



power of eminent domain because both have the general welfare of the people for their object, we need to clarify the concept of taking in eminent domain as against taking in police power to prevent any claim of police power when the power actually exercised is eminent domain. **When police power is exercised, there is no just compensation to the citizen who loses his private property. When eminent domain is exercised, there must be just compensation. Thus, the Court must distinguish and clarify taking in police power and taking in eminent domain. Government officials cannot just invoke police power when the act constitutes eminent domain.**

In *People v. Pomar*,<sup>5</sup> the Court acknowledged that “[b]y reason of the constant growth of public opinion in a developing civilization, the term ‘police power’ has never been, and we do not believe can be, clearly and definitely defined and circumscribed.”<sup>6</sup> The Court stated that the “definition of the police power of the [S]tate must depend upon the particular law and the particular facts to which it is to be applied.”<sup>7</sup> **However, it was considered even then that police power, when applied to taking of property without compensation, refers to property that is destroyed or placed outside the commerce of man.** The Court declared in *Pomar*:

**It is believed and confidently asserted that no case can be found, in civilized society and well-organized governments, where individuals have been deprived of their property, under the police power of the state, without compensation, except in cases where the property in question was used for the purpose of violating some law legally adopted, or constitutes a nuisance.** Among such cases may be mentioned: Apparatus used in counterfeiting the money of the state; firearms illegally possessed; opium possessed in violation of law; apparatus used for gambling in violation of law; buildings and property used for the purpose of violating laws prohibiting the manufacture and sale of intoxicating liquors; and all cases in which the property itself has become a nuisance and dangerous and detrimental to the public health, morals and general welfare of the state. In all of such cases, and in many more which might be cited, the destruction of the property is permitted in the exercise of the police power of the state. But it must first be established that such property was used as the instrument for the violation of a valid existing law. (*Mugler vs. Kansan*, 123 U.S. 623; *Slaughter-House Cases*, 16 Wall. [U.S.] 36; *Butchers’ Union, etc., Co. vs. Crescent City, etc., Co.*, 111 U.S. 746; *John Stuart Mill - “On Liberty,”* 28, 29)

Without further attempting to define what are the peculiar subjects or limits of the police power, it may safely be affirmed, that every law for the restraint and punishment of crimes, for the preservation of the public peace, health, and morals, must come within this category. But the state, when providing by legislation for the protection of the public health, the public morals, or the public safety, is subject to and is controlled by the paramount authority of the constitution of the state, and will not be

<sup>5</sup> 46 Phil. 440 (1924).

<sup>6</sup> *Id.* at 445.

<sup>7</sup> *Id.*

permitted to violate rights secured or guaranteed by that instrument or interfere with the execution of the powers and rights guaranteed to the people under their law – the constitution. (*Mugler vs. Kansas*, 123 U.S. 623)<sup>8</sup> (Emphasis supplied)

In *City Government of Quezon City v. Hon. Judge Ericta*,<sup>9</sup> the Court quoted with approval the trial court's decision declaring null and void Section 9 of Ordinance No. 6118, S-64, of the Quezon City Council, thus:

We start the discussion with a restatement of certain basic principles. Occupying the forefront in the bill of rights is the provision which states that 'no person shall be deprived of life, liberty or property without due process of law. (Art. III, Section 1 subparagraph 1, Constitution)

On the other hand, there are three inherent powers of government by which the state interferes with the property rights, namely– (1) police power, (2) eminent domain, [and] (3) taxation. These are said to exist independently of the Constitution as necessary attributes of sovereignty.

**Police power is defined by Freund as 'the power of promoting the public welfare by restraining and regulating the use of liberty and property' (Quoted in Political Law by Tañada and Carreon, V-II, p. 50). It is usually exerted in order to merely regulate the use and enjoyment of property of the owner. If he is deprived of his property outright, it is not taken for public use but rather to destroy in order to promote the general welfare. In police power, the owner does not recover from the government for injury sustained in consequence thereof (12 C.J. 623).** It has been said that police power is the most essential of government powers, at times the most insistent, and always one of the least limitable of the powers of government (*Ruby vs. Provincial Board*, 39 Phil. 660; *Ichong vs. Hernandez*, L-7995, May 31, 1957). This power embraces the whole system of public regulation (*U.S. vs. Linsuya Fan*, 10 Phil. 104). The Supreme Court has said that police power is so far-reaching in scope that it has almost become impossible to limit its sweep. As it derives its existence from the very existence of the state itself, it does not need to be expressed or defined in its scope. Being coextensive with self-preservation and survival itself, it is the most positive and active of all governmental processes, the most essential, insistent and illimitable. Especially it is so under the modern democratic framework where the demands of society and nations have multiplied to almost unimaginable proportions. The field and scope of police power have become almost boundless, just as the fields of public interest and public welfare have become almost all embracing and have transcended human foresight. Since the Court cannot foresee the needs and demands of public interest and welfare, they cannot delimit beforehand the extent or scope of the police power by which and through which the state seeks to attain or achieve public interest and welfare. (*Ichong vs. Hernandez*, L-7995, May 31, 1957).

<sup>8</sup> Id. at 454-455.

<sup>9</sup> 207 Phil. 648 (1983).

The police power being the most active power of the government and the due process clause being the broadest limitation on governmental power, the conflict between this power of government and the due process clause of the Constitution is oftentimes inevitable.

**It will be seen from the foregoing authorities that police power is usually exercised in the form of mere regulation or restriction in the use of liberty or property for the promotion of the general welfare. It does not involve the taking or confiscation of property with the exception of a few cases where there is a necessity to confiscate private property in order to destroy it for the purpose of protecting the peace and order and of promoting the general welfare as for instance, the confiscation of an illegally possessed article, such as opium and firearms.<sup>10</sup> (Boldfacing and italicization supplied)**

**It is very clear that taking under the exercise of police power does not require any compensation because the property taken is either destroyed or placed outside the commerce of man.**

On the other hand, the power of eminent domain has been described as –

x x x ‘the highest and most exact idea of property remaining in the government’ that may be acquired for some public purpose through a method in the nature of a forced purchase by the State. It is a right to take or reassert dominion over property within the state for public use or to meet public exigency. It is said to be an essential part of governance even in its most primitive form and thus inseparable from sovereignty. The only direct constitutional qualification is that ‘private property should not be taken for public use without just compensation.’ This proscription is intended to provide a safeguard against possible abuse and so to protect as well the individual against whose property the power is sought to be enforced.<sup>11</sup>

In order to be valid, the taking of private property by the government under eminent domain has to be for public use and there must be just compensation.<sup>12</sup>

Fr. Joaquin G. Bernas, S.J., expounded:

Both police power and the power of eminent domain have the general welfare for their object. The former achieves its object by regulation while the latter by “taking”. When property right is impaired by regulation, compensation is not required; whereas, when property is taken, the Constitution prescribes just compensation. **Hence, a sharp distinction must be made between regulation and taking.**

When title to property is transferred to the expropriating authority, there is a clear case of compensable taking. However, as will be seen, it is

<sup>10</sup> Id. at 654-655.

<sup>11</sup> *Manosca v. CA*, 322 Phil. 442, 448 (1996).

<sup>12</sup> *Moday v. CA*, 335 Phil. 1057 (1997).

a settled rule that neither acquisition of title nor total destruction of value is essential to taking. It is in cases where title remains with the private owner that inquiry must be made whether the impairment of property right is merely regulation or already amounts to compensable taking.

**An analysis of existing jurisprudence yields the rule that when a property interest is appropriated and applied to some public purpose, there is compensable taking. Where, however, a property interest is merely restricted because continued unrestricted use would be injurious to public welfare or where property is destroyed because continued existence of the property would be injurious to public interest, there is no compensable taking.**<sup>13</sup> (Emphasis supplied)

Both Section 4(a) of R.A. 9257 and Section 32 of R.A. 9442 undeniably contemplate taking of property for public use. Private property is anything that is subject to private ownership. The property taken for public use applies not only to land but also to other proprietary property, including the mandatory discounts given to senior citizens and persons with disability which form part of the gross sales of the private establishments that are forced to give them. **The amount of mandatory discount is money that belongs to the private establishment. For sure, money or cash is private property because it is something of value that is subject to private ownership.** The taking of property under Section 4(a) of R.A. 9257 and Section 32 of R.A. 9442 is an exercise of the power of eminent domain and not an exercise of the police power of the State. **A clear and sharp distinction should be made because private property owners will be left at the mercy of government officials if these officials are allowed to invoke police power when what is actually exercised is the power of eminent domain.**

Section 9, Article III of the 1987 Constitution speaks of private property without any distinction. It does not state that there should be profit before the taking of property is subject to just compensation. The private property referred to for purposes of taking could be inherited, donated, purchased, mortgaged, or as in this case, part of the gross sales of private establishments. They are all private property and any taking should be attended by a corresponding payment of just compensation. The 20% discount granted to senior citizens and persons with disability belongs to private establishments, whether these establishments make a profit or suffer a loss.

Just compensation is **“the full and fair equivalent of the property taken from its owner by the expropriator.”**<sup>14</sup> The Court explained:

x x x. The measure is not the taker’s gain, but the owner’s loss. The word ‘just’ is used to qualify the meaning of the word ‘compensation’ and to convey thereby the idea that **the amount to be tendered for the property**

<sup>13</sup> J. Bernas, S.J., *THE 1987 CONSTITUTION OF THE PHILIPPINES, A COMMENTARY* 379 (1996 ed.)

<sup>14</sup> *National Power Corporation v. Spouses Zubala*, 702 Phil. 491 (2013).

to be taken shall be real, substantial, full and ample. x x x.<sup>15</sup> (Emphasis supplied)

The 32% of the discount that the private establishments could recover under the tax deduction scheme cannot be considered real, substantial, full, and ample compensation. In *Carlos Superdrug Corporation*, the Court conceded that “[t]he permanent reduction in [private establishments’] total revenue is a forced subsidy corresponding to the taking of private property for public use or benefit.”<sup>16</sup> The Court ruled that “[t]his constitutes compensable taking for which petitioners would ordinarily become entitled to a just compensation.”<sup>17</sup> Despite these pronouncements admitting there was compensable taking, the Court still proceeded to rule that “the State, in promoting the health and welfare of a special group of citizens, can impose upon private establishments the burden of partly subsidizing a government program.”

There may be valid instances when the State can impose burdens on private establishments that effectively subsidize a government program. However, the moment a constitutional threshold is crossed – when the burden constitutes a taking of private property for public use – then the burden becomes an exercise of eminent domain for which just compensation is required.

An example of a burden that can be validly imposed on private establishments is the requirement under Article 157 of the Labor Code that employers with a certain number of employees should maintain a clinic and employ a registered nurse, a physician, and a dentist, depending on the number of employees. Article 157 of the Labor Code provides:

Art. 157. Emergency medical and dental services. – It shall be the duty of every employer to furnish his employees in any locality with free medical and dental attendance and facilities consisting of:

- a. The services of a full-time registered nurse when the number of employees exceeds fifty (50) but not more than two hundred (200) except when the employer does not maintain hazardous workplaces, in which case, the services of a graduate first-aider shall be provided for the protection of workers, where no registered nurse is available. The Secretary of Labor and Employment shall provide by appropriate regulations, the services that shall be required where the number of employees does not exceed fifty (50) and shall determine by appropriate order, hazardous workplaces for purposes of this Article;

<sup>15</sup> Id. at 499-500.

<sup>16</sup> Supra note 3, at 129-130.

<sup>17</sup> Id. at 130.

- b. The services of a full-time registered nurse, a part-time physician and dentist, and an emergency clinic, when the number of employees exceeds two hundred (200) but not more than three hundred (300); and
- c. The services of a full-time physician, dentist and a full-time registered nurse as well as a dental clinic and an infirmary or emergency hospital with one bed capacity for every one hundred (100) employees when the number of employees exceeds three hundred (300). x x x.

x x x x

Article 157 of the Labor Code is a burden imposed by the State on private employers to complement a government program of promoting a healthy workplace. The employer itself, however, benefits fully from this burden because the health of its workers while in the workplace is a legitimate concern of the private employer. Moreover, the cost of maintaining the clinic and staff is part of the **legislated wages** for which the private employer is **fully compensated** by the services of the employees. In the case of discounts to senior citizens and persons with disability, private establishments are compensated only in the equivalent amount of 32% of the mandatory discount. There are no services rendered by the senior citizens, or any other form of payment, that could make up for the 68% balance of the mandatory discount. Clearly, private establishments cannot recover the full amount of the discount they give and thus there is taking to the extent of the amount that cannot be recovered.

Another example of a burden that can be validly imposed on private establishments is the requirement under Section 19 in relation to Section 18 of the Social Security Law<sup>18</sup> and Section 7 of the Pag-IBIG Fund<sup>19</sup> for the employer to contribute a certain amount to fund the benefits of its employees. The amounts contributed by private employers form part of the **legislated wages** of employees. The private employers are deemed **fully compensated** for these amounts by the services rendered by the employees.

Here, the private establishments are only compensated about 32% of the 20% discount granted to senior citizens and persons with disability. They shoulder 68% of the discount they are forced to give to senior citizens. The Court should correct this situation as it clearly violates Section 9, Article III of the Constitution which provides that “[p]rivate property shall not be taken for public use without just compensation.” I reiterate that *Carlos Superdrug Corporation* should be abandoned by this Court and *Commissioner of Internal Revenue v. Central Luzon Drug Corporation*,<sup>20</sup> holding that “the tax credit benefit granted to these establishments can be deemed as their just

<sup>18</sup> Republic Act No. 8282, otherwise known as the Social Security Act of 1997, which amended Republic Act No. 1161.

<sup>19</sup> Republic Act No. 9679, otherwise known as the Home Development Mutual Fund Law of 2009.

<sup>20</sup> 496 Phil. 307 (2005).

compensation for private property taken by the State for public use” should be reaffirmed.

*Carlos Superdrug Corporation* admitted that the permanent reduction in the total revenues of private establishments is a “**compensable taking for which petitioners would ordinarily become entitled to a just compensation.**”<sup>21</sup> However, *Carlos Superdrug Corporation* considered that there was sufficient basis for taking without compensation by invoking the exercise of police power of the State. In doing so, the Court failed to consider that a **permanent** taking of property for public use is an exercise of eminent domain for which the government must pay compensation. Eminent domain is distinct from police power and its exercise is subject to certain conditions, that is, the taking of property for public use and payment of just compensation.

It is incorrect to say that private establishments only suffer a minimal loss when they give a 20% discount to senior citizens and persons with disability. Under R.A. 9257, the 20% discount applies to “**all establishments** relative to the utilization of services in hotels and similar lodging establishments, restaurants and recreation centers, and purchase of medicines in all establishments for the exclusive use or enjoyment of senior citizens, including funeral and burial services for the death of senior citizens;”<sup>22</sup> “admission fees charged by theaters, cinema houses and concert halls, circuses, carnivals, and other similar places of culture, leisure and amusement for the exclusive use or enjoyment of senior citizens;”<sup>23</sup> “medical and dental services, and diagnostic and laboratory fees provided under Section 4(e) including professional fees of attending doctors in all private hospitals and medical facilities, in accordance with the rules and regulations to be issued by the Department of Health, in coordination with the Philippine Health Insurance Corporation;”<sup>24</sup> “fare for domestic air and sea travel for the exclusive use or enjoyment of senior citizens;”<sup>25</sup> and “public railways, skyways and bus fare for the exclusive use and enjoyment of senior citizens.”<sup>26</sup>

Likewise, the 20% discount under R.A. 9442 applies to “**all establishments** relative to the utilization of all services in hotels and similar lodging establishments; restaurants and recreation centers for the exclusive use or enjoyment of persons with disability;”<sup>27</sup> admission fees charged by theaters, cinema houses, concert halls, circuses, carnivals and other similar places of culture, leisure and amusement for the exclusive use or enjoyment

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<sup>21</sup> Supra note 3, at 130.

<sup>22</sup> Section 4(a).

<sup>23</sup> Section 4(b).

<sup>24</sup> Section 4(f).

<sup>25</sup> Section 4(g).

<sup>26</sup> Section 4(h).

<sup>27</sup> Section 32(a),



of persons with disability;”<sup>28</sup> “purchase of medicines in all drugstores for the exclusive use or enjoyment of persons with disability;”<sup>29</sup> “medical and dental services including diagnostic and laboratory fees such as, but not limited to, x-rays, computerized tomography scans and blood tests in all government facilities, in accordance with the rules and regulations to be issued by the Department of Health (DOH), in coordination with the Philippine Health Insurance Corporation (PHILHEALTH);”<sup>30</sup> “medical and dental services including diagnostic and laboratory fees, and professional fees of attending doctors in all private hospitals and medical facilities, in accordance with the rules and regulations issued by the DOH, in coordination with the PHILHEALTH;”<sup>31</sup> “fare for domestic air and sea travel for the exclusive use or enjoyment of persons with disability,”<sup>32</sup> and “public railways, skyways and bus fare for the exclusive use or enjoyment of persons with disability.”<sup>33</sup> **The 20% discount cannot be considered minimal because not all private establishments make a 20% margin of profit. Besides, on its face alone, a 20% mandatory discount based on the gross selling price is huge. The 20% mandatory discount is more than the 12% Value Added Tax, itself not an insignificant amount.**

According to the majority opinion, R.A. Nos. 9257 and 9442 are akin to regulatory laws which are within the ambit of police power, such as the minimum wage law, zoning ordinances, price control laws, laws regulating the operation of motels or hotels, law limiting the working hours to eight, and similar laws falling under the same category.<sup>34</sup> The majority opinion states that private establishments cannot protest that the imposition of the minimum wage law is confiscatory, or that the imposition of the price control law deprives the affected establishments of their supposed gains.<sup>35</sup>

There are instances when the State can regulate the profits of establishments but only in specific cases. For instance, the profits of public utilities can be regulated because they operate under franchises granted by the State. Only those who are granted franchises by the State can operate public utilities, and these franchisees have agreed to limit their profits as condition for the grant of the franchises. The profits of industries imbued with public interest, but which do not enjoy franchises from the State, can also be regulated but only **temporarily** during emergencies like calamities. There has to be an emergency to trigger price control on businesses and only for the duration of the emergency. The profits of private establishments which are non-franchisees cannot be regulated **permanently**, and there is no such law regulating their profits permanently. The State can take over

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<sup>28</sup> Section 32(b).

<sup>29</sup> Section 32(c).

<sup>30</sup> Section 32(d).

<sup>31</sup> Section 32(e).

<sup>32</sup> Section 32(f).

<sup>33</sup> Section 32(g).

<sup>34</sup> Decision, p. 24.

<sup>35</sup> Id.

private property without compensation in times of war or other national emergency under Section 23(2), Article VI of the Constitution **but only for a limited period** and subject to such restrictions as Congress may provide. Under its police power, the State may also **temporarily** limit or suspend business activities. One example is the two-day liquor ban during elections under Article 261 of the Omnibus Election Code but this, again, is only **for a limited period**. This is a valid exercise of police power of the State.

However, any form of **permanent** taking of private property is an exercise of eminent domain that requires the State to pay just compensation. **The police power to regulate business cannot negate another provision of the Constitution like the eminent domain clause, which requires just compensation to be paid for the taking of private property for public use. The State has the power to regulate the conduct of the business of private establishments as long as the regulation is reasonable, but when the regulation amounts to permanent taking of private property for public use, there must be just compensation because the regulation now reaches the level of eminent domain.**

The majority opinion states that the laws do not place a cap on the amount of markup that private establishments may impose on their prices.<sup>36</sup> Hence, according to the majority opinion, the laws *per se* do not cause the losses but bad business judgment on the part of the establishments.<sup>37</sup> The majority opinion adds that a level adjustment in the pricing of items is a reasonable business measure and could even make establishments earn more.<sup>38</sup> However, such an economic justification is self-defeating, for more consumers will suffer from the price increase than will benefit from the 20% discount. Even then, such ability to increase prices cannot legally validate a violation of the eminent domain clause.

I maintain that while the 20% discount granted to senior citizens and persons with disability is not *per se* unreasonable, the tax treatment of the 20% discount as tax deduction from gross income computed from the net cost of the goods sold or services rendered is oppressive and confiscatory. Section 4(a) of R.A. 9257, providing that private establishments may claim the 20% discount to senior citizens as tax deduction, is patently unconstitutional. As such, Section 4 of R.A. 7432, the old law prior to the amendment by R.A. No. 9257, which allows the 20% discount as tax credit, should be automatically reinstated. I reiterate that where amendments to a statute are declared unconstitutional, the original statute as it existed before the amendment remains in force.<sup>39</sup> An amendatory law, if declared null and void, in legal contemplation does not exist.<sup>40</sup> The private establishments

<sup>36</sup> Id. at 19.

<sup>37</sup> Id. at 20.

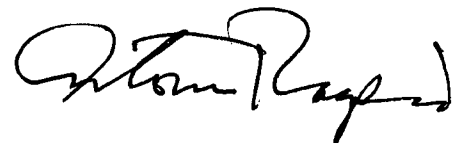
<sup>38</sup> Id. at 21.

<sup>39</sup> See *Government of the Philippine Islands v. Agoncillo*, 50 Phil. 348 (1927), citing *Eberle v. Michigan*, 232 U.S. 700 [1914], *People v. Mensching*, 187 N.Y.S., 8, 10 L.R.A., 625 [1907].

<sup>40</sup> See *Coca-Cola Bottlers Phils., Inc. v. City of Manila*, 526 Phil. 249 (2006).


should therefore be allowed to claim the 20% discount granted to senior citizens as tax credit. Likewise, Section 32 of R.A. 9442, providing that the establishments may claim the discounts given as tax deductions based on the net cost of the goods sold or services rendered, is also unconstitutional. Instead, establishments should be allowed to claim the 20% discount given to persons with disability as tax credit.

**ACCORDINGLY**, I vote to **GRANT** the petition.



**ANTONIO T. CARPIO**  
Associate Justice

**CERTIFIED XEROX COPY:**



**FELIPA B. ANAMA**  
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