Stakeholders' Caucus on Executive Order No. 79 s. 2012

by Atty. Manuel P. Quibod and Atty. Faye Risonar-Bello[1]

Executive Order No. 79 series of 2012 received President Benigno C. Aquino's stamp of approval on July 6, 2012 and was released to the press on July 9, 2012. Fifteen days following the completion of its publication in a newspaper of general circulation, EO 79 took effect although its implementing rules and regulations have yet to be crafted.

Discussion

Is EO 79 an issuance that can withstand the initial legal scrutiny? Is it an allowable exercise of the Chief Executive's powers? The answer appears to be in the affirmative. The President's authority to issue executive orders is defined and limited by Book III, Title I, Chapter 2, Sec. 2[2] of the Administrative Code. The Court interpreted this to mean that executive orders would only be proper if they are issued to give effect to laws, not in their absence, much less against them. In Ople v. Torres[3], the Court nullified Administrative Order No. 308[4] issued by

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[2] Sec. 2. Executive Orders.- Acts of the President providing for rules of a general or permanent character in implementation or execution of constitutional or statutory powers shall be promulgated in executive orders.

[3] 293 SCRA 141 (1998).

[4] Administrative Order No. 308, "Adoption of a National Computerized Identification

President Fidel Ramos on the ground that this was beyond the scope of the executive or administrative powers of the President. The Court ruled that an administrative order, and the same may be said of an executive order, "must be in harmony with the law and should be for the sole purpose of implementing the law and carrying out legislative policy." Similarly in Review Center v. Executive Secretary[5], the Court nullified EO 556[6] issued by President Gloria Macapagal-Arroyo that authorized the Commission on Higher Education (CHED) to supervise the establishment and operation of all review centers and similar entities in the Philippines. Considering that under RA 7722[7], CHED's mandate extends only to public and private institutions of higher education as well as degree-granting programs in post-secondary educational institutions, the Court declared that the order amended the law and amounted to a usurpation of legislative power.

However, in KMU v. Director General[8], the Court sustained the validity of EO 420[9] issued by President Macapagal-Arroyo directing all government agencies, including government-owned and controlled corporations, to adopt a unified multi-purpose identification system. The Court reasoned that various laws allow several government entities to collect and record data for their identification systems and the President may by executive or administrative order direct the government entities under the Executive Department to adopt a uniform identification data collection and format under her power of control provided in Article VII, Section 17[10] of the 1987 Constitution.

Reference System".

[5] 583 SCRA 428 (2009).

[6] EO 556, " Amending Executive Order 473 and Requiring the Exploration, Development and Production of Crude Oil from the Camago-Malampaya Reservoir to be Undertaken Through Bidding".

[7] RA 7722, "Higher Education Act of 1994".

[8] 487 SCRA 623 (2006).

[9] EO 420, "Requiring All Government Agencies And Government-Owned And Controlled Corporations To Streamline And Harmonize Their Identification (Id) Systems, And Authorizing For Such Purpose The Director-General, National Economic And Development Authority To Implement The Same, And For Other Purposes".

[10] Article Vll, Section 17. The President shall have control of all the executive departments, bureaus and offices. He shall ensure that the laws be faithfully executed.

Thus, to succeed any challenge raised against EO 79, one must point out specific portions that go against policies and provisions found in the Constitution and in statutes passed by Congress, or in the minimum, that it is outside the powers of the President.

Criticism points to the contents of EO 79 on grounds that it apparently attempts to "tow the line" – a message sent to all LGU heads that they have to comply with the directive established by national agencies, a message that some heads of the LGU sector did not take well, believing that it limits the autonomy granted to them by RA 7160 and the 1987 Constitution. Consistent with Article X, Section 2[11], of the 1987 Constitution, RA 7160 was enacted with genuine and meaningful local autonomy as a guiding principle. But while that is the objective, in reality there are practical limitations imposed on the autonomy LGUs enjoy. While there are cases dealing specifically with fiscal autonomy of LGUs, not much can be found dealing with the concept of autonomy with respect to other matters. Most court pronouncements on autonomy apply to the Autonomous Region in Muslim and the Cordilleras. In Limbona v. Mangelen,[12] the Court made this distinction.

> Now, autonomy is either decentralization of administration or decentralization of power. There is decentralization of administration when the central government delegates administrative powers to political subdivisions in order to broaden the base of government power and in the process to make local governments 'more responsive and accountable,' 'and ensure their fullest development as self-reliant communities and make them more effective partners in the pursuit of national development and social progress.' xxx
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> Decentralization of power, on the other hand, involves an abdication of political power in the favor of local governments units declared to be autonomous. In that case, the autonomous government is free to chart its own destiny and shape its future with minimum intervention from central authorities. xxx

[11] Article X, Section 2. The territorial and political subdivisions shall enjoy local autonomy.

[12] 170 SCRA 786 (1989).

Now, what kind of autonomy did Article X, Section 2 of the 1987 Constitution grant the LGUs? The Court in Cordellara Board Coalition v. COA[13] citing *Villegas v. Subido*[14], explains, "[T]he constitutional guarantee of local autonomy in the Constitution [Art. X, sec. 2] refers to the administrative autonomy of local government units or, cast in more technical language, the decentralization of government authority."

A reading of these cases leads one to conclude that any discourse should start with the premise that the powers of an LGU has to be exercised within the confines of statutes passed by Congress. The provision of the 1987 Constitution on autonomy is a mere principle; it is not self-executing by itself. In the end, it means what Congress wants it to mean – referring of course to RA 7160.

Is there really a conflict between the local ordinance promulgated by the Province and that of the national law? If the national law is vague or silent as to the modality or specifics, but a subsequent local ordinance enacted pursuant to police power clearly prohibits a specific act, which is not mentioned in the national law, can this be regarded as contrary to existing laws or the Constitution?

We see numerous examples of pro-active legislation crafted by LGUs that have become precursors to subsequent national legislation. We can then stipulate that what has not been expressly prohibited by national law may therefore be allowed.

The leading case involving conflicts between national laws and local ordinances remains to be Magtajas v. Pryce[15]. In nullifying PD 1869[16], the Court explained that the local ordinance should not contravene statutes and that municipal governments are only agents of the national government and cannot be superior to the principal or exercise powers higher than those of the latter.

[13] 181 SCRA 495 (1990).

[14] G.R. No. L-31711 (1971).

[15] 234 SCRA 260 (1994).

[16] PD 1869, "Consolidating And Amending Presidential Decree Nos. 1067-A, 1067-B, 1067-C, 1399 and 1632, Relative to the Franchise and Powers of the Philippine Amusement and Gaming Corporation (Pagcor)".

Here, an argument can be made on the validity of the provincial ordinance of South Cotabato prohibiting open-pit mining. Republic Act 7942[17] does not specifically permit this method of mining, unlike in Magtajas, *supra*, where a national statute authorized PAGCOR to set up casinos. South Cotabato did not contravene a statute but simply stepped in where it was silent; it did not ban all forms of mining but simply regulated it. Indeed, Section 12 of EO 79 seems to validate this when it states, "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."

Additionally, it might be argued that the act of the Province of South Cotabato appears consistent with the holding in Tano v. Socrates.[18] Here, the City of Puerto Princesa and the Province of Palawan, respectively, passed ordinances banning the shipment of live fish and lobsters outside the city and prohibiting the catching and selling of corral dwelling aquatic organisms in Palawan waters. The Court justified the ordinances under the mandate of Section 458 (a) (1) (vi)[19] of RA 7160 for LGUs to protect the environment.

In sum, it is difficult to find fault in the act of LGUs in regulating activities to protect their environment for as long as no national statute is directly contravened. To that end, one can conclude that EO 79 cannot negatively impact the ordinance promulgated by the Province of South Cotabato. Until and unless the ordinance is assailed and subsequently ruled by the Court as either unconstitutional or contrary to law, its validity is presumed.

[17] Republic Act No. 7942, "Philippine Mining Act of 1995."

[18] 218 SCRA 154 (1997).

[19] Section 458 (a) (1) (vi). The Sangguniang Panlungsod, as the legislative body of the city shall enact ordinances, approve resolutions and appropriate funds for the general welfare of the city and its inhabitants pursuant to Section 16 of this Code and in the proper exercise of the corporate powers of the city as provided for under Section 33 of this Code, and shall:

(1) Approve ordinances and pass resolutions necessary for an efficient and effective city government, and in this connection, shall:

xxx

(vi) Protect the environment and impose appropriate penalties for acts which endanger the environment, xxx.

Can the President, in effect, "tow the line" – direct the local chief executives to comply or be held in defiance of EO 79? Under Article X, Section 4[20] of the 1987 Constitution, the President exercises general supervision, not control, over local government units. The classic distinction between the two is that control "is the power of an officer to alter or modify or nullify or set aside what a subordinate officer has done in the performance of his duties or substitute the judgment of the former for that of the latter", while supervision is the "power or authority of an officer to see that subordinate officers perform their duties."[21]

While the President himself does not exercise control over LGUs, the latter, however, exercise powers that are delegated to them by statutes. Simply put, they are held within the bounds established by Congress. And it is the function of the President to see to it that laws are faithfully executed. Thus, when the President implements a statute enacted by Congress affecting LGUs, it is still within the scope of general supervision mandated by the 1987 Constitution. Since RA 7942 does not necessarily affect LGUs *per se*, an argument can be had that LGUs can still adopt their own ordinances protecting the environment and still be faithful to the terms set forth in EO 79. There is no defiance to speak of, in the real sense of the word.

Under the Doctrine of Qualified Political Agency, the Secretary of the Department of Interior Local Government (DILG) is the *alter ego* of the President based on the power of control vested on the President by Article Vlll Section 17[22] of the 1987 Constitution over all the executive departments, bureaus and offices.

The case of DENR v. DENR Employees,[23] illustrates the application of this doctrine. After the provinces of South Cotabato and Saranggani were

[20] Article X, 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.

[21] *Cruz, op. cit. supra.*

[22] Article Vlll, Section 17. The President shall have control of all the executive departments, bureaus and offices. He shall ensure that the laws be faithfully executed.

[23] 409 SCRA 359 (2003).

moved from Region XI to Region XII following a plebiscite held within the proposed area of the Autonomous Region for Muslim Mindanao (ARMM), the Secretary of the DENR issued an order to transfer the Regional Office from Cotabato City to Koronadal City. In sustaining the act, the Court recognized the continuing authority of the President to reorganize any branch or agency of the executive department and explained that the power of the President may be validly delegated to his cabinet members. If the Secretary exercised it without being reprobated by the President, then it is deemed to be the President's act.

There is sufficient authority for the proposition that the President can delegate his powers to the members of his Cabinet, including the DILG Secretary, to put into effect his orders. As to the extent of this authority, the Court has declared that this will not apply to powers that the Constitution requires him to personally exercise. This apparently includes only the power to enter into treaties, grant executive clemency, and declare martial law or suspend the privilege of the writ of *habeas corpus*.

Article lll, Section 10 of the 1987 Constitution states, "No law impairing the obligation of contracts shall be passed." This general rule in contract law maintains that contractual obligations between parties have the force of law and must be complied with. As such, performance of obligations arising from contracts cannot ordinarily be excused by the subsequent inability to perform the same by unforeseen difficulties or by the failure of a party to avail of the benefits to be had in the contract, by weather conditions, by financial stringency, or by stagnation of businesses. Neither is performance by the party of his terms in the contract be excused by the fact that the contract turns out to be hard and improvident, unprofitable, or impracticable or ill-advised, or even foolish, or less profitable or unexpectedly burdensome.[24] This of course, presupposes that such contracts are not contrary to law, morals, and public policy.

In the case of Mineral Agreements subject of RA 7942, be it a Financial and Technical Assistance Agreement (FTAA) or a Mineral Production

[24] 17 CJS 946-948; *Reyes vs. Caltex* as reiterated in *Laguna Tayabas Bus Co. vs. Manabat.*

Sharing Agreement (MPSA), we presume that the old mining contracts entered by the Government which EO 79 regards as "contracts that must be respected" conform to a standard issue contract containing all the formalities required by law[25]. Among such contracts would include the FTAA presently held by Sagittarius Mines, Inc.[26] under FTAA No. 002-95-XI approved on March 22, 1995.

The parties' signature to a written contract signifies a concrete act of having given the consent or the meeting of the minds as to the purpose or object why a contract was executed in the first place. Absent any evidence to show that consent was obtained through fraud or duress impairing one party's freedom to contract, the presumption that the signature appearing in the contract shows the voluntary execution of the same. And where the Executive Secretary signs in behalf of the President due diligence must be exerted to ascertain whether this authorization is lawful and valid.

If a member of the Cabinet signs as the *alter ego* of the President, can the same be regarded as a validly executed contract? This becomes even more significant if one argues from the framework that the FTAA is one entered not by the President alone but by the Government of the Republic of the Philippines, in which the President signs as the duly elected representative of the people. But assuming that ordinary citizens, not signatories to these MPSAs or FTAAs signed by the Republic cannot be regarded as proper parties to question the validity of the contract, but the same is later on determined to be onerous and unjust, are the people precluded from questioning the same? It then becomes a point for discussion that the contract may be impugned especially if one of the contracting parties came to the negotiation table in bad faith – as in those cases where certain representations or warranties stipulated in the FTAA have been complied through fraudulent means, such as a fictitious Free, Prior, and Informed Consent (FPICs).

[25] Article 1318 of the Civil Code states that no contract exists unless there is a concurrence of consent of the parties, object certain as subject matter, and cause of the obligation established.

[26] G.R. No. 1127882 (2004).

For contracts like an FTAA to be valid, its object has to be certain[27] – as this is the subject matter of the contract that will bind the parties. Case law tells us that the object of a contract, in order to be considered as certain, need not specify such object with absolute certainty. It is enough that the object is determinable in order for it to be considered as certain. This also presupposes that the subject matter of the contract is a valid subject. Therefore, one may even entertain the theory that if the scope of the FTAA extends to areas classified as *protected areas* – i.e. watersheds as declared by law, and such other lawful categorizations – it may render the validity of the subject matter questionable pursuant to what has been understood in law as a valid subject of a contract.

Finally, the cause or consideration of a contract is also one of the aspects that determine whether a contract is lawful or valid. The consideration is usually established at the onset. It almost always relies on the principle of mutual benefits accorded to the contracting parties. After all, why would one willingly enter into a contract without expecting something beneficial in return? In the case of an FTAA, reliance is placed on the expertise given by the contractor in undertaking the exploratiqn and utilization of natural resources, which is why the Government enters into an agreement with the former, provided, of course, that the contractor has complied with all lawful requirements. However, when viewed in terms of vast profits generated by the contractor vis-à-vis the meager pittance received by the Philippine Government in the form of excise taxes, is there really such a thing as mutual benefit accorded to both parties as the consideration for the execution of an FTAA? Consider also that at the time these contracts subject of mining operations (i.e. FTAAs and MPSAs) were signed, environmental consciousness and genuine concern for its preservation have not yet taken root; thus, the consideration for the execution of such contracts reflected its historical antecedents.

In the 60's and '70s, terms such as *sustainable development, responsible mining, climate change adaptation,* and *disaster risk reduction* have not

[27] Article 1349, Civil Code. The object of every contract must be determinate as to its kind. The fact that the quantity is not determinate shall not be an obstacle to the existence of the contract, provided it is possible to determine the same, without the need of a new contract between the parties.

yet defined governmental policy and legislation. Then, there was a mistaken reliance on the abundance of resources ripe for exploration and utilization exemplified by the numerous issuances of Timber License Agreements (TLAs). Today, we cannot afford to subscribe to the same premise. Therefore, one can also argue that subsequent external (environmental) factors may render the faithful compliance of the terms of such contracts onerous and burdensome and may not even be mutually beneficial to the parties – thereby justifying a pressing and urgent need to review them, and if necessary, invalidate those which are not truly in the interest of the Filipino people.

It is misleading to believe that executive orders such as EO 79 cannot define a stronger policy simply because due respect should be accorded to already existing contracts entered by the Government. The Court has recognized the primacy of other higher values that resulted to the nullification of already existing contracts.

Various Supreme Court decisions advance the argument that while non-impairment of legal contracts is constitutionally guaranteed, the rule is not absolute, since it has to be reconciled with the legitimate exercise of police power.[28] It can, therefore, be validly proposed that in the hierarchy of values, the force of law that binds parties to a contract is subservient to a valid governmental exercise of police power.[29] Ortigas & Co. Limited Partnership v. FEATI Bank and Trust Co.[30] citing Justice Jose P. Bengzon in *Philippine Long Distance Company v. City of Davao, et al*[31] explains that police power "is elastic and must be responsive to various social conditions; it is not, confined within narrow circumscriptions of precedents resting on past conditions; it must follow the legal progress of a democratic way of life." Furthermore, the Court in the Ortigas case,

[28] It is the power to prescribe regulations to promote the health, morals, peace, education, good order or safety and general welfare of the people.

[29] Police Power has been invariably described in jurisprudence as "the most essential, insistent, and illimitable of powers" and may be judicially inquired into and corrected only if it is capricious, whimsical, unjust or unreasonable, there having been a denial of due process or a violation of any other applicable constitutional guarantee.

[30] G.R. No. L-24670 (1979).

[31] G.R. No. L-23080 (1965).

supra, citing *Vda. de Genuino v. The Court of Agrarian Relations, et al.*,[32] emphatically declares, "We do not see why public welfare when clashing with the individual right to property should not be made to prevail through the state's exercise of its police power."

Under our system of government, the exercise of police power is an inherent power exercised by our national government and is limited only by the provisions in the 1987 Constitution. In local governments, police power is expressed as a delegated power pursuant to the general welfare clause, in recognition of the autonomy granted to LGUs. The only limitation imposed on LGUs is that it cannot contravene existing laws or the 1987 Constitution. This finds expression in Article 10, Section 2[33] of the 1987 Constitution and Title 1, Chapter 1, Section 2 (a) of R.A. 7160[34], which was enacted with genuine and meaningfully local autonomy as a guiding principle. Thus, with or without EO 79, the clear limitation of the exercise of police power by LGUs is already defined and expressed.

As a general rule, only parties to a contract can assail its validity. The Court, however, recognizes an exception that rests on those instances of transcendental importance where third parties can assail the validity of contracts. We can see this from the early case of Kilosbayan, et al. v. Guingona, et al[35] to the more recent case of Francisco Chavez v. Raul Gonzales,[36] where the Court states, "In line with the liberal policy of this Court on *locus standi,* when a case involves an issue of overarching significance to our society, technicalities of procedure may be set aside to give way to ends that justice so requires." Oposa v. Factoran[37] even includes future generations, ordinarily regarded in law as non-entities, as having the legal personality to be included as petitioners in a class

[32] G.R. No. L-25035 (1968).

[33] Article X, Section 2. The territorial and political subdivisions shall enjoy local autonomy.

[34] Chapter 1, Section 2 (a). It is hereby declared the policy of the State that the territorial and political subdivisions of the State shall enjoy genuine and meaningful 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. xxx

[35] G.R. No. 113375 (1994).

[36] G.R. No. 168338 (2008).

[37] G.R. No. 101083 (1993).

action suit following the doctrine of intergenerational responsibility. Thus, we encounter cases filed in behalf of taxpayers lodged before the Court premised on this principle.

Can we not, then, advance the argument that environmental protection is an issue of transcendental importance because it affects all of us? Since the degradation of the environment brought about by the deleterious effects of mining invades every aspect of our life, certainly it has reached that status of public interest and is considered an issue of transcendental importance. The Court can, therefore, set aside the rigid rules of procedure in order to reflect the ends of justice, which we believe is called social justice.

The underlying principle of social justice is the driving force that can modify and in certain instances, even nullify unjust and onerous contracts or even laws, prescinding from the premise that between commutative justice, which values contracts, vis-à-vis social justice, the latter outplays the former. In defining social justice, the Court in Calalang vs. Williams[38] recognizes instances when laws and contracts create more harm than good and when these perpetuate more deleterious effects rather than promote the lawful objectives of the State. Hence, the Court defines social justice as the "humanization of laws and the equalization of social and economic forces by the State so that justice in the rational and objectively secular conception may at least be approximated." Here, the principles of equity and fair play are brought into the foray to level the playing field.

Contracts involving public policy may be rescinded if public interest so requires. In Agan, et al. v. PIATCO, et al[39] and Baterina, et al. v. PIATCO, et al[40], the Court held,

> Thus, upon a concrete showing that, as in this case, the contract signed by the government and the contract-awardee is an entirely different contract from the contract bided, courts should not hesitate to strike down said contract in its entirety for violation of public policy on public bidding. A strict adherence on the principles, rules and regulations on public bidding must be sustained if only to preserve the integrity and faith of the general public on the procedure. xxx

[38] G.R. No. 47800 (1940).

[39] G.R. No. 155001 (2003).

[40] G.R. No. 155547 (2003)

And while it has been criticized often for not being a contract in legal terms, the TLAs subject of the landmark case of Oposa vs. Factoran[41] have likewise been rescinded on the same ground, invoking the principle of intergenerational responsibility. But, perhaps, the most instructive case that points to the power of the Court to compel the review of contracts, with or without any provisions indicated therein providing for the same is the case of Miners Association of the Philippines vs. Factoran, Jr.[42] where the Court explained that the principle of non-impairment of contracts does not apply. No rights are prejudiced with the review or repeal of the licenses issued by the government.

Conclusion

The manner by which EO 79 was crafted admits of multiple interpretations; a very solemn and great task lies before the drafters of the Implementing Rules and Regulations (IRR). EO 79 is filled with a recapitulation of motherhood statements about the environment and natural resources but no text therein mentions about the rational utilization of those resources, much less about conserving the same. Instead, it frames a policy that only highlights what the executive department apparently perceives must be prioritized. It emphasizes the importance of contracts and the obligations arising therefrom and finds itself non-responsive to subsequent conditions that may impact on the faithful performance of those contractual obligations. It likewise appears

[41] Oposa, *op. cit. supra.*

[42] Well settled is the rule, however, that regardless of the reservation clause, mining leases or agreements granted by the State, such as those granted pursuant to Executive Order No. 211 referred to in this petition, are subject to alterations through a reasonable exercise of Police Power of the State.

Accordingly, the State, in the exercise of its police power in this regard, may not be precluded by the constitutional restriction on non-impairment of contract from altering, modifying and amending the mining leases or agreements granted under PD 463 (the previous law on mining), as amended, pursuant to EO 211. Police Power, being co-extensive with the necessities of the case and the demands of public interest, extends to all the vital public needs.

to send a message to local government units (LGU) to align themselves fully with national directives, and courts the possibility of stepping beyond what is allowable as it may run contrary to the provisions of the 1987 Constitution and that of R.A. 7160.[43]

Hence, the group that will draft the IRR must formulate guidelines that reflect a balancing of interests and echo not only motherhood statements that protect the environment but also lay down mechanisms that embody the spirit of conserving the environment – one that fully captures the declaration of policy also quoted in the same executive order. Until then, EO 79 remains open to construction discourse.

[43] RA 7160, "Local Government Code of 1991".