CRISIS MANAGEMENT: THE OVERLOOKED IMPLICATIONS OF SECTION 17, ARTICLE XII *

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ABSTRACT

During emergencies, Congress may empower the President to take over public utilities and private businesses to serve the public interest. Jurisprudence characterizes this power of the State as an exercise of police power, for which no just compensation is due to the persons affected by the taking. This Article proposes that the takeover clause under Section 17, Article XII of the 1987 Constitution may also be characterized as an exercise of the power of eminent domain, which would entitle affected entities to secure just compensation. This recharacterization has implications on the arguments and defenses, as well as the fact and basis of just compensation, and the manner of determining the amount due. Any challenge to the exercise of the State's power under Section 17, Article XII must keep these considerations in mind.

"All I really ever wanted was to know what it feels like to be human, and now we're going to do the most human thing of all: attempt something futile with a ton of unearned confidence and fail spectacularly!"

— Michael in *The Good Place*[1]

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INTRODUCTION

Section 17, Article XII of the Constitution allows Congress to grant emergency powers in times of crises. Unlike some of the other provisions of the Constitution, this section is relatively direct and clear in its intention:

> In times of national emergency, when the public interest so requires, the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any privately owned public utility or business affected with public interest.[2]

If one accepts the premise in the Constitution that property has a social function,[3] then it is only fair that the State reasonably redirect such property to serve the public interest in a time of a crisis. Thus, Section 17, Article XII should not be a controversial proposition.

In the leading case of *Agan v. PIATCO* (and in the Resolution of its Motion for Reconsideration),[4] the Supreme Court declared that Section 17, Article XII was an exercise of the police power of the State.[5] This is important, as persons and entities subjected to police power do not receive any compensation for the inconvenience they suffered, nor for the confiscation or destruction of their property.[6] This may be an unsatisfactory arrangement for any business owner who will be turning over their property and operations to the government, especially when, as seen during the COVID-19 crisis, many leading corporations and conglomerates have demonstrated

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[1] *The Good Place: Best Self* (NBC television broadcast, Jan. 11, 2018).

[2] CONST. art. XII, § 17.

[3] Art. XII, § 6. The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands.

[4] Agan v. Phil. Int'l Air Terminals Co., Inc. [hereinafter "Agan I"], G.R. No. 155001, 402 SCRA 612, May 5, 2003; Agan v. Phil. Int'l Air Terminals Co., Inc. [hereinafter "Agan II"], G.R. No. 155001, 420 SCRA 575, Jan. 21, 2004. Hereinafter "Agan Cases" collectively.

[5] *Id.*

[6] Ass'n. of Small Landowners in the Phil., Inc. v. Sec'y of Agrarian Reform [hereinafter "ASLP"] G.R. No. 78742, 175 SCRA 343, July 14, 1989.

overwhelming support for their employees and communities.[7] This also seems counterintuitive to the basic doctrine that when private property is taken for a public purpose or in the furtherance of the public interest, it is an exercise of eminent domain for which the property owner must receive just compensation.[8]

The deliberations of the 1986 Constitutional Commission ("Commission") suggest that, in vague terms, some sort of compensation may be granted if there is "prejudice" to the persons affected by the takeover by the State.[9] However, they do not discuss whether or not Section 17, Article II is indeed an exercise of police power or eminent domain.

To complicate matters, the provisions of Republic Act No. 11469, or the "Bayanihan to Heal as One Act" (hereinafter "RA 11469"), also appear to suggest the possibility of compensation. The law recently drew public scrutiny to Section 17, Article XII when on March 22, 2020, it was reported that Malacañang had sent a draft bill to the Senate and asked for emergency powers

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[7] *See, for example,* Doris Dumlao-Abadilla, *San Miguel's COVID-19 mobilization hits P878M,* INQUIRER.NET (PHIL.), Apr. 6, 2020, *available at* https://business.inquirer.net/294295/san-miguels-covid-19-mobilization-hits-p880m; Rappler.com, *SM Group, Ayala Corp donate to fight coronavirus,* RAPPLER, Mar. 17, 2020, *at* https://www.rappler.com/business/254816-sm-group-ayala-corporation-donations-fight-coronavirus; Cathrine Gonzales & Doris Dumlao-Abadilla, *Gokongwei sets P100M COVID-19 relief fund, waives mall rental*, INQUIRER.NET, *available at* https://business.inquirer.net/292825/gokongwei-group-sets-up-p100m-covid-19-relief-fund-waives-mall-rental-amid-lockdown

[8] *See* Planters Prod., Inc. v. Fertiphil Corp., G.R. No. 166006, 548 SCRA 485, Mar. 14, 2008.

[9] III RECORD CONST. COMM'N 267 (Aug. 23, 1986).

"MR. GASCON: How will a takeover by the State operate? Will former owners be compensated for their losses.

MR. VILLEGAS: *No, this is only temporary, so there is no need to transfer ownership. Only the operation will be taken over, which precisely is the reason for such a takeover. Directed operation shall be only for the duration of the state of emergency.*

MR. GASCON: During the period of taking over by the State, will there be compensation for the owner who will be deprived?

MR. VILLEGAS: *If they are prejudiced, definitely yes. No one can be deprived of private property without just compensation.*" (Emphasis supplied.)

Bernas notes, however, that should the takeover of a facility cease to be temporary and become permanent (as in the present case of *PLATCO*), then just compensation is due. JOAQUIN BERNAS, THE 1987 PHILIPPINE CONSTITUTION: A COMPREHENSIVE REVIEWER 486 (2011). As will be discussed in later sections, the Supreme Court in the *Agan Cases* disagreed with the proposition that compensation is demandable, stating that such temporary takeover is in essence an exercise of police power.

to augment its fight against the COVID-19 crisis.[10] Among the special powers asked for by President Rodrigo R. Duterte was the takeover power pursuant to Section 17, Article XII:

> Section 4 (4): *When the public interest so requires, temporarily take over or direct the operation of any privately-owned public utility or business affected with public interest to be used in addressing the needs of the public during the COVID-19 emergency as determined by the President, including but not limited to, hospitals and medical and health facilities, hotels and other similar establishments* to house health workers, serve as quarantine areas, quarantine centers, medical relief and aid distribution locations or other temporary medical facilities; *public transportation* to ferry health, emergency, and frontline personnel and other persons; *and telecommunications entities* to facilitate uninterrupted communication channels between the government and the public; Provided, however, that to the extent feasible, management shall be retained by the owners of the public service or enterprise, under the direction and supervision of the President or his duly designated representative who shall render a full accounting to the President of the operations of the utility or business taken over; *Provided, further, That whenever the President shall determine that the further use or operation by the Government of any such public service or enterprise is no longer necessary under existing conditions, the same shall be restored to the person entitled to the possession thereof;* Provided, finally, *That reasonable compensation for any additional damage or costs incurred by the owner or the possessor of the subject property solely on account of the take-over may be given to the person entitled to the possession of such private properties or businesses* after the situation has stabilized or at the soonest time practicable.[11]

The bill was quickly ushered through Congress, and on March 24, 2020, President Duterte signed it into law. In its final version, the scope of the takeover provision was reduced, though the possibility of compensation was retained. The final provision reads as follows:

> Section 3(h): *Consistent with Section 17, Article XII of the Constitution, when the public interest so requires, direct the operation of any privately-owned hospitals and medical and health facilities including passenger vessels and, other establishments*, to house health workers, serve as quarantine areas,

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[10] Xave Gregorio, *Malacanang asks Congress to grant Duterte more powers to combat COVID-19*, CNN PHIL., Mar. 22, 2020, *at* https://www.cnnphilippines.com/News/2020/3/22/Rodrigo-Duterte-national-emergency-powers-Congress-COVID-19.html. *See also* Aika Rey and Lian Buan, *HEAL AS ONE? Why Duterte's special budget powers bill may be unconstitutional*, Mar. 23, 2020, RAPPLER, *at* https://www.rappler.com/newsbreak/in-depth/255553-reasons-duterte-special-powers-bill-may-be-unconstitutional

[11] Draft version of Senate Bill of Rep. Act. No. 11469 (unpublished draft on file with the author). (Emphasis supplied.)

> quarantine centers, medical relief and aid distribution locations, or other temporary medical facilities; *and public transportation* to ferry health, emergency, and frontline personnel and other persons; Provided, however, That the management and operation of the foregoing enterprises shall be retained by the owners of the enterprise, who shall render a full accounting to the President or his duly authorized representative of the operations of the utility or business as basis for appropriate compensation; *Provided, further, That reasonable compensation for any additional damage or costs incurred by the owner or the possessor of the subject property solely on account of complying with the directive shall be given to the person entitled to the possession of such private properties or businesses* after the situation has stabilized or at the soonest time practicable; *Provided, finally, That if the foregoing enterprises unjustifiably refuse or signify that they are no longer capable of operating their enterprises for the purpose stated herein, the President may take over their operations subject to the limits and safeguards enshrined in the Constitution.* [12]

The phrase "temporarily take over" was omitted in the final version of RA 11469, and telecommunications facilities were removed due to public backlash over the bill.[13] Still, the final provision makes an express reservation that, should the situation require, the President may take over the public utility or private business pursuant to Section 17, Article XII.

At present, the public is justifiably anxious over any application and interpretation of Section 17, Article XII in light of RA 11469 and the current administration. The country has not, in many ways, seen a president like President Duterte since Ferdinand E. Marcos. President Duterte has very publicly disparaged the owners of public utilities and key businesses.[14] He has also propped up or endorsed other individuals to compete with, if not take over, private businesses.[15] Thus, how the Duterte administration will exercise this power and justify it will be met with watchful vigilance.

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[12] Rep. Act No. 11469 (2020), § 3(h). (Emphasis supplied.)

[13] *See* Mike Navallo, *COVID-19 CRISIS: How President Duterte's emergency powers bill morphed in 36 hours*, ABS-CBN NEWS (PHIL.), Mar. 24, 2020, *at* https://news.abs-cbn.com/news/03/24/20/covid-19-crisis-how-president-dutertes-emergency-powers-bill-morphed-in-36-hours

[14] Rappler.com, *Duterte to Maynilad, Manila Water: Accept new deals or rot in jail*, RAPPLER (PHIL.), Jan. 19, 2020, *at* https://www.rappler.com/nation/249684-duterte-maynilad-manila-water-accept-new-deals-or-rot-jail; Arianne Merez, *Duterte: We should kill 'crazy rich people'*, ABS-CBN NEWS (PHIL.), Jan. 23, 2020, *at* https://news.abs-cbn.com/news/01/23/20/duterte-we-should-kill-crazy-rich-people

[15] Nestor Corrales, *BREAKING: Duterte tells ABS-CBN to just sell the network*, INQUIRER.NET (PHIL.), Dec. 30, 2019, *available at* https://newsinfo.inquirer.net/1207388/fwd-breaking-3-months-before-franchise-expires-duterte-tells-abs-cbn-to-just-sell-the-network; Krissy Aguilar, *Duterte's endorsement of Villar-led water firm due to Manny's hardwork — Cynthia*, INQUIRER.NET (PHIL.), Dec. 10, 2019, *available at*

But beyond these present concerns, the Supreme Court has not had the opportunity to revisit its characterization of Section 17, Article XII as a police power since the *Agan Cases*.[16] Since Section 3(h) of RA 11469 has not yet been made an issue before the courts, it remains to be seen whether the compensation mentioned in this provision should be deemed an inherent and foundational part of Section 17, Article XII, or treated as a *sui generis* congressional generosity. It is worth noting that in previous instances where Section 17, Article XII has been invoked, the possibility of compensation was not mentioned at all.[17] Even if no judicial review is taken of RA 11469 in relation to Section 17, Article XII, the two provisions present the possibility of future conflict which the Supreme Court may be forced to reconcile.

For now, it is worth examining what an exercise of the power under Section 17, Article XII actually means, both within and outside the context of RA 11649. Is it actually police power, or an iteration thereof, or is it better classified as eminent domain?

In exploring these questions, this paper will be divided into four parts. The first part will discuss the deliberations of the Commission on the provision to understand the framers' intent in crafting it. The second part will discuss the relevant cases decided by the Supreme Court and examine, in particular, its characterization of Section 17, Article XII as a form of police power. In response to this, the third part will examine Philippine and United States jurisprudence and argue that the provision may also be characterized as an exercise of eminent domain. Finally, the last part will discuss the implications of the characterization of Section 17, Article XII as police power and eminent domain, as well as the implications of its characterization in the context of RA 11469.

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https://newsinfo.inquirer.net/1200129/duterte-lauding-villar-led-water-firm-could-be-due-to-my-husbands-hardwork

[16] *Agan I*, 402 SCRA 612; *Agan II*, 420 SCRA 575.

[17] *See* Proc. No. 503 (1989), Declaring a State of National Emergency Throughout the Philippines; Mem. No. 267, directing the Temporary Take-Over or Direction of the Operations of JD Transit, Inc. and DM Consortium, Inc; Exec. Order No. 384 (1989), Providing General Guidelines in the Implementation of Proclamation No. 503; Nat'l Emergency Mem. No. 18 (1990), Directing the Temporary Take-Over or Direction of the Operations of the Continental Cement Corporation; Nat'l Emergency Mem. No. 19 (1990), Calling Upon and Deputizing Recognized Non-Government and People's Organizations and Volunteers As Well As Local Government Units to Assist the Government to Carry Out the Emergency Powers Through Monitoring or Implementation of Orders, Rules and Regulations.

This Article is not meant to definitively state that Section 17, Article XII is, contrary to the Supreme Court, an exercise of eminent domain. However, it wishes to explore the tension caused by the foregoing situation, and additionally, from a practical perspective, analyze the risks and benefits to the parties involved in a dispute should the provision be asserted as one power or another.

I. DEFINING TERMS IN SECTION 17, ARTICLE XII ACCORDING TO THE COMMISSION, LAW, AND JURISPRUDENCE

While the Commission's discussions are not conclusive upon courts in the interpretation of the Constitution, they nonetheless have a persuasive effect.[18] In this case, the Commission broadly defined a "national emergency" as a "threat from external aggression."[19] It was of the view that the term could be applied to both military or economic emergencies, but did not explicitly limit its application to only these types of emergencies.[20]

The Commission was also specific about the use of the phrase "public interest," despite suggestions that the term "common good" be used instead.[21] Regardless of what may have been the intention of the suggestion to use the phrase "common good," the deliberate use of the term "public interest" carries with it the usual implications elucidated in jurisprudence,

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[18] *See* Valmonte v. Belmonte, G.R. No. 74930, 170 SCRA 256, Feb. 13, 1989.

[19] RECORD CONST. COMM'N 266 (Aug. 13, 1986).

"MR. GASCON: Yes. What is the Committee's definition of "national emergency" which appears in Section 13, page 5? It reads:

When the common good so requires, the State may temporarily take over or direct the operation of any privately owned public utility or business affected with public interest.

MR. VILLEGAS: What I mean is *threat from external aggression, for example, calamities or natural disasters.*

MR. GASCON: There is a question by Commissioner de los Reyes. What about strikes and riots?

MR. VILLEGAS: Strikes, no; those would not be covered by the term "national emergency."

MR. BENGZON: Unless they are of such *proportions such that they would paralyze government service.* III RECORD" (Emphasis supplied.)

[20] *See* III RECORD CONST. COMM'N 648 (Aug. 23, 1986).

[21] III RECORD CONST. COMM'N 648 (Aug. 23, 1986).

including but not limited to, matters concerning the boundaries of the separation of powers,[22] the disbursement of public funds,[23] and those concerning established national practices, policies, and obligations.[24]

The Commission underscored that the power under Section 17, Article XII is strictly to respond to a given national emergency, and thus it is the existence of an emergency that would empower the President to act accordingly.[25] However, any objections as to the reasonableness of the President's actions may not be the subject of any judicial remedy until the emergency has passed.[26] There was also no discussion on whether the President must first "direct the operations" of an affected entity before the takeover power may be exercised, which leads to a reasonable conclusion that there is no "graduation of power."[27] Either power may be exercised according to the President's judgment, with neither power being a prerequisite of the other. Furthermore, the Commission affirmed such a takeover of the State would be temporary in nature, and suggested it was possible to compensate the affected businesses for their cooperation.[28]

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[22] *See* Province of North Cotabato v. Republic, G.R. No. 183591, 568 SCRA 402, Oct. 14, 2018.

[23] *See* Yap v. Comm'n of Audit, G.R. No. 158562, 619 SCRA 154, Apr. 23, 2010.

[24] *See* Bayan Muna v. Romulo, G.R. No. 159618, 641 SCRA 244, Feb. 1, 2011.

[25] *Agan II*, 420 SCRA 575. The Supreme Court previously declared that the nature and extent of the emergency determines the measure of the duration of the takeover, and the terms of the takeover prescribed by the State.

[26] III RECORD CONST. COMM'N 647 (Aug. 23, 1986).

"MR. SUAREZ: Under Section 13, what is contemplated is a time of national emergency, with emphasis on national emergency, and that is the character of the exercise of the power.

MR. JAMIR: That is correct.

MR. SUAREZ: Does not the Gentleman believe that if we insert the phrase "UNDER REASONABLE TERMS PRESCRIBED BY IT," this might serve as a limitation rather than a free exercise of this authority demanded under a state of national emergency? It might enable the privately owned public utility or business affected to take up this matter with the judicial authorities and claim that the terms are not reasonable and, therefore, they can successfully resist the exercise of this authority.

MR. JAMIR: I do not think so, because under my proposal *the State can temporarily take over and then prescribe the terms under which it will take over. The owner may contest that later on but cannot prevent the takeover during the period of emergency.*

MR. SUAREZ: That is exactly what I am trying to say. Therefore, as envisioned by the Commissioner, *the phrase "UNDER REASONABLE TERMS PRESCRIBED BY IT" would not serve to stop the State from taking over the operation of any privately owned public utility or business.*

MR. JAMIR: That is correct." (Emphasis supplied.)

[27] *See* Lagman v. Medialdea, G.R. No. 231658, 829 SCRA 1, July 4, 2017.

[28] *See supra* note 8.

The Commission was of the view that Section 17, Article XII covers public utilities, without limitation. However, the provision may also apply to other businesses, although not public utilities, that have "a lot of repercussions on the public," or are "so massive in terms of [their] consumption." These terms are not clearly elaborated upon by the Commission, but the discussion suggests a business with a sizeable enough consumer base may be viewed as a "private business affected with public interest."[29]

With regard to the definition of public utilities, the lack of substantial discussion in the records[30] suggests the term retains its customary definitions in law and jurisprudence:

> A "public utility" is "a business or service engaged in regularly supplying the public with some commodity or service of public consequence such as electricity, gas, water, transportation, telephone or telegraph service." To constitute a public utility, the facility must be necessary for the maintenance of life and occupation of the residents. However, the fact that a business

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[29] III RECORD CONST. COMM'N 647-8 (Aug. 23, 1986).

"FR. BERNAS: Just one question. The section uses the phrase "... public utility for business affected with public interest." Just what is meant now by "business affected with public interest"?

MR. VILLEGAS: *It means business that has a lot of repercussions on the public, whether it be public utility or other businesses which may partake of the characteristics of public utility but which is not yet considered public utility.*

FR. BERNAS: The phrase seems to have a history in jurisprudence. In early American jurisprudence, business affected with public interest was a very limited concept. They included such things as railroads and public utilities, lotteries, billiard parlors, liquor stores, ferries, wharves, carriers, practically equivalent to public utilities. In subsequent decisions, however, this very limited concept of public utilities has been expanded so that in the later decisions it was said that the notion that the business is clothed with the public interest and has been devoted to public use is a little more than fiction intended to beautify what is disagreeable to the sufferers. In other words, *business affected with public interest is any business that is subject to police power which really means any business.*

So, are we saying here that the State may take over any business when the State thinks that it is necessary?

MR. VILLEGAS: I do not think that is the interpretation of the committee. *But I think any business that has the characteristics of a public utility, which concerns a mass-based consumer group, would be included under the phrase "... business affected with public interest." Entire business operations which are not treated as public utilities do not fall under the public utility regulation, but may already be so massive in terms of its consumption, especially as regards the low-income groups, that they should also be subject of the specific section.*

FR. BERNAS: *So, is this intended to be a limited concept?*

MR. VILLEGAS: *It is.*

FR. BERNAS: Thank you." (Emphasis supplied.)

[30] Parenthetically, it was mentioned that the primary concern of public utilities is "the interest of the common good." *See* III RECORD CONST. COMM'N 267 (Aug. 13, 1986).

> offers services or goods that promote public good and serve the interest of the public does not automatically make it a public utility. Public use is not synonymous with public interest. As its name indicates, the term "public utility" implies public use and service to the public. The principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public or portion of the public as such which has a legal right to demand and receive its services or commodities. Stated otherwise, the owner or person in control of a public utility must have devoted it to such use that the public generally or that part of the public which has been served and has accepted the service, has the right to demand that use or service so long as it is continued, with reasonable efficiency and under proper charges. Unlike a private enterprise which independently determines whom it will serve, a "public utility holds out generally and may not refuse legitimate demand for service. Thus, in *Iloilo Ice and Cold Storage Co. vs. Public Utility Board*, this Court defined "public use" *viz*:
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> > "Public use" means the same as "use by the public." The essential feature of the public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character. In determining whether a use is public, we must look not only to the character of the business to be done, but also to the proposed mode of doing it. If the use is merely optional with the owners, or the public benefit is merely incidental, it is not a public use, authorizing the exercise of jurisdiction of the public utility commission. There must be, in general, a right which the law compels the owner to give to the general public. It is not enough that the general prosperity of the public is promoted. Public use is not synonymous with public interest. The true criterion by which to judge the character of the use is whether the public may enjoy it by right or only by permission.[31]

From the foregoing, it can be seen that the following are the key points with regard to Section 17, Article XII:

1. The definition of a "national emergency" is not rigid, but at the very least excludes lower levels of social disturbances that would not "paralyze the government service";

2. The powers under the provision may be used in the name of public interest, however the term is interpreted by Congress, the Chief Executive, and the Judiciary;

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[31] JG Summit Holdings, Inc. v. CA, G.R. No. 124293, 412 SCRA 10, 20-21, Sept. 24, 2003. (Citations omitted.)

3. The mere existence of the emergency empowers the Chief Executive to act. The reasonableness of his actions will be assessed in light of the character of the emergency;

4. The takeover is temporary; and

5. Compensation is possible, or at the very least, not foreclosed to the private businesses affected by the actions of the State.

II. PHILIPPINE JURISPRUDENCE ON SECTION 17, ARTICLE XII

It is also necessary to revisit cases decided by the Supreme Court which touch on aspects of Section 17, Article XII. The two cases below, *David v. Macapagal-Arroyo*[32] and the *Agan Cases*, contain the most extensive discussions on the provision, but did not touch on the matter of compensation for the owners of the affected entities.

A. *David v. Macapagal-Arroyo*

On February 24, 2006, President Gloria Macapagal-Arroyo issued Presidential Proclamation No. 1017, series of 2006 (hereinafter "PP 1017"), declaring a state of national emergency in response to "military adventurists" who were "engaged in a concerted and systematic conspiracy" to overthrow the government.[33] She also issued General Order No. 5, implementing PP 1017, which directed the armed forces and the police to "immediately carry out the necessary and appropriate actions and measures to suppress and prevent acts of terrorism and lawless violence" pursuant to PP 1017.[34]

Police operatives used these as bases to raid the *Daily Tribune* offices in Manila, confiscating news stories, documents, and pictures. Similar raids on the *Malaya* and *Abante* offices followed.[35] The following evening, Philippine National Police Director General Arturo Lomibao said the *Daily Tribune*'s operations would continue, notwithstanding the PNP's "[review] of the contents and substances *(sic)* of the publication." Presidential Chief of Staff

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[32] David v. Macapagal Arroyo [hereinafter, "David"], G.R. No. 171409, 489 SCRA 160, May 3, 2006.

[33] Proc. No. 1017 (2006), ¶¶ 1 to 6. Declaring a State of National Emergency.

[34] Gen. Order No. 5 (2006), ¶ 11.

[35] *See David*, 489 SCRA 160.

Michael Defensor also stated that although the police did not take over the newspaper's operations, the same was a "possibility" under President Arroyo's declaration of a state of emergency.[36]

Thus, among the issues before the Supreme Court *en banc* in *David v. Macapagal-Arroyo* was the nature of the power to take over private businesses during national emergencies. The Supreme Court held that generally, the President has the power to "fix a date or declar[e] a status or condition of public moment or interest" pursuant to the Revised Administrative Code.[37] However, such a proclamation does not trigger the powers of Article 17, Section XII of the Constitution. Rather, Section 17, Article XII must be read together with Section 23, Article VI, which provides:

> Section 23. (1) The Congress, by a vote of two-thirds of both Houses in joint session assembled, voting separately, shall have the sole power to declare the existence of a state of war.
>
> (2) In times of war or other national emergency, the Congress may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof.

While the President has the power to declare a state of national emergency,[38] he may only exercise emergency powers as delegated by Congress. This delegation is subject to the following conditions:

1. There must be a war or other emergency;
2. The delegation must be for a limited period only;
3. The delegation must be subject to such restrictions as the Congress may prescribe; and
4. The emergency powers must be exercised to carry out a national policy declared by Congress.[39]

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[36] *See* GMANews Online, *Police ready to take over media offices, PNP chief says*, GMANEWS ONLINE (PHIL.), Feb. 26, 2006, *at* https://www.gmanetwork.com/news/news/nation/980/police-ready-to-take-over-media-offices-pnp-chief-says/story/

[37] *David*, 489 SCRA at 242.

[38] REV. ADM. CODE, bk. II, ch. 2, § 4. Proclamations. — Acts of the President fixing a date or declaring a status or condition of public moment or interest, upon the existence of which the operation of a specific law or regulation is made to depend, shall be promulgated in proclamations which shall have the force of an executive order.

[39] *David*, 489 SCRA 160, 251, *citing* CARLO CRUZ, PHILIPPINE POLITICAL LAW 98 (1998).

The Supreme Court also described the relationship of these provisions as the checks and balances of emergency governance. In times of emergency, the Constitution reasonably demands that the citizens repose a certain amount of faith in the basic integrity and wisdom of the Chief Executive, but, at the same time, it obliges him to operate within carefully prescribed procedural limitations set by Congress. In this regard, *David* held the takeover power is just another aspect of the emergency powers generally reposed in Congress (which remains with Congress even in times of crises).[40] The extent to which the President may exercise this power depends on Congress' delegation and the reasonable terms prescribed by it. Thus, without legislation, the President has no power to take over any privately-owned public utility or business affected with public interest. Likewise, without legislation, the President cannot point out and determine for himself the types of businesses affected with public interest that should be taken over. The Supreme Court in *David* took pains to stress the seizure or takeover of other establishments cannot be rooted in some residual or inherent power of the presidency.[41]

To make this point, the Court cited the case of *Youngstown Sheet & Tube Co. et al. v. Sawyer*. In that case, the U.S. Supreme Court affirmed that President Harry S. Truman has no inherent constitutional power to seize steel mills to prevent a work stoppage, which to his mind would endanger the United States' production efforts in the Korean War, in the absence of an express grant of power from the legislature. The President's power, if any, to issue an order seizing private property must stem either from an act of Congress or from the Constitution itself.

In his concurring opinion in *Youngstown*, Justice Felix Frankfurter reaffirmed that even a great crisis should not be used to subvert the separation of powers of government:

> *A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford.* I know no more impressive words on this subject than those of Mr. Justice Brandeis:

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[40] *Id.* at 256, *citing* Araneta v. Dinglasan, 84 Phil. 368 (1949). *Araneta* was also decided by the Supreme Court *en banc*.

[41] *Id.* at 252, *citing* Youngstown Sheet & Tube Co. v. Sawyer, 43 U.S. 579 (1952).

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. Myers v. United States, 272 U. S. 52, 240, 293.

It is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated by concern for the Nation's well-being, in the assured conviction that he acted to avert danger. But it would stultify one's faith in our people to entertain even a momentary fear that the patriotism and the wisdom of the President and the Congress, as well as the long view of the immediate parties in interest, will not find ready accommodation for differences on matters which, however close to their concern and however intrinsically important, are overshadowed by the awesome issues which confront the world. When at a moment of utmost anxiety President Washington turned to this Court for advice, and he had to be denied it as beyond the Court's competence to give, Chief Justice Jay, on behalf of the Court, wrote thus to the Father of his Country:

> "We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States." Letter of August 8, 1793, 3 Johnston, Correspondence and Public Papers of John Jay (1891), 489.

In reaching the conclusion that conscience compels, I too derive consolation from the reflection that the President and the Congress between them will continue to safeguard the heritage which comes to them straight from George Washington.[42]

In her concurring opinion in *David*, Justice Consuelo Ynares-Santiago suggested that since Article XII refers to the country's national economy and patrimony, the power under Section 17 pertains specifically to economic emergency situations where the president must effect a state economic policy.[43] Nonetheless, she agreed with the majority that the President's takeover powers must be circumscribed by law. Any acts made without a legislative mandate are *ultra vires*.[44]

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[42] *Id.* at 613-20 (Frankfurter, J., *concurring*). (Emphasis supplied, citations omitted.)
[43] *David v. Macapagal Arroyo,* 489 SCRA at 279-80 (Ynares-Santiago, *J., concurring*).
[44] *Id.* at 280.

In his dissent in *David*, Justice Dante O. Tinga stated that since there was no actual takeover of any private business in the case at bar, the entire discussion on Section 17, Article XII should be treated as *obiter dictum*, but did not argue against the majority that the takeover clause must be exercised pursuant to an act of Congress.[45] He affirmed that requiring legislation was sound public policy, as to his mind, the exercise of the takeover power "would involve an infringement on the right of private business to profit [...] or perhaps even expropriation for a limited period"[46] which can only be accomplished with due process of law.[47]

B. The *Agan Cases*

In the *Agan Cases*, the Supreme Court e*n banc* directly tackled the nature of the takeover power under Section 17, Article XII in relation to the validity of the 1997 Concession Agreement awarded to PIATCO for the construction of Ninoy Aquino International Airport International Passenger Terminal III. The agreement was subsequently amended and supplemented, leading various groups and lawmakers to question the public bidding process and the validity of the resulting agreements. Among the issues in the case was the constitutionality of the following clause in the Amended and Restated Concession Agreement (ARCA), parts of which resembled Section 17, Article XII:

> Section 5.10 Temporary Take-over of operations by [the Government of the Republic of the Philippines (GRP)].
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[45] *See David v. Macapagal Arroyo*, 489 SCRA 160, at 311 (Tinga, *J.*, *dissenting*), *citing* JOAQUIN BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 1183 (2003). However, he suggested that Section 17, Article XII does not explicitly require congressional authority, for lack of the phrase "by law." Further, Justice Tinga noted that Republic Act No. 6826, which declared a state of national emergency in 1989 pursuant to President Corazon C. Aquino's Proclamation No. 503 on December 6, 1989, authorized the President to "temporarily takeover or direct the operation of any privately-owned public utility or business affected with public interest that violates the herein declared national policy." Since this authorization was made with reference to Section 23(2), Article VI, and not Section 17, Article XII, Justice Tinga suggested that the view that the latter provision requires prior congressional authority "has some novelty to it."

[46] *Id.* at 380 (Tinga *J.*, *dissenting*).

[47] Justice Tinga rationalized that Section 17, Article XII is "purposefully ambivalent" as to whether congressional approval is required. Thus, he dissents insofar as congressional approval is required in all circumstances, and that it is constitutionally permissible to recognize exceptions, such as in extreme situations wherein obtention of congressional authority is impossible or inexpedient considering the emergency, subject to judicial review.

> (c) *In the event the development Facility or any part thereof and/or the operations of [PLATCO (Concessionaire)] or any part thereof, become the subject matter of or be included in any notice, notification, or declaration concerning or relating to acquisition, seizure or appropriation by GRP in times of war or national emergency, GRP shall, by written notice to Concessionaire, immediately take over the operations of the Terminal and/or the Terminal Complex. During such take over by GRP, the Concession Period shall be suspended; provided, that upon termination of war, hostilities or national emergency, the operations shall be returned to Concessionaire*, at which time, the Concession period shall commence to run again. *Concessionaire shall be entitled to reasonable compensation for the duration of the temporary take over by GRP, which compensation shall take into account the reasonable cost for the use of the Terminal and/or Terminal Complex, (which is in the amount at least equal to the debt service requirements of Concessionaire*, if the temporary take over should occur at the time when Concessionaire is still servicing debts owed to project lenders), any loss or damage to the Development Facility, and other consequential damages. If the parties cannot agree on the reasonable compensation of Concessionaire, or on the liability of GRP as aforesaid, the matter shall be resolved in accordance with Section 10.01 [Arbitration]. Any amount determined to be payable by GRP to Concessionaire shall be offset from the amount next payable by Concessionaire to GRP.[48]

In *Agan I*, the Court framed Section 17, Article XII as a "right" of the state and an exercise of police power in the following manner:

> [Section 17, Article XII] pertains to the right of the State in times of national emergency, and in the exercise of its police power, to temporarily take over the operation of any business affected with public interest. In the 1986 Constitutional Commission, the term "national emergency" was defined to include threat from external aggression, calamities or national disasters, but not strikes "unless it is of such proportion that would paralyze government service."[49] The duration of the emergency itself is the determining factor as to how long the temporary takeover by the government would last.[50] The temporary takeover by the government extends only to the operation of the business and not to the ownership thereof. As such the government is not required to compensate the private entity-owner of the said business as there is no transfer of ownership, whether permanent or temporary. The private entity-owner affected by the temporary takeover cannot, likewise, claim just

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[48] *Agan I*, 402 SCRA at 673. (Emphasis supplied.)
[49] III RECORD CONST. COMM'N 266-267 (Aug. 13, 1986).
[50] *Id.*

> compensation for the use of the said business and its properties as the temporary takeover by the government is in exercise of its police power and not of its power of eminent domain.
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> ***
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> *PIATCO cannot, by mere contractual stipulation, contravene the Constitutional provision on temporary government takeover and obligate the government to pay "reasonable cost for the use of the Terminal and/or Terminal Complex."* Section 17, Article XII of the 1987 Constitution envisions a situation wherein the exigencies of the times necessitate the government to "temporarily take over or direct the operation of any privately owned public utility or business affected with public interest." It is the welfare and interest of the public which is the paramount consideration in determining whether or not to temporarily take over a particular business. Clearly, the State in effecting the temporary takeover is exercising its police power. Police power is the "most essential, insistent, and illimitable of powers." Its exercise therefore must not be unreasonably hampered nor its exercise be a source of obligation by the government in the absence of damage due to arbitrariness of its exercise. *Thus, requiring the government to pay reasonable compensation for the reasonable use of the property pursuant to the operation of the business contravenes the Constitution.*[51]

In *Agan II*, the Supreme Court further described police power as the "state authority to enact legislation that may interfere with personal liberty or property in order to promote the general welfare,"[52] and enumerated its two requisites: (a) the imposition of restraint is upon liberty or property, and (b) the power is exercised for the benefit of the common good. It explained that this definition of police power was intentionally made "elastic" in order to underscore its "all-encompassing and comprehensive embrace."[53] The Court emphasized that, compared to the power of eminent domain, "police power is exercised without provision for just compensation for its paramount consideration is public welfare."[54] It also provided the following standard in determining the appropriate exercise of police power:

> It is also settled that public interest on the occasion of a national emergency is the primary consideration when the government decides to temporarily take over or direct the operation of a public

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[51] *Agan I,* 402 SCRA at 672-74. (Emphasis supplied, citations in the original).

[52] *Agan II,* 420 SCRA at 604.

[53] *Id.*

[54] *See also* City Gov't of Quezon City v. Ericta, G.R. No. L-34915, 122 SCRA 759, June 24, 1983.

> utility or a business affected with public interest. The nature and extent of the emergency is the measure of the duration of the takeover as well as the terms thereof. It is the State that prescribes such reasonable terms which will guide the implementation of the temporary takeover as dictated by the exigencies of the time. As we ruled in our Decision, this power of the State can not be negated by any party nor should its exercise be a source of obligation for the State.
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> Section 5.10(c), Article V of the ARCA provides that respondent PIATCO "shall be entitled to reasonable compensation for the duration of the temporary takeover by GRP, which compensation shall take into account the reasonable cost for the use of the Terminal and/or Terminal Complex." It clearly obligates the government in the exercise of its police power to compensate respondent PIATCO and this obligation is offensive to the Constitution. Police power can not be diminished, let alone defeated by any contract for its paramount consideration is public welfare and interest.
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> ***
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> …[T]*he cases at bar will not involve the exercise of the power of eminent domain.*[55]

To review, the *Agan Cases* were mostly consistent with the Commission (and even cited their deliberations) regarding the nature of Section 17, Article XII: the contours of a national emergency; that the power must be exercised for the public interest; and that the exercise of the power must be temporary and reasonable. However, the Supreme Court, in these cases, did not agree with the suggestion that private businesses may receive compensation for whatever prejudice they may have suffered by reason of the takeover since the takeover was an exercise of police power. In ruling so, and in the final disposition of the case, the Supreme Court conveniently excused the State from paying any compensation to PIATCO in the event that it needed to take over its facilities pursuant to the ARCA.

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[55] *Agan II*, 420 SCRA at 604-05. (Emphasis supplied, citations omitted.)

III. ANALYZING SECTION 17, ARTICLE XII AS EMINENT DOMAIN

The *Agan Cases* contain the most extensive discussions of the Supreme Court with regard to Section 17, Article XII as an exercise of police power. The general flow of their discussion is as follows: *first*, the concept of Section 17, Article XII and its justification; *second*, the nature of the emergencies contemplated by this provision; *third*, the nature of police power in pursuit of the public interest; and *fourth*, citing the objective of Section 17, Article XII to further the public interest to classify it as a form of police power.[56]

However, the Court in both *Agan I* and *II* failed to analyze *why* Section 17, Article XII is indeed an exercise of police power. It also failed to provide analysis as to why, in a situation that very plainly involves the taking of private property for a public purpose, Section 17, Article XII is not a case of eminent domain. Rather, the Supreme Court's reasons mainly rest on the furtherance of public interest as the nexus between Section 17, Article XII and eminent domain—notwithstanding the fact that all the broad powers of the State (police power, taxation, and eminent domain) are ultimately exercised for a public purpose or for the public interest.[57]

If all the powers of the State are for public interest, this purpose cannot be used to determine the nature of the actions taken to achieve it. It is thus submitted that Section 17, Article XII may also be characterized as an exercise of eminent domain, which is the power of the state most associated with the taking of property.

A. Police power, in general

Police power is the power of the State to prescribe regulations to promote the health, morals, education, good order, safety, or the general welfare of the people. In broad terms, police power is that inherent and plenary power of the State which enables it to prohibit all things hurtful to the

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[56] *See supra* note 29. It is also possible that the Court considered Fr. Bernas' statements in the Commission's deliberations where he sought to clarify that, "business affected with public interest is any business that is subject to police power which really means any business," could be the subject of a takeover under Section 17, Article XII. It should be noted, however, that such a statement was in relation to establishing which businesses may be "affected with public interest," and not in relation to the nature of the act of the takeover itself.

[57] Though the Court mentioned eminent domain in *Agan II*, 420 SCRA 575, it only does so insofar as to show that, unlike the police power, the former requires the payment of just compensation to the property owner.

comfort, safety, and welfare of society.[58] It is purposely couched in general terms to underscore its comprehensiveness to meet all exigencies and provide enough room for an efficient and flexible response as the conditions warrant.[59]

The analysis of any lawful exercise of police power is ultimately grounded in reason.[60] This requires the State to comply with the test of "lawful subjects" and "lawful means": (a) the interest of the public generally, as distinguished from those of particular class, requires its exercise; and (b) the means employed are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals.[61] Case law shows that measures passed pursuant to the State's police power are presumed valid and constitutional, and there is a heavy burden on the party assailing these measures to show otherwise. Generally, however, the Supreme Court has taken a deferential approach to police power and, short of extraordinary circumstances, upholds its exercise by the State. [62]

From the Supreme Court's discussion, there are reasonable grounds to cast Section 17, Article XII as a police power measure: it is an action taken for the general welfare in response to an exigency, provided its enactment is reasonably necessary to meet the needs of the public. But a closer study of eminent domain, and its interpretation in jurisprudence both in the Philippines and the United States, would suggest otherwise.

B. Eminent domain

Eminent domain is the State's inherent power to take private property for a genuine public necessity or for public use, subject only to the payment of just compensation to the property owner as directed by Section 9, Article III of the Constitution.[63] The requisites for determining whether or not a taking has occurred are: (a) the expropriator must enter private property; (b) the entrance into private property must be for more than a momentary period; (c) the entry into the property should be under warrant or color of legal

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[58] *See* Morfe v. Mutuc, G.R. No. L-20387, 22 SCRA 424, Jan. 31, 1968.

[59] *See* White Light Corp. v. City of Manila, G.R. No. 122846, 576 SCRA 416, Jan. 20, 2009.

[60] *See* Ichong v. Hernandez, G.R. No. L-7995, 101 Phil. 1155, May 1, 1957.

[61] *See* Planters Prod., Inc. v. Fertiphil Corp., G.R. No. 166006, 548 SCRA 485, Mar. 14, 2008.

[62] *See* S. Luzon Drug Corp. v. DSWD, G.R. No. 199669, 824 SCRA 164, Apr. 25, 2017; *see also* Manila Mem'l Park v. DSWD Sec'y, G.R. No. 175356, 711 SCRA 302, Dec. 3, 2013.

[63] *See* Apo Fruits Corp. v. Land Bank of the Phil., G.R. No. 164195, 632 SCRA 727, Oct. 12, 2010.

authority; (d) the property must be devoted to a public use or otherwise informally appropriated or injuriously affected; and (e) the utilization of the property for public use must be in such a way as to oust the owner and deprive him of all beneficial enjoyment of the property.[64]

It is apparent that most of these elements would be fulfilled by the State if it decides to take over a public utility or private business pursuant to Section 17, Article XII. However, the second requisite—that the entrance into private property be for more than a momentary period—may be the most contentious point to establish.

In the landmark case of *Republic v. Vda. De Castellvi*,[65] the Court explained what "more than a momentary period" meant in relation to eminent domain. In that case, the defendant alleged that the Armed Forces of the Philippines was illegally occupying her property, preventing her from utilizing it for several years. She also argued that the continuous renewal of one-year leases on her property meant the State had effectively taken her property.

The Supreme Court examined the lease and disagreed, holding: (a) the occupation of her property was clearly temporary; and (b) there was no taking of the property, notwithstanding the continuous renewals, because there was a recognition of the defendant's ownership over the property. Any "taking" of the property in relation to eminent domain was only deemed consummated when the Government actually and finally filed an action to expropriate the property:

> "[M]omentary" means, "lasting but a moment; of but a moment's duration" (The Oxford English Dictionary, Volume VI, page 596); "lasting a very short time; transitory; having a very brief life; operative or recurring at every moment" (Webster's Third International Dictionary, 1963 edition.) *The word "momentary" when applied to possession or occupancy of (real) property should be construed to mean "a limited period"—not indefinite or permanent.* [...] If the intention of the lessee (Republic) in 1947 was really to occupy permanently Castellvi's property, why was the contract of lease entered into on year to year basis? Why was the lease agreement renewed from year to year? Why did not the Republic expropriate this land of Castellvi in 1949 when, according to the Republic itself, it expropriated the other parcels of land that it occupied at the same time as the Castellvi land, for the purpose of converting them into a jet air base? It might really have been the intention of the Republic to

[64] See NTC v. Oroville Dev. Corp., G.R. No. 223366, 833 SCRA 575, Aug. 1, 2017.
[65] Republic v. Vda. De Castellvi, G.R. No. L-20620, 58 SCRA 336, Aug. 15, 1974.

> expropriate the lands in question at some future time, but certainly mere notice—much less an implied notice—of such intention on the part of the Republic to expropriate the lands in the future did not, and could not, bind the landowner, nor bind the land itself. The expropriation must be actually commenced in court (Republic vs. Baylosis, et al., 96 Phil. 461, 484).[66]

Since the takeover of private property under Section 17, Article XII is expressly temporary, it may not meet the requirement of taking under *Vda. De Castellvi*. Because of this, one may argue, at this point and by default, that such a takeover should be classified as an exercise of police power. There are three responses to this point.

1. Police power usually involves the destruction, and not taking, of private property

Firstly, the object and purpose of Section 17, Article XII (which is, under any circumstance) is the *taking* of private property for a public purpose by depriving the owners of the affected entities of control over their property. This is incongruent with the established theory and purpose of police power, which traditionally involves the *destruction* of private property due to its noxious or harmful properties.[67] In the exercise of police power, public interest is furthered by the removal or destruction of the property injurious to the public, which in a manner of speaking, is an addition by subtraction.

On the other hand, eminent domain consists of taking property out of private hands and repurposing it for the public interest. This is precisely because the property itself is beneficial to the public, thus, no "subtraction" is needed. The Supreme Court e*n banc* made this distinction in *Association of Small Landowners in the Philippines, Inc. v. Secretary of Agrarian Reform* ("*ASLP*"),[68] where it had the opportunity to directly compare and contrast police power and eminent domain:

> There are traditional distinctions between the police power and the power of eminent domain that logically preclude the application of both powers at the same time on the same subject. In the case of *City of Baguio v. NAWASA*, for example, *where a law required the transfer of all municipal waterworks systems to the NAWASA in exchange for its assets of equivalent value, the Court held that the power being exercised was eminent domain because the property involved was wholesome and intended*

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[66] *Id.* at 350-51. (Emphasis supplied.)
[67] *ASLP*, 175 SCRA 343.
[68] *Id.*

> *for a public use. Property condemned under the police power is noxious or intended for a noxious purpose, such as a building on the verge of collapse, which should be demolished for the public safety, or obscene materials, which should be destroyed in the interest of public morals. The confiscation of such property is not compensable, unlike the taking of property under the power of expropriation, which requires the payment of just compensation to the owner.*[69]

As otherwise stated in *Didipio Earth-Savers' Multi-Purpose Association, Inc. v. Gozun*:[70]

> [W]here a property interest is merely restricted because the continued use thereof would be injurious to public welfare, or where property is destroyed because its continued existence would be injurious to public interest, there is no compensable taking. However, when a property interest is appropriated and applied to some public purpose, there is compensable taking.[71]

Analyzed from another perspective, "taking" through destruction via police power is not compensable since, in the first place, the property sought to be taken or destroyed had a *negative* contribution to the public interest. In that case, the private owner bears no "loss" to speak of because his property, a burden to the public, was rightfully removed. On the other hand, taking via eminent domain is compensable precisely because it is recognized that the property is inherently beneficial, and its owner must be compensated for their contribution to the public at large.

Thus, following the standards set in *ASLP* and *Didipio*, a takeover under Section 17, Article XII should not be classified as an exercise of police power. *Firstly*, these public utilities or private businesses affected with public interest cannot be described as noxious property or property intended for a noxious purpose. *Secondly*, their takeover would be made in response to some national emergency and for the benefit of the public at large, not because their continued operations are *per se* harmful or injurious to the public. *Thirdly*, and consequently, the State, which is not interested in the restriction of the use of such property, wants to use the property for the public interest precisely because of its beneficial uses. These characteristics are more consistent with eminent domain rather than police power.

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[69] *Id.* at 370 (Emphasis supplied, citations omitted.)

[70] Didipio Earth-Savers' Multi-Purpose Ass'n. Inc. v. Gozun, G.R. No. 157882, 485 SCRA 586, Mar. 30, 2006.

[71] *Id.* at 605. (Citations omitted.)

2. Police power can deploy eminent domain in accomplishing its goal of upholding public interest

As briefly stated earlier, the object of police power, which is the promotion of the public interest, is not mutually exclusive from eminent domain or taxation. The Supreme Court has recognized that modern interpretations of the three inherent powers of the State show they may be used to implement each other.

As a cursory observation, the Supreme Court has previously held in several cases that the term "public interest" used in Section 17, Article XII (and as cited in the *Agan Cases*) is synonymous with the concept of "public use" in eminent domain.[72] This illustrates two things: (a) police power is not the only way for the State to uphold the public interest; and (b) more importantly, the stated purpose of upholding public interest is not determinative of the type of power the State used to achieve its goal. It has been recognized that taxation can be (and has been) used to implement a police purpose.[73] It likewise stands to reason that the power of eminent domain may also be used to accomplish a police purpose, as explained by the Supreme Court in *ASLP*.

In *ASLP*, the petitioners challenged the constitutionality of the various agrarian reform laws and executive issuances passed by Presidents Ferdinand E. Marcos and Corazon C. Aquino. In part, they asserted that, notwithstanding the fact that the Constitution mandates Congress to enact agrarian reform, these could not divest the petitioners of their landholdings in favor of farmer-beneficiaries without just compensation. The petitioners asserted the agrarian reform laws were confiscatory and an invalid exercise of police power.

As the Supreme Court e*n banc* in *ASLP* illustrates:

> The cases before us present no knotty complication insofar as the question of compensable taking is concerned. To the extent that the measures under challenge merely prescribe retention limits for landowners, there is an exercise of the police power for the regulation of private property in accordance with the Constitution.

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[72] The meaning of the term "public use" has evolved over time in response to changing public needs and exigencies. The traditional definition of "public use" as strictly limited to actual "use by the public" has already been abandoned. "Public use" has now been held to be synonymous with "public interest," "public benefit," and "public convenience." *See* Republic v. Heirs of Borbon, G.R. No. 165354, 745 SCRA 40, Jan. 12, 2015.

[73] *See* Gerochi v. DOE, G.R. No. 159796, 527 SCRA 696, July 17, 2007.

> *But where, to carry out such regulation, it becomes necessary to deprive such owners of whatever lands they may own in excess of the maximum area allowed, there is definitely a taking under the power of eminent domain* for which payment of just compensation is imperative. *The taking contemplated is not a mere limitation of the use of the land. What is required is the surrender of the title to and the physical possession of the said excess and all beneficial rights accruing to the owner in favor of the farmer-beneficiary. This is definitely an exercise not of the police power but of the power of eminent domain.*[74]

The Court laid the basis for this conclusion in the following manner:

> *Recent trends, however, would indicate not a polarization but a mingling of the police power and the power of eminent domain*, with the latter being used as an implement of the former like the power of taxation. The employment of the taxing power to achieve a police purpose has long been accepted. As for the power of expropriation, Prof. John J. Costonis of the University of Illinois College of Law (referring to the earlier case of *Euclid v. Ambler Realty Co.*, 272 US 365, which sustained a zoning law under the police power) makes the following significant remarks:
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> > Euclid, moreover, was decided in an era when judges located the Police and eminent domain powers on different planets. Generally speaking, they viewed eminent domain as "encompassing public acquisition of private property for improvements that would be available for public use," literally construed. To the police power, on the other hand, they assigned the less intrusive task of preventing harmful externalities a point reflected in the Euclid opinion's reliance on an analogy to nuisance law to bolster its support of zoning. So long as suppression of a privately authored harm bore a plausible relation to some legitimate "public purpose," the pertinent measure need have afforded no compensation whatever. *With the progressive growth of government's involvement in land use, the distance between the two powers has contracted considerably. Today government often employs eminent domain interchangeably with or as a useful complement to the police power*—a trend expressly approved in the Supreme Court's 1954 decision in *Berman v. Parker*, which broadened the reach of eminent domain's "public use" test to match that of the police power's standard of "public purpose."

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[74] *ASLP*, 175 SCRA at 373-74. (Emphasis supplied.)

The Berman case sustained a redevelopment project and the improvement of blighted areas in the District of Columbia as a proper exercise of the police power. On the role of eminent domain in the attainment of this purpose, Justice Douglas declared:

> If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.
>
> *Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear.*
>
> *For the power of eminent domain is merely the means to the end.*

In Penn Central Transportation Co. v. New York City, 29 decided by a 6-3 vote in 1978, the U.S Supreme Court sustained the respondent's Landmarks Preservation Law under which *the owners of the Grand Central Terminal had not been allowed to construct a multi-story office building over the Terminal, which had been designated a historic landmark. Preservation of the landmark was held to be a valid objective of the police power.* The problem, however, was that the owners of the Terminal would be deprived of the right to use the airspace above it although other landowners in the area could do so over their respective properties. While insisting that there was here no taking, the Court nonetheless recognized certain compensatory rights accruing to Grand Central Terminal which it said would "undoubtedly mitigate" the loss caused by the regulation. This "fair compensation," as he called it, was explained by Prof. Costonis in this wise:

> In return for retaining the Terminal site in its pristine landmark status, Penn Central was authorized to transfer to neighboring properties the authorized but unused rights accruing to the site prior to the Terminal's designation as a landmark—the rights which would have been exhausted by the 59-story building that the city refused to countenance atop the Terminal. Prevailing bulk restrictions on neighboring sites were proportionately relaxed, theoretically enabling Penn Central to recoup its losses at the Terminal site by constructing or selling to others the right to construct larger, hence more profitable buildings on the transferee sites.[75]

ASLP explained the pursuit of public interest, through the use of a measure that fulfills the requisites of a valid exercise of police power, does not preclude the idea that eminent domain was used to fulfill this objective—especially when the State, in order to achieve the police objective, prohibits,

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[75] *Id.* at 371-73. (Emphasis supplied.)

restricts, or impairs the use of private property. As long as there is a taking or restriction of property in the furtherance of public interest, it is not necessarily police power *per se* but an exercise of eminent domain *in furtherance of* police power.

3. There should be no distinction between permanent, partial taking and temporary, total taking

It is submitted that, contrary to *Vda. De Castellvi*, the temporary nature of the taking should no longer be a requirement of eminent domain, especially when private property is taken to respond to the exigencies of the public interest.

It is well-settled in jurisprudence that the power of eminent domain is exercised not just when the entire property is completely taken, but even when the property is only partially but completely taken, such as when a small percentage of memorial park lots must be set aside for paupers' burials, or when more than half of a residential property is taken for the construction of the Manila Skyway Project.[76] There is also eminent domain and compensable taking when the owner's use of his property is restricted or burdened to suffer power transmission lines overhead, or when construction on property is prohibited by the government to preserve the view of the locality.[77] In the latter cases, eminent domain is exercised and just compensation is due even if the owner does not lose ownership or possession of his property.

Given that *partial and complete* takings, as well as *complete* takings or restrictions on *some* rights of ownership (particularly the right to use one's property) are recognized as compensable, there is no reason why a *temporary total taking* (as would be the case in the event of a takeover under Section 17, Article XII) of property would not be the proper subject of just compensation. The previous examples discussed show jurisprudence on eminent domain has evolved since the promulgation of *Vda. De Castellvi* to recognize that the loss of complete ownership is not necessary for compensable taking for as long as there is a degree of infringement of ownership rights, just compensation must be paid.

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[76] *See* Bartolata v. Republic, G.R. No. 223334, 827 SCRA 100, June 7, 2017; City Gov't of Quezon City v. Ericta, G.R. No. L-34915, 122 SCRA 759, June 24, 1983.

[77] *See* Nat'l Power Corp. v. Gutierrez, G.R. No. 60077, 193 SCRA 1, Jan. 18, 1991; People v. Fajardo, 104 Phil. 443 (1958).

Indeed, and contrary to the requirement of "taking for more than a momentary period" in *Vda. De Castellvi*, the U.S. Supreme Court has held in several cases that there is compensable taking where the government, pursuant to powers granted by Congress, temporarily takes over the operations of private businesses.[78] This also includes instances where the government does not take complete control of the private business, but "only assumes the responsibility of its direction and employment for national purposes, leaving the actual operations in the hands of its owners as government officials appointed to conduct its affairs with the assets and equipment of the controlled company."[79]

In these cases, the U.S. Supreme Court grounded their analysis in the Fifth Amendment of the U.S. Constitution, which states in part that "[…] nor shall private property be taken for public use, without just compensation," similar to Section 9, Article III of our Constitution. The similarities of the two Constitutional provisions should be persuasive on Philippine courts, notwithstanding the fact that the U.S. Constitution does not have a provision equivalent to Section 17, Article XII because in both jurisdictions, Congress is the repository of the power being exercised.

In *United States v. Pewee Coal Co. Inc.*[80] ("*Pewee Coal*"), the U.S. Government, pursuant to an Executive Order issued by President Franklin D. Roosevelt, temporarily took over a coal mine to avert the effects of a nationwide strike of coal miners. The U.S. Supreme Court held the Government's act of taking actual possession and control of the mine constituted a taking under the Fifth Amendment for which the mine operator was entitled to just compensation. The U.S. Supreme Court explained the seizure was "in as complete a sense as if the Government held full title and ownership," and the Government effectively took the property and became engaged in the mining business. As such, the private business was entitled to just compensation.

It is noted that, to the Commission's mind, strikes such as that in *Pewee Coal* do not fall within the scope of a "national emergency." However, the reason why a temporary taking should be viewed as eminent domain still stands, especially in light of a "direct government appropriation or physical

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[78] For example, *see,* Kimball Laundry Co. v. U.S., 338 U.S. 1 (1949); U.S. v. Gen. Motors Corp., 323 U.S. 373 (1945).

[79] *See* U.S. v. Pewee Coal Co., Inc., 341 US 114, 120 (1951), (Reed., *J., concurring*), *citing* Marion & Rye Valley R. Co. v. U.S., 270 U.S. 280 *and* U.S. v. United Mine Workers of Am., 330 U.S. 258.

[80] U.S. v. Pewee Coal Co., Inc. [hereinafter "Pewee Coal"], 341 US 114, 120 (1951).

invasion of private property."[81] This is squarely applicable to an invocation of Section 17, Article XII. Indeed, quibbling over justification for the invasion of property rights (i.e. a strike versus a calamity) is immaterial, as in either case, property will be deprived in a manner similar to other cases of eminent domain, and for which the Constitution demands the payment of just compensation.

IV. IMPLICATIONS OF SECTION 17, ARTICLE XII AS EMINENT DOMAIN

The shift in characterization of Section 17, Article XII carries implications on the arguments that the government may use to take over a public utility or private business, as well as the latter's defenses against such an action. It is also worth noting that, assuming Section 17, Article XII is an exercise of eminent domain, just compensation may be determined in the manner of a typical expropriation case. This final section does not conclude as to which situation is ultimately better for the government or the affected entity (much less which characterization is correct), but merely attempts to lay out these scenarios and arguments for the reader's consideration.

A. Defenses of public utilities and private businesses

1. Section 17, Article XII as police power in general

Assuming Section 17, Article XII is sustained as an exercise of police power, it will have to fulfill the requisites for its exercise. To recall, police power in general requires the government to show reasonableness through "lawful subjects" and "lawful means" tests.[82]

On occasion, the Supreme Court has ruled in favor of challenges to the police power of the State. In *Lucena Grand Central Terminal, Inc. v. Jac Liner, Inc.*,[83] the Sangguniang Panglungsod of Lucena City passed an ordinance which closed existing transportation terminals, prohibited all buses, mini-buses, and out-of-town passenger jeepneys from plying city roads, and instead directed them only towards the petitioner's transportation terminal facility. The ordinance was passed with the goal of improving the city's vehicular congestion by restricting the said vehicles' access to city roads.

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[81] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005).

[82] *See* Planters Prod., Inc. v. Fertiphil Corp., G.R. No. 166006, 548 SCRA 485, Mar. 14, 2008.

[83] G.R. No. 148339, 452 SCRA 174, Feb. 23, 2005.

In upholding the lower court's decision to invalidate the measure, the Supreme Court recognized that although traffic congestion is a public concern, it was "overbroad" for the city to force public transport operators to patronize the petitioner's terminal because it went "beyond what is reasonably necessary"[84] to solve the traffic problem. The Court found that it was the indiscriminate loading and unloading of passengers which caused the traffic congestion, and not having numerous bus terminals *per se*. It was thus unfair to attribute congestion to the mere existence of several terminals and the presence of public transportation on the streets. The city was enjoined to find alternatives (such as revising size standards for terminals to prevent street unloading), and was told the petitioner's exclusive operation of a terminal has not been shown to be the only solution to the problem. Moreover, the forced patronage of the terminal (resulting in fees, rentals, and charges) would be unduly oppressive.

Even if the measure was actually effective in easing traffic congestion, the Court decided such an extreme measure was unnecessary. The Supreme Court noted that, notwithstanding the popular local support for the single terminal measure, there must be "an equilibrium between authority and liberty,"[85] and the weight of popular opinion must be balanced with an individual's rights.

The Supreme Court arrived at a similar conclusion in *Lupangco v. CA*,[86] where it found that the Professional Regulatory Commission (PRC) had no power to prohibit, under threat of being disallowed from taking future examinations, accountancy licensure examinees from:

> ...attend[ing] any review class, briefing, conference or the like conducted by, or [receiving] any hand-out, review material, or any tip from any school, college or university, or any review center or the like or any reviewer, lecturer, instructor official or employee of any of the aforementioned or similar institutions during the three days immediately preceding every examination day including examination day[.][87]

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[84] *Id.* at 188.
[85] *Id.* at 189.
[86] G.R. No. 77372, 160 SCRA 848, Apr. 29, 1988.
[87] *Id.* at 851.

The PRC wanted to "preserve the integrity and purity of the licensure examinations"[88] on the theory that if examinees were so prevented, they would not have access to "leakages" that allegedly proliferated the said institutions.

The Supreme Court said that not only was the PRC unreasonable in infringing upon the examinees' liberty to take lawful steps to pass the exams, but the policy was actually impossible to implement. On balance, the PRC would have deprived many examinees from legitimate means of review or preparation. The Supreme Court also noted that efforts were better spent at stopping the leakages by chasing corrupt officials and personnel, charging fixers and swindlers, and imposing strict guidelines. In so ruling, the Supreme Court said that the rule was akin to "uprooting the tree to get rid of the rotten branch."[89]

While it remains to be seen how a trial court might appreciate what constitutes reasonableness in light of Section 17, Article XII, these cases show that it may help to point out less extreme means to achieve the State policy or demonstrate the undue burdens created in order to demonstrate how the exercise of police power is invalid.

On another note, assuming that the state of national emergency has gone on for some time, it may be worth challenging the takeover on the grounds that the emergency itself no longer exists, and thus the basis for the grant of the emergency powers and the resulting takeover has ceased. This was the contention in *Araneta v. Dinglasan*,[90] a case involving Congress' grant of powers to the President under Section 26, Article VI.[91]

The petitioners in *Araneta* questioned, among others, Commonwealth Act No. 671 (hereinafter "CA 671"), which granted a range of powers to President Manuel L. Quezon in response to the outbreak of the Second World War. Section 4 of CA 671 stated it "shall take effect upon its approval and the rules and regulations promulgated hereunder shall be in force and effect until the Congress of the Philippines shall otherwise provide."

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[88] *Id.* at 860.

[89] *Id.*

[90] 84 Phil. 368 (1924).

[91] CONST. (1935), art. VI, § 26. "In time of war or other national emergency, the Congress may by law authorize the President, for a limited period and subject to such restrictions as it may prescribe, to promulgate rules and regulations to carry out a declared national policy."

The Court said, notwithstanding the law's silence regarding the repeal of its authority, it must have been the National Assembly's belief that it was unnecessary to explicitly provide a limitation. Since the powers granted under the Constitution were explicitly "for a limited period" in response to a national emergency, it stands to reason that such powers are withdrawn upon the lapse of such emergency. This can be safely determined by the fact that Congress was, at a later point, able to reconvene and exercise its powers:

> It can easily be discerned in this statement that the conferring of enormous powers upon the President was decided upon with specific view to the inability of the National Assembly to meet. Indeed, no other factor than this inability could have motivated the delegation of powers so vast as to amount to an abdication by the National Assembly of its authority. The enactment and continuation of a law so destructive of the foundations of democratic institutions could not have been conceived under any circumstance short of a complete disruption and dislocation of the normal processes of government. Anyway, if we are to uphold the constitutionality of the act on the basis of its duration, we must start with the premise that it fixed a definite, limited period. As we have indicated, the period that best comports with constitutional requirements and limitations, with the general context of the law and with what we believe to be the main if not the sole *raison d'etre* for its enactment, was a period coextensive with the inability of Congress to function, a period ending with the convening of that body.[92]

In his concurring opinion, Justice Ricardo M. Paras stated that the end of the emergency could also be deduced from the contemporaneous acts of Congress and the President.[93] To his mind, Justice Paras said that, at the very least, these show emergencies only partially exist, and in the absence of the total emergency contemplated by CA 671, the emergency powers should be deemed withdrawn.[94]

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[92] *Araneta v. Dinglasan,* 84 Phil. at 379-80.

[93] In particular, Congress at the time had passed Republic Act No. 342, which declared that "liberation conditions have gradually returned to normal[…]". In turn, the President said in a public speech that "what emergencies it (the Republic) faces today are incidental passing pains artificially created by seasonal partisanship, very common among democracies but will disappear with the rains that follow the thunderclaps not later than November 8 of this year." *See Id.* at 388-89 (Paras, *J., concurring*).

[94] *Id.*

Based on the foregoing, it may be argued that a takeover must cease if it can be shown that the circumstances which prompted the emergency have abated (or even partially subsided), even without the express termination or repeal of the enabling law or relinquishment of the powers by the President.

It must be noted, however, that the national emergency contemplated in *Araneta* was the Second World War. The formal end of the war was the official surrender of the Axis powers to the Allied forces—official acts of the concerned states which thus provided clear basis for the Court to say the emergency was over. Such clear markers may not be applicable in situations such as and similar to the COVID-19 crisis, where its character (a virus for which no vaccine has been discovered) may make it difficult to ascertain whether the emergency has actually passed.

2. Section 17, Article XII in the context of RA 11469

To recall, the takeover clause in RA 11469 reads as follows:

> Section 3(h): *Consistent with Section 17, Article XII of the Constitution, when the public interest so requires, direct the operation of any privately-owned hospitals and medical and health facilities including passenger vessels and, other establishments*, to house health workers, serve as quarantine areas, quarantine centers, medical relief and aid distribution locations, or other temporary medical facilities; *and public transportation* to ferry health, emergency, and frontline personnel and other persons; *Provided, however,* That the management and operation of the foregoing enterprises shall be retained by the owners of the enterprise, who shall render a full accounting to the President or his duly authorized representative of the operations of the utility or business as basis for appropriate compensation; *Provided, further, That reasonable compensation for any additional damage or costs incurred by the owner or the possessor of the subject property solely on account of complying with the directive shall be given to the person entitled to the possession of such private properties or businesses* after the situation has stabilized or at the soonest time practicable; *Provided, finally, That if the foregoing enterprises unjustifiably refuse or signify that they are no longer capable of operating their enterprises for the purpose stated herein, the President may take over their operations subject to the limits and safeguards enshrined in the Constitution[.]*[95]

This provision is interesting for three reasons. *Firstly*, notwithstanding the ruling in *Agan*, Congress allowed for the possibility of granting reasonable compensation "for any additional damage or costs incurred by the owner or the possessor of the subject property solely on account of complying with the

[95] Rep. Act No. 11469 (2020), § 3(h). (Emphasis supplied.)

directive." Additionally, this compensation for "additional damages" seems distinct from the compensation mentioned in passing by the Commission, which appears to be compensation for the mere deprivation of property:

> MR. GASCON: How will a takeover by the State operate? Will former owners be compensated for their losses.
>
> MR. VILLEGAS: *No, this is only temporary, so there is no need to transfer ownership. Only the operation will be taken over, which precisely is the reason for such a takeover. Directed operation shall be only for the duration of the state of emergency.*
>
> MR. GASCON: During the period of taking over by the State, will there be compensation for the owner who will be deprived?
>
> MR. VILLEGAS: *If they are prejudiced, definitely yes. No one can be deprived of private property without just compensation.*[96]

In light of the ruling in the *Agan Cases*, the conditional grant of compensation relating to a police power measure may be characterized as *sui generis*, especially since previous laws and issuances were silent on this possibility. In other words, nothing prevents Congress from passing a similar emergency powers law in the future which does not provide for compensation since it is not a component of police power. Based on the *Agan Cases*, Congress would be within its right to do so.

Secondly, the final proviso of Section 3(h) appears to imply that an affected entity may refuse the government's direction on justifiable grounds. One can take this to mean that any takeover by the government cannot be immediate, and the affected entity should be given adequate opportunity to substantiate (within reason, and presumably using the same framework of resisting police power as described in the previous section) why the government should not take over its operations. However, this stands in contradiction to the Commission's suggestion that any takeover is immediate, and the affected owners have no choice but to immediately yield to the government.[97] Should the provision be tested, the courts may have to decide on the effect of this proviso and its implications of other exercises of Section 17, Article XII moving forward.

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[96] III RECORD CONST. COMM'N 267 (Aug. 23, 1986). (Emphasis supplied.)

[97] *See supra* note 26.

Thirdly, the requisites for the payment of compensation must be met. When a statute speaks of awarding compensation for the taking of a private business, distinction must be made as to whether payment is automatically made or is merely authorized to be made. In the latter case (which appears to be the case in RA 11469), the private business is expected to prove their losses.[98] On that note, *Pewee Coal* states these losses must have been incurred by governmental acts, such as if the business would not have been conducted at all but for the government, or if extra losses over what would have been otherwise sustained were occasioned by government operations. Where the owner's losses are those incurred in normal business operations (i.e. independent of the "taking"), the owner has suffered no loss or damage for which compensation is due.[99] This formulation seems consistent with the intent of RA 11469. The challenge lies in proving causality between the acts of the State and the losses—that is, that these losses would not have been incurred if not for the State's intervention.

3. Section 17, Article XII as eminent domain

Eminent domain does not give license to the State to expropriate any property it wishes. Apart from identifying the existence of a public interest to be served, it must also be shown that the exercise of the power was not capricious and arbitrary. It must also reasonably serve the purpose for which the expropriation was contemplated.[100]

Sometimes, assailing the expropriation is a matter of determining whether it meets the purpose stated in the relevant statute or ordinance.[101] In some cases, the Supreme Court has given credit to more creative arguments that might have some application in a takeover under Section 17, Article XII. For example, the Supreme Court has previously prevented the expropriation of high-value commercial land on the basis that its current use as a school is better than the proposed use of selling parcels thereof at cost for homesites.[102] In another case, the Supreme Court allowed the redirection of a highway's construction because of a study showing that another route was better. [103] The Supreme Court has also ruled in favor of a property owner who argued that

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[98] *See* Marion & Rye Valley Ry. Co. v. U.S., 270 U.S. 280 (1926).
[99] *Pewee Coal*, 341 US at 121 (Reed., *J., concurring*).
[100] *See* Republic v. Heirs of Borbon, G.R. No. 165354, 745 SCRA 40, Jan. 12, 2015.
[101] For example, *see*, Lee Tay & Lee Chay, Inc. v. Choco, 87 Phil. 814 (1950).
[102] *See* City of Manila v. Arellano L. Coll., Inc., 85 Phil. 663 (1950).
[103] *See* De Knecht v. Bautista, G.R. No. L-51078, 100 SCRA 660, Oct. 30, 1980.

they were unduly singled out for expropriation, which further pointed to "short-sighted methods" in remedying the problem of informal settlers within his locality.[104]

Going by these cases, the Supreme Court seems to give more room for a party to argue against the reasonableness of an expropriation as against the reasonableness of a police power measure. This may be because the Supreme Court has recognized that "[s]o great is the regard of the law for private property that it will not authorize the least violation of it, even for the public good, unless there exist *(sic)* a very great necessity thereof."[105] It may also be because, unlike police power cases, cases challenging expropriation are not saddled with the "heavy burden" of overthrowing the presumed regularity of the State's actions. At any rate, taking advantage of this "openness" may be worth considering in relation to challenging a Section 17, Article XII takeover.

B. Determining just compensation in "eminent domain"

As discussed above, just compensation follows the taking of property under eminent domain. Generally, the determination of just compensation is a judicial prerogative and is fixed in the proper court proceedings for that purpose. Factors such as the valuations made by commissioners or the fair market value of the private property during the time of its taking are considered in arriving at the proper sum.[106]

In light of other extraordinary forms of taking done by the State, it is possible that this market value formulation may not always be applied. Justice Stanley Forman Reed, in his concurring opinion in *Pewee Coal*, explained that the use of market value as a tool for determining just compensation was "too uncertain a measure to have any practical significance."[107] In lieu thereof, he recommended that just compensation be awarded "under all the circumstances of the particular case."[108]

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[104] Lagcao v. Labra, G.R. No. 155746, 440 SCRA 279, Oct. 13, 2004.

[105] City of Manila v. Arellano L. Coll., Inc., 85 Phil. 663 (1950), *citing* William Blackstone's Commentaries on the Laws of England. As an aside, this characterization of property as inherently personal (as opposed to emphasizing its social function) may be one of the biggest contributors of inequality and inadequate protections for the vulnerable in society, but that is an argument for another time.

[106] *See* Evergreen Mfg. Corp. v. Republic, G.R. No. 218628, 839 SCRA 200, Sept. 6, 2017.

[107] *Pewee* Coal, 341 US at 122.

[108] *Id.* at 120.

One other form of radical taking expressed in the Constitution is agrarian reform.[109] To this end, the Supreme Court in *ASLP* recognized agrarian reform as an act of eminent domain pursuant to the mandate and policy stated in the Constitution. However, it disagreed that just compensation must be fixed in the usual way of judicial proceedings. Rather, it upheld the just compensation determined by Congress and the President in their various agrarian reform issuances, where the amount was not solely determined by the property's fair market value. The issuances also authorized the payment of just compensation in forms other than money:

> It cannot be denied from these cases that the traditional medium for the payment of just compensation is money and no other. And so, conformably, has just compensation been paid in the past solely in that medium. *However, we do not deal here with the traditional exercise of the power of eminent domain. This is not an ordinary expropriation where only a specific property of relatively limited area is sought to be taken by the State from its owner for a specific and perhaps local purpose.*
>
> *What we deal with here is a revolutionary kind of expropriation.*
>
> ***
>
> *We assume that the framers of the Constitution were aware of this difficulty when they called for agrarian reform as a top priority project of the government. It is a part of this assumption that when they envisioned the expropriation that would be needed, they also intended that the just compensation would have to be paid not in the orthodox way but a less conventional if more practical method. There can be no doubt that they were aware of the financial limitations of the government and had no illusions that there would be enough money to pay in cash and in full for the lands they wanted to be distributed among the farmers. We may therefore assume that their intention was to allow such manner of payment as is now provided for by the CARP Law, particularly the payment of the balance (if the owner cannot be paid fully with money), or indeed of the entire amount of the just compensation, with other things of value.* We may also suppose that what they had in mind was a similar scheme of

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[109] CONST. art. XIII, § 4. "The State shall, by law, undertake an agrarian reform program founded on the right of farmers and regular farmworkers, who are landless, to own directly or collectively the lands they till or, in the case of other farmworkers, to receive a just share of the fruits thereof. To this end, the State shall encourage and undertake the just distribution of all agricultural lands, subject to such priorities and reasonable retention limits as the Congress may prescribe, taking into account ecological, developmental, or equity considerations, and subject to the payment of just compensation. In determining retention limits, the State shall respect the right of small landowners. The State shall further provide incentives for voluntary landsharing."

> payment as that prescribed in P.D. No. 27, which was the law in force at the time they deliberated on the new Charter and with which they presumably agreed in principle.
>
> ***
>
> Accepting the theory that payment of the just compensation is not always required to be made fully in money, we find further that the proportion of cash payment to the other things of value constituting the total payment, as determined on the basis of the areas of the lands expropriated, is not unduly oppressive upon the landowner. *It is noted that the smaller the land, the bigger the payment in money, primarily because the small landowner will be needing it more than the big landowners, who can afford a bigger balance in bonds and other things of value. No less importantly, the government financial instruments making up the balance of the payment are "negotiable at any time." The other modes, which are likewise available to the landowner at his option, are also not unreasonable because payment is made in shares of stock, LBP bonds, other properties or assets, tax credits, and other things of value equivalent to the amount of just compensation.*
>
> Admittedly, the compensation contemplated in the law will cause the landowners, big and small, not a little inconvenience. As already remarked, this cannot be avoided. Nevertheless, it is devoutly hoped that these countrymen of ours, conscious as we know they are of the need for their forebearance and even sacrifice, will not begrudge us their indispensable share in the attainment of the ideal of agrarian reform. Otherwise, our pursuit of this elusive goal will be like the quest for the Holy Grail.[110]

It is possible that the Court may apply a similar approach in adjudging just compensation for entities affected by the takeover, especially if Congress were to subsequently clarify how just compensation may be determined. This approach may be applicable for two reasons: *firstly*, the fact that the takeover is done pursuant to a constitutional mandate may allow for an argument to say that, similar to agrarian reform, extraordinary taking warrants extraordinary just compensation; and *secondly*, as illustrated by the COVID-19 crisis, the liquidity of funds is a separate question from their availability. It is possible that the State would like to preserve its cash and other liquid assets for immediate and essential needs in the crisis. These needs are unlikely to

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[110] *ASLP*, 175 SCRA at 385-89. (Emphasis supplied, citations omitted.)

include just compensation for the owners of the affected entities. In any case, what is important to establish at this point is that, should one decide to treat Section 17, Article XII as an exercise of eminent domain, there is legal justification and precedent to require some form of just compensation.

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