

Chief Justice Panganiban's Dissent:

A Brief Observation

by Atty. Pilariza Racho-Baldovino¹

Introduction

A dissenting opinion may be defined as an opinion that is written

[W]hen a justice disagrees with the majority opinion (which carries the force of law.) If a justice is writing a dissenting opinion, that means he or she voted with the minority group, and wants to explain the reason why he or she disagrees with the Opinion of the Court. Dissenting opinions may be cited, but are not enforceable.²

There are various reasons for dissenting judicial opinions. These include correcting flaws in majority reasons; safeguarding the integrity of decision-making by keeping the majority accountable; providing a tool of collegiality, legitimacy, and authority of the judicial power; favoring the dialogue with the past, the present, and the future; and, articulating imagination and reality.³

The dissenting opinions of the Chief Justices of the Supreme Court may not be cited in subsequent cases, but they have been read and taken as salient points in the discussion of how best a law may be interpreted and appreciated. From among the different reasons for dissent, the author submits that the basis for former Chief Justice Artemio Panganiban's dissent in these three cases⁴ is to correct flaws in the majority's reasons.

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² [http://woki.answers.com/Q/What is a dissenting opinion](http://woki.answers.com/Q/What%20is%20a%20dissenting%20opinion)

³ www.iisj.net/iisj/de/the-practice-of-dissenting-opinions-a-comparative-and-sociological-approach

⁴ *Manila Prince Hotel Corporation v. GSIS*, G.R. No. 122156 (1997); *Cruz v. Secretary of DENR*,

Dissenting opinions present a different view from that of the majority, a view that contains an interpretation of the law in relation to its application in the issue before it.

One advantage of a dissenting opinion is that it provides an educative opportunity for both bench and bar to know the breadth of the law and the opportunities for its wider interpretation and use in subsequent cases. The downside is that the opinion may not carry any weight as that given to the majority decision; hence, it may not even be considered by both bench and bar in current or subsequent deliberations of a legal issue. A study conducted by Epstein, Landes, and Posner (2010) reiterates this position.

Since writing a dissenting opinion requires effort, which is a cost, a judge will not dissent unless he anticipates a benefit from dissenting that offsets his cost. An obvious benefit is to undermine the influence of the majority opinion, with which by assumption he disagrees, although possible offsets are that a dissent will draw attention to the majority opinion and may magnify the opinion's significance by exaggerating its potential scope in order to emphasize the harm that it will do.⁵

Observation of Justice Panganiban's Dissenting Opinions

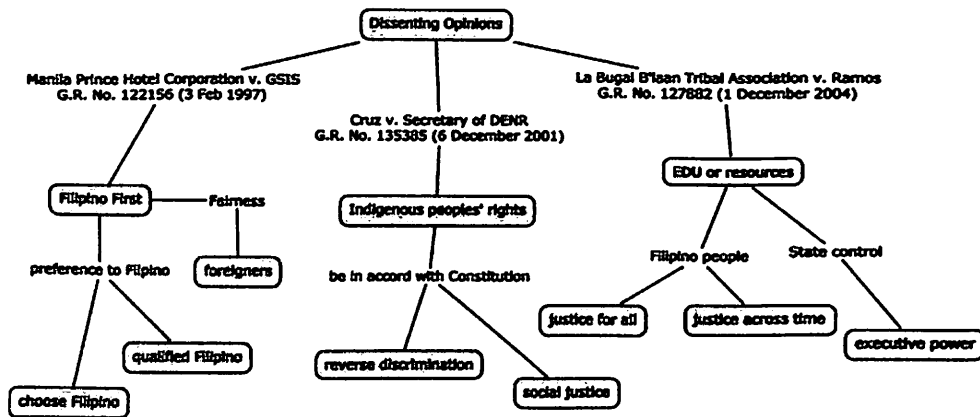


Figure 1. Concepts in Justice Panganiban's Dissenting Opinions

G.R. No. 135385 (2001); and *La Bugal B'laan Tribal Association v. Ramos*, G.R. No. 127882 (2004).

⁵ Epstein, Landes, and Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*. (2010). Retrieved on October 31, 2012 from <http://www.law.uchicago.edu/Lawecon/index.html>

This paper discusses three of the former Chief Justice Panganiban's opinions in the following cases: *Manila Prince Hotel Corporation v. GISIS*⁶; *Cruz v. Secretary of Environment and Natural Resources*⁷; and *La Bugal B'laan Tribal Association v. Ramos*⁸. His opinions cite Section 10 (2), Article XII⁹; Section 2, Article XII¹⁰; Section 3, Article XII¹¹; and Section 5, Article XII¹² of the 1987 Philippine Constitution to support his stand.

The majority in the case of *Manila Prince Hotel* see the Constitution as a

system of fundamental laws for the governance and administration of a nation. It is supreme, imperious, absolute and unalterable except by the authority from which it emanates. It has been defined as the fundamental and paramount law of the nation. xxx The fundamental conception, in other words, is that it is a supreme law to which all other laws must conform and in accordance with which all private rights must be determined and all public authority administered. xxx Thus, since the Constitution is the fundamental, paramount and supreme law of the nation, it is deemed written in every statute and contract.¹³

With the majority, CJ Panganiban sees the Constitution in like manner. He, too, believes that the interpretation of any act, deed, or subsequent laws must run in accordance with this definition. However, in the manner of seeing its applicability in the case at hand, CJ Panganiban begs to differ.

⁶ G.R. No. 122156 (1997).

⁷ G. R. No. 135385 (2001).

⁸ G. R. No. 127882 (2004).

⁹ Article XII, Section 10 (2). xxx In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos.

¹⁰ Article XII, Section 2. All lands of the public domain, waters, mineral, 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, and utilization of natural resources shall be under the full control and supervision of the State. xxx

¹¹ Article XII, Section 3. Xxx Private corporations or associations may not hold such alienable lands of the public domain except by lease, for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and not to exceed one thousand hectares in area. Citizens of the Philippines may lease not more than five hundred hectares, or acquire not more than twelve hectares thereof, by purchase, homestead, or grant. xxx

¹² Article XII, 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. xxx

¹³ *Manila Prince Hotel, supra*.

The majority sees *national patrimony* in the Filipino First policy found in Section 10 (2), Article XII as one which holds not only the country's natural resources but also its national and cultural heritage. The impact of such requires that the nation see national patrimony as a huge sliver of the Filipino's soul, which cannot be alienated. To do so means to bid adieu to all the historical memories that clothe Manila Prince Hotel and strip it of its soul-essence that contains the Filipino-ness of its existence. It is in this light that the majority opted to highlight the significance and worth of the hotel's cultural heritage by disregarding the winning bid of the foreigner in favor of the Filipino bid. CJ Panganiban points out his unwillingness to go for the same interpretation. The majority believes that

... Since the Filipino First Policy provision of the Constitution bestows preference on qualified Filipinos the mere tending of the highest bid is not an assurance that the highest bidder will be declared the winning bidder. Resultantly, respondents are not bound to make the award yet, nor are they under obligation to enter into one with the highest bidder.¹⁴

CJ Panganiban opts to see a construction of the Filipino First policy to rise beyond the dictates of partiality to cold objective neutrality that benefits the Filipino in the long run. He states, "[T]he majority's strained interpretation constitutes unadulterated judicial legislation, which makes bidding a ridiculous sham where no Filipino can lose and where no foreigner can win."¹⁵

He then proceeds to interpret the Filipino First Policy as synonymous to fairness and impartiality where both Filipino and alien bidders stand on equal footing and where discrimination in the guise of a policy and subjective appreciation of cultural heritage at the expense of the nation's international standing are to be re-viewed. He states, thus,

Aside from being prohibited by the Constitution, such judicial legislation is short-sighted and, viewed properly, gravely prejudicial to long-term Filipino interests. It encourages other

¹⁴ *Supra*.

¹⁵ *Supra*.

countries --- in the guise of reverse comity or worse, unabashed retaliation --- to discriminate against us in their own jurisdiction by authorizing their own nationals to similarly equal and defeat the higher bids of Filipino enterprises solely, while on the other hand, allowing similar bids of other foreigners to remain unchallenged by their nationals.¹⁶

CJ Panganiban's opinion in the case of Cruz v. Secretary of Environment and Natural Resources leaves much to reflect on. When the majority decides to dismiss the petition, he elects to grant it and hit on the unconstitutionality of Sections 3 (a) and (b)¹⁷, 5¹⁸, 6¹⁹, 7 (a) and (b)²⁰, and 8²¹ of RA 8371²². He explains,

¹⁶ *Supra*.

¹⁷ Section 3 (a), R.A. 8371. Ancestral Domains. Subject to Section 56 hereof, refers to all areas generally belonging to ICCs/IPs comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs. By themselves or through their ancestors, communally or individually since time immemorial, continuously to the present xxx

(b) Ancestral Lands. Subject to Section 56 hereof, refers to lands occupied, possessed and utilized by individuals, families and clans who are members of the ICCs/IPs since time immemorial, by themselves or through their predecessors-in-interest, under claims of individual or traditional group ownership, continuously, to the present xxx

¹⁸ Section 5, R.A. 8371. 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 ICCs/IPs private but community property which belongs to all generations and therefore cannot be sold, disposed or destroyed. It likewise covers sustainable traditional resource rights.

¹⁹ Section 6, R.A. 8371. Composition of Ancestral Lands/Domains. Ancestral lands and domains shall consist of all areas generally belonging to ICCs/IPs as referred under Section 3, Items (a) and (b) of this Act.

²⁰ Section 7 (a), R.A. 8371. Right 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 the lands and territories traditionally occupied, owned or used; xxx

²¹ Section 8, R.A. 8371. Rights to Ancestral Lands. The right of ownership and possession of the ICCs/IPs to their ancestral lands shall be recognized and protected.

a) Right to transfer land/property. Such right shall include the right to transfer land or property rights to/among members of the same ICCs/IPs, subject to customary laws and traditions of the community concerned.

b) Right to Redemption. In cases where it is shown that the transfer of land/property rights by virtue of any agreement or devise, to a nonmember of the concerned ICCs/IPs is tainted by a vitiated consent of the ICCs/IPs, or is transferred for an unconscionable consideration or price, the transferor ICC/IP shall have right to redeem the same within a period not exceeding fifteen (15) years from the date of transfer.

²² See R.A. 8371, "The Indigenous Peoples Rights Act of 1997".

Indigenous peoples may have long been marginalized in Philippine politics and society. This, does not, however give Congress any license to accord them rights that the Constitution withholds from the rest of the Filipino people. I would concede giving them priority in the use, the enjoyment and the preservation of their ancestral lands and domains. But to grant perpetual ownership and control of the nation's substantial wealth to them, to the exclusion of other Filipino citizens who have chosen to live and abide by our previous and present Constitutions would be not only unjust but also subversive of the rule of law.²³

CJ Panganiban has seen through R.A. 8371 and its impact on the people. He identifies certain provisions thereof which run counter to the Regalian Doctrine embodied in Section 2, Article XII of the Constitution that provides for the scope of the State's ownership of all lands and their resources.

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, and development, and utilization of natural resources shall be under the full control and supervision of the State. xxx²⁴

R.A. 8371 specifically grants the Indigenous Peoples' ownership of their ancestral lands by their mere possession thereof. CJ Panganiban calls this *reverse discrimination*; it draws a line separating Filipinos by ethnicity, by tribes, by cultural historicity, where the exclusive and continuous use, possession, and utilization of vast tracts of land, beyond the allowable ownership of 12 hectares and lease of 500 hectares, go to tribal minorities while the majority had to make do with what little they currently owned or leased. Discrimination by ethnicity bears the same impact as discrimination by cultural historicity cited in the first case. Only one alternative gives you the option to be aligned with the ruling choice.

²³ Cruz, *supra*.

²⁴ *Supra*.

... the law declares that ancestral domains, including the natural resources found therein, including the natural resources found therein, are owned by ICCs/IPs and cannot be sold, disposed, or sold. Not only does it vest ownership, as understood under the Civil Code; it adds perpetual exclusivity. This means that while ICCs/IPs could own vast ancestral domains, the majority of Filipinos who are not indigenous can never own any part thereof.²⁵

Likewise, ownership means control which again runs contrary to the provisions of Section 2, Article XII of the Constitution. CJ Panganiban factors in another practice of *reverse discrimination* with regard to ownership and utilization of the wealth of the land. Without the mandatory 25-year period to cover this, the ICCs/IPs will now have an edge over the non-ICCs/IPS. Such partiality is detrimental to everyone in the long run.

But again, RA 8371 relinquishes this constitutional power of full control in favor of the ICCs/IPs, insofar as natural resources found within their territories are concerned. Pursuant to their rights of ownership and possession, they may develop and manage the natural resources, benefit from and share in the profits from the allocation and the utilization thereof. And they may exercise such right without any time lime, unlike non-ICCs/IPs who may do so only for a period not exceeding 25 years, renewable for a like period.²⁶

How can there be discrimination in a land populated by Filipinos? How can there be unity when lands are separated by ethnic orientation?

In the third case²⁷, CJ Panganiban cements his opinions from the first two previous cases²⁸. Filipino First policy and non-discrimination of the ICCs/IPs have to be grounded on fairness and sound impartiality. Everyone has a right to be a Filipino and to enjoy the benefits of being one; every Filipino has a right to possess, own, and utilize an aliquot

²⁵ *Supra*.

²⁶ *Supra*.

²⁷ *La Bugal B'laan Tribal Association, supra*.

²⁸ *Manila Prince Hotel Corporation, supra*.

portion of his/her patrimony, and to a protection of a fair and just reading of the provisions of the Constitution and the laws whether s/he is a Filipino, an ICC/IP, or a non-tribal member thereof.

While the majority in La Bugal B'laan Tribal Association v. Ramos decided to grant the petition and to declare unconstitutional and void the Financial and Technical Assistance Agreement (FTAA) between Western Mining Corporation (Philippines), Inc. and the Philippine government, CJ Panganiban selects to do otherwise. In his discussion, he stresses that the FTAA executed was in fact a service contract between the State and the mining company. Full control and supervision still rest on the government through its designated agencies; preventive measures through these agencies will keep the exploration, development, and utilization of the natural resources of the mining company within the dictates of the Constitution.

From the foregoing, it is clear that that agreements involving either technical or financial assistance referred to xxx are in fact service contracts, but such new service contracts are between foreign corporations acting as contractors on the one hand, and on the other hand, government as principal or "owner" (of the works), whereby the foreign contractor provides the capital, technology and technical know-how, and managerial expertise in the creation and operation of the large-scale mining/extractive enterprise, and government through its agencies (DENR, MGB) actively exercises full control and supervision over the entire enterprise.²⁹

Hence, CJ Panganiban explicitly retains his opinions. Considering the succeeding generations of Filipino who may also find the effect of *reverse discrimination* disadvantageous, he sees this as contrary to the application of social justice found in the Constitution.

This Court cannot but be mindful that any decision rendered in this case will ultimately impact not only the cultural minorities which lodged the instant Petition, and not only the larger community of the Filipino people now struggling to survive amidst a fiscal/budgetary deficit, ever increasing prices of fuel,

²⁹ *Supra.*

food, and essential commodities and services, the shrinking value of the local currency, and a government hamstrung in its delivery of basic services by a severe lack of resources, *but also countless generation of Filipinos.*³⁰

Conclusion

From the lenses of the minority, a dissenting opinion may change the depth of the interpretation of the law; if it does not, the most that a dissenting opinion can do is to enlighten both bench and bar to perceive a wider arena for the application of the law. The opposing view may seldom get the favor of those who voted for the majority; but, it is in dissenting that justices also have greater opportunity to air their thoughts, views, and opinions. If the main reason for dissent rests on correcting the minority's perceived flaws in the majority's decision, then the dissent shall have achieved its purpose. At what cost? At the usual cost of being considered different, of being outside the circle of the usual. This cost, however, is set aside when the opinions reach a wider audience and both bench and bar look at the law with fresher and more analytical understanding.

³⁰ *Supra.*