cases against the consequences of imperfections in the ship which caused the collision.[38] In short, where the cause of the loss or damage is an act, omission or negligence which is not traceable to something personal to the owner, like "a duty imposed by law on him to exercise due diligence to make the ship seaworthy," the shipowner is not, in legal contemplation of the Act, in "actual fault or privity" and is, therefore, entitled to the grant of decrees of limitation. In consequence, "the mere fact that a shipowner is liable in law for the failure of his servants to exercise reasonable care does not by itself make him guilty of actual fault or privity so as to deprive him of his right to limitation.[39] Similarly, the master co-owner of a foreign ship who failed to know all the local signals of a foreign port and, as a consequence, could not brief a local pilot on board was held not in actual fault for the collision. The reason was that the master co-owner was not under duty to know all the local signals.[40] In the case of a ship owned by a company, the Act contemplates of the "fault" or "privity" of somebody who is not merely a servant or agent for whom the company is liable under the doctrine of *respondeat superior,* but somebody for whom the company is liable because his action is the very action of the company itself.[41] Despite all this, however, regardless of whether the shipowner is a natural person or company, the fault or privity of the owner must be the fault or privity in respect of that which causes the loss or damage in question.

CONCLUSION

A law similar to that previously discussed, which limits the liability of shipowners and other persons who have interests in ships, is vitally important to the shipping industry of every country. Not only would such a law provide adequate protection to existing shipping firms and their owners; in the long run, such law would undoubtedly provide a very encouraging and healthy business opportunity for financially stable enterprises to invest their idle resources in the shipping trade. Countries that have not so far legislated on a law of this nature may have failed to realize the benefits afforded by it. This could be one of the reasons why there is a sluggish development in their shipping industries.

38. The Diamond 282 (1906).
39. Beauchamn v. Turrell, 1 T.L.R. 695 (1952).
40. The Hans Hoth, 2 Lloyds' Rep. 341, 347 (1952).
41. The Truculent 1, 21(1952).

Removing the Restrictions on Public Utilities and Exploration of Natural Resources

*Perry L. Pe**

I. INTRODUCTION 582
A. *Present Barriers*
1. 1987 Constitution
2. Other Laws
i. Foreign Investment Act of 1991 (R.A. 7042)
ii. Omnibus Investments Code (E.O. 226)
iii. Public Service Law (C.A. 146)
iv. Build-Operate-Transfer Law (BOT) (R.A. 7718)
v. Philippine Mining Act of 1995 (R.A. 7942)
vi. IPRA
vii. Public Telecommunications Policy Act of 1995 (R.A. 7925)
viii. Shipping Law
II. HISTORICAL BACKGROUND 586
A. *Constitutional Foundations*
B. *1935 Constitution*
1. Nationalization of Natural Resources
2. Nationalization of Public Utilities
C. *1973 Constitution*
1. Natural Resources
2. Public Utilities
D. *1987 Constitution*
1. Natural Resources
2. Public Utilities
III. JURISPRUDENTIAL ATTITUDE 596
A. *The Economic Decisions of the Supreme Court*

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1. The Pre-1987 Constitution Cases
2. The 1987 Constitution Cases
IV. ECONOMIC BASES FOR LIFTING THE CONSTITUTIONAL RESTRICTION . . . 602
A. The Need for Investments in Public Utilities and in Natural Resources
B. The Problem of Local Capital
V. ANALYSIS AND RECOMMENDATIONS 607
ANNEX 1: SUMMARY ECONOMIC INFORMATION 611

I. INTRODUCTION

The whole body of Philippine Law, as it exists today, is replete with protectionist legislation. Protectionist in the sense that many barriers designed to give preference to Filipino individuals and corporations are still in place. As will be discussed further, this legislative tenor is mostly derived from hand-me-down provisions from earlier laws that understandably dealt with a social and economic milieu vastly different from the socio-economic landscape in which we are immersed today.

The thesis of this essay is to call for the lifting of the legal restrictions in the areas of *public utilities* (where franchises are need) and in the *exploration of natural resources*. The development potentials in these two areas are enormous enough to propel the country from an economic laggard to an industrializing nation. However, these same two industries require huge amounts of foreign capital investment. Local capital cannot accommodate such massive investment without going into foreign borrowing, and should that transpire, without risking insolvency in the event of a single default in repayment.

A. Present Barriers

1. 1987 Constitution

We begin at the outset by ascertaining what existing protectionist policies are actually codified. In other words, where are the legal restrictions? The primary source is obviously the Constitution.

a) Article XII, Section 2, WHICH DEALS primarily with the utilization of natural resources reads as follows:

> All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora, fauna, and other natural lands, all other natural resources shall not be alienated. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. 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. 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 for by law. In case of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.
>
> The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.
>
> The Congress may, by law, allow small scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fishworkers in rivers, bays, and lagoons.
>
> 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 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.
>
> The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.

b) Article XII, Section 10, which deals with capital restrictions in certain areas of invesment:

> The congress shall, upon recommendation of the economic and planning agency, when the national interest dictates, reserve to citizens of the Philippines or to corporations or associations at least sixty per centum of whose capital is owned by such citizens, or such higher percentage as congress may prescribe, certain areas of investments. The congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos.
>
> In the grant of rights, privileges and concessions covering the national economy and patrimony, the state shall give preference to qualified Filipinos.
>
> The state shall regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals and priorities.

c) Article XII, Section 11, which deals with public utilities:

> No franchise, certificate or any other form of authorization for the operation of public utility shall be granted except to citizens of the Philippines or to corporations or association 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. 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. 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, and all the executive and managing officers of such corporation or association must be citizens of the Philippines.

2. Other Laws

The major secondary sources, which are essentially statutes derived from the Constitution, are described in brief:

i. Foreign Investment Act of 1991 (R.A. 7042)

The objective of R.A. 7042 is to attract, promote and welcome productive investments from foreign individuals, partnerships, corporations and governments. The general rule is that there are no restrictions on the extent of foreign ownership of export enterprises. In the domestic market, foreigners can invest as much as 100% equity, except in areas included in the negative list, such as those prohibited by the Constitution, defense related activities and those with implications on public health and morals.

ii. Omnibus Investments Code (E.O. 226)

E.O. 226 subjects any merger, consolidation, syndicate or other combinations resulting in more than 60% foreign ownership, to government control and regulation. There is a *Negative List* formulated by the Office of the President of the Republic of the Philippines pursuant to R.A. 7042, or the Foreign Investments Act of 1991. It is primarily a list of the industries and investment areas and activities which may be opened to foreign investments, or reserved exclusively to Filipinos. The fourth and latest list was promulgated in October 2000.

iii. Public Service Law (C.A. 146)

Commonwealth Act No. 146, as amended by P.D. No. 1 and E.O. 546 provides that certificates of public convenience and necessity will be granted only to citizens of the Philippines or to corporations, co-partnerships, associations or joint-stock companies constituted and organized under the laws of the Philippines; Provided, that sixty per centum of the stock or paid-up capital of any such corporations, co-partnership, association or joint-stock company must belong entirely to citizens of the Philippines.[1]

iv. Build-Operate-Transfer Law (BOT) (R.A. 7718)[2]

R.A. 7718 mandates a 40% foreign equity restriction for the project proponent and the facility operator of a Build-Operate-Transfer or BOT project requiring a public utilities franchise. This law provides that "in case an infrastructure or a development facility's operation requires a public utility franchise, the facility operator must be Filipino or if a corporation, it must be duly registered with the Securities and Exchange Commission and owned up to at least sixty percent (60%) by Filipinos."[3]

v. Philippine Mining Act of 1995 (R.A. 7942)[4]

The law pegged the maximum foreign equity participation for domestic mining activities at 40 percent.

vi. IPRA[5] (R.A. 8371)

The 1995 Mining code gave foreign companies the freedom to devastate tribal lands, allowed 100% foreign ownership, and gave companies the right to displace and resettle people within their concessionary areas. The IPRA gave the peoples of the Cordilleras, decisive influence over the establishment of foreign mining companies. Ownership over the lands was regarded as communal rather than individual, which is in accordance with the concept of ownership of the Igorots.

vii. Public Telecommunications Policy Act of 1995 (R.A. 7925)[6]

Since the passage of R.A. 7925, the telecommunications sector has been privatized and highly fragmented, with many operators appearing in the sector. Under its WTO commitments, the Philippines has agreed to remove the "economic needs" test on foreign investment in telecommunications while retaining the 40% cap on foreign ownership.

viii. Shipping Laws

There are also other special laws which provide for investment incentives in overseas shipping. The incentives are available to foreign-owned entities, provided they satisfy the requirements under the relevant laws.

1. Parity Rights used to be granted to United States citizens but this ended in 1971 with the formation of 1971 Constitutional Convention that eventually drafted the 1973 Constitution.
2. Build-Operate-Transfer Law, Republic Act No. 7718 (1994).
3. Republic Act No. 7718 defines private sector infrastructure or development projects as "projects normally financed and operated by the public sector but which will be wholly or partly implemented by the private sector, including, but not limited to power plants, highways, ports, airports, canals, systems, land reclamation projects, industrial estates or townships, housing, government buildings, tourism projects, markets, slaughterhouses, warehouses, solid waste management, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may be authorized by the appropriate agency pursuant to this Act."
4. The Philippine Mining Act of 1995, Republic Act No. 7942 (1995).
5. The Indigenous Peoples Rights Act of 1997, Republic Act No. 8371 (1997).
6. Public Telecommunications Policy Act of 1995, Republic Act No. 7925 (1995).

In a nutshell, under the existing legal regime, the fact is that the maximum foreign ownership allowed is only 40% of the total outstanding capital stock of any domestic corporation that is engaged either as a public utility or in the exploration of natural resources. Not only that, the restriction extends to the management and operation of the company. In other words, no foreigner is allowed to be an executive officer or an operating officer of the company concerned, lest they be prosecuted for violation of the Anti-Dummy Act.[7]

II. Historical Background

A. *Constitutional Foundations*

Revisiting the philosophical and economic undercurrent behind the constitutional provisions on the nationality requirements for public utilities and natural resources reveals, to paraphrase Holmes, that the constitution was born not out of logic, but of experience.[8] The effect of over three hundred years of Spanish subjugation, followed by fifty-odd more years of American imperialism, had an unmistakable impact in the formulation of these principles.

B. *1935 Constitution*

Economic Protectionism! This was the evident theme of the nationalists in the Convention ringing in many of the speeches delivered before that body.[9] It was with this battle-cry that they won the fight for the nationalization of the natural resources, and for the nationalization of public utilities.[10]

1. Nationalization of natural resources.

The nationalization and conservation of the natural resources of the country was one of the fixed and dominating objectives of the 1935 Convention.[11]

7. Anti-Dummy Act, Commonwealth Act No. 108 (1936), *as amended*.
8. *See* Oliver Wendell Holmes Jr., The Common Law 1 (1886). Posner cites Justice Holmes as one of the law's greatest pragmatists. *See* Richard A. Posner, Overcoming Law 13 (1995).
9. 2 Jose M. Aruego, The Framing of the Philippine Constitution 658 (1949) [hereinafter Aruego].
10. *Id. See also* Jose M. Aruego (eds.), The Philippine Constitution: Origins, Making, Meaning, and Application (1971), where a detailed discussion on the origins and the various deliberations that led to the 1935 formulation of the provision on the conservation and nationalization of natural resources may be found.
11. *Id.* at 592. Aruego notes in fact that one of the first committees created as early as the organization period of the Convention was named "Committee on Nationalization and Preservation of Lands and Natural Resources" whose duty, according to the rules of the Convention, was to "consider, formulate, and propose everything relative to the nationalization and conservation of the land and natural resources of the country."

Interestingly, precedents for these principles have as their inspiration the Constitutions of Mexico, Germany, Spain, Ireland, and Czechoslovakia, and back home, the Malolos Constitution, and the Philippine Bill of 1902.[12]

Many reasons were advanced in support of this proposition. Delegate Montilla seems to have summarized the prevailing feeling of the Convention delegates on the necessity of embodying in the Constitution declarations of nationalistic policies. He said, in part:

> The Constitutional precepts that I believe will ultimately lead us to our desired goal are: (1) the complete nationalization of our lands and natural resources; (2) the nationalization of our commerce and industry compatible with good international practices. *With the complete nationalization of our lands and natural resources it is to be understood that our God-given birthright should be one hundred percent in Filipino hands...* Lands and natural resources are immovable and as such can be compared to the vital organs of a person's body, the lack of possession of which may cause instant death or the shortening of life. *If we do not completely nationalize these two of our most important belongings, I am afraid that the time will come when we shall be just a mockery, for what kind of independence are we going to have if a part of our country is not in our hands but in those of foreigners?*[13]

The following were cited as reasons compelling the nationalization of natural resources of the country: (1) to ensure their conservation for Filipino posterity; (2) to serve as an instrument of national defense, to prevent the extension into the country of foreign control through peaceful economic penetration; and (3) to prevent the Philippines from being a source of international conflicts, thus endangering its internal security and independence.[14]

Yet, the Convention still permitted aliens to acquire an interest in the natural resources of the country via the ownership of an interest in corporations or associations. The purpose, it could be observed, was to enable Filipino-controlled corporations or associations to recruit aliens to their technical or managerial staff. This could be achieved, they argued, by giving them a part interest in the same. However, the maximum limit of interest allowed became the subject of intense debate. The Committee on Nationalization and Preservation of Lands and Other Natural Resources recommended that the maximum limit be pegged at only 25% of capital. Eventually, the revised article on General Provisions raised the amount to forty *per centum*.[15]

This change became subject of another debate. The opponents to the change contended that everything should be done to make remote the

12. *Id.* at 594.
13. *See id.* at 592 [emphasis supplied].
14. *Id.* at 604.
15. *Id.* at 607.

possibility of the natural resources of the country getting into the hands of aliens. The proponents of the change, on the other hand, argued that with control remaining in the hands of Filipinos, there was no reason to fear; that the country would not lose, but in fact gain, by permitting foreign capital help to a certain extent, in the development of natural resources. Put to a vote, the Convention approved the proposed change.[16]

The 1935 Constitutional provision relating to the nationalization of natural resources read:

> All agricultural timber, and mineral lands of the public domain, waters, mineral, coal, petroleum, and other mineral oils, all forces of potential energy and other natural resources of the Philippines belong to the State, and their disposition, exploitation, development, or utilization shall be limited to citizens of the Philippines or to corporations or associations at least sixty *per centum* of the capital of which is owned by such citizens, subject to any existing right, grant, lease, or concession at the time of the inauguration of the government established under this Constitution. Natural resources, with the exception of public agricultural land, shall not be alienated, and no license, concession, or lease for the exploitation, development, or utilization of any of the natural resources shall be granted for a period exceeding twenty-five years, renewable for another twenty-five years, except as to water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, in which cases beneficial use may be the measure and limit of the grant.[17]

Today, the world is a different place. The exact milieu that compelled the Constitutional Convention delegates, almost seventy years ago, to institute such strong nationality restrictions, no longer obtains. These restrictions, if situated in this time and age, may prove to be even more damaging and detrimental. Time and again, however, these principles limiting foreign participation in the development of natural resources would return, each time with varying reasons in accompaniment.

2. Nationalization of Public Utilities.

The nationalization of public utilities, together with that of natural resources, was one of the earliest propositions planned to be included in the Constitution.[18] The deliberations of the Constitutional Commission leave little doubt that the same arguments advanced for the nationalization of our natural resources led to the concomitant nationalization of public utilities as well.[19]

The first draft of the Constitution on public utilities read:[20]

16. *Id.*
17. 1935 PHIL. CONST. art. XIII, § 1.
18. ARUEGO, *supra* note 5, at 667.
19. *See* discussion on Public Utilities under the 1935 Constitution, infra.
20. The Franchise Committee's report to President Quezon dated Sept. 27, 1934 recommended the incorporation of the following provision to the Constitution: "No franchise of public utility shall be granted except to citizens of the Philippine Islands or of the United States or to corporations, companies, or other entities, at least fifty-one per cent of the capital of which is owned by citizens of the Philippine Islands or of the United States or both."
The Public Utility Committee's nationalization recommendation was: "[t]hat the lawmaking body shall nationalize such means of transportation or communication as the national defense, the national security, or the public welfare may require."

> No franchise for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or other entities organized under the laws of the Philippines fifty-one percent of the capital of which is owned and held by citizens of the Philippines, nor shall such franchises be exclusive in character or for a longer period than fifty years.

Amendments to the first draft provisions on foreign ownership were few in the course of the Convention deliberations. For the purposes of this study the most important change was the increase in the required Philippine equity from fifty-one *percent* to sixty *percent*, a requirement that continues to this day.

After second reading, the provision on public utilities as approved by the Convention read:

> 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 other entities organized under the laws of the Philippines, sixty *per centum* of the capital of which is owned and held by citizens of the Philippines, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. No franchise or right shall be granted to any individual, firm, or corporation, except under the condition that it shall be subject to amendment, alteration, or repeal by the National Assembly when the public interest so requires.[21]

C. *1973 Constitution*

1. Natural Resources

The first paragraph of Section 9, Article XIV of the 1973 Constitution, which "Filipinizes" the "disposition, exploration, development, exploitation, or utilization of any of the natural resources of the Philippines," merely reproduces a portion of Article XIII, Section 1 of the 1935 Constitution.[22] As can be seen, the rationale of the Supreme Court as enunciated in the case of

21. 1935 PHIL. CONST. art. XIV, § 8.
22. Parenthetically, it may be observed that despite extensive deliberation and numerous proposals for change, the 1973 Constitution, at least in this area of Constitutional law, was hardly innovative, as the basic law on the nationalization of both natural resources and public utilities remained recalcitrant. *See generally* Minutes of the Meetings of the Committee on Agriculture and Natural Resources of the 1971 Constitutional Convention, which met on one hundred fourteen occasions from August 16, 1971 to May 19, 1972.; Minutes of the Meetings of the Committee on Franchises and Public Utilities of the 1971 Constitutional Convention, which met on fifty-nine occasions from August 20, 1971, to April 27, 1972.

Republic v. Quasha,[23] remained recognized by the 1971 Convention delegates. To wit:

> It should be emphatically stated that the provisions of our Constitution which limit to Filipinos the rights to develop the natural resources and to operate the public utilities of the Philippines is one of the bulwarks of our national integrity. The Filipino people decided to include it in our Constitution in order that it may have the stability and permanency that its importance requires. It is written in our Constitution so that it may neither be the subject of barter nor be impaired in the give and take of politics. With our natural resources, our sources of power and energy, our public lands, and our public utilities, the material basis of the nation's existence, in the hands of aliens over whom the Philippine Government does not have complete control, the Filipinos may soon find themselves deprived of their patrimony and living as it were, in a house that no longer belongs to them.[24]

An addition to be noted, however, was the new second sentence of Section 9. This sentence provided that "[t]he Batasang Pambansa, in the national interest, may allow such citizens, corporations, or associations to enter into service contracts for financial, technical, management, or other forms of assistance with any foreign person or entity for the exploration, development, exploitations, or utilization of any of the natural resources." To authorize the government to enter into service contracts with foreign entities was the original intent behind the provision. The idea was borrowed, according to Delegate Valera, from the methods followed by India, Pakistan and especially Indonesia in the exploration of petroleum and mineral oils. As finally approved, however, a citizen or private entity may be allowed by the National Assembly to enter into such service contract.

This provision would be reproduced substantially in the 1987 Constitution, with the original intent of having only the government enter into such service contracts with foreign entities restored.

2. Public Utilities

Article XIV, Section 5 of the 1973 Constitution, which determined foreign equity in public utilities, did not vary the rules established by the 1935 Constitution in any fundamental way. It continued to provide that "[n]o 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 the capital of which is owned by such citizens...." This is a restatement of Article XIV, Section 8 of the 1935 Constitution. It may therefore safely be presumed that the 1971 Constitutional Convention delegates did not see the necessity of changing the prevailing rules, and

23. 46 SCRA 160 (1972). The Supreme Court quoted, with approval, from the rationale of Vicente G. Sinco.

24. *Id.* at 170.

continued to be gripped by the spirit of nationalism that influenced the Constitutional Convention of 1935.[25]

Nonetheless, a new sentence in Section 5 WAS INCLUDED. Said last sentence stated: "[t]he participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in the capital thereof." Effectively, this provision allowed foreign investors to participate in the management of public utilities to the extent of their proportionate share in the capital. Indeed, it is a reversal of the Filipinization trend enunciated in *King v. Hernaez*[26] and *Luzon Stevedoring Co. v. Anti-Dummy Board*.[27]

The 1971 Convention did not believe that the thrust of Section 5 WOULD BE NULLIFIED BY foreign participation in the management of public utilities.[28] This change, having found its way into the 1987 Constitution, maintains its significance to this day.

D. *1987 Constitution*

1. Natural Resources

The primary provision concerning the development of natural resources under the 1987 Constitution is Article XII, Section 2.

The first two sentences of the said section are uncontroversial. They merely reproduced the traditional Regalian doctrine, which had existed in previous constitutions:[29] the first sentence vested ownership of all natural resources in the state;[30] and the second made a distinction between alienable and inalienable resources.[31]

The introduction of changes concerning the development and utilization of natural resources caused great controversy. According to earlier Constitutions, inalienable portions of the public domain could be explored, developed, or utilized only by license, concession, or lease which could be granted only to

25. *See id.* at 725.

26. 4 SCRA 792 (1962).

27. 46 SCRA 474 (1972).

28. JOAQUIN G. BERNAS, S.J., THE INTENT OF THE 1986 CONSTITUTIONAL WRITERS 728 (1995) [hereinafter BERNAS INTENT].

29. *See Id.*

30. "All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State."

31. "With the exception of agricultural lands, all other natural resources shall not be alienated."

Filipino or Filipino corporations.[32] The draft to the new Constitution however, introduced an unfamiliar provision:

> The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. 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.

A provision of such importance invited a number of amendments.[33] Some of the more insightful amendments were forwarded by Commissioner Hilario Davide.

In his first proposed amendment, Commissioner Davide moved that the capital stock of corporations engaged in the exploration, development, and utilization of natural resources be "wholly owned" by Filipino citizens. It was argued that full Filipino ownership was consistent with the desire "to preserve and develop the national patrimony for the sovereign Filipino people and for the generations to come." Commissioner Villegas however, insisted that the 60% minimum would guarantee the protection of Filipino interests and that to require full Filipino ownership would prejudice Filipino employment because of the shortage of Filipino capital.[34] This proposed Davide amendment lost 16-22.

Another amendment forwarded by Davide provided the following propoesed that the governing and managing bodies of such corporations shall be vested exclusively in citizens of the Philippines. The intent of the said amendment was to strip foreign stockholders of the right to sit in the board of directors. Commissioner Romulo argued that this would be unfair to foreign stockholders.[35] Commissioner Padilla added that refusing them a voice in management would make "co-production, joint-venture and production sharing illusory."[36] Again, this Davide amendment lost 14-20.

The second paragraph of the proposed Section,[37] which was to become the present fourth paragraph of Article XII, Section 2 of the 1987 Constitution,[38] also became the object of intense attention. It dealt with the issue of foreign corporations who were otherwise excluded from the exploration and development of natural resources. Due to capital scarcity, opening up such agreements with foreign corporations, *i.e.*, corporations owned by foreigners, was perceived to be beneficial.[39] Nonetheless, Commissioner Davide introduced an amendment which limited the service contacts open to foreign equity only to the exploitation of "minerals, petroleum, and other mineral oils." The Committee accepted this proposal.[40]

32. BERNAS INTENT, *supra* note 28, at 812.

33. An excellent summary of the debates of the 1986 Constitutional Convention, including the varied amendments proposed leading up to the present provision, can be found in BERNAS INTENT, *supra* note 28, at 810-28.

34. 3 RECORD OF THE 1986 CONSTITUTIONAL CONVENTION 358-59 [hereinafter RECORD].

35. BERNAS INTENT, *supra* note 28, at 818.

36. RECORD, *supra* note 34, at 362-63.

37. As proposed, this originally read: "The President with the concurrence of congress, by special law, shall provide the terms and conditions under which a foreign-owned corporation may enter into agreements with the government involving either technical or financial assistance for large-scale exploration, development, and utilization of natural resources."

2. Public Utilities

The Constitution's limitations on foreign capital on public utilities is contained in Section 11 OF Article XII.[41] At the outset, it must be noted that the originally proposed text for Section 11 was markedly different both from previous constitutions, and from the final text itself.[42] As observed, the proposal departed from Article XIV, Section 5 of the 1973 Constitution in many respects: that it spoke of two-thirds capitalization instead of 60%; that it said nothing about foreign participation in the management; that it proposed no

38. Article XII, Section 2(4), reads: "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 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."

39. BERNAS INTENT, *supra* note 28, at 818.

40. *See* BERNAS INTENT, *supra* note 28, at 819.

41. This Section states: "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. 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. 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, and all executive and managing officers of such corporation or association must be citizens of the Philippines."

42. The proposed section read: "No franchise, certificate, or any other form of authorization for the operation of 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 two-thirds of whose voting stock or controlling interest is owned by such citizens. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public."

time limit to the life of a franchise or certificate; and lastly, that the franchise could be exclusive in character.[43]

As to the provisions concerning the exploration and development of natural resources, the most important amendment was presented by Commissioner Jamir with the intent of reducing the level of Filipino participation from two-thirds to a mere sixty percent. The debates, as recorded, provide interesting insights into the mind of the framers on this provision.

The intent of Commissioner Jamir, in reducing the equity participation of Filipinos from two-thirds to sixty percent, was to provide harmonization between the provision and other sections which similarly fixed the required level of Filipino equity to sixty percent. Furthermore, by increasing the equity proportion of Filipinos, public utilities would be compelled to pay off foreign equity holders, and "instead of paying foreign equity holders ... keep[ing] the money ... and invest[ing] it in some other profitable undertaking for the welfare of the Filipinos."[44]

In support of the amendment, Commissioner Romulo, presented the side of Philippine corporations engaged in the telecommunications industry.[45] The arguments he presented were as follows: first, Philippine Telecommunications carriers reject the argument that the international telecommunications industry is controlled by their foreign partners because such proposition is based on the gratuitous assumption that they are either dummies or spineless. Giving them another six and two-thirds percent will not remedy the situation. Second, firms believed that the foreign partners were needed now more than ever. The reason for this was that international telecommunication was undergoing fast and comprehensive modernization, requiring technology transfer, technical training abroad, equipment upgrade and capital assistance. Reducing foreign participation would entail divestment and would present a disincentive to foreign partners from continuing their invaluable contribution. In the end, it was believed that the proposed change in the equity ratio would do more harm than good for the industry."[46]

On the other hand, Commissioner Braid supported the retention of the proposed two-thirds minimum participation of Filipinos. He, and other commissioners to follow, exhibited a most evident distrust for foreign capital, fearing that the ineluctable exploitation of the Philippines would result from such. The fear of a threat to national security was also evident. Describing the public utilities environment, she said: "In effect, our international cable facilities are controlled not by Filipinos, but foreign multinational compan(ies)

43. BERNAS INTENT, *supra* note 28, at 850.

44. RECORD, *supra* note 34, at 650.

45. *See id.* at 650-51.

46. *Id.* at 651.

(sic). This is a serious threat to our national security and to our sovereignty as a nation."[47] Further in her speech, she claimed that: "During a national emergency, such as war or revolution, our international communications may be subject to tapping, monitoring or 'eavesdropping' by the foreign multinationals because foreign interests may be involved."

Eventually, the Jamir amendment received approval with a vote of 20-19. Upon motion, the body went into nominal voting. The amendment was approved again, 21-19. The proposed provision was then amended into the 60-40 capital structure presently found in our Constitution.

Notably, "nationalistic" feelings tended to cloud the issues, even for the framers of the present Constitution. As an instance, Commissioner Davide implied that those who were for a lower ratio for Filipinos were anti-Filipino.[48] To this, Commissioner Monsod responded with a stinging retort:

> There is a suggestion that those who want to increase the minimum to 75 percent are pro-Filipino; and those who want to keep it at 60 percent are anti-Filipino. There is also a suggestion that if one agrees with the letter of the stockholders, he is not pro-Filipino; he is pro-Ayala or pro-Siguion-Reyna. This committee is not pro-Ayala or pro-Siguion-Reyna; neither is it pro-Santiago, Madam President. I do not know much about the business of the ones who are proposing the 100 percent or 70 percent. I just know that the ultimate judge is the user. It is the Filipino that we primarily want to protect; the user, not the investors... Many of us have been in business. If we own 60 percent of a company and we are competent, I have no fear of any foreigner taking over. As a matter of fact, even if we have less than 50 percent, if we are competent and patriotic, there is no fear of foreign dominance. And increasing it from 60 percent to 75 percent will not eliminate dummies. If there are people willing to be dummies, they will be dummies at 51, 60, 75, 90 and 100 percent.

To this, Davide replied: "I did not telegraph a message that those in favor of a 60-40 ratio are less Filipino than those who would be opting for the 75-25 ratio. All of us are Filipinos...." In the end, the vote on the 75-25 proposal was 15 in favor and 25 against.

In conclusion, the 1987 Constitution did not provide a great and fundamental deviation from the two prior constitutions. It continued to emphasize on a largely protectionist national economy for the Philippines. The effects of the failure continues to be felt today.

47. *Id.* at 652.

48. *Id.* at 856.

III. JURISPRUDENTIAL ATTITUDE

A. The Economic Decisions of the Supreme Court

Several cases of the Supreme Court decided issues of future conduct in terms of economic policy formulation. Such determinations traditionally pertain to the province of the Legislature and the Executive, but the Supreme Court, in these cases, imposed itself, saying there is an actual controversy where it may exercise jurisdiction where the public interest is so great as to affect the fundamental principles of the Constitution.

1. The Pre-1987 Constitution Cases

Before the 1987 Constitution, the Supreme Court was not well known for rendering controversial decisions dealing with economics. As a matter of fact, decisions that encroach upon the area of other branches of government in the manner that they do now were difficult to find.[49]

During the colonial period, the Court generally gave its imprimatur of legitimacy to the actions taken by the executive branch. As noted by Professor Agabin, "with respect to the review of executive action by the Philippine Supreme Court ... the American-dominated Court had to perform a *legitimating function* to the actions taken by the American Governor-General."[50]

The turning point came in 1920 where the dominant political groups in the United States made *laissez faire* a plan for dynamic action. It was at this stage where the influence on the Philippine judiciary was born regarding the protection of property interests against the assaults of the Filipino legislature, as evident in the early decisions rendered in *U.S. v. Ang Tang Ho*[51] and *People v. Palomar.*[52] In the first case, the Court made itself a reviewing branch of economic legislation; in the second, a champion of free enterprise.[53]

The Supreme Court rendered another economic decision in *Ichong v. Hernandez*[54] where the petitioner questioned the constitutionality of the Act to Regulate the Retail Business or Republic Act No. 1180. In effect, the law nationalized the retail trade business by limiting it to Filipino and American citizens. It was a response to the growing dominance of Chinese retailers and

49. Solomon Castro and Martin Pison, *The Economic Policy Determining function of the Supreme Court in Times of National Crisis*, 67 PHIL. L.J. 354, 377 (1993).

50. Pacifico A. Agabin, *The Politics of Judicial Review Over Executive Action: The Supreme Court and Social Change*, 63 PHIL. L.J. 189, 209 (1989) [hereinafter *Agabin*].

51. 3 Phil. 1 (1932).

52. 46 Phil. 440 (1924).

53. Agabin, *supra* note 50, at 198-200.

54. 101 Phil. 1155 (1957).

the latter's alleged certain unfair practices. The Supreme Court upheld the constitutionality of the Act on the ground that there existed substantial distinctions between Filipino citizens who owed allegiance to their country, and Chinese businessmen who merely wanted to make a profit, owing loyalty to neither people nor country and that they could not be relied upon in times of national emergency.[55]

The Court also took pains to expound on its inherent limitations *vis-à-vis* legislative discretion. Thus:

> Now, in this matter of equitable balancing, what is the proper place and role of the court? It must not be overlooked, in the first place, that the legislature, which is the constitutional repository of police power and exercises the prerogative of determining the policy of the State, is by force of circumstances primarily the judge of necessity, adequacy of reasonableness and wisdom, of any law promulgated in the exercise of police power, or the measures adopted to implement public policy or to achieve public interest. On the other hand, courts, although zealous guardians of individual liberty and right, have nevertheless evinced a reluctance to interfere with the exercise of legislative prerogative. Moreover, courts are not supposed to override legitimate policy, and courts never inquire into the wisdom of the law.[56]

2. The 1987 Constitution Cases

After the 1987 Constitution, there was a palpable shift in the attitude of the Supreme Court toward economic decisions.

In *Garcia v. Executive Secretary*,[57] the petitioner challenged the validity of Republic Act No. 7042,[58] on the ground that it defeated the constitutional policy of developing a self-reliant and independent national economy by allowing foreign investors to invest in a domestic enterprise up to 100 per cent of its capital without prior approval. The Court observed that under R.A. 7042, the case-to-case authorization by the Board of Investments (BOI) had been removed. With the introduction of the "Negative List," areas of investments not open to foreign investors were already determined and outlined. Thus, registration with the Securities and Exchange Commission was made the initial step to be taken by foreign investors.

The Court continued to observe that the 100 percent ownership allowed to the investors referred only to investments outside the prohibitions and limitations imposed by the law to protect Filipino ownership and interest. Furthermore, Section 8 thereof reserved to Filipino citizens sensitive areas of

55. *Id.* AT 1174.

56. *Id.* at 1165-66. This case became extremely controversial. It sowed a racial divide among Filipinos, Filipinos with Chinese ancestry and Chinese. Fortunately, the Retail Trade Law was eventually repealed by the Retail Trade Liberalization Law of 2000, R.A. 8762.

57. 204 SCRA 516 (1991).

58. Foreign Investments Act of 1991, Republic Act No. 7042 (1991).

investments. The Act opened the door to foreign investments only after securing their rights and interests over the national economy with due respect to the provisions of the Constitution.

The Court thus ruled:

> What we see here is a debate on the wisdom or the efficacy of the Act, but this is a matter on which we are not competent to rule. The Judiciary does not pass upon questions of wisdom, justice, or expediency of legislation. It is true that, under the expanded concept of political question, we may also determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government. We find, however, that irregularity does not exist in the case at bar.... The Court is not a political arena. His objections to the law are better heard by his colleagues in the Congress of the Philippines, who have the power to rewrite it, if they so please, in the fashion he suggests.[59]

Economic decisions are now rendered in a more unrestrained manner, revealing the political and economic inclinations of the Justices behind each ruling.[60] As admitted by the Court in *Marcos v. Manglapus*,[61] "the precarious state of the economy is of common knowledge and is easily within the ambit of judicial notice."[62] The sentiment of Justices on purely economic issues have become not only obvious but blatantly verbalized. Decisions on policies, as opposed to purely legal questions, were rendered, using as justification the existence of an actual controversy in which the Court must come in to uphold constitutional principles.

In *Manila Prince Hotel v. GSIS*,[63] the issue was whether the controlling shares of Manila Hotel could be legitimately sold to a Malaysian corporation when Manila Prince, a Filipino corporation, was qualified and willing to buy the shares. Manila Prince based its right to buy the shares on the following arguments: first, that the second paragraph of Article XII, Section 10 said: "In the grant of rights, privileges and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos;" and second, that Manila Hotel had become part of the national patrimony which should be kept in the hands of the Filipinos.

The Supreme Court clearly decided the case for Manila Prince. However, as pointed out by the eminent constitutionalist Joaquin G. Bernas, S.J., it is not clear what doctrine this case established. The decision stated that Manila Hotel had "become a landmark — a living testimonial of Philippine heritage." The

59. *Garcia*, 204 SCRA at 523-24.

60. Solomon Castro and Martin Pison, *The Economic Policy Determining function of the Supreme Court in Times of National Crisis*, 67 PHIL. L.J. 354, 380 (1993).

61. 148 SCRA 668 (1989).

62. *Marcos*, 148 SCRA at 698 (1989).

63. G.R. No. 122156 (Feb. 3, 1997).

decision did not say that for that reason the Manila Hotel had become subject to special proprietary restrictions such that its ownership must be reserved for Filipinos. In fact, in a later decision, *Army Navy Club v. Court of Appeals*,[64] the Court said that the power to classify a piece of property into a historical landmark subject to special restrictions had been given by law to the Director of the National Museum. Manila Hotel had not been so classified.[65]

In the end, reliance was on the second paragraph of Article XII, Section 10, which commands preference for qualified Filipinos. The Court enunciated that this is "a mandatory, positive command which is complete in itself and which needs no further guidelines or implementing law or rules for its enforcement." The Court declared that the provision does not require any legislation to put it in operation. Under such a reading of the Constitution, therefore, the sale of Manila Hotel by the government to a foreign corporation would amount to grave abuse of discretion amounting to lack of jurisdiction.[66]

This decision must be juxtaposed with *Tañada v. Angara*[67] involving the Senate ratification of the General Agreement on Tariffs and Trade (GATT). One argument raised against the treaty was that contrary to the "Filipino First" policy of Article XII, Section 10, the treaty placed foreigners on the same footing as Filipinos. Nevertheless the treaty was upheld by the Supreme Court in apparent conflict with the case of *Manila Prince*.

The Court distinguished the two cases by saying that the provision was mandatory and enforceable "only in regard to 'the grant of rights, privileges and concessions covering national economy and patrimony' and not to every aspect of trade and commerce." The Court continues: "The issue here is not whether this paragraph of Section 10 of Article XII is self-executing or not. (That had been settled in Manila Prince.) Rather, the issue is whether, as a rule, there are enough balancing provisions in the Constitution to allow the Senate to ratify the Philippine concurrence in the WTO Agreement. And we hold that there are." In other words, the Senate may play around with a mandatory provision through a balancing of values. Fr. Bernas believes that this is the Court's polite way of distancing itself from the divided decision in Manila Prince.[68]

Another economic issue on which the Court imposed itself was the proposed construction and subsequent transfer of the $320 million Bataan

64. 271 SCRA 36 (1997).

65. Joaquin G. Bernas, S.J., *Constitutionalism and the Narvasa Court*, 43 ATENEO L.J. 325, 359 (1999) [hereinafter Bernas Constitutionalism].

66. *Id.* at 257-58.

67. 272 SCRA 18 (1997).

68. Bernas Constitutionalism, *supra* note 65, at 359.

Petrochemical Corporation (BPC) site from Bataan to Batangas[69] sometime in 1989. BPC was formed by Taiwanese investors to engage in one of the biggest foreign investments in the country at that time. The Board of Investments and the Department of Trade and Industry approved the proposal for the transfer. However, there were objections from the people of Bataan and other various officials; and Congressman Garcia of the second district of Bataan filed an action with the Supreme Court to declare the approval of the application unconstitutional for not complying with the publication requirements. Thus, in *Garcia v. Board of Investments*[70] the Supreme Court upheld the petition of Congressman Garcia and overturned the previous decisions of the BOI and the DTI simply because the government agencies failed to follow the proper publication and notice requirements with regard to project plant site transfers.

In the succeeding case, the Supreme Court could not help itself and decided on the issue of the plant site transfer itself. The issue in the second *Garcia v. Board of Investments* case[71] was whether the investor had the "final choice of plant site." The BOI made it clear in its view that the BOI or the government for that matter could only recommend as to where the project should be located; it recognized that the final choice is with the proponent who would in the final analysis provide the funding or risk capital for the project. The Supreme Court rejected such argument.

The Supreme court ruled and reasoned that under Article XII, Section 10 of the 1987 Constitution, it is the duty of the State to "regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals and priorities." It also stressed that the development of a self-reliant and independent national economy effectively controlled by Filipinos is mandated in Article II, Section 19 of the Constitution. Also, in Article 2 of the Omnibus Investments Code of 1987, "the sound development of the national economy in consonance with the principles and objectives of economic nationalism" is the set goal of government.

The Supreme Court also ruled that the plant site should remain in Bataan because it would be more expensive to buy new land in Batangas; and that if the site is maintained in Bataan, the (government-owned) PNOC shall be a partner in the venture to the great benefit and advantage of the government, among other reasons. The Supreme Court also stated that every provision of the Constitution on the national economy and patrimony is infused with the spirit of national interest. "The non-alienation of natural resources, the State's full control over the development and utilization of our scarce resources,

69. Batangas was chosen by the investors because of the strategic location of the Batangas Bay area, the better harbor facilities in Batangas compared to Bataan, and the presence of the Shell Oil Refinery and depot nearby Tabangao.

70. G.R. No. 88637 (Sept. 7, 1989).

71. G.R. No. 92024 (Nov. 9, 1990).

agreements with foreigners being based on real contributions to the economic growth and general welfare of the country and the regulation of foreign investments in accordance with national goals and priorities are too explicit not to be noticed and understood."[72]

Devastated by the court decision and out of sheer frustration, the foreign investor packed its things and left the country, never to come back again; thus, depriving the country of one golden opportunity to establish a petrochemical industry so badly needed by any industrializing nation.

Tatad v. Secretary of the Department of Energy[73] was another case where the Supreme Court expressed its sentiments on issues of economics and policy. The Court ruled on the constitutionality of R.A. 8180 or the "Downstream Oil Industry Deregulation Act of 1996", which was supposed to "allow any person or entity to import or purchase any quantity of crude oil and petroleum products from a foreign or domestic source ...." The law was also supposed to end 26 years of government regulation on the downstream oil industry. But the Court declared the law unconstitutional because, from its own perspective, the law violated the constitutional prohibition against monopolies, combinations in restraint of trade and unfair competition, particularly on predatory pricing.[74]

The Court further stated: "the Constitution is a covenant that grants and guarantees both the political and economic rights of the people. The Constitution mandates this Court to be the guardian not only of the people's political rights but their economic rights as well. The protection of the economic rights of the poor and the powerless is of greater importance to them for they are concerned more with the esoterics of living and less with the esoterics of liberty."[75]

As a result of *Tatad*, Congress enacted R.A. 8479,[76] a new oil deregulation law, deleting the offending provisions of the earlier law. But once again,

72. *Id.*

73. G.R. 124360 (Nov. 5, 1997).

74. *Id.*

75. *Id.* In his concurring opinion, Justice Artemio Panganiban wrote: "*Kaya't sa mga kababayan nating kapitalista at may kapangyarihan, nararapat lamang na makiisa tayo sa mga walang palad at mahihirap sa mga araw ng pangangailangan. Huwag na nating ipagdiinan ang kawalan ng tubo, o maging ang panandaliang pagkalugi. At sa mga mangangalakal na ganid at walang puso: hirap na hirap na po ang ating mga kababayan. Makonsiyensya naman kayo!*"

Translated: To the Filipino capitalists and to those who are in power, it is but right that you commiserate with the poor and the unfortunate in their everyday needs. Let us not emphasize the loss of profits or even temporary losses. And to the heartless traders – our countrymen are already suffering dearly. Listen to your conscience!

76. An Act Deregulating the Downstream Oil Industry, Republic Act No. 8479 (1998).

Congressman Garcia, in *Garcia v. Corona*,[77] petitioned to the Court to declare the law unconstitutional. Garcia claimed that Section 19 of R.A. 8479, which prescribes the period for removal of price control on gasoline and other finished products and for the full deregulation of the downstream oil industry is contrary to the public interest and therefore, unconstitutional. He also contended that the market was dominated and controlled by an oligopoly of the "Big 3."[78]

The Supreme Court dismissed the Garcia petition and held that the deregulation of the oil industry is a policy determination of the Executive Banch of the government and thus, the policy calling for deregulation in the oil industry is not a justiciable issue.[79] Contrasting this case with the *Tatad* case, it stressed that it did not strike down deregulation *per se*, it merely declared the three key provisions (tariff differential, inventory requirement and predatory pricing) in the old law as unconstitutional for being in restraint of trade.[80]

IV. Economic Bases for Lifting the Constitutional Restriction

Law and economics go hand in hand. Citing Posner, a leading legal pragmatist, modern economics can furnish the indispensable theoretical framework for the empirical research that law so badly needs. In order for the law to be more realistic and more attuned to the needs of the people, the law must be dealt with using a more pragmatic approach[81]. The pragmatic approach to law is an activist approach. It carries a Singaporean "can do" attitude.[82] The argument therefore that is being advanced is that the nationality restrictions imposed in the areas of public utilities and in the exploration of natural resources are no longer attuned to the existing economic realities of the country.

The Philippine economy is weak. It is precarious. One more big crisis and it is the general belief that the country will be back to 1983 — 86 levels.[83] The country needs investments to spur growth, and it has to be big investments not just trickle down trade and commerce coming from its Asian neighbors. This is the reason why the areas of public utility and natural resources exploration have been chosen by this study as the areas that can catapult investment activity in the country. Tabularized in this essay as Annex 1 is a synopsis of the major

77. Garcia v. Corona, G.R. 132451 (Dec. 17, 1999).

78. He identified the Big 3 as Petron (which is run by Saudi Aramco), Shell and Caltex.

79. *Corona*, *supra* note 77.

80. *Id.*

81. *See* RICHARD A. POSNER, OVERCOMING LAW (1995).

82. *See* R.S. MILNES & DIANE K. MAUZNY, THE LEGACY OF LEE KWAN YEW (1990).

83. Philippine economic indicators hit an all-time low in the period immediately preceding the assassination of former Senator Benigno Aquino and even worse from that time to the EDSA People Power I revolt.

economic indicators arranged by Credit Suisse First Boston.[84] The data will show the country's GDP and GNP position, weakening per capita income, trade and budget deficit, unemployment rate and public sector debt.

Thus, economic nationalism in the form of constitutional protectionism may be viewed as noble, and the constitutional commitment to "conserve and develop our patrimony"[85] of great aplomb. However, on a more realistic, more pragmatic level, such protectionism causes a backlash in the form of economic retardation.

A. *The Need for Investments in Public Utilities and in Natural Resources*

Public utility infrastructure is a must to any developing nation. This is most true in the Philippines. An effective transportation, railway and tollway system, for instance, is the solution to the perennial problem of traffic congestion despite traffic management and various engineering measures. An effective telecommunications system, as another example, is necessary for increased productivity; and the demand for such system is seen in the fact that the Philippines has historically faced shortages in the availability of basic telephone services, especially outside the Metro Manila area. An effective waterworks system, power and gas distribution, airline and shipping will without doubt enhance trade and commerce and jumpstart the country's various industrial sectors, in particular the manufacturing sector.

Building public utility infrastructure is not easily accomplished. The costs to build an effective public utility system are steep, even for the bigger corporations in the country. To paint a picture of such costs, examine the budget for one of the more popular public utilities, the mass railway transit. The first phase alone of the Metro Rail Transit project along EDSA, which consists of thirteen stations along a 16.8 km double track alignment, designed to transport a total of 600,000 commuters daily, initially cost US$680 Million, but ballooned to more than US$800 Million when it was finished.[86] Another example is the ongoing construction for the Ninoy Aquino International Airport Terminal III, being developed by a consortium of Filipino, Taiwanese and German Investors.[87] The project started with a cost of US$350 Million and has now almost doubled to US$650 Million.[88] The proposed Metro Manila Subway, which is supposed to connect the international and domestic airport

84. Offering Circular, prepared by Credit Suisse First Boston for the Republic of the Philippines' US$200 million Floating Rate Notes due 2004, dated June 14, 2001.

85. PHIL. CONST. pmbl.

86. The project proponents led by the Fil-Estate Group blamed the foreign exchange drop.

87. The consortium is known as PIATCO. It upset the bid of the then Asia Emerging Dragons Corporation of the country's six leading *taipans* in a controversial unsolicited bidding framed under the BOT Law.

88. PIATCO Data and Project Study (2001) (on file with the author).

terminals to the twin financial districts of Makati and Ortigas, through a 26-kilometer underground railway, will cost approximately US$1.4 Billion.[89] It will cost about US$250 Million to build 700 GSM cell sites for mobile telephone services in the country;[90] around US$150 Million to buy at least one Boeing 747 plane for long-haul trans-pacific flights;[91] and around US$50 Million just to explore and eventually test whether there are oil and/or gas deposits in North West Palawan.[92]

The production of the country's first natural gas in Malampaya, North West Palawan by the consortium[93] led by Shell Philippines Exploration is one positive step. By far this project, which will cost roughly US$5 billion for the next ten years, is the biggest foreign investment in the country. This project is estimated to bring around US$10 billion to US$12 billion of various economic benefits to the country for the next 20 years.[94]

In contrast, the development in the mining industry is pathetic. This country, which used to pride itself as being one of the world's largest suppliers of copper, gold, nickel and other mineral resources including geothermal steam, has at present a dearth of investments in this sector. The country's power generation companies rely on coal as fuel, but at present the only supply comes from Semirara.[95] The geothermal steam field in Tiwi Albay and in Makiling-Banahaw area in Laguna can supply up to 750MW of electric energy once converted. But sadly, it only produces 300 MW of power. The reason for this is the government's National Power Corporation has no money to undertake a major rehabilitation of the existing geothermal plants. The government's partner in this project, Philippine Geothermal, Inc. (owned by the American company Unocal, Inc.), offered to undertake the rehabilitation but was instead

89. Metro Manila Subway Corporation Data and Project Study (2001) (on file with the author).

90. Digital Telecommunications Philippines, Inc. Data and Project Study (2001) (on file with the author).

91. Cebu Air, Inc. Data and Project Study (2001) (on file with the author).

92. Shell Philippines Exploration Data and Project Study (2001) (on file with the author).

93. The Malampaya gas consortium is composed of Shell Philippines Exploration (SPEX), a British-Dutch company, at 45%; Texaco/Chevron, an American company, at 45%; and Philippine National Oil Company a local government owned company, at 10%. The operator for the consortium is SPEX.

94. Her Excellency President Gloria Macapagal-Arroyo, Speech Delivered On The Occasion Of The Formal Launching Of The Natural Gas Production In The Project Plant Site Of Shell Philippines Exploration In Tabangao, Batangas (Oct. 16, 2001).

95. And even the quality of coal from Semirara is criticized for being hard to burn. Thus, the huge import comes from Indonesia.

rebuffed.[96] Atlas Mining and Philex Mining, which used to be the two largest copper producers, are now locked in financial difficulties. Benguet Mining, which used to be the country's top gold manufacturer, is bankrupt. No real exploration and further development of the country's vast natural resources could be undertaken because of the nationality restriction. This is exacerbated by the passage of another legal distraction, *i.e.*, the Indigenous People's Rights Act,[97] which gave the Indigenous Peoples of the Cordillera decisive influence over the establishment of foreign mining companies, making it very difficult for foreign mining corporations to begin operations.

B. *The Problem of Local Capital*

Indeed, the costs are tremendous, and there is lack of local capital. But, this is the area of investments that will attract foreign capital most. The largest of the local conglomerates are not even into this kind of investment activity for their flagship companies. The Ayala Group is more known for its business acumen in the areas of real estate and banking.[98] The JG Summit Group is better known in the field of food manufacturing.[99] The Lopez Group is better equipped in broadcasting.[100] The Henry Sy Group is into retail.[101] The Lucio Tan Group is into cigarettes.[102] The Yuchengco Group is into the insurance business.[103] The George Ty Group is into financial services.[104] The Gotianun Group is into real estate.[105] The Aboitiz Group is into power distribution.[106]

As rich as the biggest Filipino corporations are, the costs and the risks involved are just way too steep. The Filipino corporations which do undertake such projects are not necessarily those that are most efficient in such field.[107]

96. NPC and PGI are currently settling their dispute. NPC questioned the 25-year (renewable for another 25 years) service contract given by the Government to PGI for being unconstitutional. NPC claims PGI has to be a 60%-40% Filipino owned corporation.

97. Indigenous People's Rights Act, Republic Act No. 8371 (1997).

98. The Ayala Group controls Ayala Land and Bank of the Philippine Islands.

99. The JG Summit Group controls Universal Robina Corporation.

100. The Lopez Group owns ABS-CBN Broadcasting Corporation, the biggest broadcasting corporation in the Philippines.

101. The Henry Sy group runs the string of "megamalls" under Shoemart, Inc.

102. The Tan group owns Fortune Tobacco Manufacturing, Inc.

103. The Yuchenco Group owns Malayan Insurance and Great Pacific Life Insurance.

104. The George Ty Group runs Metrobank, Inc.

105. The Gotianum Group controls Filinvest Development, Corp.

106. Power distribution by the Aboitiz Group is done through Aboitiz Equity Ventures.

107. For example, the investment of the Ramcar group belonging to Agustines family in the EDSA MRT project was criticized as one of the causes for the family's current financial difficulty. The Agustines family is more involved in the car battery manufacturing business.

Local companies are forced to tap the international market for capital through foreign loan syndication or bond offering. Danger lurks when the local company earns in pesos to pay debts in dollars. Or worse, to borrow short term to pay its long-term debt. One big peso depreciation and the chances of the local companies to succeed easily vanishes.[108]

The global mobility of capital, like information, is a reality that individuals, corporations and nations can no longer ignore. Privatization and foreign ownership are pillars of a trend toward liberalization that most developing countries have already embraced. The benefits, as well, have been witnessed worldwide. The first major wave of investments in Southeast Asia spawned the so-called dragon economies of East Asia — South Korea, Singapore, Hong Kong and Taiwan. Later, a second wave of investments created huge capital flows (estimates exceed $100 billion) that lifted Thailand and Malaysia to newly-industrialized status and threw businessmen in Indonesia and Vietnam into a frenzy. When China decided to open up its economy, investments there leaped from just a shy of US$4 billion in 1991 to US$26 billion in 1993.[109]

In fact, this obvious need for foreign investor participation in such projects has led the government to undertake various schemes to allow such participation without violating the constitutional restriction. One such scheme is the build-operate-transfer (BOT) scheme that lured many investors to the Philippines during the Ramos administration. A BOT scheme is one where the contractor undertakes the construction and financing of an infrastructure facility and then operates and maintains such facility. After the agreed term and after the government, in turn, has paid and has allowed the contractor a reasonable rate of return on its total investment on the project,[110] the contractor transfers the ownership and operation of the project back to the government.[111] This is a joint public sector-private sector venture on public utility projects that the government would have otherwise undertaken except

It is likewise the Philippine franchisee of the Kentucky Fried Chicken and Mr. Donut fast-food chain.

108. For example, the foray of the Benpres Group in waterworks by entering into a joint venture with the French water utility giant, Lyonnaise des Eaux, to form a company known as Maynilad Water Services, Inc. to undertake the water distribution in the West Zone of Metro Manila, became a major financial burden to the Filipino conglomerate. Similarly, the Benpres Group had to restructure its telephone company, Bayantel, because of the latter's US$400 Million foreign debt. PLDT is currently putting on the auction block its 20% to 30% shareholdings in Smart Telecommunications to be able to meet its forthcoming 2002 foreign debt obligation.

109. Monica Feria , *The Next Growth Wave*, PHILIPPINES YEARBOOK 170 (1998).

110. Build-Operate-Transfer Law, Republic Act No. 6957 § 3 (as amended by Republic Act No. 7718).

111. *Id.* § 2.

that it lacked the necessary funds to do it. There is an automatic grant of franchise.

However, this solution is of no consequence because the constitutional restriction on nationality requirement still applies. To recapitulate: for public utilities, the 1987 Philippine Constitution requires that the franchise for the operation of public utilities can only be granted to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by Filipinos,[112] and that the participation of foreign investors in the governing body of any public utility enterprise shall be limited only to their proportionate share of its capital, and that all its executive and managing officers be citizens of the Philippines;[113] for natural resources, the Constitution requires that natural resources shall not be alienated, except for agricultural land, and that the exploration and development of natural resources shall be under the full control and supervision of the State, except for large scale financing of exploration and development in minerals and petroleum where foreign participants may be allowed to invest.[114]

On the part of the Supreme Court, it tried to assist the policies of the Executive Branch by liberally construing the constitutional restriction in favor of foreign ownership by making a distinction between foreign *ownership* and foreign *operation* of the franchise. In the case of *Tatad v. Garcia, Jr.*,[115] the Supreme Court held that ownership of facilities used to serve the public is not the same as operation of a public utility; thus, the restriction on foreign equity ownership does not apply to ownership of facilities to be used to serve the public. The distinction lies between the "operation" of a public utility and the ownership of the facilities and equipment used to serve the public.

Still however, all of these variations to the theme do not matter. The fact is that the maximum foreign capital that can be invested is 40%. Where can local capital scout for the balance of 60%?

V. Analysis and Recommendations

In the final analysis, the question is: What can a maximum 40% foreign equity capital do to a local venture engaged in either public utility or natural resource exploration? Under the Corporation Code, it can only act as blocking

112. PHIL. CONST. art. XII, § 10.

113. Anti-Dummy Act, Commonwealth Act No. 108 (1936), *as amended*.

114. PHIL. CONST. art. XII, § 2.

115. 243 SCRA 457 (1995).

minority vote.[116] It cannot supplant the 60% majority action. Any scheme or circumvention on this matter may trigger a violation of the Anti-Dummy Act[117] and thus subject the offender to a possible criminal prosecution. Faced with these twin hurdles, would a legitimate and serious foreign investor still take its chances and invest in this country?

116. Under the Corporation Code, the exercise of the following corporate powers or activities need a two-thirds vote and therefore the concurrence of the minority block:

SECTION	POWER / ACTIVITY	VOTE REQUIREMENT
SECTION 37	Extending or shortening corporate term	▪ Approval by a majority vote of the board of directors or trustees and ratification at a meeting by the stockholders representing at least 2/3 of the outstanding capital stock (OCS) or by at least 2/3 of the members in the case of non-stock corporations
SECTION 38	Increasing or Decreasing Capital Stock	▪ Approval by a majority vote of the board of directors and approval at a stockholders' meeting by stockholders owning or representing at least 2/3 of the OCS.
SECTION 38	Incurring, creating or increasing bonded indebtedness	▪ Approval by a majority vote of the board of directors, and approval at a stockholders meeting called for the purpose by 2/3 of the OCS ▪ For non-stock corporations: approval by a majority vote of the board of trustees and at least 2/3 of the members in a meeting duly called for the purpose
SECTION 40	Selling, disposing, leasing or encumbering assets	▪ Authority by stockholders representing at least 2/3 of the OCS and majority vote of its board of directors or trustees. ▪ For non-stock corporations: vote of at least 2/3 of the members in a stockholders' or members' meeting duly called for the purpose.
SECTION 42	Investing corporate funds in another corporation or business or for any other purpose	▪ Approval by a majority of the board of directors or trustees
SECTION 43	Declaring Dividends	▪ Approval of stockholders representing not less than 2/3 of the OCS at a regular or special meeting duly called for the purpose.
SECTION 44	Entering into Management Contract	▪ Approval by the stockholders of the managed corporation owning at least 2/3 of the total outstanding capital stock entitled to vote, or by at least 2/3 of the members in the case of a non-stock corporation. ▪ Ratification by 2/3 when the stockholders of the managing corporation own more than 1/3 of the OCS of the managed corporation, and there is a great tendency for conflict of interests to come in, to the detriment of the managed corporation.

117. Anti-Dummy Act, Commonwealth Act No. 108 (1936), *as amended.* Section 2 of this Act states that to falsely simulate the existence of minimum stock or capital requirement in cases where there is a constitutional or legal nationality requirement for the granting of a franchise is unlawful and may cause imprisonment of the president or manager and directors or trustees of guilty corporations or associations.

The ratio behind the development of the Republic's Constitution clearly indicates that nationalist sentiments were at the root of the protectionist attitude still present today. The restrictions in the 1935 Constitution are still, by and large, present in the 1987 version. The only difference found is in the supporting rationalization. In 1935, the clear intention was to ward off the coming of a new colonizer. In 1973, a relaxation of the rules came about with the inevitable realization that Filipino investment capital was largely inadequate to fuel the needed resurgence of the economy and that in order for the country to move away from its economic slump, the country needed foreign capital. However, xenophobia was still deeply ingrained in the nation's collective psyche. No real structural changes of development policies were undertaken. Limited foreign participation was grudgingly and controversially permitted, but with wide avenues for heavy government regulation and intervention.

In 1976, the World Bank categorically declared that foreign capital inflow into the country is necessary to sustain economic growth.[118] Twenty-five years down the road, those words ring truer than ever.

This study therefore proposes the removal of constitutional restrictions in the areas of public utility and in the exploration of natural resources. In particular, the following constitutional amendments should be made:

Article II, Section 19 should read as:

"The State shall develop a self-reliant and independent national economy."

Article XII, Section 2 should read as:

The third sentence of the first paragraph should be amended to read as, "The State may directly undertake such activities or it may enter into co-production, joint venture, or production sharing agreements with individuals or corporations."

The second paragraph should be amended to read as, "The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone."

The third paragraph should be amended to read as, "The Congress may, by law, allow small scale utilization of natural resources, as well as cooperative fish farming."

Article XII, Section 10 should read as:

The second paragraph should be deleted.

Article XII, Section 11 should read as:

118. World Bank Annual Report (2000).

The first sentence of the first paragraph should be amended to read as, "No franchise, certificate or other form of authorization for the operation of public utility shall be exclusive in character for a longer period than fifty years.

The last sentence of the first paragraph should be deleted.

The above amendments should be undertaken primarily to allow the economic policy to be more flexible and responsive to the global economy. All forms of protection should be more the exceptions rather than the rule. What must be rejected is the rigidity of firmly entrenching protectionist economic policies in the Constitution itself. Any protectionist policies that may be deemed necessary should be left to the discretion of legislative arm of government. Maximum flexibility should be given to the country's economic managers and Congress must adjust its legislative agenda according to the needs of the times. The example of the Negative List in the Omnibus Investments Code is one way to start. The US$5 billion Malampaya Natural Gas project undertaken by the 90% foreign consortium of Shell, Texaco/Chevron and the country's own Philippine National Oil Company is another positive step. But lifting the nationality restrictions as imbedded in 1987 constitution is definitely the most dramatic of any change that can be undertaken and certainly a moment hopefully all Filipinos can cherish.

ANNEX I: SUMMARY ECONOMIC INFORMATION**

	1996[I] (*in billions*)	1997 (*in billions*)	1998 (*in billions*)	1999 (*in billions*)	2000[II] (*in billions*)
GDP (*current market prices*)	PhP2,197	PhP2,421	PhP2,667	PhP2,996	PhP3,322
GDP (*constant 1985 prices*)	849	893	888	917	954
GDP PER CAPITA (US$, *current market prices*)	US$1,165	US$1,119	US$869	US$917	US$959
GDP (*growth rate, constant 1985 prices*)	5.8%	5.2%	(0.5%)	3.3%	3.9%
GNP (*growth rate, constant 1985 prices*)	7.2%	5.3%	0.1%	3.7%	4.2%
ANNUAL INCREASE IN CONSUMER PRICE INDEX (*1994=100*)	9.1%	5.9%	9.7%	6.7%	4.4%
UNEMPLOYMENT RATE	8.6%	8.7%	10.1%	9.8%	10.1%
TOTAL GOVERNMENT REVENUES	PhP410	PhP472	PhP463	PhP462	PhP505
TOTAL GOVERNMENT EXPENDITURES	404	470	513	590	641
SURPLUS (DEFICIT) OF GOVERNMENT	6.3	1.6	(50.0)	(111.0)	(136.0)
PUBLIC SECTOR BORROWING REQUIREMENT[III]	(12.4)	(39.5)	(76.3)	(138.0)	(175.7)
CONSOLIDATED PUBLIC SECTOR FINANCIAL POSITION[IV]	7.3	(22.7)	(56.9)	(102.8)	(141.3)
	(*in millions*)	(*in millions*)	(*in millions*)	(*in millions*)	(*in millions*)
GOODS TRADE – EXPORTS	US$20,543	US$25,228	US$29,496	US$34,210	US$37,295
GOODS TRADE – IMPORTS[V]	(31,885)	(36,355)	(29,524)	(29,252)	(30,380)
SERVICES TRADE – RECEIPTS	19,006	22,835	13,917	4,802	4,178
SERVICES TRADE – PAYMENTS	(12,206)	(17,139)	(12,778)	(7,515)	(6,084)
TRANSFERS (NET)	589	1,080	435	1,598	4,340
CURRENT ACCOUNT (DEFICIT)	(3,953)	(4,351)	1,546	7,647	9,349
As percentage of GNP	(4.6%)	(5.1%)	(2.3%)	(9.0%)	(11.8%)
TOTAL CAPITAL AND FINANCIAL ACCOUNT	US$11,075	US$6,593	US$478	(US$1,816)	(US$6,846)
OVERALL BALANCE OF PAYMENTS POSITION	4,107	(3,363)	1,359	3,586	(512)
As percentage of GNP	4.7%	(3.9%)	2.0%	4.4%	(0.7%)
GROSS INTERNATIONAL RESERVES[VI]	US$11,745	US$8,768	US$10,806	US$15,107	US$15,025
	(*in billions*)	(*in billions*)	(*in billions*)	(*in billions*)	(*in billions*)
DOMESTIC DEBT OF REPUBLIC[VII]	PhP742.1	PhP749.6	PhP850.9	PhP986.7	PhP1,080.6
EXTERNAL DEBT OF REPUBLIC[VIII]	US$15.7	US$15.0	US$16.50	US$19.8	US$22.0
PUBLIC SECTOR DOMESTIC DEBT[IX]	PhP1,502	PhP1,586.9	PhP1,721.2	PhP2,196.6	PhP2,184.2
PUBLIC SECTOR EXTERNAL DEBT[X]	US$27.9	US$27.1	US$36.5	US$36.5	US$38.8

** Sources: National Statistics Office; National Statistic Coordination Board; Bureau of the Treasury; Department of Finance; Bangko Sentral.

I. Amounts in Pesos have been converted to US dollars using the average Exchange Rate for the applicable year.

II. Preliminary, Figures from January through June 2000 only.

III. Represents the aggregate deficit of the Government, the Central Bank-Board of Liquidators (the "CB-BOL"), the Oil Price Stabilization Fund and the 13 Government Owned and Controlled Corporations ("GOCCs") whose debt comprises virtually all the debt incurred by GOCCs (the "13 monitored GOCCs").

IV. Comprised of the aggregate deficit or surplus of the Government, the CB-BOL's accounts, the Oil Price Stabilisation Fund, the 13 monitored GOCCs, the Social Securities System

(the "SSS"), the Government Service Insurance System (the "GSIS"), Bangko Sentral, the Government Financial Institutions ("GFIs") and the local government units.

v. National Statistics Office data was adjusted to: (a) exclude aircraft procured under operating lease arrangements amounting to $542 million for 1996, $45 million for 1997 and $136 million for 1998 and (b) included an additional $466 million worth of aircraft imported under capital lease arrangements for 1997.

vi. Comprised of the holdings by Bangko Sentral of god reserves, foreign investments, foreign exchange and SDRs, including Bangko Sentral reserve position in the IMF. Amounts in original currencies were converted to US dollars or Pesos, as applicable, using the Bangko Sentral reference exchange rates at the end of each period.

vii. Represents debt of the Government only, and does not include other public sector debt. Includes direct debt obligations of the Government, the proceeds of which are on-lent to GOCCs and other public sector entities, but excludes debt guaranteed by the Government and debt originally guaranteed by other public sector entities for which the guarantee has been assumed by the Government.

viii. *Id.*

ix. Represents debt of the Government, the 13 monitored GOCCs, the CB-BOL, Bangko Sentral and the GFIs.

x. Includes public sector debt whether or not guaranteed by the Government.

Legacies in Civil Law from Justice Arsenio P. Dizon and His Peers*

*Justice Ricardo C. Puno, Sr.***

I. INTRODUCTION 614
A. *Honorees of the 13th Centennial Lecture*
B. *Ponencia Styles*
C. *Memories of Justice Dizon*
II. DISCUSSION OF THE LEGACIES LEFT BEHIND IN VARIOUS AREAS OF CIVIL LAW 617
A. *Family Law*
B. *Property*
1. Fraud
2. Easements
C. *Succession*
1. Probate
2. Wills and Testaments
D. *Obligations*
1. Sources
2. Obligations with a period
E. *Contracts*

* The Supreme Court Centenary Lecture Series Thirteenth Lecture. Lecture delivered in the Supreme Court Session Hall on October 5, 2001 in commemoration of the Centennial of the Supreme Court of the Philippines. The principal honoree of the Lecture, Justice Arsenio P. Dizon, obtained his Bachelor of Arts degree at the Ateneo de Manila in March, 1919.

This lecture is also published in Vol. III, No. 10 of the PHILJA Judicial Journal, and in the Court Systems Journal of the Supreme Court of the Philippines.

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