

EXTRA-JUDICIAL FORECLOSURE OF REAL ESTATE MORTGAGE BEFORE A NOTARY PUBLIC: A CASE FOR THE RE-EXAMINATION AND REVERSAL OF CHINA BANKING CORPORATION V. COURT OF APPEALS*

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The economic crisis spawned by the Asian currency crisis that confronts the Philippines today has resulted in a multitude of foreclosures of real estate mortgages, as borrowers continue to default in their obligations.

Amid the multitude of foreclosures, the controversial issue that arises is whether the extra-judicial foreclosure of real estate mortgage before a NOTARY PUBLIC must comply with the requirements of Supreme Court Administrative Order No. 3. This order provides that all petitions docketed and assigned a file number, with the corresponding filing fees collected as in ordinary civil actions, and the propriety of the foreclosure itself, be monitored by the Clerk of Court as Ex-Officio Sheriff under the direct supervision of the Presiding Judge of the Regional Judicial District.

Under the explicit terms of Supreme Court A.O. No. 3, all applications for extra-judicial foreclosure of real estate mortgage under Act 3135, as amended, must be filed with the Executive Judge through the Clerk of Court who is also the Ex-Officio Sheriff, who must receive, docket, and assign a File Number to the application and collect the filing fees thereof, and examine whether the applicant has complied with all the requirements of the law before the public auction conducted under his direction or under the directions of a notary public. The mandatory procedure provided for by Administrative Order No. 3 for all applications for extra-judicial foreclosure of real estate reads as follows:

1. All applications for extra-judicial foreclosure of mortgage under Act 3135, as amended by Act 4118, and Act 1508, as amended, shall be filed with the Executive Judge through the Clerk of Court who is also the Ex-Office Sheriff;
2. Upon receipt of an application for extra-judicial foreclosure of mortgage, it shall be the duty of the Office of the Sheriff to:
 - a) receive and docket said application and to stamp the same with the corresponding file number and date of filing.
 - b) collect the filing fees therefore and issue the corresponding official receipt;

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- c) *examine in case of real estate mortgage foreclosure, whether the applicant has complied with all the requirements before the public auction is conducted under its direction or under the direction of a notary public, pursuant to Sec. 4 of Act 3135, as amended;*
- d) sign and issue certificate of sale, subject to the approval of the Executive Judge, or in his absence, the Vice-Executive Judge; and
- e) turn over after the certificate of sale has been issued to highest bidder, the complete folder to the Records Section, Office of the Clerk of Court, while awaiting any redemption within a period of one year from the date of registration of the certificate of sale with the Register of Deeds concerned, after which the record shall be archived.

3. The Notice of auction sale in extra-judicial foreclosure for publication by the sheriff or by a notary public shall be published in a newspaper of general circulation pursuant to Section 1, Presidential Decree No. 1709, dated January 26, 1997, and non-compliance therewith shall constitute a violation of Section 6 thereof;" (italics supplied)

It is thus clear that Supreme Court A.O. No. 3 applies as a matter of procedure to the applications for foreclosure of real estate mortgage, whether to be conducted by the sheriff or by a notary public.

By the explicit provisions of Supreme Court A.O. No. 3, all petitions must be filed with the Executive Judge, through the Clerk of Court, which must be given the corresponding file number after collecting docket and filing fees, and the Office of the Clerk has the duty to "/c/ examine in case of real estate mortgage foreclosure, whether the applicant has complied with all the requirements before the public auction is conducted under its direction or under the direction of a notary public, pursuant to Sec. 4 of Act 3135, as amended."

In *China Bank Corporation vs. Court of Appeals*¹ promulgated on December 5, 1999 by its Third Division, the Supreme Court held that its Administrative Order No. 3 does not apply to a petition for foreclosure for real estate mortgage filed before a notary public, as follows:

With respect to the third issue, we find private respondents' contention that Administrative Order No. 3 is the governing rule in foreclosure of mortgages misplaced. The parties, we note, have stipulated that the provision of Act. No. 3135 is the controlling law in the case of foreclosure. Thus:

"17. The MORTGAGOR(S) hereby grant(s) unto the MORTGAGEE full and irrevocable power of attorney coupled with interest in the event of breach of any of the conditions of this mortgage; to sell, in its discretion, the mortgaged properties at public auction, for cash and to the highest bidder, in the Province or City where the mortgage properties are located, before the Sheriff, or the Notary Public, without court proceedings, after posting notices of sale for a period of twenty days in three public places and said place; and after publication

¹ G.R. No. 121158.

of such notice in a newspaper of general circulation in the said place once a week, for three consecutive weeks, and the MORTGAGEE is hereby authorized to execute the deed of sale and all such other documents as may be necessary in the premises all in accordance with the provision of Act. No. 3135 of the Philippine Legislature, as amended, and Section 78 of Republic Act No. 337;

By invoking said Act, there is no doubt that it must "govern the manner in which the sale and redemption shall be effected". Clearly, the fundamental principle that contracts are respected as the law between the contracting parties finds application in the present cases, especially where the are not contrary to law, morals, good customs and public policy.

Moreover, Administrative Order No. 3 is a directive for executive judges and clerks of court which, under its preliminary paragraph, "(1) in line with the responsibility of an Executive Judge, under Administrative Order No. 6, dated June 30, 1975, for the management of courts within his administrative area, included in which is the task of supervising directly the work of the Clerk of Court, who is also the Ex-officio Sheriff, and his staff." Surely, a petition for foreclosure with the Notary Public is not within the contemplation of the aforesaid directive as the same is not filed with the court. At any rate, Administrative Order No. 3 cannot prevail over Act No. 3135 as amended. It is an elementary principle in statutory construction that a statute is superior to an administrative directive and the former cannot be repealed or amended by the latter.

The above ruling ought to be re-examined and reversed for the following reasons:

1. The explicit terms of Supreme Court A.O. No. 3 includes in its coverage all applications for extra-judicial foreclosure under Act 3135, whether the public auction conducted under its (office of the sheriff's) direction or under the direction of a Notary Public, pursuant to Section 4, of Act 3135, as amended. (Sec. 2, A.O. No. 3).

2. A notary public is an officer of the Court. There is nothing wrong or objectionable in including notaries public, in addition to Clerk of Court as Ex-Officio Sheriff in the coverage of Administrative Order No. 3, requiring that all petitions for extra-judicial foreclosure be filed before the Executive Judge and be given corresponding file and docket numbers after collecting the filing fees and the documents to be examined by the Ex-Officio Sheriff under the supervision of the Executive Judge, to make sure that all requirements are complied with before the auction sale is conducted either by the sheriff or by a notary public.

As officers of the Court, the foreclosing notaries public are under the authority and supervision of the Executive Judge, through the Clerk of Court as Ex-Officio Sheriff, in the extra-judicial foreclosure of real estate mortgage, as mandated by the explicit terms of Supreme Court A.O. No. 3.

The need for such supervision is underscored by the fact that the notary public in all circumstances is selected and hired by the foreclosing mortgagee; hence, the Notary Public is biased in favor of the mortgagee. Subjecting the notary public to the coverage and requirements of A.O. No. 3 is the best way to ensure that the legal

requirements for extra-judicial foreclosure under Act 3135 are complied with by the applicant, as a measure of protection of the rights of the mortgagors in cases of Auction Sale conducted by the notary public.

3. There is no conflict between Supreme Court A.O. No. 3 and Act 3135, as amended. If A.O. No. 3 is valid insofar as foreclosure sales conducted by the Ex-Officio Sheriff under Act 3135, as amended, are concerned, there is nothing legally wrong or objectionable in applying its requirements, as it actually does, to foreclosure sales conducted by the Notary Public, who, as an officer of the Court may legally be subject to the supervision of the Executive Judge through the Clerk of Court as Ex-Officio Sheriff in the conduct of foreclosure proceedings under Act 3135.

4. Supreme Court A.O. No. 3 is a procedural rule which has no conflict with the provisions of Act 3135, as amended, and the same may be implemented side by side with Act 3135, by making it uniformly applicable to all foreclosures, as expressly provided under par. 2 (c) thereof, whether conducted under the direction of the Sheriff or under the direction of the Notary Public.

5. A.O. No. 3 of the Supreme Court is clear and explicit in stating that it applies to all extra-judicial foreclosures, whether "conducted under its (Sheriff's) direction or under the direction of Notary Public." To exempt foreclosure before a notary public from the payment of filing fees and from the scrutiny of the Ex-Officio sheriff under the supervision of the Executive Judge would be discriminatory to, and would violate the rights of, those who foreclose through the sheriff's office to equal protection of the law. All applicants for extra-judicial foreclosure of real estate mortgage, whether the auction sale will be conducted by a Sheriff or a notary public must comply with the requirements of Supreme Court A.O. No. 3 to avoid invidious discrimination prohibited by the Equal Protection of the Law clause of the Constitution.

6. Moreover, if the petition for foreclosure filed with the notary public will not pass the scrutiny of the Ex-Officio Sheriff under the supervision of the Executive Judge as required under paragraph 2 (c) of A.O. No. 3, it would violate the rights of the mortgagor to due process of law because the Notary Public, who is hired and paid by the foreclosing Bank, would not be impartial and objective in examining whether the mortgagee Bank has complied with all the requirements of Act 3135 before the Public Auction is conducted.

The judicial law in the *China Banking Corporation* case, holding that extra-judicial foreclosure of real estate mortgage before a notary public is not covered by the requirements of A.O. No. 3, may be expeditiously corrected by an amendment of the Supreme Court, clarifying that A.O. No. 3 applies as well to the extra-judicial foreclosure of real estate mortgage before a notary public. Otherwise, the matter will have to await an appropriate case to come up before the Supreme Court calling for a re-examination, re-appraisal, and re-evaluation and review of the questioned ruling in the *China Banking Corporation* case.

THE HUMAN RIGHTS IMPACT OF CHARTER CHANGE PROPOSALS*

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INTRODUCTION

To make governance more effective and open up the country to the global economy, the administration of President Joseph Estrada and other sectors of society are proposing that certain provisions of the 1987 Philippine Constitution be amended.

Specifically, the following constitutional amendments have been suggested:

- A. Political Reform Proposal:
 - a. Shift in the form of government from presidential to parliamentary;
 - b. Shift to federalism;
 - c. Increase in the number of senators and senatorial election by region;
 - d. Extend terms of office of certain officials; and
 - e. Package-deal (same party) election of the President and the Vice President.
- B. Economic Reform Proposals
 - a. Allow ownership of land by foreigners;
 - b. Allow / increase the participation / ownership of foreigners in certain areas of investment reserved for Filipinos; and
 - c. Clip the power of the Supreme Court to decide economic questions.

This paper will examine the likely impact of these proposals on the basic human rights of Filipinos. In evaluating the proposals, the writer will give special attention to the effects, particularly of the economic reform proposals, on the rights of vulnerable groups like farmers, fisherfolk, indigenous peoples, the urban poor and ordinary workers. This is because they constitute the poor majority and have been declared to be the intended beneficiaries of the proposed amendments. Moreover, analyzing the proposals from the standpoint of vulnerable groups is, for this writer, the most reasonable way of determining the merits of the proposals. As one human rights advocate puts it: "The ultimate measure of whether a society can properly be called civilized ... is how it treats those who are near the bottom of its human heap." (Palkhivala, 1993)

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The proposals will be assessed based on human rights guarantees under the 1987 Constitution itself and under international human rights instruments which have been ratified by the Philippines and / or adopted by the United Nations General Assembly. These instruments include the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). As a member of the United Nations and as a state party to these instruments, the Philippines is obligated to treat them with the same force and effect of ordinary laws in the country.

Fundamental rights are at the heart of the Philippine Constitution. The power to amend the Constitution must, therefore, be exercised with utmost care particularly when human rights are affected. Any mistake in changing the basic law cannot easily be undone.

The ultimate goal of the proposed amendments is presumably to promote a better life for Filipinos by improving governance, alleviating poverty, and generating the resources required to provide for basic needs and services. In undertaking a cost-benefit analysis, this paper will show that, from a strictly human rights perspective, while some of the political reform proposals may appear to be meritorious, others deserve outright rejection because they infringe on the political rights of the people. On the other hand, in discussing the economic reform proposals, this paper will argue that unless the governments deals with the problem lack of access by the poor to existing resources and prioritizes measures to enable the people to enjoy the benefits of a globalized economy, globalization could further restrict people's access to resources and lead to increased violations of human rights. Throughout the paper, the writer is mindful of the burden the proposals will have on already scarce resources. The financial costs of instituting changes alone will mean less resources for basic needs and services. The paper ends with a call for the government to adopt a more holistic approach to human development.

I. POLITICAL REFORM PROPOSALS

A. Shift in the form of government from presidential to parliamentary

It is proposed that the parliamentary system of government be adopted as part of a package of measures to have a more effective and efficient government and to improve the economy. Proponents of the system claim that the presidential system, with its separation of powers, often leads to paralysis in government due to conflicts between congress and the president. Hence, it has become an obstacle to national development. On the other hand, under a parliamentary system, decisions can be quicker since the government and parliament are under the control of the party in power. Moreover, bad governments under a parliamentary system can easily be changed since government leaders have no fixed terms.

These claims are arguable since there is no perfect system and no system is immune to abuses of power and violation of rights. Each system has advantages and

disadvantages peculiar to it. Ultimately, the success of any system depends largely on the quality of politicians and civil servants who operate it. From the human rights angle therefore, it does not generally matter whether the form of government is presidential or parliamentary.

Perhaps, the only significant human rights concern with the proposed amendment is the manner of choosing the Prime Minister in a parliamentary system. Under a presidential system, the President is chosen directly by the people. However, in a parliamentary system, the Prime Minister as head of government is normally chosen by the dominant party in parliament, and only indirectly by the people who vote for the members of parliament. This indirect choice of the Prime Minister may be considered a diminution of the people's right to participate in governance and to choose their leaders.

In this connection, Article 21 of the Universal Declaration of Human Rights (UDHR) provides: "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives." Similarly, under Article 25 of the International Covenant on Civil and Political Rights (ICCPR): "Every citizen shall have the right and opportunity ... to take part in the conduct of public affairs, directly or through freely chosen representatives."

Although these international human rights interments allows direct participation in governance "through freely chosen representatives", direct participation by the people in the choice of their leaders is the ideal arrangement. The presidential system, in allowing the people to directly vote for the President, clearly gives more recognition and importance to the people's right to participate in governance and to choose their leaders than the parliamentary system.

B. Greater autonomy for local government; shift to a federal system

The Philippines operates under a unitary form of government where the control of national and local affairs is exercised by the central or national government based in Manila. There is a proposal, however, for a shift from this unitary system to a federal form of government. The purpose is presumably to unburden the national government of local concerns and to increase the capacity of local governments to participate in the national development process and to engage the global economy.

A federal system divides governmental powers between the national and local governments. It presupposes the existence of a society divided by difference in geography, race, religion, language, culture or economics. The system enables each group of people, free from interference or control by the others, to govern itself in matters of local concern, leaving matters of national concern to the national government. Power, however, is shared over matters of common interest.

For a heterogeneous society like the Philippines, a form of government which gives more autonomy to the local governments, like the federal system, is more in conformity with the right of the Filipino citizen "to take part in the government of his

country" (Art. 21, UDHR) or "in the conduct of public affairs" (Art. 25, ICCPR). The division of powers between the national and the local governments provides more opportunities for the Filipino citizen to participate in governance. In this sense, therefore, a federal system is more democratic than a unitary system.

One could be a faithful adherent to the provisions of Article II, Section I, of the 1987 Constitution: "The Philippines is a democratic and republic State. Sovereignty resides in the people and all government authority emanates from them." It would be a faithful adherence to the provisions of Article II, Section I, of the 1987 Constitution: "The right of the people and their organizations to effective and reasonable participation at all levels of social, political, and economic decision-making shall not be abridged."

A federal system also accords more respect and recognition to the right of self-determination. In this connection, Common Article 1 of the ICCPR and ICESCR states:

"1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principles of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

While the right of self-determination may ordinarily be understood to mean political freedom, the Covenants also mention the rights of peoples to "freely pursue their economic, social and cultural development." They further mention the right of people to "freely dispose of their natural wealth and resources." These rights imply a certain freedom of peoples to pursue economic, social and cultural activities independent of government policies or at least with minimal intervention from government.

In view, therefore, of existing differences in geography, culture, language, and economic and social structures among various regions in the Philippines, a federal form of government would appear to be highly recommended. It is more respectful of people's right to participate in governance and the right to self-determination.

The more important and crucial question is: to what extent should the country federalize? From a human rights perspective, the overall impact of a shift to a federal system on the basic rights of Filipinos would greatly depend on the degree of autonomy or federalism adopted. Undue autonomy will lead to an attitude of self-sufficiency, separatism and intolerance among the regions. This situation, in turn, would have adverse consequences on the civil, political, economic, social and cultural rights of the people. Federalizing the country, therefore, must not be at the expense of national unity and territorial integrity.

Furthermore, the shift to a federal system must be gradual. It is unlikely the local governments will be able to readily cope with the enormous demands that a sudden increase in self-governance would have on their capabilities and resources. A hasty, ill-timed and ill-considered shift to a federal system would result in wastage of scarce resources and, as such, adversely affect the basic rights of Filipinos. There will be less money for housing, education, health, social security and social services.

If gradualism is the mode of effecting federalism, then it would seem that whatever degree of autonomy sought for local governments at present could be attained under the existing unitary system. The government could step up the process of decentralization, regionalism and devolution. In such a case, therefore, there is no compelling need to amend the constitution now.

C. Increase in the number of senators (from 12 to 48) and senatorial election by region.

Under the present system, the Senate is composed of 24 senators who are elected at large (Art. VI, Sec. 2, 1987 Constitution). The reason the constitutional commissioners fixed the number of senators to 24 is to maximize the benefits of bicameralism, i.e., to achieve quality legislation. It is believed that a small number of senators would lead to better laws. Since senators are elected at large, those elected come mainly from Luzon where the population is bigger and where Metro Manila, the seat of government, commerce, education and entertainment in the country, is located. This situation has led to perceptions of under-representation in the Senate by inhabitants of other regions. Hence, there is a proposal to increase the number of senators from 24 to 48 and to have them elected either by region (i.e., at least two senators per region) or by island grouping (i.e., 24 for Luzon, 12 for Visayas and 12 for Mindanao).

The proposal appears to be reasonable. It allows greater recognition of the political rights of the people. Increasing the number of senators and electing them by region would give inhabitants of remote provinces and regions added opportunity to stand for election to a high public office and participate in running the country.

At the same time, it would enable the people to choose representatives who come from their own communities and who are probably more aware of their concerns. It would facilitate better interaction between senators and their constituents since senators would be more personally known and accessible to the people. This would result in a Senate which is truly representative and in laws which are truly reflective of the needs and wants of the people. Democracy and republicanism would thereby be further promoted.

Possible economic and social benefits should also be mentioned. The proposed arrangement could minimize election expenses on the part of the candidate and the government. This allows the allocation of more resources for social services and the satisfaction of basic needs of the people. Electoral fraud may be further abated since it will be easier to monitor the canvassing of election returns and guard

the votes in the regions. There will be less opportunities for "dagdag-bawas", and hopefully more integrity and credibility in the Senate.

In the end, the decision to increase the number of senators and elect them by region will actually result in the genuine representation of people's interests in the Senate will depend primarily on the quality of candidates chosen. The best guarantee of genuine representation in the legislature is responsible voting. More does not necessarily mean better senators.

In the end, increasing the number of senators and electing them by region will actually result in the genuine representation of people's interests in the a Senate will depend primarily on the quality of the candidates chosen. The best guarantee of genuine representation in the legislature is responsible voting. The electorate must exercise their political rights with maturity and responsibility. Otherwise, the proposed amendment, if adopted, will only result in useless expense on the part of the government and the people, an unnecessary burden on already scarce resources, and further violations of political, social and economic rights of Filipinos.

D. Extend the terms of office of government officials.

In general, term limits were fixed to facilitate the synchronization of national and local elections. The drafters of the Constitution wanted to avoid the political, social and economic costs of a desynchronized electoral system. As regards the office of the President and Vice-President, the drafters fixed the terms on the belief that the elimination of the prospect of reelection would make for a more independent President capable of making correct even if unpopular decisions. The presidential term limits were therefore designed to make the President more effective.

It is proposed, that the terms of office of government officials be extended. Proponents of term extension point mainly to the need for more experience on the part of government leaders in order for them to be more effective. It is argued that more experience in public service on the part of government officials would result in good governance, more quality legislation and improved delivery of basic services.

The problem with the proposal is the lack of credibility of many government officials. The public perception is that the clamor for term extension proceeds more from the urge of many incumbent officials to remain in power than from a genuine desire to serve the public better. This is precisely the problem constitutional term limits seek to address. Term limits complement the constitutional mandate for the state to "guarantee equal access to opportunities for public service, and prohibit political dynasties as may be defined by law" (Art.II, Sec. 26, 1987 Constitution). Term limits are indeed safeguards against attempts by official to perpetuate themselves in power.

At present, term limits are already ineffective in controlling political monopolies since many officials circumvent term limits by letting relatives run for positions they have vacated. This has given rise to political dynasties and a problem of unequal

access to public office. As a consequence, a poor but competent candidate has little chance of getting elected to public office.

The problem of unequal access to public office is a reality closely linked to the unequal distribution of wealth in the Philippines. Wealthy families tend to control political power, particularly because election expenses are prohibited. Hence, political dynasties abound, and there is until now no law and none forthcoming against political dynasties despite the constitutional prohibition, Congress being "the principal playground of political dynasties" (Bernas, 1996). This situation has bred crony capitalism or the concentration of business favors to a few favored families since business often works closely with those in power for juicy contracts. In this context, term limits, serve to democratize political and economic power.

Extending the terms of office of government officials would, in effect, restrict the following political rights of Filipinos under Article 25 of the ICCPR:

- a. the right to directly take part in the conduct of public affairs;
- b. the right to be elected at genuine periodic elections; and
- c. the right to have access, on general terms of equality, to public service.

Considering the political and economic costs of term extensions, and the human rights implications, it would be more advisable to address the concerns of incumbent government officials within the system of existing term limits.

E. Package-deal (same party) election of the President and the Vice-President.

Under the present system, the President and the Vice-President are elected by direct vote of the people (Art VII, Sec.4, 1987 Constitution). This means that the people have the right to directly and separately choose the President and the Vice-President of the country.

This system has often led to a situation where the President and the Vice-President belong to different political parties resulting in a lack of cooperation or teamwork between them. Hence, it is proposed that the President and the Vice-President be elected as a team or as a package. Under this block-voting arrangement, the people will vote only for the Presidential candidate and the vote is automatically credited to his running mate who is seeking the vice-presidency.

It is argued that this system will not only lead to better teamwork between the top two officials of the country but also to stability and continuity of policies and programs in case a vacancy in the office of the President arises mid-term and the Vice-President becomes President. Moreover, it is hoped that such a system will promote a politics of ideology and programs and strengthen political parties since the indirect vote on the Vice-President will make people give more attention to political platforms rather than personalities.

An indirect vote on the Vice-President, however, tends to lessen the importance of the office in the eyes of the people. People usually focus on work of a person they have helped install into a particular position. It may also diminish the holder's sense of responsibility in the office. Generally, a public officer will feel a greater sense of responsibility to those to whom he owes his position, and this sense is keener when he owes it directly rather than indirectly. Significantly, the proposed amendment contemplates a limitation on the right of the citizen to choose directly a Vice-President. It diminishes the citizen's right to take part in the conduct of public affairs, directly or through freely chosen representatives.

As guaranteed by Article 21 of the UDHR: "Everyone has the right to take part in the government of his country directly or through freely chosen representatives." Likewise, Article 25 of ICCPR provides: "Every citizen shall have the right and the opportunity... to take part in the conduct of public affairs, directly or through freely chosen representatives." The package-deal election of the President and the Vice-President deprives the people of their right to directly choose the Vice-President. It also imposes on the people whomever the political parties choose to run for Vice-President. The proposal, therefore, limits the people's political right of participation in governance.

II. ECONOMIC REFORM PROPOSALS

Apart from amending certain political provisions, The Estrada government wants to remove "protectionist" policies in the 1987 Constitution and open the country to foreign investments and technology. According to the President: "Once these obstacles to our development are removed, our economists expect that 3 or 4 percentage points can be added to the growth rate our GNP and GDP. Employment and incomes will rise quickly, and poverty levels will drop significantly." (President's Speech on Aug.9, 1999 at the MOFC President's Night)

These perceived "obstacles to our development" in the Constitution are basically provisions which limit foreign equity participation in certain areas of investment impressed with public interest, as follows:

1. Article 12 Section 2: exploration, development and utilization of natural resources - 40%
2. Article 12 Section 11: operation of public utilities-40%
3. Article 14 Section 4: ownership of educational institutions-40%
4. Article 16 Section 11: advertising-30%

The Constitution also completely prohibits foreigners from owning land in the Philippines (Art.12, Sec.7) and from engaging in mass media (Art. 16, Sec.11).

The government believes that lifting the limitations and prohibitions on foreign equity will lead to increased foreign capital investments, and foreign investors with greater equity will be more committed to ensuring growth and sustainability of the Philippine economy. It is argued that if foreigners are allowed majority control of a

business, they will be more willing to introduce new and more sophisticated technologies. In turn, these will uplift the economy and generate more employment opportunities for Filipinos.

Specifically, the following amendments to the 1987 Constitution are proposed:

- a. Allow ownership of land by foreigners.
- b. Allow/increase the participation/ownership of foreigners in certain areas of investment reserved for Filipinos.
- c. Clip the power of the Supreme Court to decide economic questions.

III. LAND AND NATURAL RESOURCES

Under the Constitution, foreigners cannot own lands, except in the following cases: (1) hereditary succession (Art.12, Sec.7); and (2) natural-born Filipinos who have lost their Philippine citizenship, subject to limitations imposed by law (Art.12, Sec.8). Foreigners are also limited to 40% participation in any business undertaking to explore, develop, and use Philippine natural resources (Art.12, Sec.2)

The Estrada government wants to lift the limitation on foreign investments on our natural resources because it claims that the government is unable to put up the 60% capital requirement to enable foreigners to invest up to 40% in these areas. On the other hand, it is argued that foreign investors find land ownership indispensable for a stable business. Certainly, lifting the limitation on foreign investments in our natural resources will most likely result in increased foreign investments in the country, however, this move could also lead to serious impairment of the right of access of Filipinos, particularly the vulnerable groups, to these resources.

For millions of landless and homeless Filipinos, foreign ownership of land could be disastrous. It will push up land prices in urban areas and put them further beyond the reach of the urban poor. In rural areas, although the proposal is limited to industrial and commercial lands, it may cause land speculation and encourage landowners to convert agricultural lands to industrial and commercial lands. This will further decrease lands available for the agrarian reform program and deprive farmers of their constitutional right to own lands they till.

The proposal to increase foreign access to our natural resources could also result in the limited access of indigenous groups to their ancestral lands, lead to their displacement and threaten their survival. Fisherfolk groups will also be at risk, since alien exploitation of our marine resources will further aggravate the problem of over-fishing, affect bio-diversity and lower marine catch. With all their sophisticated technology and financial resources, foreign exploitation of our natural resources will ensure their early depletion and hasten the destruction of our environment.

In particular, the proposals will infringe on the following rights of vulnerable groups:

- a. Right to land and the right to food: if there is less access to land and natural resources, farmers, fisherfolk and indigenous peoples will be deprived of their means and of their right to food. Where the right to food is affected, the right to life itself and all other rights are threatened.
- b. Right to culture: for indigenous peoples, culture requires a close link to their ancestral lands. If they are deprived of access to their ancestral lands, their culture will suffer.
- c. Right to shelter: the urban poor will have less chances of owning shelter since capital in urban areas will likely be directed at real state investments.

Since human rights are indivisible, interdependent and interrelated, the impairment of these rights will also negate the right to work, the right to health, the right to an adequate standard of living, and the meaningful exercise of civil and political rights of vulnerable groups. For without food and shelter, a person cannot expect to be healthy, to benefit from education or to actively participate in governance.

Instead of restricting the access of vulnerable groups to these essential but finite resources, the government should enhance their right and capability to access them by creating the necessary conditions for their access and protect such access from intrusion by more powerful, influential and wealthy elements, both local and foreign.

IV. PUBLIC UTILITIES, EDUCATION, MASS MEDIA AND ADVERTISING

Under the Constitution, foreigners cannot invest in mass media. They are limited to 40% participation in the operation of public utilities, 40% participation in the ownership of education institutions, and 30% participation in any advertising business in the Philippines.

By proposing that these limitations on foreign investments be abolished, the government hopes to achieve the following:

- a. Improve public utilities (e.g., water, power transportation and telecommunications) since these are the backbone of the country's future development. The government also argues Filipinos are unable to put up the needed 60% capital to enable foreigners to invest up to 40% participation in this area.
- b. Improve the quality of education which has declined due to the proliferation of substandard schools which lack quality teachers and facilities. Moreover, foreign-owned schools will facilitate the entry into the country of new ideas from the outside world.

- c. Upgrade the country's information technology and enhance access to information.

Increased foreign investment in these areas will definitely improve the delivery of basic services, enhance quality education, and facilitate information dissemination in the country. The satisfaction of these needs will in turn have a positive impact on other civil, political, social, economic and cultural rights of the people. However, these are areas of investment which are sensitive and vital not only to the economy but also the culture and sovereignty of the Filipino people. The impact of the proposals on our culture, our security and on governance in the country are equally, if not more, important considerations.

Opening up public utilities (e.g., telecommunications), media, advertising and schools to foreign control will enable foreigners to exercise unwanted influence on the hearts and minds of Filipinos. For instance, if foreigners are allowed to control media establishments, they will have some control over the content and manner of dissemination of information. This will enable them to manipulate public opinion to suit their interests and exert pressure on the political and economic decision-making processes of the country.

Foreign influence per se is not the evil which is sought to be avoided; it is inevitable. It is part of our past, our present and future. Filipinos are the product of a confluence of western and eastern cultures. Even now, foreigners continue to exercise considerable influence over Filipinos through their control of the global economy and the global media. Many Filipinos continue to pursue post-graduate studies abroad. The risk in the proposed amendments, lies in the diminished capacity of the government to prevent or control the negative or destructive elements of foreign technology and influence. This is exemplified clearly by the helplessness of the government in regulating pornography in the Internet.

Another area of concern is the likelihood that foreign ownership of enterprises engaged in public utilities, education, mass media, and advertising will limit the access of ordinary Filipinos, especially vulnerable groups to these services or facilities. Access of the poor to these services or facilities is a primary consideration because they are the intended beneficiaries of the proposed constitutional amendments. If for instance, foreign-owned public utilities and schools charge prohibitive fees, the developments brought about by foreign investments would be meaningless to the majority of the people.

Allowing foreign control over public utilities, educational institutions, media and advertising can therefore have negative consequences on the following rights of Filipinos: the right to self-determination, the right to information, the right to culture, the right of free speech and expression (press freedom), and the right to education.

V. CLIPPING THE POWER OF THE SUPREME COURT OVER ECONOMIC QUESTIONS

The Estrada government wants to clip the powers of the Supreme Court to prevent its interference in business and economic matters. Under the 1987 Constitution, the Supreme Court is vested with powers which allow it to rule on cases involving economic issues. The proposal is based on the view that economic matters are beyond the court's area of expertise, and that the Court's rulings on economic questions have become a hindrance to the country's economic development. The sentiment of business is that the Supreme Court should not substitute its own business judgement for that of businessmen. (President's speech, Aug. 9, 1999)

The Supreme Court's power to rule on economic matters is based on the constitution's definition of judicial power. Article VIII, Section 1(k) of the 1987 Constitution defines judicial power as including "the duty of the courts of justice...to 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". This duty has been introduced to allow the Court to rule even on "political questions", in view of the frequency with which the Court to rule even on "political questions", in view of the frequency with which the Court refused to rule on acts of former President Marcos during Martial law under the cloak of the "political question" doctrine (which restrains the court from ruling on matters involving policies or the exercise of powers exclusively vested by the Constitution in the political branches of government.)

The exercise of this power of the Court to nullify any act of the legislative and executive branches of the government which constitutes a grave abuse of discretion, even if it involved economic questions has allegedly discouraged foreign investments in the country. It is claimed that it weakens the stability and security of transactions entered by foreigners involving the government. The government expects that by limiting such power of the Court, investor confidence in the country will increase.

It is not easy, however, to determine what is purely an economic issue. Controversies involving economic questions often overlap with non-economic interests. Any foreign investment undertaking will certainly require compliance with existing laws, policies and procedures, and must not be inconsistent with public interest. Moreover, whether or not an issue is purely economic is immaterial when it involves rights which are entitled to judicial protection. Prohibiting the Supreme Court from ruling on economic matters involving justifiable rights would, in effect curtail its power to protect the rights of the people and the interests of the nation. It would also limit the people's right to redress their grievances in cases involving economic issues and impair their constitutional rights to due process and to equal protection of the laws. The government should be more concerned with protecting and enhancing legal remedies rather than limiting them.

Such a proposal would also undermine the system of checks and balances in our government. The Supreme Court arbitrates on constitutional questions to ensure

there is no abuse in the exercise of governmental powers by the President and by Congress. The proposal, which seeks to exempt the decisions of government agencies on economic issues from judicial review, will clearly emasculate the judiciary's role in our system of government and encourage authoritarian tendencies on the part of the executive department. In the end, democratic governance in the Philippines will suffer.

VI. CONCLUSIONS AND RECOMMENDATIONS

This paper has examined the merits of the charter change proposals from purely human rights perspective. Based on this study, it is submitted that the proposals for constitutional amendments should be reconsidered in view of their probable adverse effects on the rights of Filipinos.

In examining each of the political reform proposals, the following conclusions may be drawn:

- a. The presidential system is preferable because, by allowing the people to vote for the President directly, it gives greater importance to the people's right to participate in governance than the parliamentary system.
- b. Federalism is good because it enhances political participation by the people and promotes the right of self-determination. However, it must not foster disunity and must be gradual.
- c. Having more senators and electing them by region may strengthen political rights, but genuine representation is guaranteed only mainly by a responsible exercise of the right to vote.
- d. Term extensions are, under existing circumstances violative of the people's rights to take part in public affairs, to be elected, and to have equal access to public service.
- e. The package-deal election of President and Vice-President deprives the people of their right to choose the Vice President and imposes on them the choice of political parties.

The writer's conclusions regarding the economic reform proposals, however, are less categorical and more prescriptive. The realization of human rights, particularly economic, social and cultural rights, requires resources to create conditions for their protection and fulfillment. Under the International Covenant on Economic, Social and Cultural rights (ICESCR), the government is obligated to protect and fulfill these rights by taking steps "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights..." (Article 2, par. 1 of ICESCR)

In proposing the constitutional amendments to globalize the economy, the government aims to generate the resources needed to alleviate poverty, promote employment, provide basic services and thereby address the human rights of Filipinos.

Globalization comes with mixed blessings. The proposed amendments could also lead to the impairment of basic rights of Filipinos, particularly the vulnerable groups. This will certainly be the case if the proposed amendments are implemented under existing political and economic conditions which will make it difficult for ordinary Filipinos to enjoy the benefits of a globalized economy.

At present, ordinary Filipinos, especially vulnerable groups, barely have access to resources needed to satisfy their basic needs. Farmers still struggle for survival despite the agrarian reform program. Homeless millions have yet to own shelter. A just wage remains a dream for the ordinary worker. The gap between the rich and the poor continues to widen. This sad plight can easily be attributed to the government's lack of resources. To a large extent, however, it is also due to laws, policies, programs, structures and practices which hinder or prevent access by the poor to resources, or allow greater access by advantaged groups. If these concerns are not addressed as priorities, it is not unreasonable to expect this problem of access to worsen once the economy is fully globalized. In a globalized economy, the government, even if it is willing, will have less capacity to regulate or control the activities of transnational corporations. In other words, it will have greater difficulty in ensuring that available resources, particularly those in foreign hands, be devoted to satisfy basic needs and be made more accessible to the people.

If the government is bent on globalizing the economy, and because the forces of globalization are unstoppable, it would be advisable for the government to create, as a matter of priority, the necessary conditions and infrastructures to prepare the country and the people to deal with the requirements of globalization so that everyone will enjoy the benefits. This means, for example, drafting the necessary dressing bureaucratic abuses and red tape, re-allocating resources, and controlling or eradicating graft and corruption. It also means the setting up of safety nets to cushion the negative effects of globalization.

The government may also look at other means of generating resources from within, and at improving existing programs to generate resources. These measures could include increasing wealth and "sin" taxes, improving tax collection, and taking bolder steps to ensure the success of the agrarian reform program.

Economic growth should not be the sole consideration in opening up our economy to foreigners for the purpose of developing the country. Social justice, democracy and the promotion and protection of human rights are also essential dimensions of sustainable human development. Globalizing the economy must not be pursued at their expense. Unless the government gives priority to creating the preconditions to globalization, the proposed constitutional amendments may, instead of progress, result in regress and end up causing more violations of rights of ordinary Filipinos.