

EN BANC

G.R. No. 248061 – MORE ELECTRIC AND POWER CORPORATION, *petitioner* v. PANAY ELECTRIC COMPANY, INC., *respondent*.

G.R. No. 249406 – REPUBLIC OF THE PHILIPPINES, *petitioner-oppositor*, MORE ELECTRIC AND POWER CORPORATION, *petitioner* v. PANAY ELECTRIC COMPANY, INC., *respondent*.

Promulgated:

March 9, 2021

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DISSENTING OPINION

DELOS SANTOS, J.:

Upon careful review of the merits of the present Motion for Reconsideration and with the indulgence of my colleagues, the honorable Members of the Court, I most respectfully change my vote from the 15 September 2020 Decision of the Court and join the dissenting opinion of Associate Justice Marvic Mario Victor F. Leonen (Justice Leonen). Considering the substantive arguments raised in the Motion for Reconsideration, I agree with Justice Leonen that Sections 10 and 17 of Republic Act No. (RA) 11212<sup>1</sup> must be struck down by the Court as unconstitutional. The said provisions are clearly beyond the scope of the State's power of eminent domain. Glaringly, the taking of respondent Panay Electric Company, Inc.'s (PECO) assets by petitioner More Electric Power Corporation (MORE) through the State's power of eminent domain effectively amounts to the taking of private property not for a public purpose but for private gain.

RA 11212 granted petitioner MORE a franchise to establish, operate, and maintain an electric power distribution system in Iloilo City. Section 10 of RA 11212 provides for the exercise of the right of eminent domain in favor of MORE, to wit:

Section 10. *Right of Eminent Domain.* – Subject to the limitations and procedures prescribed by law, the grantee is authorized to exercise the power of eminent domain insofar as it may be reasonably necessary for the efficient establishment, improvement, upgrading, rehabilitation,

<sup>1</sup> An Act Granting More Electric and Power Corporation a Franchise to Establish, Operate, and Maintain, for Commercial Purposes and in the Public Interest, a Distribution System for the Conveyance of Electric Power to the End Users in the City of Iloilo, Province of Iloilo, and Ensuring the Continuous and Uninterrupted Supply of Electricity in the Franchise Area; approved on February 14, 2019.

maintenance and operation of its services. The grantee is authorized to install and maintain its poles wires, and other facilities over, under, and across public property, including streets, highways, parks, and other similar property of the Government of the Philippines, its branches, or any of its instrumentalities. The grantee may acquire such private property as is actually necessary for the realization of the purposes for which this franchise is granted, including, but not limited to poles, wires, cables, transformers, switching equipment and stations, buildings, infrastructure, machineries and equipment previously, currently or actually used, or intended to be used, or have been abandoned, unused or underutilized, or which obstructs its facilities, for the operation of a distribution system for the conveyance of electric power to end users in its franchise area: *Provided*, That proper expropriation proceedings shall have been instituted and just compensation paid:

*Provided, further*, That upon the filing of the petition for expropriation, or at any time thereafter, and after due notice to the owner of the property to be expropriated and the deposit in a bank located in the franchise area of the full amount of the assessed value of the property or properties, the grantee shall be entitled to immediate possession, operation, control, use and disposition of the properties sought to be expropriated, including the power of demolition, if necessary, notwithstanding the pendency of other issues before the court, including the final determination of the amount of just compensation to be paid. The court may appoint a representative from the ERC as a trial commissioner in determining the amount of just compensation. The court may consider the tax declarations, current audited financial statements, and rate-setting applications of the owner or owners of the property or properties being expropriated in order to determine their assessed value.


The *ponencia* claims that Sections 10 and 17 of RA 11212 constitutes a valid exercise of the State's power of eminent domain. The *ponencia* reasons that the general consideration of public use is "whatever is beneficially employed for the general welfare." As applied in the present case, the *ponencia* posits that the law is undoubtedly for the general purpose of electricity distribution and, thus, satisfies the requirement of public use. Moreover, the *ponencia* reasons that Sections 10 and 17 ensure uninterrupted supply of electricity in the city during the transition period from the old to the new franchisee, from PECO to MORE, respectively.

I most respectfully disagree.

Section 9, Article III of the 1987 Constitution states:

Section 9. **Private property shall not be taken for public use without just compensation.** (Emphasis and underscoring supplied)

The power of eminent domain is an inherent power of the State. The power gives the State the authority to forcibly take private property provided



the taking of private property is: (1) **for a public purpose**; and (2) upon payment of just compensation.<sup>2</sup> In a long line of cases, the Court has consistently held that the power of eminent domain must be **solely or exclusively exercised for a public purpose**. Section 9, Article III, thus, acts as a **restraint on the State's expansive power of eminent domain**.<sup>3</sup> In *Provincial Bus Operators Association of the Philippines v. Department of Labor and Employment*,<sup>4</sup> the Court held that property due process undoubtedly involves the promotion of stability of ownership over private property.<sup>5</sup> Verily, without such restrictions on the State's power of eminent domain, the State could then arbitrarily confiscate privately-owned property without due process.

Revisiting Justice Leonen's dissenting opinion in the 15 September 2020 Decision of the Court, he cited the evolving definition of "public use," in the wise:

In its traditional and literal sense "public use" means "public employment or the actual use by the public." There is no question that the taking of private property for the building of roads, schools, or hospitals for the use of the public falls under this notion of actual use. "Public use," however, evolved to mean "public purpose," "public advantage or benefit," and even "public welfare." It is under this expanded meaning of public use that expropriations for agrarian reform and urban development were allowed by this Court.

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It is settled that the business of electricity distribution is for a public purpose and is imbued with public interest. It is for this reason that the operation of an electricity distribution system requires a national franchise from Congress.

However, if the private property is taken for the same public use as to which the property was originally devoted, how the expropriator will serve the public purpose better than the former owner should be examined. **For if the public is not better off with the taking of the property, then there is no true expropriation. There is only transfer of property from one entity to another. All the exercise of eminent domain results in a change in the "application of profits," directly serving proprietary interests.** Any public benefit is only pretended or, at best, incidental.<sup>6</sup> (Emphasis supplied)

Likewise, in Justice Leonen's dissenting opinion in the Motion for Reconsideration brought before the Court, he reiterates his position and cites

<sup>2</sup> *Mactan-Cebu International Airport Authority v. Lozada, Sr.*, 627 Phil. 434, 445 (2010).

<sup>3</sup> See *Jesus is Lord Christian School Foundation, Inc. v. Municipality of Pasig, Metro Manila*, 503 Phil. 845 (2005).

<sup>4</sup> G.R. No. 202275, July 17, 2018, 872 SCRA 50.

<sup>5</sup> *Id.* at 114.

<sup>6</sup> *Justice Leonen, Dissenting Opinion*, G.R. Nos. 248061 & 249406, September 15, 2020, pp. 12-13.

the Court's Decision in *Seña v. Manila Railroad Co. and Insular Government*<sup>7</sup> in that true expropriation implies **a new public purpose**, to wit:

Nevertheless, if property is taken for the same public use to which it was originally devoted, there is no true expropriation. As early as 1921, this Court in *Seña v. Manila Railroad Co. and Insular Government* noted how the meaning of the term 'public use' [is] one of constant growth and that [a]s society advances, its demands upon the individual increase and *each demand is a new use to which the resources of the individual may be devoted*. This implies that a true expropriation requires a new public use.

Indeed, if property is taken then subsequently devoted to the same public use, there is only a transfer of property from one entity to another. All the exercise of eminent domain results in is a change as to who gets the profits. Therefore, the taking primarily serves proprietary interests, with little if no regard as to the interests of the public. Any public interest is only pretended or, at best, incidental.<sup>8</sup>

In relation to the term "public use," the Court must be guided by Justice Sandra Day O'Connor's dissenting opinion in *Kelo v. The City of New London*.<sup>9</sup> In her strong dissent, Justice O'Connor explained the dangerous precedent the US Supreme Court may cause if the US Court would expand the definition of "public use" to accommodate private interests, to wit:

**In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public – such as **increased tax revenue, more jobs, maybe even aesthetic pleasure**. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.**

There is a sense in which this troubling result follows from errant language in *Berman* and *Midkiff*. In discussing whether takings within a blighted neighborhood were for a public use, *Berman* began by observing: "We deal, in other words, with what traditionally has been known as the police power." 348 U.S., at 32. From there it declared that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.*, at 33. Following up, we said

<sup>7</sup> 42 Phil. 102 (1921).

<sup>8</sup> *Justice Leonen, Dissenting Opinion* in the Motion for Reconsideration in G.R. Nos. 248061 & 249406, pp. 5-6.

<sup>9</sup> 545 U.S. 469 (2005).

in *Midkiff* that “[t]he ‘public use’ requirement is coterminous with the scope of a sovereign’s police powers.” 467 U.S., at 240. This language was unnecessary to the specific holdings of those decisions. *Berman* and *Midkiff* simply did not put such language to the constitutional test, because the takings in those cases were within the police power but also for “public use” for the reasons I have described. The case before us now demonstrates why, when deciding if a taking’s purpose is constitutional, the police power and “public use” cannot always be equated.<sup>10</sup> (Emphasis and underscoring supplied)

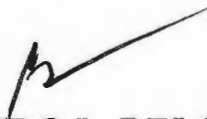
In the present case, upon careful review of PECO’s Motion for Reconsideration, I find that the taking of PECO’s property does not amount to a legitimate public purpose and, hence, is not a proper subject of the exercise of the State’s power of eminent domain. *Firstly*, under the facts presented, MORE has no basic qualifications, much less experience, in electricity distribution. *Secondly*, MORE clearly does not have assets of its own. MORE will undoubtedly depend on the transfer of PECO’s assets to create an electricity distribution system. In fact, during the Congressional debates on MORE’s franchise application, the Lower House conceded that MORE will **solely** rely on PECO’s assets for the effective distribution of electricity in Iloilo City. *Thirdly*, the taking of PECO’s private property will undoubtedly foster a monopoly in the electricity distribution system in Iloilo City. *Fourthly*, the taking of PECO’s assets *ipso facto* amounts to the transfer of property from one entity to another and a mere **appropriation of profits, directly serving MORE’s proprietary interests**. *Fifth*, there is no direct public good that can be derived from the **exercise of the power of eminent domain**. The benefit or welfare of the people is only incidental to the exercise of the power. The sole primary benefactor remains to be MORE. *Sixth*, the mere fact that Sections 10 and 17 ensure uninterrupted supply of electricity in Iloilo City during the transition period from PECO to MORE should not be honored as strong evidence of public use. The flawed reasoning suggests that as long as there is no interruption in the service of electricity then the exercise of the power of eminent domain could be justified. In addition, **such statement cannot be guaranteed by the Court** since it has been established that MORE has no experience whatsoever in electricity distribution. To repeat, incidental public benefit cannot justify the exercise of the State’s power of eminent domain.

All things considered, the Court has the primordial duty to abolish laws passed by the legislative that amount to the taking of property exclusively for private gain or laws that promote the facilitation of a monopolistic system. **Conceivably, it will be the Filipino people who will bear the brunt of these arbitrary and confiscatory laws like Sections 10 and 17 of RA 11212**. Ultimately, to uphold the validity of Sections 10 and

<sup>10</sup> United States Supreme Court Justice O’Connor, *Dissenting Opinion in Kelo v. The City of New London*, available at <<https://www.law.cornell.edu/supct/html/04-108.ZD.html>> (last accessed on February 26, 2021).

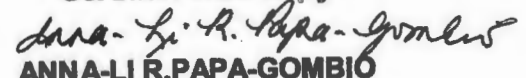
17 of RA 11212 is to sanction a clear violation of the 1987 Constitution, PECO's rights to property due process, and the people of Iloilo City's right to the efficient and effective access to proper electricity distribution.

**ACCORDINGLY**, I vote to **DECLARE** Sections 10 and 17 of Republic Act No. 11212 as unconstitutional.



**EDGARDO L. DELOS SANTOS**  
*Associate Justice*

**Certified True Copy**



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