Social Justice and Mining[1]

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Introduction

No one really talked much about mining when I was going to school. It was one of those activities engaged in by a relatively small number of people and its effects were not well understood. Things have changed. While no one will contest that in the modern world we need the products of mining for such things as mobile phones, computers, skyscrapers and the like, there are concerns about the cost of mining on the environment. The desire has been to understand what "responsible mining" is. Even as some Philippine activists' positions have been characterized as "anti-mining," the thrust is less to ban mining activities absolutely from the country, but to hold it in abeyance until a broader consensus is achieved as to what responsible mining policy might be, and until the country clearly has the structures and competent personnel to enforce responsible mining.

Because of the various interests involved, finding consensus on responsible mining is elusive. I believe that the more Philippine citizens and their friends participate in a competent discussion on mining and its effect, the better. Why? On the one hand, the Philippine Constitution declares that minerals belong to the State. This means that originally they do not belong to owners of land titles, nor are they the preserve of private interest groups, whether these are foreign capitalists or indigenous peoples (IPs). They belong to the State — to the Filipino people. Thus, the public policy that governs the use of minerals, including Executive Order (EO) 79 as well as Republic Act (RA) 7942 or the Philippine Mining Act of 1995, is the concern of all who are its owners.

The Call of the Common Good

There is another, arguably even more fundamental reason why people should participate in this discussion. This is a principle espoused by the social doctrine of the Catholic Church. It teaches that there is a social mortgage on private property. While the church has consistently recognized the validity of private property in the human being's fulfillment of personal and family needs, private property is encumbered by a "social mortgage" and must contribute to the common good (*Laborem exercens*, no. 14). Short of this the legitimacy of private property is lost: "The right to private property is subordinated to the right to common use, to the fact that goods are means for everyone" (*Laborem exercens*, no. 14). This is a powerful doctrine inviting reflection on the manner in which property in society in general is handled. It is embedded in a principle called the "universal destination of all created goods" (*Sollicitudo rei socialis*, no. 42)—the doctrine that all goods created by God are for the good of all. Where the constitution states that minerals belong to all, and the church teaches that even minerals are numbered among created goods with a "universal destination"—the good of all, the search for a rational policy on mining cannot exclude "the good of all," that is, *the common good*. In fact, the Philippine Constitution's acclaimed "centerpiece," its Article XIII on Social Justice, states: "The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic and political inequalities, and remove cultural inequalities by equitably diffusing wealth and political power for the common good" (Sec. 1). This is an ongoing mandate. It enacts laws in pursuit of the common good. It repeals, amends, and perpetually improves laws toward the greater pursuit of the common good. This greater pursuit of the common good is the pursuit of social justice.

No laws are perfect. Agreements and activities undertaken under laws are often imperfect and harmful to the common good, even if they are legal. The pursuit of social justice warrants the repeal and ongoing reform of laws, just as the pursuit of social justice warrants the cancellation of agreements that militate against the common good. If a law were to be enacted that would

cause harm to all women and children in a male chauvinistic society, it is ultimately in pursuit of social justice (and not just political advantage) that such law should be repealed. If a contract would deprive large numbers of babies from necessary nourishment, it is in pursuit of social justice that such contract should be repealed. Social justice provides the ultimate rationality for a law, or the compelling warrant for its repeal. Commutative justice, which compels the fulfillment of contracts, and distributive justice, which distributes benefits and burdens in the maintenance of society, find their legitimacy in social justice and are subordinated to it. When they harm social justice, in social justice they are to be overcome.

Law, Rationality, and Social Justice

The rationality of laws must be anchored in social justice. If a law is not socially just, activities and agreements under that law become socially unjust, and so can never be legitimated simply because they comply with the law. What is legal is not necessarily socially just, and therefore not necessarily moral. Human beings who take responsibility for society must be sensitive to this. Existing laws may advance the common good, or advance the common good merely partially, or may militate against the common good. Who makes this call? It is the people, yourselves and myself, weighing the various forces and constraints which affect us in our current society, asserting a certain shared wisdom achieved by and for whole of society in history, who make this call.

For instance, if a law were to give a group of people a monopoly over fresh air in exchange for large taxes paid to the state, but this law were to deprive poor people of the air they need to breath, no matter how legitimately enacted, the people could declare this law socially unjust and act toward its repeal. Until it is repealed, in social justice, they could act to undermine it. Of course, enforcers of the law could defend the unjust law. But because it is defended does not mean it is just, and the stuff of heroism and martyrdom is when people undermine existing social structures in the pursuit of social justice.

Where our intention is to search for what responsible mining especially in the light of perceived sins against social justice of the laws currently

governing mining policy, it is thoroughly unsatisfying if it is argued that "responsible mining is achieved when the current laws governing mining are complied with." Where especially RA 7942, first, notoriously allows a fiscal regime which does not give the Filipino people, who are the owners of the minerals, a fair share of the product and, second, fails today to effectively protect the environment, especially in the light of expected climate change impacts, a claim "to responsible mining" because of compliance to this law dodges the issues raised in social justice.

This is what I tried to point out in an earlier article. If responsible mining is to be based on a certain rationality, what is "rational" for the investor is quite irrational for the environmentalist; what is "rational" for the B'laans or the T'boli peoples is irrational for the military; what is "rational" and necessary for the government is "irrational" for the free private sectors. In the end, rationality must be decided on by the autonomous people in a given historical moment defining what is socially just.

Mining under RA 7942

In a powerpoint presentation entitled "To mine or not to mine: The case of the Tampakan copper gold project: Mindanao, Philippines" presented by Dr. Esteban C. Godilano of the University of the Philippines (UP), with contributions by Atty. Christian Monsod (referred to hereafter as: G.M.), they speak of four conditions for allowing mining in the Philippines. I believe it is their position on what "responsible mining" is. These conditions are:

a. "the environmental, economic and social costs are accounted for in evaluating mining projects;
b. "the country gets a full and fair share of the values of extracted resources;
c. "the institutional capabilities of the government to evaluate and regulate mining activities are put in place; and
d. "since mining uses up non-renewable natural capital, the money from mining are specifically used to create new capital such as more developed human resources and infrastructure, particularly in the rural areas" (G.M., Slide 22).

Where under RA 7942 and EO 270-A, providing for the aggressive development of Philippine mining, we still do not have the tools and disciplines to account for the full costs of mining projects, where we admit the people are not getting their full and fair share of mineral products, where the institutional capabilities of government to evaluate and regulate mining activities are not in place, where we have not devised a scheme to exploit the benefits of extracting these non-renewable resources in new capital and infrastructure projects, we have warrant for stating that mining continues to be irresponsible and socially unjust.

This brings me to a key problem with EO 79. Where the Catholic Bishops' Conference of the Philippines (CBCP) in "A Statement of Concern on the Mining Act of 1995" in 1998 called for the repeal of RA 7942, the EO continues to lean on it for its effectivity. Of course, the Executive can only rely on existing law for any EO. But the EO seems to show no sensitivity for the ills wrought by RA 7942 as pointed out by the bishops. "The adverse social impact on the affected communities, especially on our indigenous brothers and sisters, far outweighs the gains promised by large-scale mining operations. Our people living in the mountains and along the affected shorelines can no longer avail of the bounty of nature. Rice fields are devastated and bays rich with seafoods become health hazards." The bishops' call was reiterated in 2006: "We reaffirm our stand for the repeal of the Mining Act of 1995. We believe that the mining act destroys life. The right to life is inseparable from their right to sources of food and livelihood. Allowing the interests of big mining corporations to prevail over people's right to these sources amounts to violating their right to life."

EO 79 on Mining: A Mixed Bag

Leaning on RA 7942, EO 79 is a mixed bag.

Environmental consciousness and concern today is a powerful force. EO 79, reiterating the constitutional right of the Filipino to a balanced and healthy ecology, certainly asserts the need to protect the environment. This is demonstrated in the "areas closed to mining applications" of Section 1.

Beyond those already articulated in Section 19 of RA 7942 and in the National Integrated Protected Area System (NIPAS) or RA 7586, it also includes:

a. Prime agricultural lands, in addition to lands covered by RA 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);
b. Tourism development areas, as identified in the National Tourism Development Plan; and
c. Other critical areas, island ecosystems, and impact areas of mining as determined by current and existing mapping technologies, that the Department of Environment and Natural Resources (DENR) may hereafter identify pursuant to existing laws, rules and regulations, such as but not limited to, the NIPAS Act.

But the EO also states:

> Mining contracts, agreements and concessions approved before the effectivity of the Order shall continue to be valid, binding, and enforceable so long as they strictly comply with existing laws, rules and regulations and the terms and conditions of the grant thereof. For this purpose, review and monitoring of such compliance shall be undertaken periodically.

For the People, "Zero to Nil"

Section 4 of EO 79, however, makes the grant of now mineral agreements contingent on new legislation "rationalizing existing revenue sharing schemes and mechanisms."

The existing revenue regime is irrational or socially unjust. This is because with RA 7942, foreign mining investments with 100 percent foreign equity were not possible, overtaking the previous policy of sixty percent Filipino and only forty percent foreign equity. The RA 7942 further *limited* the government share from Mineral Production Sharing Agreements (MPSA) to two percent: "The total government share in a mineral production sharing

agreement shall be excise tax of mineral products as provided in RA No. 7729" (RA 7729, Sec. 80), while the state is the owner of the product. The excise tax however is not a share in the product itself. The state gets, as Justice Carpio puts it, "Zero to Nil" of the product.

On the other hand, through the Foreign Technical Assistance Agreement (FTAA), the state enters into an agreement with a mining firm as a "contractor." The state's share again consists in taxes, fees and duties, which are not a direct share in the product. It gets an additional share "only if the contractor's net income after tax amounts to more than forty percent share of gross output." Historically, however, this is a practical impossibility. Again, therefore, in the FTAA the state's share in the product is "Zero to Nil."

Challenging the Validity of Existing Contracts

If the state so clearly sees that this is socially unjust, why would it not in its EO 79 more aggressively challenge the validity of existing contracts based on RA 7942 in the name of social justice? If the provisions of the law themselves are socially unjust, are not the contracts closed under these conditions voidable? Where there is so much poverty in the Philippines, should we allow these contracts to continue to rob the Filipino people of their patrimony? Through these contracts under RA 7942 the state is practically giving away the people's mineral for free! Lamentably, EO 79 declares the contracts valid without having first worked out a program so that extracted minerals, which are non-renewable, can better contribute to the development of human capital and infrastructure that would uplift our poor rather than the profit margins of foreign investors and wealthy capitalists (cf. G.M.).

More Rational Environmental Regime Required

Furthermore, where the EO calls on congress to enact a more rational fiscal regime, why does it not also call on congress to legislate a more rational regime of environmental protection? What protects the people from repetitions of the Marcopper Mining disaster of 1996, which Marcopper walked away from

with practical impunity? Open-pit mining is no longer allowed in developed countries like the US and Canada. Why does the EO remain neutral to the law that allows it for our fragile island ecosystem, oblivious to the country's vulnerability to acid mine drainage through open-pit mining? Why does it seem even to support open-pit mining by its Section 12, where it challenges the local ordinances prohibiting open-pit mining in their jurisdiction? Secretary Ramon Paje of DENR actually stated that the apparent conflict between the ordinance of South Cotabato prohibiting open-pit mining and the national law RA 7942 was to be addressed by this provision. Does the national law RA 7942 which favors foreign miners outweigh the national law RA 7160 and Administrative Order 270 which is the Local Government Code (LGC) and its Implementing Rules and Regulations (IRR)? These mandate the local government units (LGUs) to enact measures that protect the local environment. So what does the EO intend when it says: "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" (EO 79, Sec. 12)? Is environmental protection not "reasonable"? Is it asking the Department of Interior and Local Government (DILG) to militate against the enforcement of the LGC?

These questions are raised parallel to the *laudable* declaration by the EO that existing contracts are valid conditionally, only "so long as they strictly comply with existing law, rules, and regulations and the terms and conditions of the grant thereof." This means that their validity is assailable when they violate existing laws, for example, through the devastation of old growth forests, the manipulation of the Free, Prior and Informed Consent (FPIC), and the like. The call for the review of existing contracts from this vantage point is therefore happy news. The review however should not be periodic, but ongoing.

Bring "Work in Progress" Forward in Social Justice

EO 79 is a mixed bag. It recognizes the imperative to protect the environment. But it is weak in its reliance on RA 7942. It has not brought about a consensus on "responsible mining."

On the other hand, Atty. Christian Monsod has described it as "a work in progress." This should be progress in and for social justice rather than just for the private benefit of the mining investors. While the administration continues to rely on RA 7942 for now, it should work proactively for better mining legislation not just for an improved fiscal regime but for improved environment protection. Considering the limited capacity of the government to oversee and evaluate the mining activities throughout the country, the Mining Industry Coordinating Council (MICC) referred to in EO 79, Section 9, needs the active participation of climate change specialists, environmental scientists and anthropologists, as well as representatives from religion and civil society for the oversight of mining projects that are open and not violently hostile to the scrutiny of the public. In the end, together, in a convergence of conscience, we must take responsibility for mining policy that is not just legal but socially just. After all, the minerals belong to all. On all minerals, there is a social mortgage.

Note

[1] Paper presented at the Roundtable Discussion on EO 79 at the Ateneo de Davao University on 18 July 2012.

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