty to ensure the protection of the environment because it performed only a superficial review of the documents submitted by the Province for an ECC. Thus, the DENR ignored the adverse environmental impact to Boracay.

Furthermore, the PRA had required the Province to obtain the favourable endorsement of the LGUs of Baranagay Caticlan and Malay Municipality pursuant to the consultation procedures under the Local Government Code. Not only that, Sections 26 and 27 of the Code required consultations if the project may cause pollution, climactic change, depletion of renewable resources, etc. The Boracay Foundation argues that the consultations made after the ECC had been issued and after the MOA was executed were not consultations but mere "project presentations."

On the other hand, the Province claimed that the petition is premature because it failed to exhaust administrative remedies provided in Section 6 of DENR DAO 2003-30.

Also, that it was erroneous to consider the area as co-located because the two sites were separated by a body of water and that since it is a 'stand alone project' and an expansion of the existing jetty project, the Province was required to perform an EPRMP which is sanctioned under Item No. 8 (b), page 7 of DENR DAO 2003-30. Assuming that it was erroneously categorized,

the Province argued that this was not a final determination because the DENR-EMB RVI had the final decision on the matter.

Furthermore, the Province claimed that the application for reclamation of 40 hectares is advantageous to the Provincial Government.

Moreover, it asserted that the consultation and favourable endorsement contemplated under the Code were merely tools to seek advice and not a power given to the LGUs to unilaterally approve or disapprove any government projects. They claimed to have conducted the consultations provided in Sections 26 and 27.

Lastly, the Province argued that the petition is now moot and academic because the Sangguniang Barangay of Caticlan and the Sangguniang Bayan of Malay have given their favourable endorsements.

The Supreme Court ruled in favor of Boracay Foundation, Inc.

Firstly, the Court held that the resolutions of the two LGUs are not enough to render moot the petition because there are explicit conditions imposed that must be complied with by the province. What the resolutions endorsed was the reclamation only while the petition is opposing the construction of the building and the entire project.

Secondly, it was ruled that the petition cannot be dismissed for failure to exhaust administrative remedies. Such rule did not apply in this case because the appeal provided under Section 6, Article II of DENR DAO 2003-30 applies only if the person or entity charged with the duty to exhaust the administrative remedy of appeal to the appropriate government agency has been a party or has been made a party in the proceedings wherein the decision to be appealed was rendered. In this case, the Boracay Foundation was never made a party to the proceedings before DENR-EMB RVI. It was only informed that the project had been approved after the ECC was granted.

However, the Court did not make a determination of whether all the requirements were complied with because the matters regarding the project's classification, the lack of comprehensive studies or circumvention of any documentary requirements must be resolved by the DENR. The Court recognized that the DENR is the agency vested with delegated powers to review and evaluate all EIA reports and to grant or deny ECCs.

Nevertheless, the Court emphasized that the Local Government Code established the duty of national government agencies to secure prior public consultation and approval of local government units for the projects described therein.

In this case, the national agency involved was the PRA and the project could have been classified a national one which affects the environmental and ecological balance of local communities, and is covered by the requirements found in Sections 26[331] and 27[332] of the Code.

In reading the provisions, the Court ruled that Section 27 applies only to national programs and/or projects which are to be implemented in a particular local community and whose effects are those enumerated under Section 26 namely, those which: (1) may cause pollution, (2) may bring about climatic change, (3) may cause the depletion of non-renewable resources, (4) may result in loss of crop land, range-land, or forest cover, (5) may eradicate certain animal or plant species from the face of the planet, and (7) other projects or programs that may call for the eviction of a particular group of people residing in the locality where these will be implemented.

It was established during oral arguments that the projects falls under Section 26 because the commercial establishment could cause pollution as it could generate garbage, sewage and possible fuel toxic discharge.

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331 Republic Act No. 7160 (1991), §26. The provision reads:
Section 26. Duty of National Government Agencies in the Maintenance of Ecological Balance. – It shall be the duty of every national agency or government-owned or controlled corporation authorizing or involved in the planning and implementation of any project or program that may cause pollution, climatic change, depletion of non-renewable resources, loss of crop land, rangeland, or forest cover, and extinction of animal or plant species, to consult with the local government units, nongovernmental organizations, and other sectors concerned and explain the goals and objectives of the project or program, its impact upon the people and the community in terms of environmental or ecological balance, and the measures that will be undertaken to prevent or minimize the adverse effects thereof.

332 Republic Act No. 7160 (1991) §27. The provision reads:
Section 27. Prior Consultations Required. – No project or program shall be implemented by government authorities unless the consultations mentioned in Sections 2 (c) and 26 hereof are complied with, and prior approval of the sanggunian concerned is obtained: Provided, That occupants in areas where such projects are to be implemented shall not be evicted unless appropriate relocation sites have been provided, in accordance with the provisions of the Constitution.

The Court reiterated the requirements under the Local Government Code before a national project that affects the environmental and ecological balance of local communities can be implemented. These are (1) prior consultation with the affected local communities (Sections 26 and 27) and prior approval of the project by the appropriate sangguninan (Section 447). Moreover, Section 5.3 of DENR DAO 2003-30 also provides public hearing and consultation requirements.

While the DENR Memorandum Circular No 2007-08 stated that no permits and/or clearances from national government agencies are required for the projects, the Court said that a Memorandum Circular cannot prevail over the Local Government Code, which is a statute and thus, enjoys greater weight under our hierarchy of laws.

The information dissemination conducted months after the ECC had already been issued was insufficient to comply with this requirement under the Local Government Code. Subsequent to the information campaign of the province, the Municipality of Malay and the Liga ng mga Barangay-Malay Chapter still opposed the project. Thus, when the Province commenced the implementation project, it violated Section 27 of the Code, which clearly enunciates that "no project or program shall be implemented by government authorities unless the consultations mentioned in Sections 2 (c) and 26 hereof are complied with, and prior approval of the sanggunian concerned is obtained."

The lack of prior public consultation and approval was not corrected by the subsequent endorsements of the reclamation project by the Sangguniang Barangay of Caticlan and the Sangguniang Bayan of the Municipality of Malay which were both undoubtedly achieved at the urging and insistence of Province.