Of Construction and Excavations: An Examination of the Power of Judicial Review in Light of *La Bugal B'laan*

*Rodolfo Ma. A. Ponferrada**

Some critics consider the Constitution even specific in many of its provisions saying that the Constitution could pass more as an omnibus law than a fundamental law. This is, of course, an obvious exaggeration but it does give an idea of their perception regarding this particular defect.[1]

I. INTRODUCTION

A momentary glance at today's headlines would give one more than an ample glimpse of the sad state of affairs the Philippines finds itself in: the growing number of Filipinos living below the poverty line; the increasing volume of overseas Filipino workers; and the deafening clamor for delivery of essential and basic services - food, shelter and medicine. Filipinos are still hounded by the perennial problem of finding the road that will finally lead the country to progress. And much recently, the country's leadership was hard-pressed seeking answers to the country's financial and budgetary woes.

Indeed, there seems to be no instant cure to the ills the Philippines is currently enduring. Such complex problems cannot be solved with a solitary snap of a finger. But perhaps, lying below all of us is a significant key to

* LL.B. '01, *cum laude* (Class Valedictorian), University of the Philippines College of Law. He is a faculty member of the Ateneo de Manila University School of Law and of the University of the Philippines College of Law. He teaches *Administrative Law, Agency* and *Partnership*. He is currently the Assistant Chief of Staff of Vice President Noli L. de Castro.

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1. 1 HECTOR S. DE LEON, PHILIPPINE CONSTITUTIONAL LAW: PRINCIPLES AND CASES, n. 13 at 6-7 (1999) [hereinafter DE LEON].

finding a determinative solution to the problems of the Philippines. The Philippines is blessed with abundant natural resources. It is but natural to expect that the Philippines will be able to effectively and efficiently utilize these resources for the benefit of the entire country and its population.

In a democratic society that upholds the rule of law, the overall responsibility of harnessing the nation's natural resources is naturally lodged in the country's political leadership. This responsibility and its concomitant power gain increased significance when viewed together with the constitutional provision granting the State absolute ownership and control over these natural resources. Thus:

> [a]ll 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, 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 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.[2]

In accordance with the foregoing constitutional prescription, Congress enacted Republic Act No. 7942,[3] otherwise known as the Mining Act of 1995. The Mining Act of 1995, which provided, among others, the general terms and conditions in the execution of financial and technical assistance

2. PHIL. CONST. art. XII, § 2.

3. An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization and Conservation, Republic Act No. 7942 (1995).

agreements (FTAAs),[4] took effect on 9 April 1995, thirty days following its publication on 10 March 1995 in two newspapers of general circulation.[5]

On 30 March 1995, shortly before the effectivity of the Mining Act of 1995, then President Fidel V. Ramos entered into an FTAA with WMC Philippines, Inc. (WMCP), covering 99,387 hectares of land in South Cotabato, Sultan Kudarat, Davao del Sur and North Cotabato, hereinafter the WMCP FTAA.

Sometime in 1997, as stated in the case of *La Bugal-B'laan Tribal Association, Inc., et al. v. Victor O. Ramos, et al.*,[6] various petitioners traversing a wide spectrum of Philippine society filed a petition before the Supreme Court assailing the validity of the Mining Act of 1995, its implementing rules and regulations, as well as the WMCP FTAA for being violating the Constitution.

Needless to say, the Supreme Court's *en banc* Decision in *La Bugal-B'laan* was widely anticipated considering its far-reaching implications, not only on and in the mining industry, but also on the general economic direction of the Philippines.

In *La Bugal-B'laan*, the Supreme Court, speaking through Justice Carpio-Morales and concurred in by seven other magistrates,[7] declared the following acts, which were ostensibly exercised pursuant to paragraph 2, section 2, Article XII of the Constitution, unconstitutional and void for ironically violating the same constitutional provision:

1. The following sections of the Mining Act:
   (a) The proviso in Section 3 (aq),
   (b) Section 23,
   (c) Sections 33 to 41,
   (d) Section 56,
   (e) The second and third paragraphs of Section 81, and
   (f) Section 90.
2. All provisions of Department of Environment and Natural Resources Administrative Order No. 96-40 [1996] (the implementing rules and regulations of the Mining Act of 1995) which are not in conformity with the decision in *La Bugal-B'laan*; and
3. The WMCP FTAA.

4. *Id.* ch. VI.
5. *Id.* § 116.
6. La Bugal-B'laan Tribal Association, Inc., et al. v. Victor O. Ramos, et al., G.R. No. 127882, Jan. 27, 2004.
7. Mr. Chief Justice Davide and Messrs. Justice Puno, Quisumbing, Carpio, Corona, Callejo and Tinga.

There were two separate opinions written by Justices Vitug and Panganiban that were in favor of the dismissal of the petition. Three other justices[8] joined Justice Panganiban's separate opinion. One justice[9] took no part in the Court's resolution of the case.

The 8-5-1 *en banc* Decision best underscores the burden of having an expanded power of judicial review enshrined in the Constitution. In *La Bugal-B'laan*, the executive and legislative departments acted ostensibly pursuant to the fourth paragraph of section 2, Article XII of the Constitution. These acts: a piece of legislation enacted by both houses of Congress and approved by the President; the implementing rules and regulations issued by the Department of Environment and Natural Resources; and a contract entered into by the President on behalf of the Republic of the Philippines with a foreign private mining corporation were all declared null and void by the judicial department for violating the same constitutional provision: the fourth paragraph of section 2, Article XII.

In other words, *the fate of the country and countless millions of Filipinos rested on the differing and contrary interpretations by the three co-equal branches of government of one particular constitutional provision with the executive and legislative on one hand, and the judiciary on the other hand.* The predicament is further confounded when one considers that even the position of the judiciary is not unanimous. There is at best a significant opinion by five out of the thirteen magistrates participating that the constitutional provision in question allows the execution of the WMCP FTAA.

This article is not meant to be an apology for either side of the argument in *La Bugal-B'laan.*[10] Rather and using the case as the trigger, this article seeks to examine the propriety of placing national economic policies on a constitutional pedestal. Are these better left to the sole discretion of the political departments of government?

To answer this problem, this article will be presented in this manner: Part I will present an examination of the constitutional form of government, in general, and its application in the Philippines; Part II will give a brief

8. Mesdames Justice Ynares-Santiago, Sandoval-Gutierrez and Austria-Martinez.
9. Mr. Justice Azcuna (since one of the parties was a former client).
10. Considering that the resolution of the motions for reconsideration of the *en banc* Decision filed by the respondents and some of the petitioners is still pending with the Supreme Court, a discussion of the particular merits of either side would be prohibited as the case is still *sub judice*.

discussion of the *en banc* Decision and the separate opinions in *La Bugal-B'laan*; Part III will present the principles of constitutional construction. Finally Part IV will try to offer possible solutions to the Philippine situation of having economic policies enshrined in the Constitution in the hope of contributing to finding a solution to the bigger problem of bringing the country towards the light of progress at the end of the current tunnel of poverty and hardship.

II. Constitutional Government

The Philippines adheres to a constitutional form of government.[11] A document called the *constitution* is considered the supreme law in a constitutional form of government.[12] One of the main features of a constitutional form of government is the observance of the principle of *separation of powers*.[13]

The principle of separation of powers is probably the most significant feature of a constitutional form of government, whether presidential or parliamentary, when compared with other forms of government like an absolute monarchy or other forms of absolute rule. Under this principle, the great powers of government are not fused in one entity, which is the case in an absolute monarchy, but are instead vested in separate branches of government.[14] Thus, in the Philippine setting, the legislative power is principally vested in Congress,[15] the executive power is vested in the President[16] and the judicial power is vested in the Supreme Court and other lower courts.[17] Gone are the days of the absolute King who was at the same time the lawmaker, the executor and administrator of the laws and the judge of disputes regarding the law.

Legislative power is essentially the authority to make laws and to alter and repeal them.[18] Executive power is the power to administer the laws, carrying them into practical operation and enforcing their due observance.[19]

11. Joaquin G. Bernas, The 1987 Constitution of the Republic of the Philippines: A Commentary 47 (1996) [hereinafter Bernas].
12. Antonio B. Nachura, Outline/Reviewer in Political Law 2 (2000).
13. Bernas, *supra* note 11, at 602.
14. *Id.* at 603.
15. Phil. Const. art. VI, § 1.
16. Phil. Const. art. VII, § 1.
17. Phil. Const. art. VIII, § 1.
18. *See* Duarte v. Dade, 32 Phil. 36 (1915); People v. Santiago, 43 Phil. 120 (1922).
19. *See* Government of the Philippine Islands v. Springer, 50 Phil. 259 (1927); Planas v. Gil, 67 Phil. 62 (1939).

Judicial power is the power and duty of judicial tribunals to construe and apply the laws to controversies or disputes concerning legally recognized rights or duties between the State and private persons, or between private litigants in cases properly brought before them, originally or on appeal. It is principally the power to decide actual controversies or cases between adverse litigants.[20]

Under this set-up, each branch is meant to be supreme in its own sphere. The three branches of government are designed to be equal to, coordinate with, and independent of, each other. Stated differently, the branches entrusted with their respective powers can only exercise such powers as are expressly given and such other powers as are necessarily implied from the given powers. As a consequence, each branch is prohibited from encroaching upon the power and authority vested in the other branches. If one branch goes beyond the limits set forth by the Constitution, its acts would be null and void.[21]

This set-up seeks to prevent the accumulation of all the great powers of government in one entity. Such accumulation is considered to be the precursor to tyranny and despotism. Moreover, with this set-up, the exercise of powers by each branch is subject to a systemic check from the other branches.[22] Hence, the desired equality and balance is essentially achieved.

In the Philippines, the President or the head of the executive branch may veto bills enacted by Congress or the legislative department[23] and through the grant of pardons, he may effectively prevent the enforcement final judgments of the courts or the judiciary.[24]

On the other hand, Congress may override presidential acts such as a presidential veto,[25] an appointment to certain high government offices,[26] a declaration of martial law or a suspension of the privilege of the writ of *habeas corpus*.[27] Congress may likewise enact, amend or repeal laws that effectively amend or revoke doctrines enunciated by the courts.[28] Congress

20. *See* Vera v. Avelino, 77 Phil. 192 (1946).
21. *See* Angara v. Electoral Commission, 63 Phil. 139 (1936).
22. Bernas, *supra* note 11 at 603.
23. Phil. Const. art. VI, § 27.
24. Phil. Const. art. VII, § 19.
25. Phil. Const. art. VI, § 27.
26. Phil. Const. art. VII, § 16, ¶ 1.
27. Phil. Const. art. VII, § 18, ¶ 1.
28. This forms part of the plenary power of Congress to legislate. Indeed, judicial decisions form part of the law which the decision interprets or construes (Civil

likewise has the power to define, prescribe, and apportion the jurisdiction of the various courts provided it does not deprive the Supreme Court of its constitutionally granted powers, as well as prescribe the qualifications of judges of lower courts.[29] More importantly, Congress has the power to impeach, try and convict the President and the members of the Supreme Court.[30]

Finally, the judiciary may declare legislative and executive acts unconstitutional and, therefore, null and void.[31]

A corollary feature flowing from the foregoing is the power of judicial review. The power of judicial review, among others, is the exercise of the courts of its judicial power to review and pass upon the acts of the other two branches of government and, if warranted, to strike them down upon a finding that the questioned acts contravene the Constitution.[32] This power has been described as basic in the philosophy of constitutional government, where "in the interests of free government, the agencies of government must be subject to external control."[33]

It has been said that with the exercise of this power, the judiciary is not in a higher position *vis-à-vis* the other two branches. It is the Constitution which is superior to all the co-equal branches of government. It is merely the essence of judicial power for the courts to declare it to be so. [34] Stated differently, the courts are not actually striking down executive or legislative action. The court is merely declaring that the questioned action has contravened the supreme law. The courts, beginning with the lower courts and ultimately, the Supreme Court, are merely deciding whether or not the agencies of government were keeping within their constitutional bounds.[35]

A long standing exception from the power of judicial review is the ***political question doctrine***. A political question is one which "is to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive

CODE, art. 8). Congress may easily "reverse" a jurisprudential doctrine by the simple expedient of amending or repealing the law interpreted or construed by the court when the doctrine was enunciated.

29. PHIL. CONST. art. VIII, § 7, ¶ 2.

30. PHIL. CONST. art. XI, § 2-3.

31. This is the practical effect of the exercise of the power of judicial review.

32. *See* Angara v. Electoral Commission, 63 Phil. 139 (1936).

33. ERIK MCKINLEY ERIKSSON & DAVID NELSON ROWE, AMERICAN CONSTITUTIONAL HISTORY 332 (1933).

34. *See Angara*, 63 Phil. 139.

35. *See* Marbury v. Madison, 1 Cranch. 137 (1803).

branch of the government."[36] The term connotes a question of policy in matters concerning the government of the State as a body politic. It is concerned with issues dependent upon the wisdom, expediency, necessity, advisability or practicability, not the validity or legality, of a particular measure or contested act.[37]

In order for the courts to strike down acts of the other two departments, it must be satisfied that, indeed, the questioned acts have transgressed specific constitutional provisions. If no constitutional provision is violated, then the courts have no discretion but to uphold the questioned acts as valid and constitutional.

As distinguished from the judiciary, the legislative and executive branches of government are regarded as the political departments of government because in very many cases, their action is necessarily dictated by considerations of public or political policy.[38] Necessarily, these policy considerations will not permit Congress or the President, including his alter egos, from exercising powers not granted by the Constitution or by statute. But within the confines of the supreme law and the entire legal system, policy considerations allow the two political departments to recognize that a certain set of facts exists or that a given status exists, and these determinations, together with the consequences that flow therefrom, may not be touched upon by the courts.[39]

It has likewise been said that a constitution should logically concern itself with three matters, namely: (a) a constitution of government; (b) a constitution of liberty and (c) a constitution of sovereignty.[40] Such would be a true embodiment of a document, serving as a nation's supreme law, and constituting the most vital of institutions to give life to a civilized society.

The Constitution of Government lays down the structure of government and the powers and duties entrusted to each branch or division of government. The Constitution of Liberty lays down the rights of private individuals *vis-à-vis* the State. And the Constitution of Sovereignty recognizes the fallibility of its framers by laying down a mechanism whereby the Constitution itself may be amended or revised. As one has put it, the wisdom of the framers lies in their knowledge that they have not crafted a perfect document. While they might have intended to constitute a permanent system that should last lifetimes and generations, it is indeed

36. DE LEON, *supra* note 1, at 490.

37. *See* Tañada v. Cuenco, 103 Phil. 1051 (1958).

38. *See* Mabanag v. Lopez Vito, 78 Phil. 1 (1947).

39. *See Tañada*, 103 Phil. 1051.

40. NACHURA, *supra* note 12, at 3.

possible given the limitations of human frailty that they have committed a mistake or have not foreseen an eventuality that should be addressed later on.

Fortunately or unfortunately, the framers of the 1987 Constitution saw it fit to include in the fundamental law matters other than the three just mentioned. Thus, there are specific articles dealing with matters such as national economy and patrimony, labor and social justice, language, family, education, science and technology, arts and culture. Brevity was apparently not a priority of the framers of the Constitution, which would probably rank among the longest and most verbose constitutions in the world.[41] One cannot totally fault the framers. Both the 1935 and 1973 versions dealt with similar subject matters. And starting with what is considered the first organic act of the Philippines, the Philippine Bill of 1902,[42] provisions dealing with natural resources may be found.[43]

Not only has the general scope of the Constitution continued to broaden; the framers have likewise broadened the concept of judicial review. The expanded definition of judicial power in the present Constitution now includes "the *duty* ... to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[44] While courts already had the *power* to resolve questions involving grave abuse of discretion by executive, legislative, administrative and, even judicial bodies, as the extraordinary and highly prerogative writs of certiorari, mandamus and prohibition were available even before the promulgation of the present Constitution, judicial review has been significantly broadened when the determination of whether there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any government entity was made a *duty*. The exercise of *power*, one may waive in favor of the greater public interest. But the call of *duty*, one cannot lightly shirk from. As aptly put by a noted constitutionalist, "power may be renounced under certain circumstances, but duty cannot be honorable renounced." [45]

Suppose the controversy involves the issue of whether or not there has been a grave abuse of discretion on the part of the legislative or executive branch, has the court the duty to assume jurisdiction notwithstanding that the matter is "one in regard to which full discretionary authority has been

41. CONSTANTINO G. JARAULA, CONSTITUTION OF THE PHILIPPINES AND BASIC DOCUMENTS 336 (1997).

42. An Act Temporarily to Provide for the Administration of the Affairs of Civil Government in the Philippine Islands, and for other purposes, Public Act No. 235 (1902) [Philippine Bill of 1902].

43. *Id.* § 20 - 62.

44. PHIL. CONST. § 1, ¶ 2 (emphasis supplied).

45. Joaquin G. Bernas, *The 'Political Question' Doctrine*, TODAY 8 (Nov. 19, 2003).

delegated to [said] branch?"[46] In other words, does the question remain a political one or is it converted into a justiciable issue?

With these two factors[47] *working* hand-in-hand, the power of judicial review has been heightened to extremes it never experienced before.

III. THE LA BUGAL-B'LAAN CASE

In La Bugal-B'laan Tribal Association, Inc., et al. v. Victor O. Ramos, et al.,[48] the Supreme Court declared unconstitutional and void:

1. The following provisions of the Mining Act of 1995:
   a. The *proviso* in Section 3 (aq),[49]
   b. Section 23;[50]
   c. Section 33 to 41;[51]

46. DE LEON, *supra* note 1, at 490 (citing 16 CJS 413).

47. First, broadening the scope of the Constitution. Second, broadening the concept of judicial review.

48. G.R. No. 127882, Jan. 27, 2004.

53. § 90. This provides for applicable fiscal and non-fiscal incentives that may be granted to contractors under the FTAA.

49. § 3 (aq). The proviso states that a legally organized foreign-owned corporation shall be deemed as such for purposes of granting an exploration permit, financial or technical assistance agreement or mineral processing permit.

50. Section 23 (This provides for the rights and obligations of the permittee. Such rights include the right to enter, occupy and explore the area while his obligations are [1] to discuss and settle with private parties affected, if any, the extent, necessity and manner of his entry, occupation and exploration of such area and [2] to undertake an exploration work on the area as specified by its permit.).

51. Section 33 (This provides that any qualified person with technical and financial capability to undertake large-scale exploration, development, and utilization of mineral resources in the country may enter into an FTAA with the government through the Department of Environment and Natural Resources.);Section 34 (This provides for the maximum contract area such permittees may be granted: [a] 1,000 meridional blocks onshore; [b] 4,000 meridional blocks offshore; [c] combinations of [a] and [b] provided that it shall not exceed the maximum limits for onshore and offshore areas); Section 35 (This provides for the terms, conditions and warranties that shall be incorporated in the FTAA.); Section 36 (This provides that a financial or technical assistance agreement shall be negotiated by the DENR subject to the approval of the President, which shall be made known to Congress within 30 days from its execution and approval.); Section 37 (This provides for the procedure by which the filing and evaluation

d. Section 56;[52]

e. The second and third paragraphs of Section 81;[53] and

f. Section 90.[54]

2. All provisions of the implementing rules and regulations of the Mining Act of 1995, which are not in conformity with the *La Bugal-B'laan* Decision; and

3. The WMCP FTAA entered into by and between the Republic of the Philippines (represented by then President Fidel V. Ramos) and WMCP on 30 March 1995.

At the center of the controversy is the correct construction of the fourth paragraph of section 2, Article XII of the Constitution, which provides:

> 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.

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of the FTAA proposals shall be made.); Section 38 (This provides that the FTAA shall have a term not exceeding 25 years to start from the execution thereof, renewable for not more than 25 years.); Section 39 (This provides that the contractor has the option to convert the financial or technical assistance agreement to a mineral agreement at any time during the term of the agreement, subject to certain conditions such as if the economic viability of the contract area is found to be inadequate to justify large-scale mining operations, etc.); Section 40 (This provides that the FTAA may be assigned or transferred in whole or in part, to a qualified person subject to the prior approval of the President, which shall be made known to Congress within 30 days from the date its approval.); Section 41 (This provides that withdrawal from the FTAA may be manifested by the contractor to the Secretary of DENR provided that the former has satisfied all his financial, fiscal or legal obligations.).

52. Section 56 (This provides that a foreign-owned/-controlled corporation may be granted a mineral processing permit.).

53. Section 81 (This provides that the government's share in FTAA shall comprise of 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).

54. Section 90 (This provides for applicable fiscal and non-fiscal incentives that may be granted to contractors under the FTAA.).

On one side of the controversy is a group of petitioners "travers[ing] a wide range of sectors."[55] Among them are: (a) La Bugal B'laan Tribal Association, Inc., a farmers and indigenous people's cooperative organized under Philippine laws representing a community actually affected by the mining activities of WMCP; (b) members of La Bugal B'laan Tribal Association;[56] (c) other residents of areas also affected by the mining activities of WMCP;[57] and (d) non-governmental organizations with advocacies concerning the environment and natural resources.[58]

Named respondents on the other side of the controversy were then DENR Secretary Victor O. Ramos,[59] Mines and Geosciences Bureau Director Horacio Ramos, then Executive Secretary Ruben Torres,[60] all three of whom were impleaded in their respective official capacities, and private corporation WMCP. WMCP is owned by WMC Resources International Pty., Ltd., a wholly owned subsidiary of Western Mining Corporation Holdings Limited, which is a publicly listed major Australian mining and exploration company.[61]

In a special civil action for mandamus and prohibition under Rule 65 of the Rules of Court, the petitioners assail the constitutionality of (a) the Mining Act of 1995, (b) its implementing rules and regulations issued by the DENR and (c) the WMCP FTAA entered into on 30 March 1995 by the Republic of the Philippines and WMCP. The petitioners argue that the WMCP FTAA allows a foreign-owned company to extend more than mere financial or technical assistance to the State in the exploitation, development, and utilization of minerals, petroleum, and other mineral oils, and even permits a foreign owned company to operate and manage mining activities

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55. *La Bugal-B'laan*, G.R. 127882 at 15.

56. *Id.* at n. 68.

57. *Id.* at n. 69.

58. These organizations are: Green Forum Philippines; Green Forum Western Visayas; Environmental Legal Assistance Center; Philippine Kaisahan Tungo sa Kaunlaran ng Kanayunan at Reporma ng Pansakahan; Partnership for Agrarian Reform and Rural Development Service, Inc.; Philippine Partnership for the Development of Human Resources in the Rural Areas, Inc.; Women's Legal Bureau; Center for Alternative Development Initiatives, Inc.; Upland Development Institute; Kinaiyahan Foundation, Inc.; Sentro ng Alternatibong Lingap Panligal; and Legal Rights and Natural Resources Center, Inc.

59. Sec. Michael T. Defensor is the current Secretary of Environment and Natural Resources.

60. Sec. Eduardo R. Ermita is the current Executive Secretary.

61. *La Bugal-B'laan*, G.R. No. 127882 at 10.

in contravention of the Constitution.[62] The petitioners further argue that the WMCP FTAA permits WMCP to manage and operate every aspect of the mining activity.

In support of their contention, the petitioners point out that the WMCP FTAA:

> [G]uarantees that wholly foreign owned [WMCP] entered into the FTAA in order to facilitate 'the large scale exploration, development and commercial exploitation of mineral deposits that may be found to exist within the Contract area.' As a contractor it also has the "*exclusive right to explore, exploit, utilize, process and dispose of all mineral products and by-products thereof that may be derived or produced from the Contract Area.*"[63]

On the other hand, private respondent WMCP argues that:

> [T]hat the word 'technical' in the fourth paragraph of Section 2 [of Article XII of the Constitution] encompasses a 'broad number of possible services,' perhaps, 'scientific and/or technological in basis.' It thus posits that it may also well include 'the area of *management or operations* ... so long as such assistance requires specialized knowledge or skills, and are related to the exploration, development and utilization of mineral resources.'[64]

WMCP and the other respondents further argue that the phrase "agreements involving technical or financial assistance" is equivalent to the term "service contracts."[65] In support thereof, they cited proceedings of the Constitutional Commission to show "that although the terminology 'service

62. The petitioners also claim that the WMCP FTAA is unconstitutional for it allows a foreign-owned company to extend both technical *and* financial assistance, instead of *either* technical *or* financial assistance. They contend that the provisions of Section 2, Article XII of the Constitution authorizes the President to enter into an agreement with a foreign corporation involving only just one of either technical or financial assistance; an agreement involving both technical and financial assistance is argued to be not allowed. Such contention was dismissed by the Supreme Court as absurd, as it ruled:

> Surely, the framers of the 1987 Charter did not contemplate such an absurd result from their use of "either/or." A constitution is not to be interpreted as demanding the impossible or the impracticable; and unreasonable or absurd consequences, if possible, should be avoided. Courts are not to give words a meaning that would lead to absurd or unreasonable consequences and a literal interpretation is to be rejected if it would be unjust or lead to absurd results. That is a strong argument against its adoption. Accordingly, petitioners' interpretation must be rejected. (*La Bugal-B'laan*, G.R. 127882 at 92-93 (citations omitted)).

63. *La Bugal-B'laan*, G.R. No. 127882 at n. 222 (emphasis supplied).

64. *Id.* at 60 (citations omitted) (emphasis supplied).

65. *Id.* at 61.

contract' was avoided [by the Constitution], the concept it represented was not."[66] The respondents likewise claim that the phrase "agreements involving technical or financial assistance" includes the concept of "service contracts." To prove their point, they cite various instances during the course of the debates in the Constitutional Commission leading to the adoption of the controversial constitutional provision wherein the commissioners themselves referred to FTAAs as "service contracts."[67]

In further support of its contention, WMCP cites Department of Justice Opinion Nos. 75 (1987) and 175 (1990) expressing the view that an FTAA "'is no different in concept' from the service contract allowed under the 1973 Constitution."

On this issue,[68] majority of the Supreme Court, through the well-written *ponencia* of Justice Carpio-Morales, found in favor of the petitioners. The Court ruled that following the literal text of the Constitution, assistance accorded by foreign-owned corporations in the large-scale exploration, development, and utilization of petroleum, minerals and mineral oils should be limited to *technical* or *financial* assistance only.[69]

Debunking WMCP's contention, the Supreme Court further ruled that pursuant to the statutory construction principle *casus omisus pro omisso habendus est*,[70] the deletion of the phrase "management or other forms of assistance" by foreign corporations which was the main feature of the controversial service contracts entered into during the regime of the 1973 Constitution, should only be limited to financial and technical areas. The management and/or operation of mining activities by foreign contractors

66. *Id.*

67. *Id.* at 61-63.

68. There were other issues decided by the Supreme Court in *La Bugal-B'laan*. Procedurally, the respondents questioned (a) the presence of three of the four requisites for the proper exercise of judicial review (actual case or controversy, *locus standi* and pleading the constitutional challenge at the earliest opportunity); (b) the propriety of the remedy taken; and (c) the propriety of going directly to the Supreme Court. Substantively, the petitioners also assail the validity of then President Corazon C. Aquino's Executive Order No. 279 [1987] because its supposed date of effectivity came after she lost her legislative powers upon the convening of the first Congress under the 1987 Constitution. The resolution of the foregoing issues is not relevant to this article and consequently, will not be discussed.

69. *La Bugal-B'laan*, G.R. No. 127882 at 60.

70. A person, object or thing omitted from an enumeration must be held to have been omitted intentionally.

were precisely the evils that the framers of the 1987 Constitution sought to eradicate.[71]

Using the same statutory construction principle *casus omisus pro omisso habendus est*, the Supreme Court also ruled that the framers of the Constitution did not intend to retain the phrase and concept of "service contracts" reasoning that if the Constitutional Commission indeed intended to do so, it could have easily retained the same language instead of employing new and unfamiliar terms: "agreements ... involving either technical or financial assistance." The Supreme Court further held that such difference between the language of a provision in a revised constitution and that of a similar provision in the immediately preceding constitution is indicative of a difference in purpose.[72]

In support of the foregoing, the Supreme Court cited the following:

(1) Question of 1986 Constitutional Commissioner Minda Luz M. Quesada and Answer of 1986 Constitutional Commissioner Bernardo M. Villegas.[73]

> MS. QUESADA. The 1973 Constitution used the words "service contracts." In this particular Section 3, is there a safeguard against the possible control of foreign interests if the Filipinos go into coproduction with them?
>
> MR. VILLEGAS. Yes. In fact, *the deletion of the phrase 'service contract' was our first attempt to avoid some of the abuses in the past regime in the use of service contracts to go around the 60-40 arrangement.* The safeguard has been introduced — and this, of course can be refined — is found in Section 3, lines 25 to 30, where Congress will have to concur with the President on any agreement entered into between a foreign-owned corporation and the government involving technical or financial assistance for large scale exploration, development ad utilization of natural resources.

(2) Explanation of then 1986 Constitutional Commissioner, now Supreme Court Chief Justice Hilario G. Davide, Jr.[74]

> MR. DAVIDE. ... The Commission had just approved the Preamble. In the Preamble we clearly stated that the Filipino people are sovereign and

71. *La Bugal-B'laan*, G.R. No. 127882 at 60-61.

72. *Id.* at 63.

73. *Id.* at 64-65 (citing III RECORD OF THE CONSTITUTIONAL COMMISSION 278 (1986)) (emphasis in the original).

74. *Id.* at 66-67 (citing III RECORD OF THE CONSTITUTIONAL COMMISSION 358-59 (1986)).

> that one of the objectives for the creation or establishment of a government is to conserve and develop the national patrimony. The implication is that the national patrimony or our natural resources are exclusively reserved for the Filipino people. No alien must be allowed to enjoy, exploit and develop our natural resources. As a matter of fact, that principle proceeds from the fact that our natural resources are gifts from God to the Filipino people and it would be a breach of that special blessing from God if we will allow aliens to exploit our natural resources.
>
> I voted in favor of the Jamir proposal because it is not really exploitation that we granted to the alien corporations but only for them to render financial or technical assistance. It is not for them to enjoy our natural resources. Madam President, our natural resources are depleting; our population is increasing by leaps and bounds. Fifty years from now, if we will allow these aliens to exploit our natural resources, there will be no more natural resources for the next generations of Filipinos. It may last long if we will begin now. Since 1935 the aliens have been allowed to enjoy to a certain extent the exploitation of our natural resources, and we became victims of foreign dominance and control. The aliens are interested in coming to the Philippines because they would like to enjoy the bounty of nature exclusively intended for Filipinos by God.
>
> And so I appeal to all, for the sake of the future generations, that if we have to pray in the Preamble 'to preserve and develop the national patrimony for the sovereign Filipino people and for the generations to come,' we must at this time decide once and for all that our natural resources must be reserved only to Filipino citizens.
>
> Thank you.

(3) Opinion of 1986 Constitutional Commissioner and author Jose N. Nolledo.[75]

> Paragraph 4 of Section 2 specifies large-scale, capital intensive, highly technological undertakings for which the President may enter into contracts with foreign-owned corporations, and enunciates strict conditions that should govern such contracts....
>
> This provision balances the need for foreign capital and technology with the need to maintain the national sovereignty. It recognizes the fact that as long Filipinos can formulate their own terms in their own territory, there is no danger of relinquishing sovereignty to foreign interests.
>
> *Are service contracts allowed under the new Constitution? No. Under the new Constitution, foreign investors (fully alien-owned) can NOT participate in Filipino enterprises except to provide: (1) Technical Assistance for highly technical enterprises; and (2) Financial Assistance for large scale enterprises.*

75 *Id.* at 67-68 (citing JOSE N. NOLLEDO, THE NEW CONSTITUTION OF THE PHILIPPINES ANNOTATED 924-26 (1990)) (emphasis in the original).

The intent of this provision, as well as other provisions on foreign investments, is to prevent the practice (prevalent in the Marcos government) of skirting the 60/40 equation using the cover of service contracts.

(4) Proposed Resolution No. 496 and Draft of the 1986 U.P. Law Constitution Project.[76]

U.P. LAW PROJECT	PROPOSED RESOLUTION No. 496	1987 CONSTITUTION
The National Assembly may, by two-thirds vote of all its members by special law, provide the terms and conditions under which a foreign-owned corporation may enter into agreements with the government involving *either technical or financial assistance* for large-scale exploration, development, or utilization of natural resources.	The President with the concurrence of Congress, by special law, shall provide the terms and conditions under which a foreign-owned corporation may enter into agreements with the government involving *either technical or financial assistance* for large-scale exploration, development, and utilization of natural resources.	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.

(5) Insights of proponents of the U.P. Law Constitution Project.

Dean Pacifico A. Agabin: The service contract as we know it here is antithetical to the principle of sovereignty over our natural resources restated in the same article of the [1973] Constitution containing the provision for service contracts. If the service contractor happens to be a foreign corporation, the contractor happens to be a foreign corporation, the contract would also run counter to the constitutional provision on

76. *Id.* at 68-71 (emphasis in the original).

nationalization or Filipinization, of the exploitation of our natural resources....[77]

Recognizing the service contract for what it is, we have to expunge it from the Constitution and reaffirm ownership over our natural resources. This is the only way we can exercise effective control over our natural resources.

This should not mean complete isolation of the country's natural resources from foreign investment. Other contract forms which are less derogatory to our sovereignty and control over natural resources — like technical assistance agreements, financial assistance [agreements], co-production agreements, joint ventures, production-sharing — could still be utilized and adopted without violating constitutional provisions. In other words, we can adopt contract forms which recognize and assert our sovereignty and ownership over natural resources, and where the foreign entity is just a pure contractor instead of the beneficial owner of our economic concern.[78]

Dean Merlin M. Magallona: Through the instrumentality of the service contract, the 1973 Constitution had legitimized at the highest level of state policy that which was prohibited under the 1973 Constitution, namely: the exploitation of the country's natural resources by foreign nationals. The drastic impact of [this] constitutional change becomes more pronounced when it is considered that the active party to any service contract may be a corporation wholly owned or foreign interests. In such a case, the citizenship requirement is completely set aside, permitting foreign corporations to obtain actual possession, control, and [enjoyment] of the country's natural resources.[79]

Professor Eduardo A. Labitag: Service contracts as practiced under the 1973 Constitution should be discouraged, instead the government may be allowed, subject to authorization by special law passed by an extraordinary majority to enter into either technical or financial assistance. This is justified by the fact that as presently worded in the 1973 Constitution, a service contract gives full control over the contract area to the service contractor, for him to work, manage and dispose of the proceeds or protection. It was

77. *La Bugal-B'laan*, G.R. No. 127882 at 72 (citing Pacifico A. Agabin, *Service Contracts: Old Wine in New Bottles?*, II DRAFT PROPOSAL OF THE 1986 U.P. LAW CONSTITUTION PROJECT 15-16 (1986)).

78. *Id.* at 73 (citing Pacifico A. Agabin, *Service Contracts: Old Wine in New Bottles?*, *in* II DRAFT PROPOSAL OF THE 1986 U.P. LAW CONSTITUTION PROJECT 16 (1986)).

79. *Id.* at 72-73 (citing Merlin M. Magallona, *Nationalism and Its Subversion in the Constitution*, *in* II DRAFT PROPOSAL OF THE 1986 U.P. LAW CONSTITUTION PROJECT 5 (1986)).

a subterfuge to get around the nationality requirement of the constitution.[80]

The Supreme Court, on this score, observed:

> The proponents nevertheless acknowledged the need for capital and technical know-how in the large-scale exploitation, development and utilization of natural resources — the second paragraph of the proposed draft itself being an admission of such scarcity. Hence, they recommended a compromise to reconcile the nationalistic provisions dating back to the 1935 Constitution, which reserved all natural resources exclusively to Filipinos, and the more liberal 1973 Constitution, which allowed foreigners to participate in these resources through service contracts. Such a compromise called for the adoption of a new system in the exploration, development, and utilization of natural resources in the form of technical agreements or financial agreements which, necessarily, are distinct concepts from service contracts.
>
> The replacement of 'service contracts' with 'agreements ... involving either technical or financial assistance,' as well as the deletion of the phrase 'management or other forms of assistance,' assumes greater significance when note is taken that the U.P. Law draft proposed other equally crucial changes that were obviously heeded by the CONCOM. These include the abrogation of the concession system and the adoption of new 'options' for the State in the exploration, development, and utilization of natural resources. The proponents deemed these changes to be more consistent with the State's ownership of, and its 'full control and supervision' (a phrase also employed by the framers) over, such resources.[81]

On the mentioned prior opinions of the Secretary of Justice which appear to be in consonance with the position of the respondents, the Supreme Court brushed them aside as administrative interpretations that are simply advisory in nature and which are not binding on the courts for it is the courts which conclusively and finally determine the meaning of the provisions of the Constitution and of laws.[82]

Assuming that: (a) the WMCP FTAA indeed involved more than extending financial and technical assistance to the State by allowing WMCP to participate in the management and operations of the mining activities; and (b) the Mining Act of 1995 — in spite of its use of the term "financial and technical agreements" — actually allows the execution of service contracts, the ruling of the Supreme Court in *La Bugal-B'laan* declaring the WMCP FTAA and the provisions of the Mining Act of 1995 and its implementing

80. *Id.* at 73-74 (citing Eduardo A. Labitag, *Philippine National Resources: Some Problems and Perspectives, in* II DRAFT PROPOSAL OF THE 1986 U.P. LAW CONSTITUTION PROJECT 17 (1986)).

81. *Id.* at 75-76.

82. *Id.* at 79.

rules and regulations allowing the execution of service contracts to be unconstitutional and void appears to be well-reasoned and supported by adequate legal and factual bases.

However, borrowing the language of the Supreme Court, if one considers the repercussions of the issues in *La Bugal-B'laan* on the Philippine Mining Industry, as well as on the entire national economy,[83] it may be hard to sleep well at night knowing that *the fate of the country, and the future of generations of Filipinos yet to be born, hinged on a question of constitutional construction.* Aware that constitutional construction is resorted to only in case the meaning of the provision in question is doubtful,[84] one should be doubly worried that policies and actions of the executive and legislative departments of government have been struck down for being found to be in violation of an arguably *doubtful* constitutional provision.[85] Doubtful is apt, considering that learned and erudite jurists and legal scholars have differing constructions and interpretations of the same constitutional provision.

The worry is only compounded with the knowledge that the *en banc* Decision in *La Bugal-B'laan* was not unanimous. There were two ably well-written separate opinions by Justices Vitug and Panganiban. Both justices dissented with the majority's resolution declaring the WMCP FTAA unconstitutional. In addition, the three other lady justices[86] of the highest court joined in the separate opinion of Justice Panganiban.

83. *Id.* at 20.

84. *See* Civil Liberties Union v. Executive Secretary, 194 SCRA 317 (1991).

85. *See also, Gravely Abusive Contracts*, a keynote address delivered by Justice Panganiban during the 25th National Conference of Employers sponsored by the Employers' Confederation of the Philippines held on 21 April 2004 at the Westin Philippine Plaza, Pasay City. The said speech is published in 49 ATENEO L.J. 3 (2004).

> Justice Panganiban discussed recent Supreme Court decisions in which the Supreme Court voided the contracts entered into by the following companies: (1) The Amari Coastal Bay and Development Corporation, for the reclamation, development and purchase of a portion of Manila Bay (*Chavez v. Public Estates Authority*, 384 SCRA 152 (2002), 403 SCRA 1(2003)); (2) The Philippine International Air Terminals Company, Inc., for the construction and operation of the Ninoy Aquino Airport Terminal III (*Agan v. Phil. International Air Terminals Co. Inc.*, GR No. 155001, 402 SCRA 612 (2003) and GR No. 155001 Jan. 21, 2004); and (3) The Mega Pacific eSolutions, Inc., for the supply of computer hardware and software for automating the counting and the canvassing of votes for the 2004 elections (*Information Technology Foundation of the Philippines v. Commission on Elections*, GR No. 159139, Jan. 13, 2004 and Feb. 17, 2004).

86. Mesdames Justice Ynares-Santiago, Sandoval-Gutierrez and Austria-Martinez.

While Justice Vitug agrees that portions of the Mining Act of 1995 that allows foreign-owned corporations to engage in matters outside FTAAs should be declared unconstitutional, he disagrees with the majority's conclusion that the fourth paragraph of Section 2, Article XII of the Constitution prohibits service contracts *per se*. He reasons that:

> [T]he present Constitution indeed has provided for safeguards to prevent the execution of service contracts of the old regime, but not of service contracts *per se*. It could not have been the object of the framers of the Charter to limit the contracts which the President may enter into, to mere 'agreements for financial and technical assistance.' One would take it that the usual terms and conditions recognized and stipulated in agreements of such nature have been contemplated. Basically, the financier and the owner of know-how would understandably satisfy itself with the proper implementation and the profitability of the project. It would be abnormal for the financier and owner of the know-how not to assure itself that all the activities needed to bring the project into fruition are properly implemented, attended to, and carried out. Needless to say, no foreign investor would readily lend financial or technical assistance without the proper incentives, including fair returns, therefor.[87]

Coming from the premise that the Constitution and the laws are deemed written into every contract,[88] Justice Vitug proposes that Section 10.2 (a) of the WMCP FTAA which provides that:

> the Contractor shall have the exclusive right to explore for, exploit, utilize, process, market, export and dispose of all minerals and products and by-products thereof that may be derived or produced from the Contract Area and to otherwise conduct Mining Operations in the Contract Area in accordance with the terms and conditions hereof, [89]

must be read to mean that:

> the foregoing rights are to be exercised by WMCP for and in behalf of the State and that WMCP, as the Contractor, would be bound to carry out the terms and conditions of the agreement acting for and in behalf of the State. In exchange for the financial and technical assistance, inclusive of its services, the Contractor enjoys an exclusivity of the contract and a corresponding compensation therefor.[90]

87. *La Bugal-B'laan*, G.R. 127882 at 6-7 (Vitug, J., separate opinion).

88. Philippine American Life Insurance Co. v. Auditor General, 22 SCRA 135, 143 (1968).

89. *La Bugal-B'laan*, G.R. 127882 at 8 (Vitug, J., separate opinion).

90. *Id.*

For his part, Justice Panganiban argues for the validity of the WMCP FTAA[91] first by pointing out that the use of the phrase "agreements ... involving ... technical or financial assistance" does not absolutely indicate the intent to exclude other modes of assistance. Instead, he observes that the phrase signifies the possibility of the inclusion of other activities, as long as they bear some reasonable relationship to and compatibility with either financial or technical assistance.[92]

He underscores that if it were the intention of the framers to strictly confine foreign corporations to financial or technical assistance and nothing more, their language would certainly have been unequivocally restrictive. He suggests that the framers may have used language such as: "Foreign corporations are *prohibited* from providing management or other forms of assistance." The apparently conscious non-use of restrictive language betrays an intent not to employ an exclusionary, inflexible and limiting meaning to the phrase "agreements involving technical or financial assistance."[93]

Justice Panganiban likewise pointed out that the Constitution still recognizes, and allows service contracts. The Constitution has not rendered service contracts taboo *per se*, albeit subject to several restrictions and modifications designed to avoid the pitfalls of the past. He quoted excerpts from the deliberations of the Constitutional Commission showing that its members discussed "technical or financial agreements" in the same breath as "service contracts" and, as a matter of fact, used the terms interchangeably.[94]

In any case, Justice Panganiban posits that the members of the Constitutional Commission probably had in mind the Marcos-era "service contracts" that they were familiar with. He submits that these "service contracts" were then duly modified and accordingly restricted so as to prevent the abuses prevalent during the mentioned era when the Constitutional Commissioners were crafting and polishing the provisions dealing with financial and/or technical assistance agreements. As Justice Panganiban puts it: "'Technical and financial assistance agreements' were understood by the delegates to include service contracts duly modified to prevent abuses."[95]

Justice Panganiban then argues that it may be fool-hardy for one to insist that the "agreements involving technical or financial assistance" refer only to

91. Justice Panganiban principally argues that the petition must be dismissed for being moot with the WMCP FTAA's transfer to, and registration in the name of, a Filipino-owned corporation.

92. *La Bugal-B'laan*, G.R. No. 127882 at 6-7 (Panganiban, J., separate opinion).

93. *Id.* at 7 (Panganiban, J., separate opinion).

94. *Id.* at 7-14 (Panganiban, J., separate opinion).

95. *Id.* at 14-15 (Panganiban, J., separate opinion).

purely technical or financial assistance to be rendered by a foreign corporation to the State and, therefore, excluding management and other forms of assistance. It should be common knowledge that securing financial assistance for large-scale explorations, which could easily run into billions of pesos, is not simple.[96] As observed by the good Justice:

> Current business practices often require borrowers seeking huge loans to allow creditors access to financial records and other data, and probably a seat or two on the former's board of directors; or at least some participation in certain management decisions that may have an impact on the financial health or long-term viability of the debtor, which of course will directly affect the latter's capacity to repay its loans. *Prudent lending practices necessitate a certain degree of involvement in the borrower's management process.*[97]

In the same way, Justice Panganiban explains that technical assistance would likely come from the mining industry's leading players, which may involve personnel supervision and training to ensure proper implementation of the assistance given. Selfishly, the assisting foreign corporation would also want to protect its business reputation and successful track record in the industry. It thus becomes plain why a foreign corporation offering technical assistance to the State must necessarily have a significant "interface with the management process itself."[98]

Again, it must be stressed that this article is not an apology for either side of the argument. In other words, *it is not the objective of this article to examine the wisdom behind the well-written* ponencia*'s legal conclusions; neither is it the desire to establish that either or both of the separate opinions should have been the court's ruling.* The goal sought to be achieved is simple. And that is, *to simply point out that under the present constitutional set-up, the Philippines will inevitably find itself in numerous situations where the judicial branch of government will strike down policies and programs crafted by the other two branches of government on the hallowed ground of constitutional infirmity.* This is the direct consequence of enlarging judicial power to also include "the *duty* ... to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government"[99] and casting in constitutional stone, policies on national economy and patrimony, as well as other matters like labor and social justice, family, education, science and technology, arts and culture.

As incisively observed by Justice Panganiban:

96. *Id.* at 16-17 (Panganiban, J., separate opinion).

97. *Id.* at 17 (Panganiban, J., separate opinion) (emphasis in quote).

98. *Id.* at 17 (Panganiban, J., separate opinion).

99. PHIL. CONST. art. VIII, § 1, ¶ 2 (emphasis supplied).

> The mining industry is in the doldrums, precisely because of lack of technical and financial resources in our country. If activated properly, the industry could meaningfully contribute to our economy and lead to the employment of many of our jobless compatriots. A hasty and premature decision on the constitutionality of the herein FTAA and the Philippine Mining Act could unnecessarily burden the recovery of the industry and the employment opportunities it would likely generate.[100]

It would be lamentable for one branch of government to, as it were, throw away a solution crafted by the other two branches of government using an argument anchored on constitutional construction as support. The lamentation is only heightened by the fact that a significant number of magistrates, using the same tools of constitutional construction, have found an opposite argument as anchor.

IV. CONSTITUTIONAL CONSTRUCTION

A Constitution has been defined as an instrument of a permanent nature, intended not merely to meet existing conditions, but to govern the future. It does not deal in details but enumerates general principles and general directions which are intended to apply to all new facts which may come into being and which may be brought within those general principles or directions.[101]

A constitution is not meant to provide merely for the exigencies of a few years but is to endure through a long lapse of ages, the events of which are locked up in the inscrutable purposes of the Almighty.[102] And in this regard, "[t]he primary task of constitutional construction is to ascertain the intent or purpose of the framers of the constitution as expressed in the language of the fundamental law, and thereafter to assure its realization."[103]

The driving force behind constitutional construction is to give effect to the intent of the framers of the supreme law and of the people, whom through their ratification, adopted it. The intention which will be given effect is that which is embodied and expressed in the constitutional provisions themselves.[104] This is probably the most significant difference between constitutional construction and the relatively simpler statutory construction. While in the latter, one is tasked with trying to ascertain the collective intent of the entire legislative body; in the former, one is not only

100. *La Bugal-B'laan*, G.R. No. 127882 at 18 (Panganiban, J., separate opinion).

101. *See* Lopez v. De los Reyes, 55 Phil. 186 (1930).

102. *See* Commissioner of Internal Revenue v. Guerrero, 21 SCRA 180 (1967).

103. *See* J.M. Tuason & Co., Inc. v. Land Tenure Administration, 31 SCRA 413 (1970); Co v. Electoral Tribunal, 199 SCRA 692 (1991).

104. *See* Gold Creek Mining Corp. v. Rodriguez, 66 Phil. 259 (1938).

tasked with ascertaining the collective intent of the framers, but one must also find out the intention of the general electorate which ratified and adopted the Constitution. In connection with this, it has been held that the proceedings of a constitutional convention are less conclusive of the proper construction of the fundamental law than legislative proceedings of the proper construction of a statute, since in the latter case, it is the intent of the legislature that the courts seek, while in the former, courts are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives.[105]

Thus, it has likewise been held that while historical discussions on the floor of the constitutional convention are valuable, they are not necessarily decisive.[106] And that debates in the constitutional convention are of value as showing the views of the individual members, and as indicating the reasons for their votes, but they shed no light as to the views of the large majority who did not talk, much less of the mass of the citizens whose votes at the polls gave that instrument the force of fundamental law. The proper interpretation depends more on how it was understood by the people adopting it than the framers' understanding thereof.[107]

The foregoing rules on constitutional construction only serve to underscore the shaky ground upon which the conclusions of both the majority and minority in *La Bugal-B'laan* stand. Both sides quoted portions of the same debate with approval. For some reason, both sides ended with differing conclusions. Whichever side is right does not really matter.[108] What matters is whether the country should pin its hopes, its chances of surviving the woes it faces now, on a question best left to academics.

V. The Philippines Henceforth

It has been said that: "[t]he store of wealth of our country lies underneath the soil and therefore beyond our immediate apprehension. It is that which remains in the state of potency as an economic factor which if realized actually may in a surprising degree relieve the nation from its present plight. In general, we call this hidden treasure of nature as minerals."[109]

105. *See* Vera v. Avelino, 77 Phil. 192 (1946).

106. *See* J.M. Tuason & Co., Inc. v. Land Tenure Administration, 31 SCRA 413 (1970).

107. *See* Civil Liberties Union v. Executive Secretary, 194 SCRA 317 (1991).

108. Logically, both cannot be right; although, both could be wrong.

109. Antonio H. Noblejas, Philippine Law on Natural Resources 151 (1901).

Indeed, what is probably one of the last remaining keys to Philippine progress is the ability to unlock the vast potential lying underneath us all. It only makes sense for a country to utilize that which it has been given.

The enactment of the Mining Act of 1995 and the promulgation of its implementing rules and regulations, coupled with the execution of FTAAs pursuant to the same, signaled the direction which the political departments of government have decided to take in paving the path towards unlocking that proverbial gate of wonders and riches. Rightly or wrongly, the continuously growing reach of judicial review has placed a roadblock on the progress of this path. With the benefit of hindsight, it may happen that the roadblock placed by *La Bugal-B'laan* may have been the right decision after all. But with an equally, if not more compelling force of reasoning, it may likewise happen that *La Bugal-B'laan* is a roadblock forcing a detour in the wrong direction.

In any case, it is humbly submitted that such a very big roadblock should not be allowed on a very important avenue especially if based on something where there are significant diverging opinions. If the highest magistrates of the land honestly differ on their interpretation of a constitutional provision, some weight must be placed on the actions taken by the political departments of government. Unfortunately, such is how the present government is constituted. A simple majority of like-minded magistrates would be enough to strike down an action taken by the executive and/or legislative branches for being unconstitutional. Moreover, the political departments themselves are persistent in arguing for the validity of their actions and optimistically clinging to the possibility that the honorable Supreme Court may reverse itself.

There is no problem if the constitutional provision transgressed involves principles and doctrines that have been long regarded as proper foundations of a democratic society under the rule of law There lies a problem when the constitutional provision supposedly transgressed is actually nothing more than a policy imbued with constitutional trappings.

Policies, especially economic policies, are so dependent on numerous current factors that it would be difficult for a group of distinguished and illustrious ladies and gentlemen to foresee all possible permutations and make a general rule about them. Hence, it does not make good sense to enshrine economic policies into constitutions. What happens when economic policies are enshrined as constitutional provisions? In a jurisdiction with a strong tradition and an enlarged concept of judicial review, courts are thus given more ammunition with which to gun down executive and legislative enactments.

In the relatively young Philippine constitutional history, the very first organic act of the country, the Philippine Bill of 1902, dealt extensively with

mining and natural resources concerns.[110] Why is this so when the American constitution with its profound brevity is a true model of constitution drafting?

In all probability, the United States government had its self-interest in mind in drafting the afore-mentioned organic act for the Philippines. Thus, not only did the United States government insure that the rights of its citizens to exploit Philippine natural resources would be guaranteed and protected, it also ensured that Philippine organs of government would not possess a wide latitude of discretion in determining the direction that Philippine domestic policy would take. By being as detailed as they possibly can in drafting an organic act for the Philippines, the Americans ensured that the Philippines would be duly constrained. No room for movement, as it was.

That is why it does not make sense to have followed this initial organic act. The United States government itself did not see it fit to have a constitution that is as detailed. Indeed, it may be argued that our natural resources, being our heart and soul, should be amply protected in the Constitution, no less. While such an argument may have a hint of perceived soundness and validity, a deeper scrutiny would betray its hollowness. As previously mentioned, enshrining economic policies into petrified constitutional provisions would do more harm than good. It does not afford the prevailing administration any flexibility in responsively adapting to the varying stimuli of the day. It will have to live with the policies as laid down by its predecessors of decades past. Or if need be, it would have to go through the arduous and protracted process of amending the constitution.

There lies the crucial factor: reposing the necessary trust and confidence in the political leaders of the day. Consequently, it is necessary to repose the same trust and confidence in the electorate that they will put into office only competent and deserving political leaders. Could the distinguished forefathers trust the nation's future leaders yet to be born to act selflessly and with the national interest at heart when the opportunity arises? With economic policies enshrined in the constitution, its framers could rest assured that no matter how vile and guile the leaders of the day would be, they could not do much harm as the constitution has effectively cuffed a tight chain on their cunning and wily wrists.

But what if the policies cast in stone are found by credible, extensive and objective study to have been wrong, or at least, no longer relevant for that time, then what will our leaders, no matter how noble, be left with? They would have to contend with having to undergo a rigid and usually long constitutional amendment process.

110. Sections 20 to 62 (out of eighty-eight sections) of the Philippine Bill of 1902 were devoted to mineral lands.

All in all, economic policies as constitutional provisions serve to only hamper noble and well-intentioned leaders. In any event, evil and selfish leaders will not be similarly hampered as they could easily set aside the constitution altogether if need be. It thus simply boils down to choosing the right leaders, which would correspondingly entail fully and adequately educating the electorate by giving them the tools with which to choose their leaders wisely.

Therefore, considering the myriad proposals to amend the constitution, for varying and differing reasons, it may be wise to consider drafting a constitution that is really a constitution and not which practically results to an omnibus legal code. And in the meantime, it may be well for the judiciary, with all due respect, to consider exercising more restraint when dealing with matters that may tend to enter the political domain. It may be time to trust that the political departments of government, whose leaders are supposedly given the mandate by the people themselves, have actually done their homework. And in cases where both political departments have gone down a particular path, it may be worth considering that such path may actually be what would be for the betterment of the nation at large. Be that as it may, the nation may still sleep well knowing that the courts will not shirk from their responsibility to be the last gatekeepers of the nation's fellowship, and ensure that scattered Filipinos would ultimately be led to the light.