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The Philippine Supreme Court and the Mining Act Ruling Reversal

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The Philippine Supreme Court and the Mining Act Ruling Reversal

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Abstract

In January 2004, the Philippine Supreme Court nullified provisions of the Philippine Mining Act of 1995 which allowed foreign mining firms to operate in the country. In December of the same year, the Court reversed its January ruling to the dismay of environmentalists, advocates of indigenous peoples' rights, and opponents of economic liberalization. What accounts for the Court reversal? How does one explain the Philippine Supreme Court's overturning of its *very own* ruling? The paper explores the factors that contributed to the Supreme Court reversal. The author first conducted an analysis of the text of the Court's two rulings. The aim of the content analysis was to compare and contrast the articulated bases of the Court's January and December rulings. The author then examined the reversal in relation to factors that affect judicial outcomes. According to Paul Wahlbeck, these factors are: (1) judicial preferences, (2) legal constraints, (3) litigation environment, and (4) political environment. According to a Filipino legal luminary, the December reversal resulted from a change in the Court's choice of approach to constitutional interpretation - that is, from a textual and historical approach to a prudential and structural approach. The adoption of a different approach to constitutional interpretation however partly explains the court reversal. The change in the choice of interpretative approach still begs the question: What occasioned the adoption of a new approach to constitutional interpretation and hence the court reversal?

Introduction

In January 2004, the Philippine Supreme Court nullified provisions of the Philippine Mining Act of 1995 which allowed foreign mining firms to operate in the country. In December of the same year, the Court reversed its January ruling to the dismay of environmentalists, advocates of indigenous peoples' rights, and opponents of economic liberalization. What accounts for the Court reversal? How does one explain the Philippine Supreme Court's overturning of its own ruling? The paper explores the factors that contributed to the Supreme Court ruling reversal. The author first conducted an analysis of the text of the Court's two rulings. The aim of the

content analysis was to compare and contrast the articulated bases of the Court's January and December rulings. The author then examined the reversal in relation to factors that affect judicial outcomes. According to Paul Wahlbeck,¹ these factors are: (1) judicial preferences, (2) legal constraints, (3) litigation environment, and (4) political environment.

Philippine Mining Act of 1995

On March 3, 1995, President Fidel V. Ramos signed into law Republic Act 7942, otherwise known as the Philippine Mining Act of 1995. Under the Mining Act of 1995, the government has the power to grant three types of mining rights: (1) Exploration Permit, (2) Mineral Agreement, and (3) Financial or Technical Assistance Agreement (FTAA). An exploration permit gives the permittee the right to conduct mineral exploration in specified areas. A mineral agreement grants the contractor the exclusive right to conduct mining operations and to extract all mineral resources found in the contract area. A financial or technical assistance agreement (FTAA) meanwhile is a contract involving large-scale exploration, development, and utilization of mineral resources.²

On March 30, less than a month after the passage of the Mining Act, Pres. Ramos entered into an FTAA with Western Mining Corporation Philippines (WMCP), Inc. – a fully foreign-owned mining corporation. The FTAA covered 99,387 hectares of land in Mindanao. On August 15, 1995, then Department of Environment and Natural Resources (DENR) Secretary Victor Ramos issued DENR Administrative Order (DAO) No. 95-23, s. 1995, otherwise known as the Implementing Rules and Regulations (IRR) of the Mining Act. On December 20, 1996, DAO No. 95-23 was repealed and a new set of IRR was adopted (DAO No. 96-40, s. 1996).³

In 1997, a petition questioning the validity of the Mining Act of the 1995, its IRR, and the FTAA between the President of the Philippines and WMCP was brought to the Supreme Court. This came to be known as the case of *La Bugal-B'laan Tribal Association, et al. versus Secretary Victor O. Ramos, et al.* (G.R. No. 127882). The petitioners focused their challenge on the FTAA

¹ Paul Wahlbeck, The Life of the Law: Judicial Politics and Legal Change, *The Journal of Politics*, Vol. 59, No. 3, August 1997, pp. 778-802.

² Antonio Tujan., *Globalizing Philippine Mining*, Revised edition (Philippines: IBON Foundation, Inc.), 2002, pp. 80-81.

³ *La Bugal v. Ramos*, G.R. No. 1278821, 27 January 2004, <http://www.supremecourt.gov.ph/>

provisions in the Mining Act. The Mining Act's provisions on exploration permits and mineral agreements clearly had basis in Article XII (National Economy and Patrimony) of the 1987 Philippine Constitution.⁴ A literal reading of the Constitution and a review of the drafters' intent would however challenge the constitutionality of the Mining Act's provisions on FTAAAs.⁵

The petitioners contended that the Mining Act and its implementing rules were unconstitutional for they allowed fully foreign owned-corporation to explore, develop, utilize, and exploit natural resources in a manner contrary to Section 2, paragraph 4, Article XII of the Philippine Constitution. As a consequence, they argued that the FTAA between the President of the Philippines and WMCP was illegal and unconstitutional.⁶

Section 2, Article XII of the Philippine Constitution specifies the options that the Philippine government can take in relation to its natural resources. The State may either (1) **directly undertake full supervision and control**; (2) enter into co-production, joint venture, or production-sharing agreements **with Filipino citizens**, or **entities at least 60% of whose capital is owned by such citizens**; (3) allow small-scale utilization of natural resources by **Filipino citizens**; or (4) 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, etc. As can be gleaned from the listing above, the Philippine Constitution provides that foreigners can participate in mining operations in the Philippines only via FTAAAs.⁷

The petitioners argued that the proper interpretation of Section 2, Article XII of the Philippine Constitution should take into consideration a similar provision in the 1973 Philippine Constitution. The 1973 Charter speaks of 'service contracts for financial, technical, management, or other forms of assistance.' The 1987 Constitution meanwhile only speaks of 'agreements... involving **either financial or technical assistance**.' Omitted were the phrases 'service contracts' and 'management of other forms of assistance.' For the petitioners, this

⁴ Philippine Constitution

⁵ Tujan, *Globalizing*, p. 81.

⁶ *La Bugal*, 27 January 2004.

⁷ Philippine Constitution [Emphasis mine]

meant that the Philippine Constitution barred foreigners from managing mining operations in the country. It also meant that an FTAA that allowed foreign management was in fact a service contract – an option disallowed by its mere omission in the provision. Invoking *casus omisus pro omisso habendus est.*, i.e. a person, object or thing omitted from an enumeration must be held to have been omitted intentionally, the petitioners held that the Mining Act of 1995 must be declared invalid.⁸

On January 27, 2004, the Philippine Supreme Court took the side of the petitioners. In a 95-page decision, the Court declared certain provisions of the Mining Act including those covering FTAAAs as unconstitutional by a vote of 8-5 with one abstention. The Supreme Court ruled that FTAAAs, as understood under the Act, were identical to the service contracts that were prohibited by the 1987 Philippine Constitution.⁹ Subsequently, public and private respondents filed separate motions for reconsideration, and the Chamber of Mines of the Philippines, Inc. (CMP) filed a Motion for Intervention which the Office of the Solicitor General (OSG) adopted. On December 1, 2004, the Philippine Supreme Court reversed its January decision. By a vote of 10-4 with one abstention, the Court upheld the constitutionality of the Mining Act of 1995. Of those who joined the majority in the original decision, five changed their vote. Justice Panganiban, the *ponente* of the decision, justified the reversal by declaring ‘the Constitution should be read in broad life-giving strokes; it should not be used to strangulate economic growth or to serve narrow, parochial interest.’¹⁰ On February 1, 2005, the Court issued a final ruling upholding the constitutionality of the Mining Act. What accounts for the Court’s dramatic turnaround?

Explaining the Mining Act Reversal

Wahlbeck identifies the crucial factors that account for judicial outcomes. These are: (1) judicial preferences, (2) legal constraints, (3) litigation environment, and (4) political environment. Attempts to explain court decisions, as suggested by Wahlbeck, can focus on these factors. The Mining Act ruling reversal is interesting because it took place in 2004, an election year in the Philippines. As such, it provides an opportunity to test theories that stress the impact of a ‘ruling

⁸ *La Bugal*, 27 January 2004 [Emphasis mine].

⁹ *La Bugal*, 27 January 2004.

¹⁰ *La Bugal v. Ramos*, G.R. No. 1278821, 1 December 2004, <http://www.supremecourt.gov.ph/>

executive-legislative coalition'¹¹ on Court rulings. 2004 also saw the appointment of two new justices to the Supreme Court. 2004 ended with 're-electionist'¹² Gloria Macapagal-Arroyo still in office and the convening of a Congress that was largely supportive of her. The 'ruling coalition' that saw the nullification of the Mining Act in January held on long enough to witness the reversal in December. Did a change in the character of the Court's interaction with the other branches explain the reversal?

Political Environment

The first Mining Act ruling was issued a little more than a month after relations between the Court and the other two branches of government were strained by an attempt of the House of Representatives to impeach Supreme Court Chief Justice Hilario Davide in late October 2003. The Congressmen failed to impeach Davide. The public satisfaction ratings of governmental institutions plunged dramatically presumably as a consequence of that embarrassing interlude. In April 2004, the net satisfaction ratings of governmental institutions recovered.¹³ Relatively cordial relations between the institutions were re-established as the country prepared for the May national elections. As already mentioned, Macapagal-Arroyo was declared the winner of the May presidential elections while her coalition maintained its hold in Congress.

A review of Pres. Arroyo's directives since she took office clearly showed that she championed the revival of Philippine mining. Speaker Jose De Venecia of the House of Representatives was also reputed to have vigorously supported the Mining Act of 1995.¹⁴ While it may be argued that the executive and legislature exerted tremendous pressure on the Court to reverse its January ruling, it can also be argued that the same pressure was exerted even prior to January 2004. The same may be said for the lobbying efforts of pro-mining lobbies, powerful business groups, foreign governments, international financial institutions, aid agencies, etc.

¹¹ Robert A. Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker', *Journal of Public Law*, Vol. VI, no. 2, 279-295. Reprinted in *Emory Law Journal* (Spring, 2001:): 563-582.

¹² Gloria Macapagal-Arroyo assumed the presidency in early 2001 after EDSA people power 2 ousted Pres. Joseph Estrada. She ran for the presidency – for the first time – in the May 2004 elections and was declared the winner.

¹³ Social Weather Stations, '16 April 2004 Media Release', <http://www.sws.org.ph/>: President Arroyo's ratings were +2 in early September, -3 in early November, and +30 in March 2004. The Supreme Court: +16, +8, +23 respectively. The Senate: +20, +7, +25. The House of Representatives: +11, +3, and +17.

¹⁴ Has anyone been surprised by the Arroyo government's rise to the most corrupt list of the world?, Kalikasan-PNE Press Statement, January 28, 2005, <http://www.minesandcommunities.org/Action/press522.htm>.

Studies that focus on the Court's interaction with the executive and legislative branches of government hypothesize that during instances of incompatibility in policy preferences, a policy-oriented Court would tend to take into consideration the president's policy preferences in its rulings especially when (1) the president enjoys significant support in Congress and can initiate impeachment proceedings against justices,¹⁵ (2) the president has recently won an election, and (3) the president gets higher public approval ratings.¹⁶ A quick look at the 2004 public satisfaction ratings of Pres. Arroyo shows that the Mining Act ruling reversal in fact happened when her popularity ratings dropped to -5 and plunged even further. The Social Weather Stations reports that her ratings for October 2004, December 2004, March 2005 were -6, -5, and -12 respectively.¹⁷ Moreover, while Arroyo was declared the winner of the 2004 presidential elections, her victory did not result in massive support for her administration from the public or from legislators. The data suggests that the reversal was not exactly the product of the Court bowing to executive pressure in deference to the latter's powers.

Judicial Preferences

In the judicial decision-making literature, changes in the Court's composition are treated as indicating a possible change in overall judicial preference. Justices appointed by the presidents are normally regarded as individuals whose preferences significantly match those of the president.¹⁸ A thorough analysis of the judicial preferences or policy views of the 2004 Supreme Court justices still has to be made but the following statements can be made thus far:

1. Between the January nullification and the December reversal, one justice retired (Justice Vitug) and two new justices (Justices Chico-Nazario and Garcia) were appointed by the president. The new appointees voted in favor of the Mining Act. Justice Vitug who retired in July 2004 voted in favor of the Mining Act. While the new appointees favored Pres. Arroyo's position, their appointments were not that crucial.

¹⁵ Matias Iaryczower, Pablo Spiller, and Mariano Tommasi, 'Judicial Independence in Unstable Environments, Argentina 1935-1998', *American Journal of Political Science*, Vol. 46, No. 4, October 2002, pp. 699-716; and, Timothy Johnson, 'The Supreme Court, The Solicitor General, and the Separation of Powers', *American Politics Research*, Vol. 31, No. 4, July 2003, pp. 426-451.

¹⁶ Johnson, Timothy R., 'The Supreme Court, The Solicitor General, and the Separation of Powers', *American Politics Research*, Vol. 31, No. 4, July 2003, pp. 426-451.

¹⁷ Social Weather Stations, '2 June 2005 Media Release', <http://www.sws.org.ph/>

¹⁸ Dahl, 'Decision-Making', 2001.

2. Not all of Pres. Arroyo's appointees voted in favor of the Mining Act. In fact, three Arroyo appointees (e.g. Carpio-Morales, Carpio, and Callejo) consistently voted against the Mining Act's validity.
3. In the first voting, five (5) of Arroyo's original six (6) appointees – (excluding Justice Azcuna who abstained because WMCP used to be his client), voted against the Mining Act. This suggests that presidential appointments are not always good predictors of voting behavior- at least in initial rulings.

A review of the December 2004 Supreme Court voting shows that what was crucial was the move of five justices (Chief Justice Davide included) to change their previous position and tilt the voting in favor of the constitutionality of the Mining Act (see Figure 1). What prompted this change of heart?

Figure 1: How they Voted on the Mining Act Rulings¹⁹

Name of Justice	Appointing President	January Vote	December Vote
Chief Justice Davide	Aquino	Unconstitutional	Constitutional
Carpio-Morales	Arroyo	Unconstitutional	Unconstitutional
Puno	Ramos	Unconstitutional	Constitutional
Quisumbing	Ramos	Unconstitutional	Constitutional
Carpio	Arroyo	Unconstitutional	Unconstitutional
Corona	Arroyo	Unconstitutional	Constitutional
Callejo	Arroyo	Unconstitutional	Unconstitutional
Tinga	Arroyo	Unconstitutional	Constitutional
Vitug	Ramos	Constitutional	(retires in July 2004)
Panganiban	Ramos	Constitutional	Constitutional
Ynares-Santiago	Estrada	Constitutional	Unconstitutional
Sandoval-Gutierrez	Estrada	Constitutional	Constitutional
Austria-Martinez	Arroyo	Constitutional	Constitutional
Azcuna	Arroyo	Abstain	Abstain
Chico-Nazario	Arroyo	(appointed in November 2004)	Constitutional
Garcia	Arroyo	(appointed in October 2004)	Constitutional

The attitudinal model of judicial decision-making asserts that while the voting behavior of justices is motivated by their personal policy preferences, their responses to 'stimuli' (i.e.,

¹⁹ *La Bugal*, 27 January 2004 & 1 December 2004, <http://www.supremecourt.gov.ph/>.

‘facts’) presented in the cases they handle also bear on their decisions.²⁰ The model suggests that raw attitudes, values and preferences determine the choice of ‘case stimuli’ to which a justice responds. Court cases normally possess many dimensions. The Mining Act itself may be viewed in relation to various issues, e.g. environmental protection, respect for indigenous peoples’ rights, constitutionalism, support for the incumbent president, support for economic liberalization, support for judicial restraint, etc. Given that cases possess many dimensions, it is very possible that the change in vote was not the result of a change in personal policy preferences but was merely the outcome of a change in issue.²¹

Again, at this point, the author cannot establish whether the policy preferences of the five pivotal justices changed between the two rulings. It is however worthwhile to look into the possibility of ‘issue change’ as an explanation for the Mining Act reversal. The author recommends a systematic analysis of the ‘stimuli’ offered by parties and of the ‘stimuli’ to which justices responded in their two rulings. This will address the question of ‘issue change.’

Legal Constraints

Compared to other political actors, members of the Court are arguably more conscious about issues of constitutionality. Even advocates of the attitudinal model grant that justices need to justify their policy preferences by citing legal doctrines and precedents while employing legal argumentation.²² As to the Mining Act ruling, even if it is assumed that the pivotal justices experienced a change in policy preferences, their new decision must still be shown to be compatible with the Philippine constitution.

Noted Filipino legal luminary Joaquin Bernas commented that the reversal was not surprising. He writes: “A change of mind in constitutional cases is always a possibility because of the varied modalities of constitutional interpretation... The original decision followed a textual approach

²⁰ Jeffrey Segal and Albert Cover, ‘Ideological Values and the Votes of the U.S. Supreme Court Justices’, *American Political Science Review*, Vol. 83, No. 2, June 1989, pp. 557-565; and James Gibson, ‘From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior’, *Political Behavior*, Vol. 5, No. 1, 1983, pp. 7-49.

²¹ Lawrence Baum, ‘Membership Change and Collective Voting Change in the United States Supreme Court’, *Journal of Politics*, Vol. 54, No. 1, February 1992, pp. 3-24.

²² Harold Spaeth, *Supreme Court Policy Making: Explanation and Prediction*, USA: W.H. Freeman and Company, 1979, pp. 52-64.

supported by historical argument... There is, however, more than one way of skinning a cat... [T]he new majority subjected the textual and historical approach of the previous majority to what may be called a structural and prudential critique”²³

The adoption of a different approach to constitutional interpretation however partly explains the court reversal. The change in the choice of interpretative approach still begs the question: What occasioned the adoption of a new approach to constitutional interpretation and hence the court reversal?

Litigation Environment

The judicial decision-making literature which focuses on elements of the litigation environment portrays litigation as a contest requiring litigants to use the most appropriate and effective weapons to impress the members of the Court. The tendency of the literature is to compare the relative strengths and resources of the litigants.²⁴ In *La Bugal-B'laan Tribal Association, et al. versus Secretary Victor O. Ramos, et al.*, it is very clear that the resources of the litigant parties are grossly asymmetrical and greatly favors the respondents – i.e., government and the mining firm. The literature also highlights the role of ‘repeat players’²⁵ like the Solicitor General²⁶ who is often portrayed as a credible, highly respected, and knowledgeable legal counsel of the president who rarely loses in Court. The mere fact however that government lost the first round to *Bugal-B'laan* suggests that even underdogs sometimes win legal battles. If the litigation environment holds the key to solving the puzzle of the Mining Act ruling reversal, the author must show that changes in the litigation environment or, at least, a change in the choice of counsel significantly affected the outcome of the December 2004 decision. Thus far, there is no evidence that any of the above took place.

²³ Bernas, Joaquin, ‘The Mining Act Redeemed’, *TODAY*, 3 December 2004.

²⁴ Wahlbeck, ‘Life’, 1997.

²⁵ Kevin McGuire, ‘Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success’, *The Journal of Politics*, Vol. 57, No. 1, February 1995, pp. 187-196.

²⁶ Timothy Johnson, Paul Wahlbeck, and James Spriggs, ‘The Influence of Oral Arguments on the U.S. Supreme Court’, *American Political Science Review*, Vol. 100, No. 1, February 2006.; and Timothy Johnson, ‘The Supreme Court, The Solicitor General, and the Separation of Powers’, *American Politics Research*, Vol. 31, No. 4, July 2003, pp. 426-451.

Issue Change!

It must be noted that after the January 2004 nullification of the Mining Act, the Office of the Solicitor General filed for a motion for reconsideration. When that was granted, National Economic and Development Authority (NEDA) Secretary Romulo Neri requested the Supreme Court that he be allowed to speak on the consequences of the January nullification. Sec. Neri prepared a presentation which included the estimation that lying hidden beneath Philippine soil are \$840 billion worth of mineral wealth!²⁷ Inasmuch as Neri is a key member of Pres. Arroyo's cabinet, his presentation must be construed as an argument that supplements the solicitor general's position. Neri's intervention can be seen in the context of Court-executive relations, i.e. as part of the political environment.

The author cannot yet ascertain the impact of Neri's presentation on the Court at the time that it was made. What is known thus far is that the majority opinion in the final ruling gave credence to his assertion about the Philippines' comparative advantage in mineral resources. It is also known that the final ruling acknowledges the existence of an 'exceptional event' that requires government to address the 'paramount public need to attract foreign investments.' The final ruling offered the upholding of the Mining Act as a solution to that 'exceptional event.'²⁸

The December ruling clearly must be appreciated in relation to events that happened between the two rulings. In August 2004, the grim prospect of a very serious financial crisis began to grip Philippine society after a group of noted economists released their assessment of the country's fiscal situation. With runaway debt, massive government spending, failure to raise revenue, and the inability to attract foreign investments, the group declared that the Philippines was facing a deepening economic crisis.²⁹ The 'exceptional event' referred to in the final ruling was the prospect of a fiscal crisis.

The author surmises that the announcement of a fiscal crisis alongside a re-appreciation of Neri's presentation constituted a re-framing of the issues surrounding the Mining Act, i.e. a change in

²⁷ *La Bugal*, 1 December 2004.

²⁸ *La Bugal*, 1 December 2004.

²⁹ E. de Dios, B. Diokno, E. Esguerra, R. Fabella, Ma. Bautista, F. Medalla, S. Monsod, E. Pernia, R. Reside, Jr., G. Sicat and E. Tan, 'The deepening crisis: The real score on deficits and the public debt', Discussion Paper No. 0409, August 2004.

issue dimension. Whereas the first ruling on the Mining Act largely dwelled on issues of constitutionality, the December 2004 decision clearly addressed an issue which was unrecognized in January – the fiscal crisis. The prospect of a fiscal crisis must have challenged the previous predisposition of the five justices. Recognition of the Philippines’ comparative advantage in mineral deposits must have instructed them to reconsider mining as a solution to the country’s looming fiscal crisis. This time, their ‘nationalist’ appreciation of the provisions of the Philippine Constitution needed to be re-evaluated in relation to questions about the country’s very survival and sustainability. Surely, efforts by pro-mining groups attesting to the arrival of new technologies that ensure the safety of large-scale mining reinforced the sentiment to once again encourage Philippine mining. Still, the justices of the Supreme Court needed to find constitutional moorings for their new position towards foreign mining in the Philippines. As Bernas contends, Justice Panganiban constructed a ponencia that met the requirements of constitutionality and ably supported the Court’s new position on mining.

FINAL REMARKS

The paper provides a preliminary explanation for the Mining Act reversal. As such, its claims are tentative and subject to a more systematic analysis. The author still has to establish that no significant change in the justices’ raw preferences occurred between the January and December 2004 rulings. While the author strongly suspects that a change in issue accounts for the reversal, a more rigorous content analysis of oral arguments and written briefs apart from a more thorough examination of the text of the Court’s two rulings will provide more definitive findings. An analysis of the pivotal justices’ voting behavior in economic cases may be needed to establish the stability of their policy preferences and to ascertain whether their voting on the second ruling is no major deviation from their normal behavior. The author also needs to describe more competently the alleged re-framing of the Mining Act issue. Thus far it is not clear whether the claim of a fiscal crisis was openly presented in Court by a functionary of the president. The ‘issue change’ hypothesis needs to account for the source of the ‘stimuli’ that altered the Justices’ appreciation of the case. Moreover, such information will indicate the sources of pressure and constraints that significantly bear on the decisions of the Court. With further analysis and additional data, the author hopes to find more definitive answers to the puzzle of the Mining Act ruling reversal.

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