

DRAFT: NOT FOR QUOTATION OR PUBLICATION

Economic Provisions of the 1987 Constitution

What Good is Our National Patrimony If We Can't Make Money Off of It?

Joel Rocamora, 30 September 2007

The “national patrimony” issue is the 'sleeper' in the chacha controversy. Removing the restrictions on foreign ownership of sectors of the economy has not had a consistent advocate during the Arroyo years. Part of the reason has been the determined opposition of civil society groups backed by sections of the Catholic church. Knowing this, De Venecia and the House tended to shy away from the issue in its advocacy in 2002-2005. The other major chacha proponent, the federalists organized within the Citizens Movement for a Federal Philippines (CMFP) have not paid much attention either. The people who should be interested, the business community, have only shown sporadic interest. Only foreign chambers of commerce have consistently advocated this step.

The debate on this issue has not really been 'joined'. It is, potentially, the most emotionally explosive of the three major constitutional reform issue clusters. It is not an easy issue to deal with. On one hand, there is no evidence that foreign investors will respond to changes in the economic provisions of the constitution. Instead, foreign investors generally point to political factors – corruption, unstable regulatory and policy environment, peace and order problems – as the main investment disincentives. On the other hand, constitutional restrictions have not exactly been effective. As one analyst put it, rather plaintively, “It would seem that constitutional constraints become ineffective when the government wishes it so.” (Quevedo,2006:1)

But there are proposals out there. The issue may have taken only third place in the attention of proponents behind a shift to a parliamentary and a federal form of government, but it was always on the agenda. The two most extensive proposals were made by the Estrada period Philippine Commission on Constitutional Reforms (PCCR), later, by the 2006 Consultative Commission. Other chacha proposals also weigh in on the issue, but these two proposals plus that of the Congressional Policy and Budget Office are the most coherent and comprehensive. These, and similar proposals, would drastically revise the 1987 constitution's declaration of economic ideals and remove the restrictions on foreign investment in selected industries.

These are the proposals which have provoked widespread anger and fear in progressive civil society circles. To the point where some groups refuse to even think about the reform potential of chacha because they believe that chacha is a Pandora's Box which will inevitably produce the changes in economic provisions that they fear. But there has, in fact, been little discussion of these issues in these circles. I believe these fears are exaggerated, that we should examine the issue carefully the better to fight it when chacha happens, as it will at some point.

The Proposed Changes

All the proposals for changing the economic provisions of the 1987 constitution target **both** the declaration of principles and restrictions on foreign investment in specific industries. All the proposals would remove many constitutional provisions and leave the determination of policy to a national legislature or to federal states (CPBO). The specifics of the proposals vary, especially on what they would replace the amended sections of the 1987 constitution with. I do not believe that **all** of the specific proposals should be rejected out of hand. What I believe needs to be fought is the common economic perspective underlying these proposals. “The proposed changes in Article 2 asserts a new set of values for the Filipino people, deleting each and every provision on the state's responsibility on social entitlements as asserted in the 1987 Constitution – in particular, the role of the state in the provision of education, health, youth development, communication and information, and balanced and healthful ecology. The removal of these provisions means something profound, much more profound than the very narrow legal critique about the verbosity of the 1987 Constitution. It means the introduction of new set of values for a neo-liberal world.” (Juego,2006: 6)

Framework

It is also Juego who points out (Juego,2006: 8) that the economic provisions of the 1987 constitution, taken together, constitute a Keynesian perspective. Under attack by neo-liberals for decades, the Keynesian perspective asserts the need and utility of government intervention to balance the requirements of the market and social justice. To understand the changes which have been proposed, we should look carefully at the elements of that perspective.

1. **Activist, developmental state** – Pervading all of the economic provisions is the perspective that the state should be an activist state. It should develop and implement an industrial policy to facilitate and organize economic development. It should also organize asset reform in order to lessen the gap between rich and poor. It should develop social policy to guarantee the provision of basic services to the poor. This clearly contrasts with the neo-liberal conception of the state as performing only a limited regulatory function.
2. **National economy** – An economic nationalist perspective is stated forcefully and unequivocally in Art. II, Sec. 19. “The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos.” Article XII, Section 1 says “the State shall protect Filipino enterprises against unfair foreign competition and trade practices.”
3. **Social Justice** - Art. XII, Sec. 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. **Pro Labor** – Art.II, Sec 11 says "The State affirms labor as a primary social economic force. It shall protect the rights of workers and promote their welfare." Art. XII, Sec. 12. The State shall promote the preferential use of Filipino labor, domestic materials and locally produced goods, and adopt measures that help make them competitive.
5. **Industrial Policy** - Art.XII, Sec.1 says “The State shall promote industrialization and full employment based on sound agricultural development and agrarian reform, through industries

that make full and efficient use of human and natural resources, and which are competitive in both domestic and foreign markets.” The constitution also lays down a firm base for development planning. Art. XII, Sec. 9. “The Congress may establish an independent economic and planning agency headed by the President, which shall, after consultations with the appropriate public agencies, various private sectors, and local government units, recommend to Congress, and implement continuing integrated and coordinated programs and policies for national development.”

This is the philosophical scaffolding of the 1987 constitution, one that to varying degrees the various proposals would dismantle. Here we will reproduce the analysis of Tanya Lat (Lat, 2006: 1) and add the proposed changes of the Philippine Commission on Constitutional Reforms (PCCR) and the Congressional Policy and Budget Office. The Con-Com draft presents the most comprehensive, and coherent (from a neo-liberal perspective) alternative perspective. The Jaraula proposal, that of the House of Representatives Constitutional Reform Committee, pays little attention to framework setting, preferring to focus on specific changes in provisions restricting foreign participation.

“The Con-Com draft eliminates vital provisions of the 1987 Constitution, including the following:

- “The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos.” (Art. II, Sec. 19)
- “The State shall promote industrialization and full employment based on sound agricultural development and agrarian reform, through industries that make full and efficient use of human and natural resources, and which are competitive in both domestic and foreign markets. However, the State shall protect Filipino enterprises against unfair foreign competition and trade practices.” (Art. XII, Sec. 2, paragraph 2)
- The phrase “a sustained increase in the amount of goods and services produced by the nation for the benefit of the people” as one of the goals of the national economy. (Art. XII, Sec. 1, paragraph 1)

“Eliminating these provisions effectively divests the State of a mandate to pursue economic development that is premised on independence, self-reliance, manufacturing, industrialization, and agricultural development... The deletion of the phrase “a sustained increase in the amount of goods and services produced by the nation” further operates as a renunciation of domestic manufacturing and production as one of the goals of the national economy, and as an implicit acceptance of importation as a national economic policy. The drive towards maximization of the agricultural sector and food self-sufficiency is likewise abandoned, with the elimination of the State mandate to “promote industrialization and full employment based on sound agricultural development and agrarian reform”. (Article XII, Sec. 2, paragraph 2) “ (Lat, 2006:1)

“The Concom draft would also water down the State's commitment to labor. Art.II, Sec.11 has been revised in such a way that provides the platform needed for the project of creating the conditions for the hegemony of capital over labour, upon which capitalist reproduction ultimately depends. In the proposed Constitution, the word 'responsible' is added to describe the role of labour as a social economic force. And it then guarantees not only the rights of the workers, but the private sector as well. It says, 'The State affirms labor as a primary and *responsible* social economic force. The State shall protect and promote the welfare of *both workers and employers*.' (Article 2, Section 11, Proposed

Constitution).” (Juego,2006:7)

The Philippine Commission on Constitutional Reforms (PCCR) was created by then President Joseph Estrada to work only on changes in the economic provisions of the 1987 constitution. Although the extensive recommendations of the PCCR never went anywhere, having been buried together with other Estrada administration plans with his overthrow in January 2001, the positions carved out in the PCCR proposals have influenced subsequent proposals. “The restrictive provisions of the 1987 constitution,” the PCCR said, “have limited the ability of our country to compete in the global economy. PCCR submits that “the basic legal framework of the (1987) Constitution presents practical and philosophical difficulties in approaches to economic, trade and investment policies.” It has limited the flexibility of the government to respond to the changes in the global environment, hence adversely affecting the economy’s capacity to achieve higher growth... Section 19 of Article II needs to be reviewed because of ambiguity in language. The phraseology aspiring for “independent” national economy “effectively controlled” by Filipinos taken together with other provisions in the Constitution gives rise to controversial policy decisions that affect investments.” (Vicerra, 2003:1)

The Con-Com draft eliminates the State’s mandate to pursue “a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity.” (Art. XII, Sec. 13) This is combined with the removal of the provision that “...the State shall protect Filipino enterprises against unfair foreign competition and trade practices.” (Art.XII, Sec.1) The other drafts do not say anything about this. What is involved here is not even neo-liberal. The centers of neo-liberalism, the US and Europe have governments that actively promote trade for its nationals. An active trade promotion strategy is a crucial component of industrial policy because international competitiveness has to be built into industry promotion. Even asset reform, to the extent that it contributes to building a domestic market, is very much a part of long term trade policy.

“Perhaps most telling of the state of mind of the proponents of Charter Change is the deletion of the following Constitutional provision: “The use of property bears a social function, and all economic agents shall contribute to the common good.” (Art. XII, Sec. 6) Social justice is one of the cornerstone principles of the 1987 Constitution, and the recognition that property and wealth should be amassed not simply for its own sake but for the good of society is embodied in this specific Constitutional provision. Its deletion is tantamount to a renunciation of the principle of social justice in the use of property, and indicates a reversion to a purely capitalist framework. This is further compounded by a renunciation of another mandate of the State granted under the 1987 Constitution. Instead of the State having the positive “duty” to “promote distributive justice and to intervene when the common good so demands” in the ownership, establishment, and operation of economic enterprises by the private sector, under the Con-Com draft, this duty becomes a mere “authority” on the part of the State. This evinces a hands-off, laissez-faire approach on the part of the State, which has authority to intervene but may choose not to do so.” (Lat,2006:3)

Specific Provisions

All proposals call for the lifting of the prohibition on land ownership by foreigners, and the lifting of foreign equity restrictions in the areas of public utilities, exploitation of natural resources, mass media, and advertising. There are variations between proposals but these have to do with detail, the basic thrust of all the proposals is the same, remove restrictions on foreign participation in the economy. There are also differences on where authority to set policy removed from the constitution will be transferred.

(a) Use and ownership of land

The issue of land use and ownership is a very emotional issue for most Filipinos, given the fact that it is virtually every Filipino's dream to have a house and lot of his/her own, and given the unfulfilled promise of genuine land reform. Land has always been the flashpoint for conflict in the Philippines, and the proposition that foreigners will be allowed to own land when millions of Filipinos cannot, makes this issue potentially the most contentious of all the proposed constitutional revisions.

Proponents of Charter Change argue that Constitutional restrictions on land ownership by foreigners impede the entry of foreign direct investment ("FDI") into the country, and with it, the jobs and income generated by such FDI. Both the Con-Com draft and the Jaraula proposal push for the lifting of foreign equity restrictions on the ownership of land as follows:

	1987 Constitution	Jaraula Proposal	Con-Com Proposal
Transfer of private lands	Can be owned only by (1) Filipino citizens or (2) Filipino corporations, or (3) former natural-born Filipino citizens subject to limitations provided by law	Parliament may provide by law ownership of residential and industrial lands by foreigners in connection with their investment in the country under such conditions it may deem necessary for the protection of the Filipino citizens.	Lands classified in accordance with law as industrial, commercial or residential may be transferred or conveyed to foreign individuals or corporations with foreign ownership. Parliament shall define the conditions for ownership of allowable lands by foreign individuals and by corporations with foreign ownership.

Both the Jaraula proposal and the Con-Com proposal state that Parliament may provide for the ownership of private land by foreign individuals and foreign corporations.

For public lands, the Con-Com proposal provides for a 5th classification of public land, i.e. reclaimed land, undoubtedly a reaction to the Supreme Court's decision in the PEA-Amari case. The Con-Com proposal provides that reclaimed land, like agricultural land, can be privatized, and thereby pass into the ownership of foreigners once it has become private land. Also, under the Con-Com proposal, it is Parliament which shall ultimately determine the size and kinds of public lands that can be privatized:

	1987 Constitution	Jaraula Proposal	Con-Com Proposal
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<p>Classification of public lands</p>	<p>(1) Agricultural, (2) forest or timber, (3) mineral lands, (4) national parks.</p> <p>Agricultural lands of the public domain may be further classified by law according to the uses to which they may be devoted.</p>	<p>Same as 1987 Constitution</p>	<p>(1) Agricultural, (2) reclaimed, (3) forest or timber, (4) mineral lands, (5) national parks.</p> <p>Agricultural lands of the public domain may be further classified by law according to the uses to which they may be devoted.</p>
<p>What public lands can be alienated</p>	<p>Only agricultural lands</p> <p>Size to be determined by Congress</p>	<p>Same as 1987 Const.</p>	<p>Agricultural & reclaimed</p> <p>Size and kind of lands to be determined by Parliament</p>

To give Congress or Parliament blanket authority to determine the size and kind of lands that can be opened up for foreign ownership is a very dangerous proposition given the following circumstances:

- (1) The responsibility of approving, regulating, and monitoring land conversion from agricultural use to industrial, commercial, and residential use is not well-defined and lies with several government bodies and agencies (i.e., the Department of Agriculture, the Department of Land Reform, the local government units, and the Housing and Land Use Regulatory Board);
- (2) Congress has yet to enact a Land Use Act that will consolidate and unify various laws and policies relating to land use and conversion.” (Lat,2006:4-5)

The CPBO proposal is for “All lands & natural resources to be owned by a Federal Republic. Utilization and development will ultimately be controlled by Federal States which shall have the authority to regulate development of natural resources in their territories. The national Parliament will define national policy for its development & use including revenue sharing for its use. (Section 2) Section 3 which provides for the classification of all lands of the public domain, into alienable lands,

and lands for lease would be deleted so parliament can set policy through legislation. The PCCR proposal is to “...liberalize the ownership of industrial and commercial land, which represents less than 1% of the total land area of the Philippines, in order to attract more investments and increase job opportunities.”

(b) Exploitation of natural resources

“Both the Con-Com and Jaraula proposals remove the 60-40% equity requirement and allow the exploitation of natural resources to be undertaken by the State in joint venture with foreign corporations. The Con-Com proposal states that the terms and conditions for such agreements shall be provided by law, i.e. by Parliament.

The Con-Com proposal likewise removes the time limit for exploitation, so theoretically, foreigners may be allowed to exploit the country’s natural resources in perpetuity. The Con-Com proposal likewise removes the Constitutional provision on FTAA’s, effectively relegating it from a State agreement entered into by the President into a mere commercial contract: “ (Lat,2006:6)

	1987 Constitution	Jaraula Proposal	Con-Com Proposal
Ownership and exploitation of natural resources	<p>The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens.</p> <p>Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law.</p> <p>The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to</p>	<p>The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or with any corporation or association, domestic or foreign.</p> <p>Same as 1987 Constitution.</p> <p>The Prime Minister may enter into agreements ... (same as 1987 Constitution)</p>	<p>The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements under such terms and conditions as may be provided by law.</p> <p>No counterpart provision.</p> <p>No counterpart provision.</p>

	<p>the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.</p>		
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The PCCR and CPBO proposals on this issue are consistent with its overall position. “The huge capital requirement to develop our natural resources particularly the energy, mining, fisheries and forestry sectors is the main argument to liberalize these sectors. Likewise, the entry of foreign investors into these areas of the economy is expected to bring in not only capital but new technology and expertise in operating these industries. The PCCR recommended that these sectors be regulated by law and not through the Constitution.(CPBO,2003:19) The CPBO's own proposal would change section 10 to read: “Local States shall regulate and exercise authority over foreign investments within their jurisdiction and in accordance w/ national goals and policies... Parliament shall define national foreign investment policy and ensure protection of national interest & public welfare.”

(c) Mass media, public utilities, and advertising

Art. XII, Section 11 says ownership of media would be limited to Filipino citizens or Filipino-owned corporations. Congress is tasked to regulate/prohibit mass media monopoly. The advertising industry is also to be regulated, its ownership limited to Filipino citizens or 70% Filipino-owned corporations, and Filipino executive and managing officers. The Con-Com and Jaraula proposals both seek to liberalize the areas of mass media, public utilities, and advertising by either revising the foreign equity restrictions (Jaraula proposal) or deleting them altogether (Con-Com proposal).

Like the Concom, the CPBO would just delete these provisions and leave it to parliament to regulate these areas. It proposes a provision which says “Upon the effectivity of the amendments to Articles II, XII, XIV and XVI of the Constitution, all provision of existing laws and regulations, the nationality prohibitions or restrictions on the grant of congressional franchises, the ownership and operation of public utilities, mass media, advertising, educational institutions and the exploration, development and utilization of all natural resources are hereby repealed unless otherwise provided by law. All existing laws governing education and mass media and advertising shall continue to be in effect unless expressly repealed by this Constitution or repealed by law.”

The PCCR recommended that foreigners be allowed to invest in and manage public utilities, transportation, communication, power and water supply based on a policy of nondiscrimination and merit. The power to grant franchises should be given to specialized regulatory agencies, which would “result in greater efficiency and expertise in the supervision of the industry”. In mass media and advertising, the PCCR said “The equity restrictions in the Constitution has denied Filipinos access to new technological innovations which require huge investments that local companies find difficult to raise. Certain sectors oppose the liberalization of mass media because of the fear of foreign influence. However this is unfounded because foreign media is already accessible to Filipinos through cable

television and the Internet.”

In the case of advertising the arguments for liberalizing this sector are the need for new capital, technology and expertise. “It has been noted by the study that the ten top advertising firms are already partly owned by foreign entities. The educational sector in the Philippines is also being left behind because of lack of funds for new technology, basic facilities and infrastructure. The latest techniques in education need greater use of information technology and alternative media, which require huge investments. There is a need therefore to open up this sector to foreign investors to give our students access to better education and raise educational standards up to par with other countries. Sectors opposed to this proposal cite the possible influence of foreigners shaping the students patriotic values. The PCCR study however contends that the curricula will still be controlled by the Department of Education. At present, the Constitution already allows foreigners to own and manage educational institutions but only through religious orders and mission boards.” (Vicerra,2003:19)

<p>Operation of public utilities</p>	<p>Art. XII, Sec. 11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines, at least sixty per centum of whose capital is owned by such citizens; nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years.</p> <p>Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires.</p> <p>The State shall encourage equity participation in public</p>	<p>Art. XII, Sec. 11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years.</p> <p>Same as 1987 Constitution</p>	<p>No counterpart provision.</p> <p>No counterpart provision.</p> <p>No counterpart provision.</p>	
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	<p>utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines.</p>	<p>The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital.</p>	
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Why Defend Something Which Does Not Work

Defenders of the national patrimony provisions oppose chacha altogether for fear that these provisions will be removed or radically altered as some proponents of chacha want. But this position makes sense only if these provisions actually do what they're supposed to do, keep foreign investors out of the areas where their entry is restricted. The record, however, is the opposite. It has been relatively easy for the government to get around these constitutional restrictions. It is important to look at how this has been done. "If there are already big holes in the dike protecting national patrimony do you want to merely preserve the existing provisions of Article 12 of the Philippine Constitution? Or might it make more sense to try to strengthen those provisions, specify their precise area of application and also cause a revision or abolition of certain laws, executive acts and court precedents that undermined Article 12" (Esguerra,2003:1)

The only study of legal dodges availed of by the government is that of Eric Quevedo (Quevedo,2006) so it is necessary to quote extensively from him and to examine specific legal cases. Quevedo concludes that "...inroads to foreign participation have been made possible by the acts of the Executive departments of the government. Courts generally presume the validity of those acts. The policy to invite foreign investments has allowed for the liberal construction, though not expressly stated, of protectionist provisions in favor of foreign participation... The methodology is simple – break-up concepts and definitions. The broken down components can then be parceled out to foreign participants hoping that when these parceled out components are summed up again, they do not add-up to operation or control of the public utility by a foreign entity. To borrow a phrase, it is an "unbundling of property and contractual rights, then, and their repackaging into new institutional arrangements" (Quevedo,2006:11- 12)

Article XII (National Economy and Patrimony) of the 1987 Constitution provides that: "SECTION 11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens x x x" "A pitfall comes with the word "operation". The use of "operation" implies that

activities not included in “operation” are outside of the constitutional limitation. What those activities include is limited only by the creativity of one’s mind – consultancy, advisory, training, technical assistance, supply and maintenance agreements and so on. Generally classed, such activities should be understood as those that do not assert or affect the right to control the “operation”. Thus, while consultants are or may be required in “operation”, consultancy by itself is not “operation” as it does not give rise to a right to control. While training of personnel is necessary, even indispensable, in “operation”, training by itself is not “operation”, again, as it does not intrude into the determinative criterion of control.” (Quevedo,2006:5-6)

Electricity

Public utilities have been the key area of contention. The high cost of these facilities, especially in energy and public transportation, combined with the government's already high debt exposure and low fiscal capacity and the low capacity of the Philippine private sector have been powerful motivations for circumventing constitutional limitations. The difficulty of sourcing investment in these industries is compounded by the highly centralized character of generation and transmission and a distribution sector characterized by one very large distributor, Meralco, and over 130 other, mainly small distributors.

In the mid-nineties, in response to a massive generation deficit which caused six to eight hour brownouts in the metro Manila area, the Ramos administration made a successful bid to get foreign investors on rather generous terms. “The pervasive flaws have caused a low utilization of existing generation capacity; extremely high and uncompetitive power rates; poor quality of service to consumers; dismal to forgettable performance of the government power sector; high system losses; and an inability to develop a clear strategy for overcoming these shortcomings.” (Quevedo,2006:8)

These government moves were facilitated by a Department of Justice opinion which separates generation from distribution. “In Opinion No. 95 (Series of 1988) dated 11 May 1988, the Department of Justice (DOJ) concluded that “there should be no constitutional impediment to the entry of alien-owned enterprises to business ventures involving the generation of electricity for their own utilization and the sale of any excess electricity to the National Power Corporation”. As the DOJ reasoned, this is because its product is not available to the public indiscriminately and the latter is not entitled to demand from such enterprise the product. The furnishing of electric power to one customer under a private contract does not make the furnishing agency a public utility.” (Quevedo,2006:7)

Water

The issue of foreign ownership of public utilities was brought home with the privatization of water utilities in Metro Manila in 1997. At the time, it was the biggest privatization of a water utility in the world. The issue of privatization of water utilities again became public in 2005 with the bankruptcy of Maynilad, one of two companies that took over from the government. Although foreign shares in the two companies were kept below the 40 percent constitutional limit, both companies have challenged the restriction, and the government supports this position. There is a pending case in the Supreme Court on this issue.

As early as 1994, a Department of Justice opinion clarified the nationality requirement by stating that, “In view of the preemptory provision of the Constitution and the Water Code, a company not owned at least 60 percent by Filipino citizens may not be qualified to operate water supply facilities

if it will take, divert, and pump water directly from its natural source because of the nationality requirement, but it may legally process or treat the water after it is removed from the source by a qualified person.” *Department of Justice Opinion No. 100 (1994)*. This was followed a decade later by a MWSS Board of Trustees Resolution in July 2004 that Maynilad and Manila Water are mere contractors.

MRT

The EDSA MRT is another precedent-setting arrangement upheld by the courts that seems to undermine Article 12. In this case, the courts say that owners of rail assets can be 100 percent foreign. The assets may be leased to a government agency that holds the franchise and the government may then engage the same foreign owners for a fee to execute the most crucial aspects of the operations. Through such legal circumlocution a foreign company is allowed to own and operate facilities. This case sets a precedent for telecommunications.

In the case of *Tatad vs. Garcia*¹, the Supreme Court took the opportunity to explain the distinction between “operating a public utility” and “owning the facilities” which may be used to serve the public. As the Court stated:

The right to operate a public utility may exist independently and separately from the ownership of the facilities thereof. One can own said facilities without operating them as a public utility, or conversely, one may operate a public utility without owning the facilities used to serve the public. The devotion of property to serve the public may be done by the owner or by the person in control thereof who may not necessarily be the owner thereof.” (citations omitted)

Proceeding from such distinction, EDSA LRT III Corporation, a foreign corporation, was allowed to own the “rail tracks, rolling stocks like the coaches, rail stations, terminals and the power plant” and then to lease it the Department of Transportation and Communication who operated the same. EDSA LRT III Corp. was to be paid by way of monthly rentals and was to have no dealing with the public. (Quevedo,2006:6)

Lotto

In the case of *Kilosbayan vs. Morato*², known as the second Lotto case, the foreign corporation leased the lottery equipment to the Philippine Charity Sweepstakes Office (PCSO). Payment was computed at 4.3% of the gross receipts but in no case less than P35,000 per machine per annum. The Supreme Court saw nothing objectionable in such payment scheme as “there is nothing unusual in fixing the rental as a certain percentage of the gross receipts. The leases of space in commercial buildings, for example, involves the payment of a certain percentage of the receipts in rental. Under the Civil Code (Art. 1643) the only requirement is that the rental be a ‘price certain.’”

While the legal precepts seem sound and plausible, the net effect is disturbing. The PCSO, who had no know-how and capability then to operate the Lotto system, was allowed to share its gross

¹ G.R. No. 114222 [April 6, 1995]

² G.R. No. 118910 [July 17, 1995]

proceeds with a foreign entity in the 2,000-terminal Lotto system. The size and cost of the system alone, making substitution of equipment impractical, entrenches the position of the foreign supplier and lessor.

Land

One might think that something as tangible and irreplaceable as land would be difficult to tamper with legally. There is no known legal formula that would enable foreign citizens to actually own land. Foreign corporations are only allowed to lease land. But again, fancy legal footwork will enable foreign entities to come close to having the same control over land as Filipino citizens.

A Department of Finance proposed legislation for a Leasehold Rights System will grant foreign investors the ability to trade real properties. During the term of the lease, the foreign investor can market or re-assign his leasehold rights through a deed of assignment, effectively creating a market for land in which foreigners can participate. Thus, in the unbundling of ownership, foreigners may lease private lands. While they may not have control of its disposition, the Filipino owner could be restricted in the disposition right in the lease agreement. While control and supervision of the exploration, development and utilization of natural resources remain with the State, a variety of activities short of “control and supervision” could be conjured. When placed in a setting like that of the Lotto and LRT cases (i.e. projects involving not immediately replaceable assets), the “control and supervision” cannot but be diminished. (Quevedo,2006:5)

Media

The Constitution requires 100% Filipino ownership and management of mass media. Telecommunications, being in the nature of a public utility, allows 40% foreign ownership of capital in corporations engaged in such activity... Now came the eCommerce Act. Section 28 of the said Act as well as Section 42 of its Implementing Rules provide that “the physical infrastructure of cable and wireless systems for cable TV and broadcast excluding programming and content and the management thereof shall be considered as within the activity of telecommunications...”

If one were to construe these in relation to the LRT case, the mass media could be divided into three players: the infrastructure owner, the operator and the content provider. The infrastructure could be 100% foreign owned, the operator at 40% while the content provider remains as the only 100% owned. If the infrastructure is not to be operated for telecommunications purposes then the players could be trimmed to two: one infrastructure owner that is 100% foreign owned and another 100% Filipino owned operator and content provider. But “content”, by any logic, need not be Filipino owned. The result is then clear that the content provider could simply re-broadcast a foreign program. The futility of nationality restrictions is even more highlighted when one puts into the picture two platforms where control or regulation is inherently difficult if not undesirable – internet and satellite. With both technology platforms, the “content provider” is altogether by-passed. (Quevedo,2006:8)

Mining

The Constitution provides that the “President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils...” As worded, it is a provision allowing foreign participation rather than a restriction. It allows foreigners the ACT of entering into and performing in accordance with “agreements involving either technical or financial assistance”.

In the case of La Bugal-B'laan Tribal Association, Inc., et al. Vs. Victor Ramos, the Supreme Court gave a rather expansive construction of the allowable acts. To the Court, "the use of the word 'involving' signifies the possibility of the inclusion of other forms of assistance or activities having to do with, otherwise related to or compatible with financial or technical assistance" and does not "convey a sense of exclusivity". In short, it allows for the possibility that matters, other than those explicitly mentioned, could be made part of the agreement.

Thus, the Court concluded that "the use of the word "involving" implies that these agreements with foreign corporations are not limited to mere financial or technical assistance". In the words of the Court, "by specifying such 'agreements involving assistance,' the drafters [of the Constitution] necessarily gave implied assent to everything that these agreements necessarily entailed; or that could reasonably be deemed necessary to make them tenable and effective, including management authority with respect to the day-to-day operations of the enterprise and measures for the protection of the interests of the foreign corporation, PROVIDED THAT Philippine sovereignty over natural resources and full control over the enterprise undertaking the activities remain firmly in the State".

The apparent twist is that unlike in the other cases where the ACT was unbundled to allow for foreign participation, the term "financial and technical assistance agreement" was bundled with "everything necessary to make them tenable and effective, including management authority with respect to the day-to-day operations of the enterprise and measures for the protection of the interests of the foreign corporation". (Quevedo,2006:8-9) This case became very controversial because the Supreme Court at first declared a law allowing foreign investment in mining unconstitutional, then less than a year later reversed itself.

Advocacy against government actions reversing nationality provisions in the constitution are limited. "Franchises issued by Congress are not required before each and every public utility may operate. Our statute books are replete with laws granting specified agencies in the Executive Branch the power to issue such authorization for certain classes of public utilities. Among the examples cited in the footnoted case are:

1. The Land Transportation Franchising and Regulatory Board created under E.O. No. 202, which is empowered to "issue, amend, revise, suspend or cancel Certificates of Public Convenience or permits authorizing the operation of public land transportation services provided by motorized vehicles, and to prescribe the appropriate terms and conditions therefor." [Sec.5(b).]
2. The Board of Energy, reconstituted into the Energy Regulatory Board created under E.O. No. 172, is empowered to license refineries and regulate their capacities and to issue certificates of public convenience for the operation of electric power utilities and services, except electric cooperatives [Sec. 9 (d) and (e), P.D. No.1206.].

One effect of this delegated authority to grant franchises or authorizations, is that the decision to allow an entity becomes largely dependent on Executive policy. Certainly, it reduces the possibility of utilizing the Legislative branch to foster a more nationalistic measure.(Quevedo,2006:9)

The citizenry could, in appropriate cases, resort to judicial scrutiny to strike down acts or arrangements which tend to impinge on nationality restrictions. However, the power or authority of the courts to conduct review have somewhat been constricted with the use of foreign arbitral clauses in contracts with foreign entities. The validity of foreign arbitral awards is expressly given recognition by the Alternative Dispute Resolution Act of 2004¹² and by the United Nations "Convention on the

Recognition and the Enforcement of Foreign Arbitral Awards of 1958” adhered to by the Philippines in 10 May 1965 Resolution No. 71 of the Philippine Senate. The policy of the law is in favor of arbitration. For all intents and purposes, arbitration precludes court action.

“A court before which an action is brought in a matter which is the subject matter of an arbitration agreement shall, if at least one party so requests, refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. Thus, at the first instance, court intervention is made difficult and it tends to effectively deprive citizens of the prerogative to seek judicial relief against contracts executed by the government involving foreign private parties. It is also problematic for the citizens, usually not parties to privatization contracts, to be even informed of the proceedings as “the arbitration proceedings, including the records, evidence and the arbitral award, shall be considered confidential”. The net result would be the not too distant possibility that entities desiring or interested in participating to protect national patrimony would be effectively silenced and sidelined. (Quevedo,2006:10)

What to Do

The question then is what can, or should, be done to prevent government 'end runs' around the constitution's nationality provisions. For nationalists, it is not anymore just a question of preventing the removal of nationalist constitutional provisions. It is what should be done in a situation where these provisions are being rendered inutile. Quevedo seems to think not much can be done. “Are there methods to plug-up those loopholes? The answer seems to be that when faced with a government bureaucracy bent on allowing participation, any proposed method could be illusory. All allowable interventions have been accomplished not through the use of novel legal principles but of time honored concepts such as lease and ownership. When these concepts are unbundled, a seemingly infinite set of combinations can be conjured that can pass judicial scrutiny who has to rely on the presumption of validity and the accepted policy of attracting foreign investments.” (Quevedo,2006:12)

I do not agree with Quevedo. If the national patrimony provisions of the 1987 constitution are worth defending, they should not be left “defenseless” before administrations anxious to secure more and more foreign investment. I do not believe the limits of legal construction in constitutions are so narrow. I agree with Jude Esguerra, for example, that “If members of the Freedom from Debt Coalition, think that potable water should not be in the hands of the private sector, should not be under the control of French and British multinationals nor under the sovereignty of international commercial courts then that might be an advocacy that can find expression in terms of amendments to the constitution. The constitution can reverse, pre-empt or at least make difficult the granting such franchises by requiring approval by legislative super majorities.” (Esguerra,2003:2)

I do not believe that simply saying “we don't want the national patrimony provisions changed, period” is the best way to defend them. We should carefully examine the restrictions on foreign investment one by one, then pick which provisions we want strengthened and which ones we believe are unnecessary or go against other economic goals. It is clear, for example, that the legal contrivance availed of by the government in the case of the MRT violates the spirit of the national patrimony provisions. It is also clear that the BOT contract on MRT is disadvantageous to the government which has to pay a set fee to the operators while limiting increases in fares. What we have to ask ourselves then is if this legal “end run” is the only way, at this time, given the existing political economy, to get an MRT, would we have preferred not getting an MRT? If the contract with the EDSA LRT III Corporation cannot be revised, would we prefer fare increases so that government exposure is at least lessened.

There are other issues that require great care and detailed examination. AR Now, a coalition of peasant groups, said in a statement that “Mainly due to speculations, allowing foreign ownership of private lands (irregardless of land type – i.e. agricultural, residential, industrial or commercial lands) would result in greater demand for land, and with limited supply of land (there is actually already a shortage of land in the country), in increases in the domestic price of land.” (AR Now, 2006:1) In fact, the proposed changes almost all exclude agricultural land. If foreigners are allowed to own residential land there might be higher real estate prices but presumably mainly in high end residential subdivisions. I actually doubt that there would be enough foreigners who want to buy residential lots outside of Makati, but we should ask people in real estate. We also need to ask professionals what the effect would be of allowing foreigners to own commercial and industrial land.

Media and education also require careful discussion. If given current laws, only the content part of media requires 100 percent Filipino ownership, would we then censor Korean or Taiwanese telenovelas ? Or video streaming on the internet to make sure of Filipino content in our media? If you ask journalists, most support allowing foreigners to compete with ABS CBN and GMA 7 because the oligopolistic structure of broadcast media puts working journalists at a disadvantage and keeps salaries and wages low. In making these assessments, the main criteria should not be how to encourage foreign investment, but whether opening up an industry would improve conditions. Finally, as Jude Esguerra puts it: “I think that Charter Change deliberations rather than the Courts are a better venue for reaching society-wide consensus on these crucial constitutional matters.” (Esguerra,2003:2)

Foreign Investment and Development

If the goal is to encourage greater foreign investment, there is reason to believe that removing the national patrimony provisions of the 1987 constitution will not do the trick. The Philippines is already one of the most open economies in the world. “Compared to many of our trade and investment-restrictive neighbors, movement in liberalizing foreign investment in the Philippines has been marked, consistent, and applauded by the international business press. Yet this approval has not translated into higher levels of investment. The Foreign Investment Act (FIA) of 1991 opened most areas to foreign investment except those on three "negative lists." The third of these lists, "C", composed of sectors deemed adequately served by domestic firms, was eliminated by RA 8179, an amendment to FIA, which also allowed 100 per cent foreign ownership in enterprises serving the domestic market and removed foreign equity restrictions in enterprises exporting at least 60 per cent of their total products.”

“While foreigners are not allowed to own land, leasing terms are liberal, with the passage in July 1993 of RA 7652, which extended the maximum allowable lease to foreign companies from 25 years to 50 years, renewable once for 25 years. Liberal terms were also provided by the 1995 Mining Act (RA 7942), which gave foreign investors 100 per cent control over a maximum of 81,000 hectares of mineral lands for 25 years, renewable for another 25 years. Liberalization has also definitely been the trend in the financial sector. Controls on repatriation of capital, dividends, and profit remittances on investments registered with the Bangko Sentral were abolished in January 1992. After being closed for 50 years, the insurance sector was opened up to 100 per cent foreign ownership in 1994. Republic Act 7721 also permitted 10 new foreign banks to open full-service branches in the Philippines and allowed each of them to own up to 60 per cent of a new or existing local subsidiary. Participation in the stock market was made more liberal than in Singapore, with membership in the Philippine Stock Exchange opened up to foreign-controlled brokerages provided they were incorporated under Philippine laws.” (Bello,1999:5)

“Yet the response to all this has not come up to expectations. Direct investment rose from \$228 million in 1992 to \$1.6 billion in 1994 then dropped to \$1.5 in 1995, \$1.4 in 1996 and \$1.11 billion in 1997.” (Bello, 1999:6) Compared to neighboring economies, this is minuscule. Surveys of foreign investors show that the national patrimony provisions in the constitution are the least of their concerns. High on the list is corruption, poor infrastructure, an unpredictable policy environment, peace and order. What is not often mentioned is that foreign investment is, more than anything else, driven by the size and buying power of the domestic market. A major study of barriers to entry commissioned by USAID barely mentions the national patrimony provisions. It does raise the issue of high levels of concentration of ownership of Philippine industry, the role of rent seeking in reproducing these oligopolistic structures, and the weakness of the Philippine state. (USAID,1992:104-109)

What could happen, in fact, under current conditions is likely to happen, is that if the national patrimony provisions are removed, no substantial increase in foreign investment will happen, but conditions will improve for foreign business already in the Philippines. The question is, how do you change “current conditions” so that the more substantive concerns of potential foreign investors are addressed. How do you reduce corruption and other forms of rent seeking when this is built into the core of our political system. How do you have more money for building infrastructure without reforms in tax administration when it is the elite that benefits from varieties of tax evasion, legal and illegal? How do you have a predictable regulatory system when unpredictability is the source of corrupt deal making? How, in the end, do you get a government capable of attracting foreign investment under conditions where the national interest is protected?

This is where the framework provisions of the 1987 constitution come in. The framework provisions of the constitution which lay down what kind of economy we aspire for and the role of the state in achieving that goal is where the answer to these questions come from. This is the part of the constitution we need to defend because they lay out not just what kind of economy we want but also what kind of politics. What we need is a state that is capable of disciplining the oligarchy, instead of being controlled by them. The very nature of Filipino capitalism, in particular the high concentration ratios of industry, lead to oligopolistic industry structures, and to reduced consumer welfare. These very structures of industry act as barriers to entry more effective than those in the constitution. The most important economic reforms are political.

This would take us to other issues in constitutional reform. But it is important to point out here that without political reforms at a level which would make substantial changes in the political system, none of the economic goals of those who oppose chacha can be achieved. Opposing chacha is opposing the possibility of political change; it is an argument for the status quo, in politics and in the economy. We should also not assume that the proposals for amending the national patrimony provisions of the 1987 constitution will necessarily be what is adopted if chacha happens. These proposals are part of a package which would give us a parliament which would cement control by local political clans and not just preserve but strengthen the worst aspects of our politics. The challenge to civil society is the formation of a social coalition for change anchored on the goal of forming a strong developmental state. ##