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Legal and Constitutional Disputes and the Philippine Economy

By

Gerardo P. Sicat*

I. Introduction

The starting point of this essay is the observation that many rulings of the courts of law in the country affect the economy, some of them slowing down the nation's economic performance thereby causing loss of economic welfare for many citizens. Since all decisions are based in the law, there is need to understand what types of law lead to these interpretations.

*Professor Emeritus of Economics, University of the Philippines. In much of this essay, the author puts forward his observations and reflections on the country's long term economic performance, viewed from a career perspective: as former government economic policy maker, as a long time economic professional who has worked on Philippine economic development, and as a citizen committed to the improvement of the living standards and future wellbeing of the succeeding generations.

A dramatic example of this problem is the constitutionality decision of the Supreme Court on mining contract that permitted 100% foreign owned mining firms to participate in a production sharing contract with the Philippine government. Initially, the Supreme Court ruled this contract as being in violation of the Constitution. In the early ruling, the court invoked many principles regarding the issue, one of which is the issue of patrimony of the nation over the exploitation of natural resources – a principle invoked in the constitution. The other principles included laws about the rights of local and indigenous communities and environmental care.

In the appeal of its own ruling, the Supreme Court reversed itself.[1] This recent and more final ruling was greeted with general approval in many sectors of the economy. At last, by its decision, the court recognized indirectly the vehicle that was already in use concerning service contract arrangements that the government had undertaken to promote greater exploration and exploitation of country's natural resources. Such a principle was adopted during the 1970s in relation with the encouragement of energy exploration and exploitation of offshore mineral resources that had led to discoveries of petroleum and gas fields in the country. Facing the same problems of natural resource exploitation issues, other developing countries have adopted the same principle to encourage foreign capital to discover and exploit the finds for to raise their energy supplies. The Supreme Court ruling in 2005 simply demonstrates how far behind the country had been in encouraging foreign capital to help the country in realizing the economic benefits from its large endowment of natural resources.

Section II discusses the constitutional restrictions on the nationality of capital in specific areas of the economy. By putting the economic protection clauses in the constitution and not in ordinary legislation, the economic restrictions take the form of laws that are almost immutable – they are *iron laws* of economic protection. Section III examines statistics of legal cases filed in the country's courts and the backlog of cases in court are examined. It is a general discussion and covers all kinds of cases, including the burden derived from criminal and civil cases that sum up the work of the judicial system.

The main body of the essay discusses three major impacts of these provisions on the branches of principal branches of government. Section IV discusses consequences of the economic provisions on the work of the executive and legislative branches of the government. Section V discusses the implications on the work of the courts and the administration of justice. Section VI relates these provisions on the business processes that affect the investment and business climate.

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[1] In the majority decision that Chief Justice Panganiban penned concerning the constitutionality petition filed by the La Bugal-B'laan Tribal Association, Inc. against the mining law, the Supreme Court stated: "All mineral resources are owned by the State. Their exploration, development and utilization (EDU) must always be subject to the full control and supervision of the State. More specifically, given the inadequacy of Filipino capital and technology in *large-scale* EDU activities, the State may secure the help of foreign companies in all relevant matters -- especially financial and technical assistance -- provided that, at all times, the State maintains its right of full control….The Constitution should be read in broad, life-giving strokes. It should not be used to strangulate economic growth or to serve narrow, parochial interests. Rather, it should be construed to grant the President and Congress sufficient discretion and reasonable leeway to enable them to attract foreign investments and expertise, as well as to secure for our people and our posterity the blessings of prosperity and peace. On the basis of this control standard, this Court upholds the constitutionality of the Philippine Mining Law, its Implementing Rules and Regulations…." G.R. No. 127882. December 1, 2004.

With the use of the Doing Business surveys of the World Bank, the Philippines is placed in comparative context with other countries in its immediate region and the world at large.

The final section (section VII) deals with the overall assessment of the various effects of the legal framework on the national economy. This last section is divided into three parts. In part A, a historical perspective is provided on the implications of the economic restrictions especially in the context of the special economic relations with the United States that led to the parity rights amendments in favor of American citizens. In part B, the economic policy regime under the 1935 constitution continued to take effect under the 1987 Constitution with the exception that some areas of restrictions even widened. This took place even as the country undertook to continue the reforms of economic policy and attempted to improve the foreign investment climates. Finally, in part C a grand conclusion is attempted. The economic restrictions on foreign capital in critical sectors made the Philippine economy fail to appropriate the beneficial initial endowments available at the start of independence. Instead of being therefore one of the vanguards of East Asian development, as experts had earlier surmised, the country became a regional laggard in growth and industrialization.

II. The Constitutional framework of Philippine economic development policy since 1935

The framers of the Philippine constitution contributed to the tangled framework of economic policy dealing with capital, an indispensable factor of economic production. The form in which this took place started simply from a desire expressed by the country's emergent leaders to assert Filipino control of the country's future destiny. Rules that were written in the constitution would guide the use of foreign capital in industry.

The focus of the constitution on specific economic provisions zeroed in on land ownership, on the citizenship qualifications for the ownership of public utilities and of the rights to exploit the country's natural resources. The constitution prohibited foreign ownership of land. It instituted citizenship requirements for corporations engaged in the operation of public utilities and in the exploitation of natural resources. Through these restrictions, these important industries and resources would be kept in the control of Filipino citizens. By writing these rules in the constitution, the standards for revising them were equated with the rules for amending the country's basic political document.[2]

Specifically, the constitution required that only corporations owned and controlled by *sixty* percent Filipino capital would be allowed to participate in these sectors. That percentage ownership came out to be too restrictive, as future experience would indicate. Filipino capital was not in great abundance to take over large public utilities. By putting this barrier in the constitution, it became

[2] In general, the constitutional framers were essentially of one mind – to restrict foreign capital in specific areas of the economy so as to allocate the benefits of progress to Filipinos. The debate that dominated the final decision of the topic was in relation to the degree of control by Filipinos. The sixty percent degree of control for Filipino corporate control was a compromise between those who favored a more restrictive provision and those who favored a lower level of restriction. This stemmed from a belief that foreign capital competed with domestic capital and that in such competition domestic capital would need state protection to survive. See Emmanuel de Dios, "Nationalism and the strong state in the 1935 Philippine constitution, The Philippine Review of Economics, vol. 39, no. 1, June 2002.

difficult to institute changes in those provisions. In the realm of ordinary legislation, the adjustments could have been undertaken with the relative ease of passing an ordinary law (compared to a constitutional amendment) that required revision. To change a provision of the constitution required a higher bar of effort. No one had thought at the time of the framing of the constitution that a grave mistake of strategy was being committed. Making the rules in the constitution made them them difficult to amend. They would therefore become *iron laws* of behavior affecting capital, both foreign and domestic.

The early leaders of independence played the role of the overzealous guardian of the nation and of the economy. In trying to institute protection clauses for Filipino capital, they introduced rigidities in policy making that made it difficult to make any timely adjustments to economic policies that touched on these sectors of the economy. The nascent leadership substituted drastic changes in rules that would disturb the pattern of development that had taken place over time in the country which at that time had accounted for the country's strong economic progress.

A major consequence of introducing these provisions was to cause those directly adversely affected – American citizens – to seek the help of their government against these changes in provisions on capital that affected them. They would not be forced out of their existing investments without waging a fight on the strength of their own influence on their own government. Immediately after the war and in full anticipation of political independence but before United States congressional action on the grant of rehabilitation aid for war damage and a bilateral trade agreement could be made, the US government pressured the Philippine government to grant citizenship rights to American citizens in economic and business operations through an amendment of the country's 1935 Constitution. This was the first of the major economic debates on the Constitutional amendments – the grant of parity rights to American citizens. As a result of that amendment, parity rights were given to American citizens. As interpreted by the Supreme Court later,[3] those rights ended with the end of the Laurel-Langley Agreement in 1974.

As Filipino leaders faced the prospects of amending the constitution in 1946 to accommodate the American demand for parity rights, they simply added to the rights of Filipino citizenship those of American citizens. An alternative process of striking out the economic provisions in the constitution and leaving the matter of foreign investment legislation to later enactments of Congress would have been the appropriate solution then. It would have achieved the same result for Americans citizens, and Filipinos would not have created the double standards for foreigners that would make it difficult to deal with foreign investment issues of the future. For that route would have opened the way for a more equal treatment of all foreigners in matters of the economy. That solution would have put all foreigners on equal footing, and the issue of national treatment would not become the touchy issue that it would become later on for a young and still inexperienced nation. But apparently, no one thought of this Solomonic answer to the problem that was posed at the time.

[3] In a decision on a land case owned by an American citizen, the issue before the court was whether the ownership right enjoyed with parity ceased after the termination of the Laurel-Langley Agreement. In a majority decision penned by Justice J.B.L. Reyes, the Supreme Court ruled in 1971 that indeed, American ownership rights ended with the termination of parity rights.

Some changes in political provisions of the constitution were pursued and succeeded in getting amended.[4] To save face, Filipino leaders used the need for rehabilitation and other economic benefits from the inflow of war damage and other resources as important reasons for making the constitutional changes. But no Filipino leader had directly posed the need to remove the restrictive economic provisions in the constitutional document.[5] Thus, the constitutional legislation on economic matters was written into the Philippine Constitution as a part of law. Such provisions would be more difficult to compared to laws that are passed by ordinary legislation. The policy concerning foreign capital survived even during the major revisions of the Constitution that happened in 1972 and in 1987.

In fact, in 1987, the principle of the legislation was extended even more to other sectors of the economy. In that year, the country was experiencing a kind of euphoria with the restoration of political freedoms after successfully expelling the dictatorship of the previous years. In promulgating a new constitution, the economic provisions were not only completely ignored but there were further restrictions that were introduced to further limit the role of foreign capital in other sectors of the economy. Thus, the country continued to be hampered in its search for a higher degree of foreign direct capital to stimulate the progress of the nation's various industries.

Intricate provisions of law in the Philippine Constitution were responsible in large part for the difficulties in pursuing effective economic policy making in the country. An important window of opportunity was missed at the time of independence in facilitating effective policy making to achieve economic development of the country. That critical time could have paved the way for a more rapid accumulation of capital and technology by opening further toward international markets. But the opposite happened: the barricades that existed were further enhanced, not liberalized.

The history of Philippine postwar industrial development paved the way for this attitude. Instead of opening the newly independent country to the world economy and using that to advantage, the country closed the window of opportunity early. It encouraged the growth of a perverse type of nationalism that was to sap the nation's potential for comparative advantage and for competition in terms of the best use of its rich endowment of labor, managerial talent developed through a well-endowed educational pool at the beginning of independence, natural resources and so on. This misdirection reached many sectors of the economy, firstly in stifling the growth of efficient agricultural and industrial expansion at a time of unprecedented growth of the world economy. It affected the framing of laws and therefore the direction of jurisprudence of the country regarding

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[4] Almost immediately the Commonwealth presidency of Manuel Quezon, constitutional changes covering the political provisions were made. The election of senators was amended to make the voting for members of the Senate from regional to nationwide voting. The other amendment reduced the fixed term of six years for the presidency to four years with reelection for a second term for a maximum of eight years. The second constitutional change directly benefited Quezon as sitting president. The amendment of the economic provisions took place in 1946 to allow parity rights to American citizens in the enjoyment of economic rights. (This is discussed more fully in this paper.) The next set of political changes in the Constitution were undertaken during the revision of the Constitution in 1973 (during the time of Marcos) and the adoption of the 1987 Constitution (under Corazon Aquino) after the people power revolution of 1986.

[5] Joseph Estrada proposed to change the economic provisions early in his presidency. For the purpose of studying the matter, he created a review committee to examine the proposed changes. See *Preparatory Commission on Constitutional Reforms*, 1999.However, he quietly retreated from the advocacy once he began to feel the political heat from his proposal and the other problems that bedeviled his hold on the presidency.

investments and development issues. Instead of promoting a more open economy, it promoted an economy that was an inward-looking and protectionist in the sum of the parts.

Thus, from the beginning of independence, the economic provisions of the constitution provided the backdrop for a set of complicated economic policies that could not be altered easily. Ordinary legislation on economic issues had to pay homage to specific barriers placed within the constitutional framework effectively providing some check on the improved flows of foreign capital in critical sectors. Of course, that was precisely the reason the early leaders placed these provisions in the constitution: to make them difficult to amend through ordinary legislation. The higher level of legal standing of the constitutional provisions provided a further backdrop for the country's evolution into more complicating laws and regulations that raised the strictures of protection disguised as nationalism, more restrictive legislation on economic issues extending toward other sectors of the economy.

From the basic tenets of these restrictive constitutional provisions on foreign capital came a series of related inward looking policies. For instance, under the guise of further policies to protect Filipino citizens from competition, retail trade nationalization took place. Industrial, banking, financial, and agricultural activities followed the pattern set in the constitution. It was as if the economic provisions in the constitution provided the basic theme or the baton in a symphonic piece. All the players within the orchestra played to the tune.

Various mood changes in the government efforts to change these patterns of development took place during this period, but the main provisions remained unquestioned. By this time, the developments of economic policies helped to buttress the favored sectors with further coalition within the political framework and it became all the more hard to reform the system. Only major crises would bring about the pressure to undertake redirections in policies. But the constitutional restrictions provided a major constant in the nature of economic policy pertaining to foreign capital.

An additional provision that extends the reach of the constitution in economic matters is that on "grave abuse" as a cause for expanding the mandate of the courts of justice, a unique provision contained in the 1987 Constitution. According to this provision (Section 1 of Article VIII):

> Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and 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 provision introduced further ammunition for any party to invoke *grave abuse* in relation to any legal provision that caused economic and other injury to any sector or person. The elastic implications of grave abuse allowed its potential use to any types of injury that might be presumed to be acts of government. This phrase opened a Pandora's box toward justifying litigations resulting from decisions of the government or of any of its instrumentalities that affected economic benefits among citizens.

III. The Courts of Justice as Statistics

The demand for litigations is a major feature of the Philippine justice system. A brief assessment of this feature of the country's court system helps to provide some perspective concerning the country's delivery of justice and the effects that this has on the whole country's allocation of scarce court resources.

New cases, caseloads, and backlogs

The country's courts are filled with lawsuits. Chart 1 shows the number of newly filed cases by types of trial courts of the country from 1998 to 2005. The number of cases filed per year is high among five distinctly different trial courts. In 1998, the number of newly filed cases was 593,416 cases. In 2005, this number fell to 383,582 cases. The bulk of these cases are filed in the regional trial courts and in the metropolitan trial courts. The number of newly filed cases leveled off in 2001, and this pattern continued to 2005.

Chart 1. Newly Filed Cases in Trial Courts

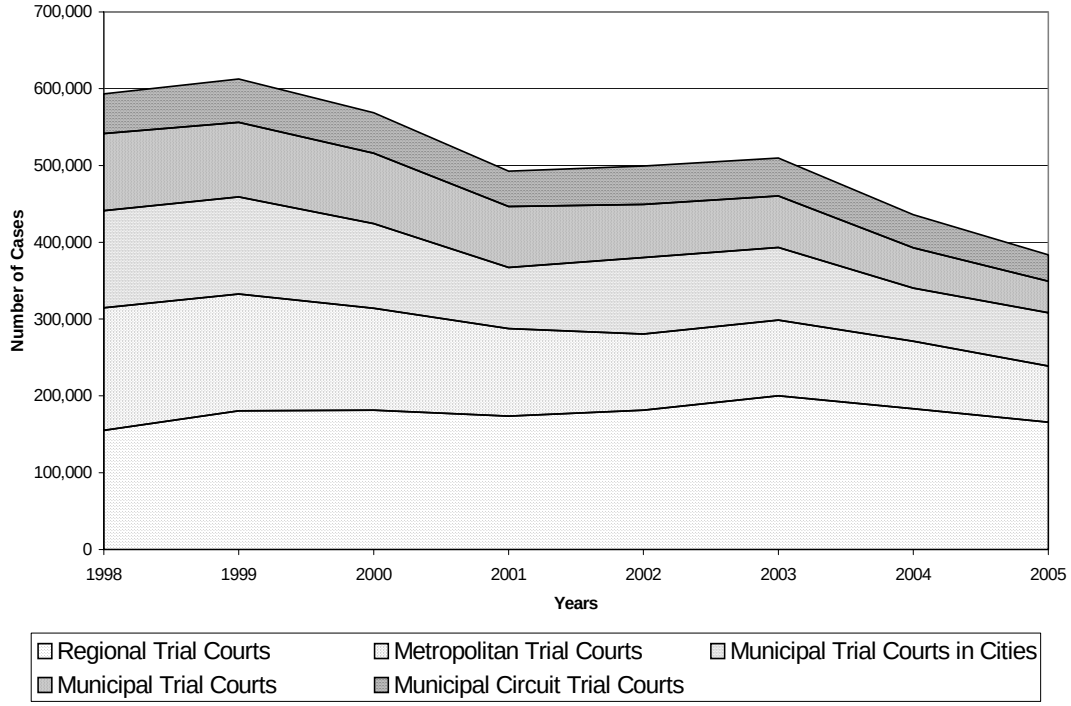
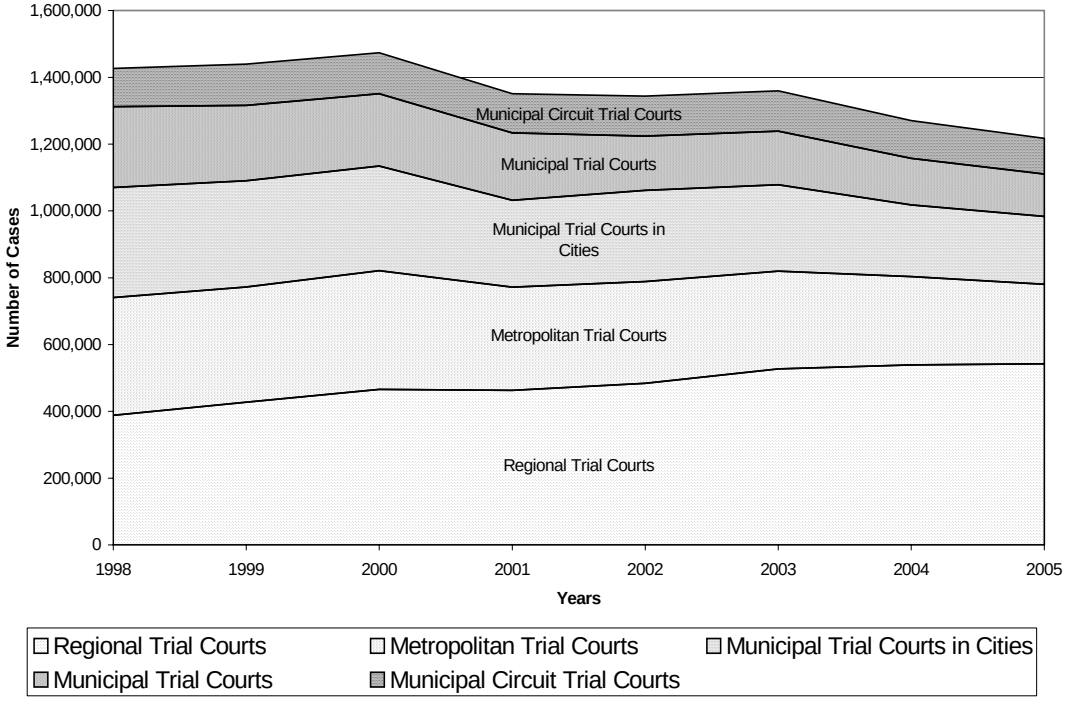


Chart 2 presents a corresponding graph for the number of caseloads of the courts by type of courts. As expected, the main bulk of caseloads are concentrated in the lower courts. The caseload represents the amount of cases pending, including those that are not yet settled by the courts. Therefore, the caseload includes the set of newly filed cases. Each type of court accumulates its own caseloads during the year by the amount of cases that remain undecided during the reporting period. The trial courts are the working pillars of the country's justice system. They represent the first courts

of trial in various municipalities, cities and regional subdivisions of the country's court system.[6]

Chart 2. Court Caseload in the Trial Courts



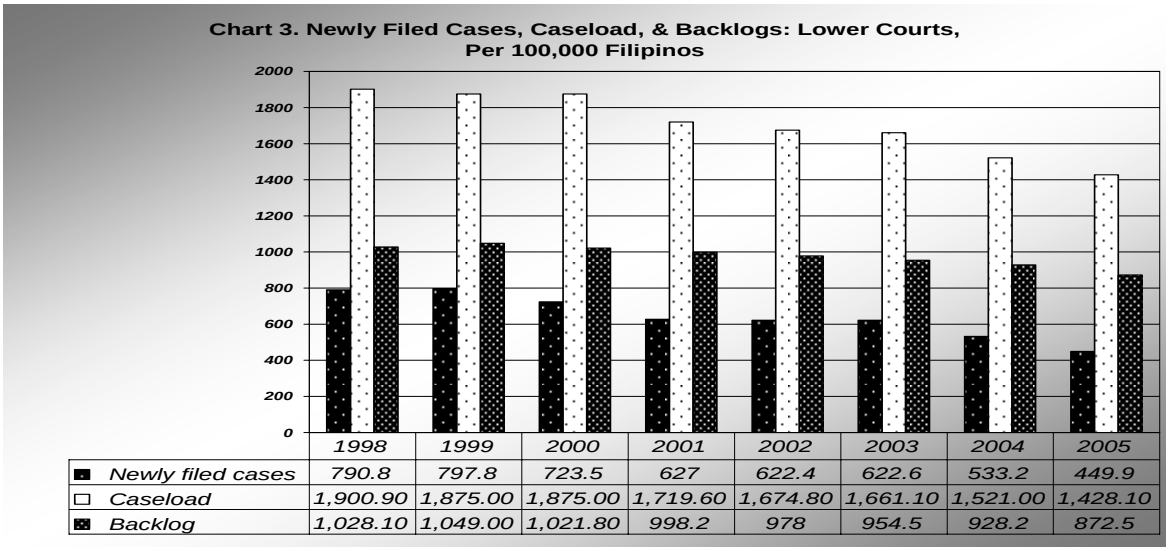
The fall in the number of newly filed cases should lead to the reduction of caseloads since new cases add only to the cases not disposed of in the previous year. However, the caseloads of the courts do not indicate the same rate of fall. The courts are not able to dispose of the outstanding cases at the same rate as they receive the new filings in court. Charts 1 and 2 provide information on data for the lower trial courts, not for the high courts. Similar data involving the higher courts when superimposed with those the amount of cases in the lower courts disappear from the naked eye when added to the chart. They are only a tiny speck in the figures. They are few in number in relation to the magnitudes of cases in the lower courts.

Chart 3 presents a summary picture of the burden on the justice system by converting the data previously shown (on newly filed cases, caseloads, and backlogs of court) by relating them to the population level – per 100,000 inhabitants. (This measure conforms to similar data on a few countries where comparative data are available.) Court backlogs are high. They have not fallen as drastically as the drop in the new cases filed. The country's population increased from 75 million in 1998 to 85 million in 2005. The numerator (number of cases filed, of caseloads, or of backblogs) is divided by the population (denominator). The resulting numbers appear more impressive than just viewing the number of cases. There were 790.8 cases newly filed cases per 100,000 Filipinos in

[6] The Philippine Statistical Yearbook, published by the National Census and Statistics Office, provides information on the cases brought before the country's justice system. For purposes of the presentation here, the shari'a courts that were set up in the Muslim areas of the country are not included. These courts are very few in number and have no statistical effect.

1998, but in 2005 this fell to 449.9 cases per 100,000 Filipinos. The caseload of the courts per 100,000 inhabitants fell from 1,900.9 cases in 1998 to 1,428.1 cases in 2005. This means that the backlog of cases fell from 1,028.1 cases in 1998 to 872.5 cases in 2005. This means that the drop in backlogs although apparent is not as sharp as the drop in number of cases per population.

Translated in terms of cases per 1,000 inhabitants, there are 1.4 court cases in the court dockets in 2005. Although the backlog is falling, by 2005, the number of backlogs docketed is substantial relative to the number of courts and judges – in short, the resources available to the justice system. For almost every 1,000 Filipinos, almost one court case is awaiting a final decision in the courts of law.



	1998	1999	2000	2001	2002	2003	2004	2005
Newly filed cases	790.8	797.8	723.5	627	622.4	622.6	533.2	449.9
Caseload	1,900.90	1,875.00	1,875.00	1,719.60	1,674.80	1,661.10	1,521.00	1,428.10
Backlog	1,028.10	1,049.00	1,021.80	998.2	978	954.5	928.2	872.5

Compared with Latin American countries, the new cases filings (for which comparative data are available) are even fewer. In terms of per 100,000 inhabitants, Brazil has 2,739 new cases; Panama, 1,656; Peru, 2,262. Ecuador has a very high number of new cases, 10,467. In more industrial countries, the number of new cases filed in first-instance courts is much higher. For instance, the corresponding per 100,000 inhabitants statistics for England and Wales is 4,718; in France, 2,242; in Germany 2,655; and Italy, 1,227.[7] The rudimentary information suggests that as a country's per capita output rises, the amount of litigations are likely to be higher. But the rate of increase of the number of litigations could be at a diminishing rate.

The efficiency of courts in settling the cases docketed before them is related to the number of judges in the system. There are relatively few judges in the Philippines in relation to the courts filed before the courts. This is a major cause of backlogs. That the number of judges per 100,000 of population in the Philippines is almost similar to those in some Latin American countries probably indicates that these other countries face the same serious problems in terms of court dockets being clogged. There are 2 judges per 100,000 population in the Philippines, the same as in the case of Brazil. The phenomenon of court backlogs is not a unique problem of the Philippine court system. Some countries that also complain about the problem of the courts having too many cases have more

[7] These data are from Table 6.1, World Bank, World Development Report 2002, p. 120. Comparative country data are taken from the studies of Contini (2000) and Buscaglia and Dakolias (1996), cited in this report.

judges per 100,000 people. There are 5 judges for England and Wales, for Italy 12 and for Germany 27.[8]

Comparative data on court cases in other countries are rough benchmarks for comparison. Apparent similarity in information about backlogs and caseloads of the courts might hide critically unique issues in each country. Thus, even though many countries suffer from the same problems of the judiciary – too many cases, too much backlogs, and too few judges to work on the cases – it is important to examine the issues confronting the Philippine judiciary with a focused view on the specific issues needing attention.

Backlogs: high courts vs. lower courts

Attention now is given to a comparison of the lower courts and the higher courts in terms of newly filed cases, caseloads, and resulting backlogs. It is expected that the number of cases before higher courts is considerably fewer in number compared to those filed in the lower courts. The cases that get docketed in the higher courts are mainly those that are made on appeal or are matters of specialized legal interest to the state because they concern specific court cases that are required to be filed in these specialized courts.

The total number of new cases in the high courts – for the Supreme Court, the Court of Appeals, the Sandiganbayan (corruption court), and the court of Tax Appeal – in 2004 were 17,428 cases compared to 458,367 cases in the lower courts. Thus all new cases in the higher courts were only 3.8 percent of the total number of cases filed in the lower courts. The higher courts have a case load equivalent to 49,662 cases compared to the 1,302,686 for the lower courts. This again is 3.8 percent of the total caseload of the lower courts.

Instead of comparing the number of cases and backlogs, a better measure of the burden of the courts is the ratio of the backlog of cases as a percent of the total caseloads. Such data were therefore calculated and these are provided for the major types of courts in Chart 4. This chart provides comparative information about the backlog ratios between different types of high courts and of the lower trial courts. Chart 5, however, provide a summary information about the backlog ratios of the high courts compared to those of the lower courts.

Chart 4 therefore shows court backlog ratios for the Supreme Court, the Court of Appeals, the Sandiganbayan, and the Court of Tax Appeals – all referred to as higher courts. Against this information also are the corresponding backlog ratios for regional trial courts, metropolitan trial courts, municipal trial courts located in the cities, municipal trial courts, and municipal circuit trial courts.

[8] See the same table source referred to in the previous footnote.

Chart 4. Backlog to Caseload Ratios, by Type of Courts

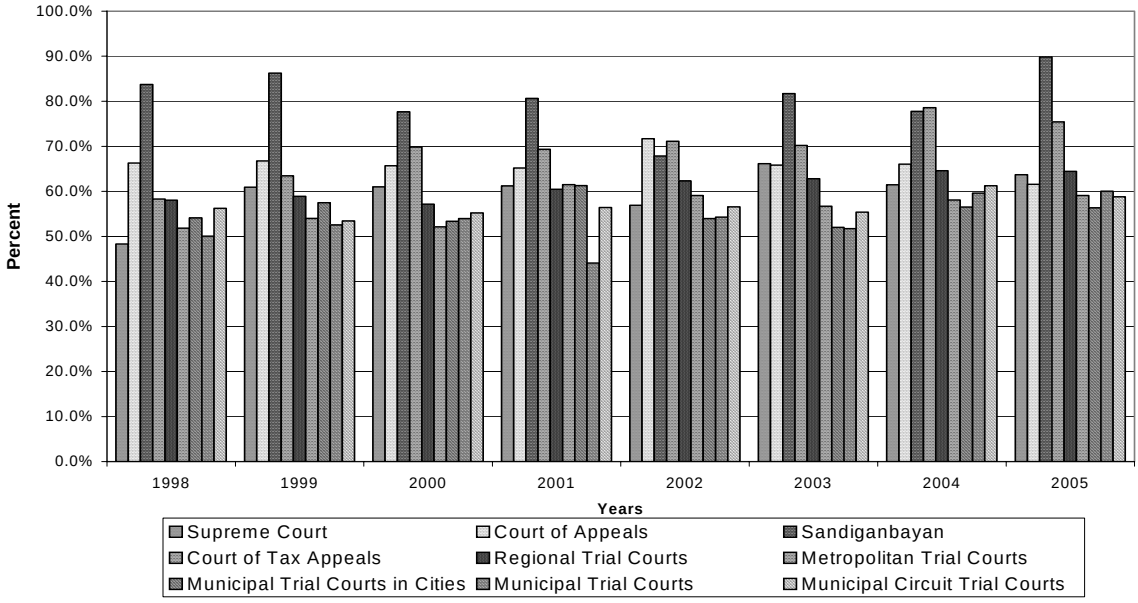
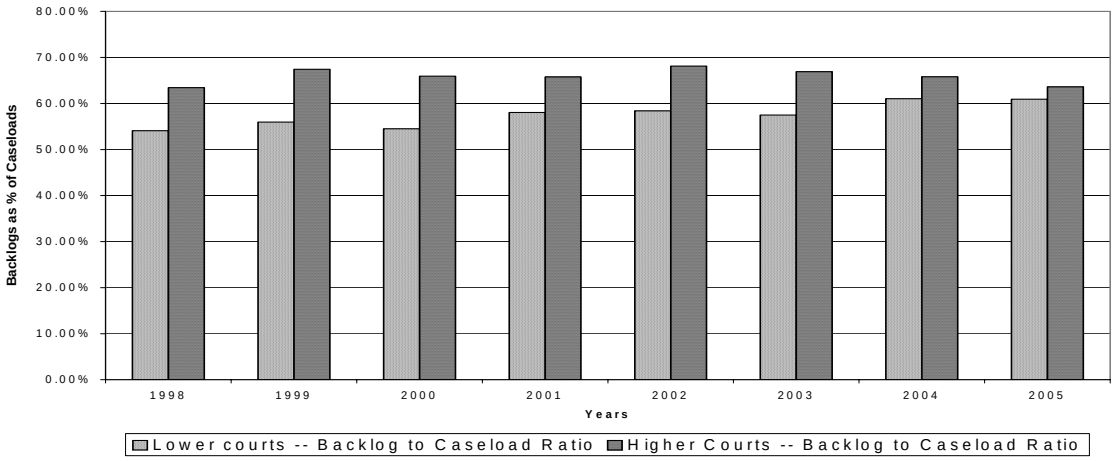


Chart 5. Summary Comparison -- Backlog to Caseload Ratios



The higher courts have a larger backlog to caseload ratios compared to the same ratios for the lower courts. Of the higher courts, the corruption courts (Sandiganbayan) have the highest backlogs, followed by the court of Tax Appeal. The corruption courts have a high backlog because of the highly political nature of some of the corruption cases brought before it. They also include the martial law plunder cases related to Ferdinand Marcos and to Joseph Estrada (discussed in part in the Appendix 2.) The Supreme Court also has a high backlog. A characteristic observed is that the Supreme Court's backlog is higher than those of the lower courts. In a sense, the low backlog of the Supreme Court is illusory because it is the final arbiter of cases that are backlogged in the other higher courts. Few of those cases would end up only in their respective benches for their decisions when rendered would have to be reviewed by the Supreme Court either by way of appeal or by other review mechanism. Cases that are decided which leave litigants unhappy would often appeal the rulings to the Supreme Court for final judgment.

Chart 5 provides the backlog ratios of the higher courts and the lower courts as separate groups. As a curiousity, grouping the courts by their weighted average based on the weights derived from new cases or from the distribution of total caseloads does not produce any significant change in the ratios (see the Appendix tables).

These estimates show that the high courts have higher backlog ratios compared to the lower courts. This is not surprising. The higher courts review the cases that are brought to them by appeal from the lower courts. As collegial bodies, the higher courts have more involved decision-making processes that often require longer debates because of the need to reach consensual judgment. A single judge can render a judgment quicker than a committee of judges. The simple average for all the courts for backlog to caseload ratio ranges from 63 percent to 68 percent. Among the lower courts, this ratio ranges from 54 percent to 60 percent. In other words, the backlog ratio is definitely lower in the lower courts. This is a difference of around 5 percentage points in relation to the total caseloads for each set of courts. In some years, it is a little more.[9]

The decision-making practices of each level of courts determine in part the heavy burden that might accumulates in their dockets. This is illustrated by the flow of cases and the decisions that are taken thereafter in the case of appeals to the Supreme Court. The courts with multiple memberships can work as independent divisions of the courts so that different cases can be heard simultaneously in different divisions of the courts. This is often the case for matters that reach the higher courts on appeal. But there are questions that require en banc meetings of the courts. The Supreme Court hears constitutional issues before it en banc. No amount of numbers in the membership can speed up such a process. In fact, the more members there are the likelihood of a more slow hearing of the case. Thus, these questions can consume enormous amount of time involving all the justices working together before decisions are finally reached.

De-clogging the court dockets

The problem of clogged dockets of the justice system has been around for decades. The excessive build up of cases worsened especially during the 1990s. The observed reduction of newly filed cases arose from various efforts to unclog the courts. One part of this effort was simply to cleanse from the court dockets those cases that had been in dead file through legal lapse. One part of the judicial reform undertaken in recent years was to cleanse the logjam by simply removing from the backlogs cases that were as good as abandoned.

There are alternative methods of dispute resolution that have helped to reduce the filing of court cases. One of these methods applies to the settlement of minor disputes, especially among local parties, especially at the community level. The other mode of alternative dispute resolution is the use of arbitration, especially in the case of commercial disputes. Recent developments along these lines have helped to reduce the backlog of cases. In particular, the community level system might have helped in reducing court cases that originate from this source.

[9] The simple average of the backlog ratio is not much different from the weighted average of backlog ratios from among the different types of courts, whether the weights are based on the year 2004 caseload distribution or the backlog distribution by courts.

Dispute resolution at the local level is not a new phenomenon. The government had introduced the barangay justice system way back in 1978.[10] When the local government code was enacted in 1993, the law on village peace adjudication was integrated into the code. Barangay elders and officials form the village peace council, the Lupon Tagapamayapa. The peace council assists those who are engaged in disputes to mediate these through conciliation, arbitration and persuasion. Only if a dispute failed to get settled at this level would it be filed in the courts. Through this system, a number of disputes avoid reaching the courts and therefore it helps to reduce the court dockets.

According to the records of the Department of the Interior and Local Government,[11] the barangay justice system had settled 4,062,068 cases from 1980 to 2005, which translates into 156,233 cases per year being brought to the system for settlement. Between 2001 and 2003, the average number of settlements rose to 263,536 cases per year. In 2004, the Lupon Tagapamayapa settled an even higher number of cases, amounting to 342,386 disputes. Of these, 45.2 percent were criminal cases, another 38.8 percent were civil cases, and others, 16.0 percent. Of the total cases before it, 191,279 (55.9 percent) were settled through mediation, another 57,371 (16.6 percent) through conciliation, 10,379 (3.0 percent) through arbitration, and 18,966 (5.5 percent) of the cases were filed in court finally.

Thus, 75 percent of the cases brought before the barangay council gets disposed of either through mediation, arbitration, or conciliation. Only 5.5 of the cases ended up being filed in court for litigation. Presumably the rest of the cases unaccounted for had not been resolved in any way or had been dropped. According to the government, the average cost of litigation per case is 9,500 pesos, so the amount of saving is substantial, in addition to the fact that the dockets of the courts do not get burdened any further.

A major recent development that is likely to have an impact on the number of court cases dealing with commercial disputes is the enactment of the law on Alternative Dispute Resolution (ADR), or R.A. 9285 in 2004. The use of effective arbitration of commercial disputes has a higher impact on economic issues. It can reduce extensive economic loss arising out of long legal suits. By encouraging their early resolution, disputes can be settled more quickly and their potential losses on the economy can be minimized as a result. The law defines ADR as any procedure that resolves a dispute or controversy that does not use a presiding judge of a court or an officer of a government agency, in which a neutral third party participates to assist in the resolution of issues. ADR thus includes arbitration, mediation, conciliation, early neutral evaluation, mini-trial, or any combination thereof. Arbitration as a method of settling disputes has been a recognized practice under the arbitration law (R.A. 876, passed in 1953) which has been in the statute books for decades. The arbitration of construction contracts disputes was institutionalized under an Executive Order No. 1008 in 1985. However, arbitration has not been widely followed. Controversies more often were brought into court for judgment as litigations.

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[10] The barangay justice system became law under Presidential Decree 1508 (1978). The provisions of this law were codified, with minor amendments, into Republic Act 7160, the Local Government Code. Direct administrative monitoring and supervision of the barangay justice system is under the Department of the Interior and Local Government, not under the judiciary.

[11] These statistics on the barangay justice system are also reported in the Philippine Statistical Yearbook,.

The law dealt with the arbitration of any controversy affecting contracts. The method has been more readily applied to construction disputes with specific rules covering the process.

The significant part of this new law is related to the introduction of international arbitration. The law adopts international commercial arbitration of disputes as governed by the Model Law on International Commercial Arbitration that was adopted by the United Nations Commission on International Trade Law (UNCITRAL Model Law) in 1985. This provision makes the playing field for disputes transparent and more reassuring to the parties involved. The full effects of international arbitration law of contract disputes helps parties to a controversy the benefit of having an impartial third party to help resolve contracts. Commercial arbitration covers matters arising from all types of commercial relationships, whether contractual or not. Domestic arbitration is still governed by the early law on arbitration. However, the ADR law provides that some provisions of the Model Law on International Commercial Arbitration, such as the composition of arbitral tribunal and the form and contents of the award, are applicable to domestic arbitration.

The application of international commercial arbitration has many advantages that translate in the speedy resolution of controversies. The parties to the controversy have the opportunity to argue their cases, without the excessive reliance on legal technicalities and on court processes. In this way, costly litigation could be avoided and cases that could be prolonged under litigation could be quickly resolved. Arbitration of commercial disputes can help to unclog judicial logjams and will help to speed up resolutions on commercial disagreements. Alternative dispute resolutions of this type will prosper as the courts help to recognize their applicability in settling commercial disputes amicably.

In the past, dispute resolution along the arbitration path has not found much favor in practice in part. In part, this was due to benign neglect on the part of the government. Parties used the method of filing court cases to achieve their private ends. Recent developments apparently favor the use of resolutions of commercial issues through arbitration rather than the courts.

IV. Complex constitutional provisions cause difficulties in policy making and in business operation

The restrictive economic provisions in the constitution on foreign capital made the promotion of investments more difficult to pursue effectively. Since capital is often the scarce resource in an economy like the Philippines, restrictions on its use brought about many unintended distortions in the crafting of proper development policies. They helped to compound the conduct of private businesses by encouraging methods of business pursuits that only raised the unit cost of domestic production. An immediate result was to diminish international competitiveness. High costs that simply raised rents and profits became the mode for encouraging businesses because they were based on rules of award that paid more attention to non-market qualifications, such as citizenship and sometimes political accommodation. But these did not strengthen the development of industrial activity that had competitive viability in the market. One perverse result was that they discouraged the provision of high quality but low cost public utility services. All these points are discussed in this section.

The constitutional restrictions had to be translated into administrative practices in the absence of clarifying laws passed by Congress that further defined them. Hence, subsequent actions of government agencies would have to be in line with the spirit of the law. Consequent economic legislation had to dovetail with the economic restrictions so as to be in compliance with constitutional provisions. Thus, any ordinary legislation had to be in line with the restrictions or otherwise, the constitutional provision would be violated. As it would turn out, areas of industrial promotion, retail distribution, banking and finance, as well as the promotion of investments in public utilities had to be in line with these provisions.

To recognize that this complexity hampered the Philippine future compared to most countries that were trying to attract foreign investments is an important advance in understanding the relatively poor degree of performance of the economy compared to these countries. It also helps to account for the high incidence of macroeconomic instability that would visit the economy. The presence of many constraints on improving resource flows into the economy contributed toward enlarging macroeconomic resource gaps.

The message that this state of affairs has for constitutional revision is powerful. But the political economy of simplifying the provisions of the constitution is a complex affair to manage. It requires far-seeing leadership that has inspired communication skills and political skills to make the required constitutional change.

At the time of independence, the conditions for the long term deterioration of public services had been set in place through the constitutional framework. In that hopeful atmosphere, no one recognized that mistaken decision. Even today, many hold the views that there was nothing decisive about those economic restrictions except to improve the chances of Filipino capital in their country's own industrial progress. Restrictions that reduced the role of foreign capital simply meant turning away from a source of needed capital and accepting alternatives of lower scale of plant operations or heavily borrowing the capital. The latter meant that the operations would have to shoulder a large part of the investment being highly dependent on borrowing rather than a good base in equity capital. The public utilities needed access to capital to undertake expansion of facilities and assure their modernization. But the lack of domestic capital to finance the initial base of this expansion meant a greater tendency to rely on borrowed capital.

To understand fully how this process worked against the country's long term future in promoting rapid development (and all the beneficial effects linked with that development – faster rate of growth, higher level of employment, wider employment of the labor force, impact on the productive sectors, greater economic efficiency, and higher per capita output), it is useful to focus on the immediate implications of those restrictions on the development and growth of services associated with public utilities. Companies that provided "public utilities" were already well in place at the end of the war, although these were destroyed and needed rehabilitation.

At the time of independence in 1946, the resources needed for the rehabilitation of major public utilities and infrastructure were available in good quantity despite war destruction. War damage payments from the United States gave priority to these types of rehabilitation problems.[12]

[12] Total war damage payments that were made available to the Philippines, in addition to an annual stream of large US military expenditures, brought in substantial economic resources at the initiation of independence. The total war

Thus, badly strained as the country was like all those that suffered major destruction during the ear, there were nevertheless enormous opportunities available for rehabilitation unlike other war damaged countries. Large expansions of the capacity of public utilities and other investments were not wanting. Filipino and American citizens who owned property and businesses destroyed during the war were entitled to receive compensation from the US war damage payments. In addition, there were resources for the reconstruction of public facilities.

A lot of the American capital that received compensation from war damage was in the form of investments in public utilities, in land assets, in mining and in industry and commerce. Some of this capital could have stayed in the country for a long time. In fact, some of that capital did stay. Initially Americans were allowed rights that were similar to those of Filipinos through the parity rights amendment in 1946. In this respect, the predicted exodus of American capital was at least partially stayed, as predicted during the political debate on the parity amendment. The rights granted were temporary – or only up to the period covered by the Laurel-Langley agreement (up to 1974). The handwriting was therefore written on the wall. American investments in public utilities, in mining, and in land ownership had their terminal dates put on notice. There was no certainty that rights that had been acquired under the parity rights agreement could continue beyond. Indeed, the Supreme Court ruled in 1971 with reference to a piece of residential land owned by an American that the ownership right would end after 1973.[13]

Nationalistic ideas about the desirability of restricting foreign capital gained headway during the early decades of independence. Following this philosophy, further restrictions expanded. New legislative, administrative and regulatory work expanded the restrictions into other areas of economic activity. The restrictions against land ownership added conditions that made it unattractive to invest in manufacturing and commercial services with an aspect of fixed investment (on land) being completely prohibited.

Limitations on the exploitation of natural resources meant that opportunities for the planning of large scale exploration and mining and other resource extraction that led toward raising the country's export earnings would now be limited to domestic capital. New opportunities for investments opened to domestic capital. But the relative lack of domestic capital caused those opportunities to be passed up. One only needs to understand that the mining industry after the end of the Laurel-Langley agreement, new mining ventures declined in number. Many of the new ventures were simply premised on the availability of foreign loan capital to the private sector that local mining interests tried to borrow to start mining investment. With little equity capital and severely handicapped by lack of technology and sometimes the lack of firm market contracts, the mining

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damage payments appropriated in 1947 amounted to US$620 million, of which $120 million was for the reconstruction of public facilities. Today's US dollar terms is close to a ten-fold multiple of the 1947 US dollar. The majority of the payments were made to private citizens, and this included Americans with capital invested and destroyed in the Philippines during the war. Such investments could have been made to remain invested in the country. The main utilities principally owned then by Americans were Meralco and PLDT. These were companies that were directly affected by the issue of parity rights. The termination of such rights by 1974 reduced the incentives of the investors to undertake major expansion of their investments in Philippine public utilities thereby hampering the underlying basis of economic progress..

[13] The Supreme Court ruling was penned by the then Justice J.B.L. Reyes.

ventures were destined to fail. When the economy suffered a crisis, many of these ventures went down the drain, for want of capital to exploit them.[14]

A major impact of the restrictions on foreign capital was the failure of investments in public utilities and in public infrastructure to facilitate rapid growth in the economy. Because of the scarcity of capital in this sector, the public utilities became the bottlenecks that hindered the economy's expansion. The private investors who succeeded in the ownership of the utilities neglected their expansions for they themselves were perennially hard up for internal capital to undertake future expansion. Moreover, their desire to keep the investments within the family led to close ownerships of these utility franchises. The government as a result was to take on a much larger responsibility in raising capital to expand the public infrastructure – a task that would make heavier the task of the government to raise capital for public infrastructure to be financed from the public sector.

As experience on this account would later demonstrate, the pressures on the government to raise resources were inherited from the strategic error of restricting the economic provisions on foreign capital. This made the government more prone to depend on foreign borrowing whenever domestic capital resources were inadequate. The presence of American enterprise and capital in these critical public utilities would have become a point of strength rather than one of weakness. Such capital provided access to external capital that was already grown at home during the early period of independence. The only problem was that the capital was redefined as foreign when independence took place.

The constitutional provisions preempted the issue of control of enterprise by insisting that foreign interests be limited to a minority of forty-percent equity position, whereas they were in complete control of the facilities before. The idea that gradual growth of Philippine ownership of the utilities over time, if promoted then, could have encouraged an orderly growth and expansion of public utilities that would meet the growing needs of the economy during this period. In such a framework, it was possible for strong Filipino enterprises engaged in utilities to grow and develop strongly. The latter had the advantage of being home-grown and interested in doing well in competition with established operations that were also providing quality service. There was something inevitable about Filipinos eventually taking control of public utilities in the long run through a process of growth if their expansion could be harnessed toward promoting national prosperity.

Without these restrictions to the ownership of public utilities, these companies would gradually involve more domestic capital participation. Foreign owners would have found it essential if not expedient to court public opinion in order to sustain their operations and foster good business relations. Hence domestic capital would have participated naturally as the pressure to expand services and to modernize facilities would have required new capital. Besides, it would have been impolitic for wholly- or substantially-owned foreign investors to control a major public utility for too long without opening to the participation for local investors in a public utility that was serving the nation.

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[14] During the early years of independence, in view of parity rights, American capital participated in mining, resource extraction and other industries. The termination of parity in 1974 did not encourage any plans for business expansion.

The growth of the public utilities would have necessitated the participation of Filipino capital even if control of the enterprise management did not readily change hands. That would have happened later on but in an orderly and phased development caused by economic circumstances, not through state fiat. Even today the two largest utilities – Meralco and PLDT – are widely held companies in which Filipino stockholders participate. The situation in the other cities and provinces of the country is much more bleak, for here, the public utilities have remained in general small operations and held as closed family corporations. The only exceptions are those utilities that have been promoted under the cooperative arrangements promoted by the government, the private electric cooperatives.[15]

With capital scarcity being a major problem, it became incumbent upon the state, as a consequence, to take over a large part of the financing and control of other public services. The government therefore ventured in the provision of the major infrastructure for generation of electric power, for the maintenance and expansion of ports, and for the construction of water and sewerage facilities for urban areas. Under the government, complete ownership of the major utilities would be in the hands of Filipinos, for the government agencies that were created to provide these services are 100 percent Filipino owned. This in part explains why the expansion of the hand of the government gradually deepened in many public utilities.

By putting the restrictions on foreign capital through a constitutional fiat, foreigners with existing assets in these prohibited sectors in the long run were required to sellout to the level of minimum control. But if they were not inclined to undertake this measure, that would force them to sell out to domestic business groups. In any case, the sellout would be to parties with sufficient local market clout. Such power was predicated more on political rather than economic capacity. The sale of the controlling shares of the major utilities took place as a consequence of the provisions in the constitution.

In spite of efforts to provide incentives and to promote their growth, limitations of equity capital among the acquiring domestic interests in these utilities hampered the improvement of utility service. Hence the country was witness to a wider deterioration of infrastructure services from electricity generation and distribution to telecommunications and transportation. This happened despite the major efforts of the government to provide for these services. What the government tried to promote – capital investments in these utilities – was hampered by the limitation of the venues for capital financing which depended mainly on domestic sources of equity and on the borrowed capital that such equity could carry.

This was happening to the country at a time when a number of East Asian countries were attracting strong foreign investment inflows that would help to stimulate their economic growth. Such capital financed their industrialization and other economic development. The Filipinization of major public utilities coincided with the decline of the quality of these services over the postwar period. One of the major casualties of the future electricity service was the neglect of mass transit in Manila that was already in place in Manila before the war when Meralco discontinued the electricity-run public transport system. The narrow expansion of electricity distribution was partly the result of the takeover of an undercapitalized Filipino group that bought into the American

[15] The electricity cooperatives however are having enormous difficulty operating profitably because much of their operations had been based on state subsidy before.

company that foresaw the future. That was the reason that it also did not engage in a major expansion program of electricity service.

What was most important in the case of these public utilities was that the former foreign controlling shares had lost the major incentive to the required investments for expansion of the facility. In the case of the telephone company, telephone service went from good to bad and then worse, as the decades rolled on. Reading the writing on the wall with the end of parity rights in 1974, the American owners neglected to put any major investments in the telecommunications sector. When the Filipino group took over, the lack of equity capital further led to the deterioration of the country's telecommunications services.

The liberalization of the telecommunications sector in the 1990s and the birth of the cell phone revolution helped to alter the picture into what is found today. Before that time, PLDT found it convenient *not* to meet the growing need for telephone service. Telephone subscriptions were not filled for lack of lines. And service quality was very poor. Today the picture is very different as the presence of competition among cellphone providers and the forced opening of PLDT's connections to efficient providers of telephone services (especially international) through regulatory mandate to provide better service. Complete monopoly over the provision of competing services to the fixed telephone line monopoly was no longer allowed. But as long as that regime had lasted, lack of capital created enormous limitations on the improvement of telecommunication services.

The same condition was fostered in other critical sectors of public utilities. The state of public infrastructure supporting the transportation sector remained in the infrastructure for the transportation sector. The transportation sector – land, sea and air transportation – requires major infusions of capital but the restrictions on foreign capital helped to reduce the investments in these sectors to small companies with limited capital but with appropriate citizenship qualifications. A strong protectionist lobby had grown in this sector and it became difficult to institute the appropriate liberalization of the sectors. Today, these sectors continue to suffer from lack of modernizing developments as they continue to starve from lack of capital infusion.

The economic restrictions to foreign capital also resulted in new and unintended restrictions to other economic activity. "Public utilities" could be extended to a wide range of activities that were effectively regulated by the state, often with a franchise secured from the government. By the power of regulation and public franchising, it was possible to even broaden the application of the restrictive provisions on foreign capital through a simple definition of what constituted public utilities. Consider the fact that conventional wisdom applied the definition of public utilities to those services that delivered electricity, telecommunications, transportation and port works services, and water and other public infrastructures. Many of these utilities could easily have branched out into subsidiary activities that could often be linked to the essential services that they offered.

During the protectionist period of development (which accounted for the first decades of development through the 1990s),[16] the meaning of public utility operations extended toward other

[16] This period covers the time when the author actively participated in the government machinery, at the helm of the economic development and planning, the NEDA. The main issues of the period focused on liberalizing the trade and industry regime, a reform covering grand but difficult issues regarding the reduction of tariff rates and evening out the protection regime toward a level that was more conducive to investment and growth. There was misplaced

activities. Aspects of publicly sold services such as transportation would include all its branches – land, sea and air. Further, this included mass transit systems, land bus transportation and passenger shipping lines, trucking and warehousing, freight shipping and so on. In electricity, the issue generation of power, its distribution through small and large communities; the franchising of cold storage and ice plants, which are critical to the food industry. Eventually, even these definitions would be extended to the prohibition of retail activities because of the law of retail trade nationalization. This was another issue that removed a major activity that could have been undertaken by foreign direct investments engaged in industry. Eventually, they faced the inability to deal with the distribution of their produce at retail, when serving the domestic market.

Even foreign investments in manufacturing and commerce often had to deal with the problem of restrictions involving land assets. Almost all investments require some element of land use, land being a factor of production in most sectors of the economy – agriculture, manufacturing, commerce, infrastructure, etc. All these operations use land as an input however limited and relatively insignificant it was with respect to the total investment. When restrictions are placed on land use, some degree of freedom is lost in the actions of those with the power to apply capital for investment. Businesses then use alternative modes of overcoming those restrictions that are prone to raise the unit cost of evading the direct use of land either through purchase or lease of land services.

A roundabout method of creating companies that were majority Filipino owned specialized in leasing land to these corporations and in branching further into activities that monopolized the provision of services that were often related to the provision of services that were likely to be classified as public utility. In this way, a lot of Filipino landowning groups and business people were able to tap in on activities that provided rents rather than genuine profits.

Otherwise, long term leases of land became the only viable alternative. Operations that required the movement of raw materials and goods eventually would need the services of public utilities – transport companies, warehousing companies, and other ventures in which landownership was critically linked where foreign enterprises had limited ability to acquire asset control.

These natural extensions of the operational work of any business venture often ran counter against regulations that restricted the activities that foreign companies could undertake. The foreign direct investor would therefore be dependent on all these services in the general economy and it would have been prevented to participate in any of these activities by virtue of the restrictions that applied to them – first from the constitutional provisions, buttressed by the system of laws and regulations that have arisen as a consequence of those provisions of general policy on the role of foreign capital. Once they decided to set up operation in the country, they would have to rely on the services of other suppliers of services within the economy.

Foreign investments that were granted opportunities to invest in the economy were hampered in branching out into those subsidiary economic activities. They therefore could not control some element of domestic costs, such as investments in fixed assets involving land. They were constrained in undertaking trucking and warehousing operations, which also had restrictions in business ownerships as they were in the nature of public utilities. Thus, they had to subcontract the movement

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optimism then that working on these issues would overcome the constitutional restraints that made economic policy front somewhat more difficult to pursue

of their goods to companies or businesses that were substantially owned by Filipinos businesses. Moreover, by virtue of the retail nationalization law, they could not sell their goods directly in the Philippine market. In this, they had to negotiate with suppliers of services who were allowed to undertake these operations. In short, they were also correspondingly hampered in their other business operations.

Thus, market imperfections fostered by the artificial restrictions raised the cost of operations. The protection shielded Filipino enterprise from competition, making it adopt costly practices even while taking advantage of the business opportunities. Such activities created a limited amount of domestic jobs. But they were misleading Filipino capital to invest in areas with little or no comparative advantage. Filipino capital got committed into activities that were coated with state protection. Such arrangements produced temporary profits as long as state protection lasted, but in the long run the protection bred high costs and uncompetitive results. Thus even the jobs that were created were not guaranteed long term continuation because the industries did not expand when confronted with more efficient competition.

In adjusting to these realities, the foreign direct investors had to look for domestic partners (who would control sixty-percent of the enterprise to follow the spirit of economic restrictions). These mechanisms involved the contracting of subsidiary services that are related to production operations that were restricted only to Filipino companies. This created a pyramiding of the costs to investors. At least legally, such processes implied a loss of partial or even total control over business decisions. Often, arrangements akin to those of dummy investors have resulted from these setups. While this provided new source of incomes for the dummies, this often meant violations of existing rules and laws.

There were the industries with foreign direct investments that simply found presence in the market profitable because their product was sold to a captive domestic market that they already controlled. This applied to pharmaceuticals, cosmetics, and other consumer goods industries, including energy refining. For these investments, the issues of economic efficiency were not as important as market retention because they had a monopoly position in those markets. To these foreign investors, the constitutional restrictions to foreign enterprise were not meaningful to them. They were mainly in protected import substitution industries where high profits were guaranteed.

The cost pyramiding described earlier was therefore not a problem to these investments so long as they were not competing with other external suppliers with lower costs. They themselves earned enormous rents from the import substitution policies and the monopoly position that they enjoyed in their markets. This explained however why there were few foreign companies that were attracted to come to the country that would have helped to establish the country’s true comparative advantage in industry because these types of industries were highly penalized by the policy regime that was in force. Until the liberalization of the industrial and trade policies became a fact, the opportunities for establishing new industries were not open sufficiently because of the high costs that were imposed on industries in which some comparative strength was possible. This also explains why, when the future of ASEAN free trade agreement became clear and tariff liberalization led to lower import tariffs, many of these foreign investments relocated to other ASEAN countries with lower costs so as to fill their supply of future goods for the Philippine market.

Increasingly detailed and complex provisions

As a result of the *iron law* provisions on foreign capital introduced in the 1935 Constitution, the country suffered from seven decades of restrictions relating to the attraction of foreign capital in the country. As the country moved on from the 1935 Constitution to the 1987 Constitution, nothing had really changed in the economic provisions. Those provisions encouraged the build up of new laws and regulations that became more restrictive in other sectors of the economy.

This also encouraged a maze of new administrative processes that were invented to conform to the perceived intent of the constitutional. Supplementary administrative requirements on citizenship issues verged on the determination of qualification tests. This increased the red tape in government. The amounts of approvals by different agencies and functionaries of the government concerning business proposals involving foreign investments multiplied in terms of compliance for business applications. This expanded to approvals regarding the hiring of professional managers, the use of land, application to control of media, and so on. In short, the requirements involved some monitoring of the citizenship of investors to be sure that compliance is at least being made.

A culture surrounding the business relationships between foreign investors and domestic investments developed in which higher domestic costs were mutually tolerated. A kind of symbiosis arose in which foreign investors became a buyer of protected services from domestic corporations. These local corporations earned substantial rents from the business relationships that developed. Naturally, this often led to higher costs of distribution and of services in the home economy. The challenge to encourage businesses through competitive markets was displaced by a relationship of convenience among business partnerships between investors and their suppliers of services. The force of competition became less of a factor in the behavior of investors, for the partnerships encouraged a symbiosis of convenience – with rents generated from these relationships. Such rents arose from facilitation of convenience in operation rather than a reaction from the stimulus of competitive forces. In short, an inherent bias toward raising domestic costs of production became a result of these relationships.

During the framing of the constitutional design at the dawn of independence in 1935, the constitution became a victim of the work of committees of men with diverse styles of writing, temperaments, and philosophies. The resulting constitution became a receptacle of many good and lofty ideas mixed unfortunately with wrong and misleading ideas. As in Gresham's law in economics, the bad ideas, especially when they have the political upper hand, would drive out the good especially in the translation of law into practice.

A word count of the three constitutions that have influenced Philippine political growth shows the progressive lengths of the constitutions. Each new constitution became lengthier in text and in coverage of issues. If the growth in length correlates in their extension of coverage of subjects of the constitution and in the increase of basic tenets that are translated into additional constitutional principles, then what further proof would be needed? The 1935 Constitution – the one which we associate with Claro Recto as Chairman of the Convention and Manuel Quezon – was only 7,828 words. It took nine months to finish it. The 1973 Constitution associated with Diosdado Macapagal [chairman of the convention] and with Ferdinand Marcos was 13,671 words, and it took 2 years to finish it. The 1987 Constitution – the Corazon Aquino Constitution – is 26,034 words, with four

months to finish. The 1973 Constitution was almost twice (1.74 times) as long as the 1935 version. But the 1987 Constitution was close to 3.3 times as long as the 1935 Constitution.

The Philippine Constitution is not unique in being a broad document with a lot of unnecessary and sometimes confusing content. Recently, and in line with my concern about the problem of the style and construction of constitutions, my wife [Dr. Loretta Makasiar Sicat of the UP Political Science Department] and I engaged in a research that compared the content and style of 22 constitutions of different countries.

A brief of the findings is summarized here.[17] Comparing most constitutions with the textual content, style, coverage, and sharpness of language, the US constitution has practically no equal. The US constitution is unique in that it is the longest surviving written constitution – a life of two centuries and one score to this day. Amendments to it have been relatively few (27 formal amendments of specific content.) Most constitutions have been overhauled – not the US constitution, with its 27 unique amendments, the last of which was instituted last in 1913. Most political constitutions of later vintage are long, verbose in character, and contain a lot of details that make them almost unreadable as constitutions. There are however several constitutions that are also very well written in terms of sharpness of language and brevity of coverage.

The 1987 Constitution, strangely and in relation to some of the constitutions with which it may be compared, is moderate in length. But it has provisions that go into details and moves away from general principles in a substantive way. In this respect, it is full of verbiage where the 1935 Constitution was at least concise. Constitutions in general are ideally suited as setting up the general principles of a nation and spelling the basic structure of government. That is the minimal content that has made the US constitution survive the centuries without overhaul.[18]

The 1987 Constitution was a reaction to recent political events – the period of martial law. The 1935 Constitution and the 1972 version contained a simple statement about the judiciary's main function. The 1987 Constitution is more complex and has extended provisions over a wide field compared to the 1935 Constitution. By comparison, the 1972 Constitution was also more complex than the 1935 version. The 1987 Constitution had a far broader coverage and contained more inconsistencies as a result. For all the faults of the 1935 Constitution it appears to be a superior legal document than either of the subsequent constitutions that replaced it in 1973 and in 1987.

In spite of the imperfections of the 1935 Constitution, the 1987 Constitution is even a worse document. It is verbose, and in keeping, it reaches into many aspects of national life that should have been the subject of legislation documents. As a result, it is full of inconsistent provisions. In the absence of specific legislation, the Supreme Court is made to interpret many political and economic issues that often hold the country in suspense. Whenever there appeared any conflict of provisions, the issue of constitutionality is raised. In this way, the Supreme Court has become the arbiter of the nation's politics and the interpreter of economic policy.

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[17] Gerardo P. Sicat and Loretta Makasiar Sicat, *An International Comparison of Constitutional Style: Implications for Economic Progress*, UPSE Discussion Paper 0412 .

[18] This is the impression conveyed by my commentary on various provisions of the Constitution on the economic provisions. See to Gerardo P. Sicat, *Philippine Economic Nationalism*, UPSE Discussion Paper 0201, the appendix item on the constitutional provisions.

Another way of collecting these facts is to review the constitutions of countries that have experienced political trauma of biblical proportions. After the fall of the Soviet empire, the Russian constitution (1993) of today is a relatively brief constitution containing guarantees of private ownership and other economic and political freedoms without grandiloquent commands and sentiments about the rights and duties of workers and the elaborate structure of social and economic rights that were present in the Soviet constitutions. The Chilean constitution (post Allende) is also as brief document with strong statements about the importance of property rights and safeguards against state expropriation. The People's China constitution (1981) contains guarantees against property rights of individuals even as the state affirms the socialistic constitution and is relatively less elaborate about various aspects of the economy compared to the Philippine Constitution.

Most of the provisions of these constitutions insofar as they concern the rights, duties and obligations of citizens are not encumbered by specific statements about the role of citizens in relation to those of foreigners. When there are rights of foreigners introduced, as in the Chinese constitution, for instance, it is the recognition of the role of foreigners in undertaking activities allowed by the state. The implication of this is that specific but ordinary legislation would undertake details of those rights in relation to those of citizens. But in the case of provisions of the Philippine Constitution, specific details on the extent of foreign participation were detailed in the provisions on the national economy.

The major complications of Philippine constitutional economic provisions are thus exposed. The provisions on the role of foreign capital – seen somewhat simply as a case of protecting Filipino capital during the framing of the 1935 constitution –produced distortions and economic inefficiencies that account for the poor economic performance of the Philippine economy in the long run and, as a result, for the economic misery of many poor Filipinos today. These provisions have remained essentially intact in the country's current 1987 constitution although they were introduced in the 1935 Constitution. As already stated, this is the original sin of Philippine economic development policy – a sin that I have ascribed to be the main legacy of two revered Filipino heroes – Claro Recto and Manuel Quezon – who have complicated the lives of Filipinos for seven generations and made life for them difficult to pursue because they insisted they knew better in their own time than the future leaders and citizens of the nation.

Clogged court dockets and their economic effects

It is useful to go back to the statistics on backlogs and court dockets and comment on the issue of their economic impact. In some indirect manner, the clogged dockets could be partly linked to the complexity of the constitutional provisions. How do these large backlogs in court dockets relate to the performance of the economy? Some of the effects can be appreciated from several angles.

The large backlogs in court cases strain the country's judiciary resources. It is also recognized that this strain also leads to other serious outcomes. One of these is the recognition that such strain on resources fosters corrupt practices in the courts. At least, this is widely

recognized as a part of the problem of the judicial system and is often used as an imperative argument for judicial reform.[19]

The likely economic impact of the clogged justice delivery system is that it causes delays the proper dispensation of justice. It also clogs the efficient working of a system of economic allocation in which the movement of resources is required to facilitate economic activity. Clogged dockets could stop a proper response to a required adjustment that is desired for economic activity to proceed. The fact is that delay or impasse creates benefits as well as losses for specific parties to a legal suit. If the delays protect the effective adjustment of economic resources from their proper use, then the expected benefits from a particular economic action could be lost or reduced. In any case, the lack of decisive conclusions to court cases could help to shake up faith in the justice system to deliver proper judgments on time. An economic drag takes hold. Economic efficiency is therefore weakened. The resulting hindrance saps the nation's ability to solve economic problems.

Not all legal suits have any direct economic impact. An example helps to establish this point. There is a significant amount of criminal cases that are simply police cases, where the state is the prosecutor. Examine for instance the bulk of court filings that affect poor citizens who have availed of the state's public attorney's assistance. According to the reports of the Department of Justice, 545,613 cases involved extension of assistance to indigent persons in 2005. Of these forms of assistance, 88.5 percent were related to criminal cases.[20] Only 10.5 percent involved civil cases.

In fact, criminal suits might involve simply crime against persons or property of insignificant total value. But there are economic crimes where the stakes are large and the criminals – or those accused of criminal actions – have a significant impact on economic behavior. They call to mind cases of poor governance and rent-seeking behavior such as smuggling, corruption, tax evasion, and plunder. Some of these criminal cases do indeed have a negative impact on economic activity.

Civil cases, compared to criminal court cases, have a potentially higher degree of economic impact. Such cases involve the assertion or defense of property rights –contractual obligations, assertion of inherited rights, or rights acquired through commerce. The outcomes of these cases determine a particular use affecting the contested economic resources. If a court decision favors parties that have skills that are innovative and entrepreneurial, the contested economic resources could grow over time in value. But decisions are hardly partial to the ultimate use of economic resources. They are tuned to the protection of the property rights of the contesting parties. Some laws are designed to create conditions that are perceived to have this type of benefits and therefore legal suits would tend to follow this. Other types of laws promote social justice and are blind to the ultimate use of the resources as to whether it helps consumption or investment activity. The hope is that investment would triumph over consumption, but that is not the objective of the law.

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[19] The justification for judicial reform includes the removal of corruption in the courts, the improvement of court procedures and the need to speed up the settlement of disputes in which the economic stakes are high.

[20] See Table 17.17 of the Philippine Statistical Yearbook 2006.

The extensive use of legal suits indicates the litigious nature of social and economic relations in the country. When the cost of filing cases is not sufficiently high to discourage legal suits, the cases of frivolous filings often arise. Of course, some filings are definitely in defense of the protection of property rights from other parties. Often, the proper setting for defining the rights of property owners is dependent on the existence of appropriate commercial laws that define the exact relations between creditors and borrowers. There is a need for a law that sets clearly the rights of borrowers and of creditors – which are often in conflict. When these are not well defined, they encourage the use of legal methods to extend the life of economic enterprises that are failing to maintain their viability.

The body of commercial, industrial and other legal framework helps to determine the assignment of property rights to economic agents in an economy. This would include the proper termination of businesses or economic activities that are essentially insolvent or bankrupt.[21] In a social setting where the owners of property rights are an entrenched oligarchy, it is difficult to reform the legal framework that determines these rules, especially if those rules would tend to benefit economic parties that are more entrepreneurial but whose members are outsiders in the ruling class structure.

Thus, while the large number of cases in the court dockets creates an economic drag on overall performance, some single cases involve large economic impact. These cases might be linked to the economic restrictions that are tied up with constitutional restrictions that prevent very significant economic projects from getting the go-signal for decision – those related to land rights, mineral exploitation, or public utilities. Other cases could be linked to property rights involving major infrastructure projects where right of way is blocking the continuation of the project. There are cases that could be linked with the division of assets of an essentially bankrupt but large private company. The case could include issues linked with large political issues – such as the issue of proceeding with a major infrastructure project that is marred by serious political symbols (the example of the nuclear power plant comes to mind) or with corruption cases (such as a number of infrastructure projects in which the underlying reason is essentially political and the external symbol of it is alleged corruption. [22]

A major example that is related to social legislation is the land reform program. This program has been undertaken over a long period of progressive efforts to define the land rights of the poor and the use of the land reform vehicle to cover their reform. The coverage of the program got expanded ambitiously over time. And the implementation of land transfer schemes affecting landowners and tenant farmers took a very slow evolution. In the meantime, the threat of land reform alone had created a major decline in investments in land for productive purposes.

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[21] A bankruptcy law is needed that could settle the proper allocation and division of assets of a bankrupt firm. Insolvent firms tie up capital and entrepreneurship often in business operations that are no longer economically viable. Their continued operations only lead to a downward spiral of the business and the dissipation of remaining capital. This problem figures fully with the discussion of the section on doing business, especially the item dealing with "closing a business," discussed in section VII, below.

[22] The case of the finished international airport project (the terminal 3 project of the Ninoy Aquino international terminal in Manila, known also as the PIATCO contract, is a major public infrastructure project that has been held up for nearly three years from being opened for service.

The long period of evolution of the policy produced many defensive legal and political strategies that slowed down in the courts. On the other hand, investments failed to expand and as a result land productivity growth had been held back. In the meantime, a lot of government resources have been allocated in support of land reform programs. Property rights that are left hanging are not able to exercise the options that ownership of these rights often brings. All that is assured is the uncertainty of future changes in that ownership when the proper transfer of ownership rights are implemented as predicted by the law. Land reform is a large topic, and it is only used here as an illustrative example.

Uncertainties in land use prevented investments in agriculture. Philippine agriculture has failed to live up to the high growth potential that it has had. What has made agriculture perform well – especially during the 1970s– was the heavy public infrastructure that was built in that period, spreading over the wide span of the country's geography. But where land reform was introduced, the need for complementary investment in public infrastructure and the support of new institutions surrounding land reform had led to high costs of maintenance of the program.

A litigious culture of justice dispensation substitutes the use of legal principles and judicial interference over market allocation. Sometimes, a litigious interference helps to buy time and uses delays as a framework for harassment or changing the rules of project implementation. The use of temporary restraining orders (TROs) is often the vehicle of choice. Issued by a judge to withhold the continuation of a projected activity, it could have a deadly impact on the pursuit of specific contracts, including those that involve public investments in infrastructure and major industrial projects pursued in the private sector.

V. Restraints on legislation and executive action

The economic restrictions in the Philippine constitution affected the functions of the executive and legislative branches of government in encouraging the enlargement of capital formation in the economy. The rules for encouraging investments became complicated by the amount of permissible opportunities to raise capital. Domestic enterprises were encouraged to depend on government to provide the protective umbrella for the kind of economic activities that they could engage in.

The executive branch could not proceed to take decisive measures short of requiring an amendment of the restrictive provisions. Those types of amendment were difficult to undertake since they required a level of consensus formation that was far more demanding than for ordinary legislation. Moreover, even within the executive branch, the influence of the policies of the constitutional framework continued to cast their spell on the leadership. These provisions also hampered the treaty making function. The treaty making process suffered because foreigners were not given national treatment, as customary treatment in treaties often provided.

The constitutional framers wanted to confront the issue of foreign capital directly rather than leave it to more thoughtful legislation outside of the constitutional framework. In attempting to make it explicit, they tried to enumerate the channels through which foreign investments would not be allowed and these covered significant areas of particular activity. They did not foresee the possibility that the areas where they were applying restrictions could suffer in quality of services and output. They were optimistic about the capacity of the Filipino enterprise to take over the industries.

They simply assumed that domestic capital was capable of taking over the public utilities and the required industries to exploit natural resources exploration and exploitation.

The enormity of the problems posed by the constitutional provisions of 1935 made itself evident as soon as independence commenced in 1946. Foreigners (meaning Americans) who had major investments in the country faced the certain prospect of reducing their investment opportunities in areas in which they had committed assets. They therefore sought the adoption of the same rights of Filipinos even if only during the transitional period of economic adjustment foreseen in the original law on independence.[23] The adoption of the parity amendment only provided a temporary postponement of the original provisions of the constitution. The temporary provision created a special class of foreigners rather than providing for an equal treatment of all foreigners for a prescribed period.

National treatment now involved not only the rights of Filipinos but also of Americans who enjoyed all the rights of citizens (as long as the parity amendment was in place). Any future prospects of accommodation to foreign interests became more problematic. The complication of the economic relations, including the revisions contained in the Laurel-Langley agreement in 1955, helped to reset the nature of trade and economic relations between a young republic and its former colonial master. Special relations between colonial power and former ward handcuffed the policy making process. The treaty making arrangements of the young republic became more complicated. Once favored treatment was accorded to one set of foreigners (Americans), the young republic that wanted to assert a differentiation of the rights of its citizens in economic matters from other foreigners could not do so clearly any more.

The young republic's international economic relations with other countries were tainted by the parity provision. From the viewpoint of foreign countries, any strong expression of nationalism within the laws of the republic was to be expected and respected. It was a natural aspiration and right of any young republic for its citizens. But they did not see the point of specific discrimination against them when American citizens were treated differently from other foreigners. The special treatment accorded to Americans was therefore troublesome to them. Foreign governments wanted their citizens to be treated like all other foreigners in any country. That is the essence of the most-favored-nation (MFN) clause in most international treaties.

Another view of this same problem was that many modern countries do not have discriminatory clauses or detailed provisions in their constitutions on issues affecting foreigners. These are dealt with in specific legislation and also in treaties of friendship, commerce, investment and taxation with other countries. Not being so hampered in the conduct of their international relations, they found it difficult to have to face constitutional provisions that delimited their rights as foreigners within a treaty arrangement.

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[23] The law granting independence to the Philippines passed by the US Congress in 1934 was popularly known as the Tydings-McDuffie Law in the Philippines. It contained a program of economic adjustment for a 20 year period that would gradually reduce the economic dependence of the Philippines on the American market. This law would further be amended by specific provisions that subsequently dealt with the Philippine Trade Act and the War Damage Payments which represented a response to the act of amending the 1935 constitution with the grant of parity rights to American citizens. The well-known Laurel-Langley Agreement was a revision in 1955 of some provisions of the provisions contained in the Philippine Trade Act, which governed the economic relations between the United States and the Philippines after independence in 1946.

From a Filipino point of view, this position became gradually untenable. The complications in policies were evident from the start of independence. First, the parity amendment to the constitution in 1946 reserved the rights accorded to Filipino citizens under the limitations of the Constitution also to Americans. The *quid pro quo* for this was the problem of financing the rehabilitation period from the destruction of the war and the resumption of trade relations with the United States. If those provisions in the constitution were not present, there would have been no need to amend the constitution to begin with. So, the first strike against the complications from the original sin of development policy was set once the country was forced to debate the issue of parity for Americans.

Second, the parity debate helped to poison the atmosphere for a rational approach to the issue of promoting an open approach to foreign direct investment policy after independence. A perverse nationalistic approach to economic policy took hold. It helped to close the door to a more rational approach of allowing liberality of treatment of foreign direct investments but enacting regulatory principles through an ordinary law of the legislature. The economic provisions in the constitution cemented further arguments for national patrimony and a secondary role for foreigners in the expansion of the domestic economy. The relationship between the domestic entrepreneurial sector with the government strengthened on the basis of political patronage for fiscal and investment incentives.

Parity as a right for the citizens of the former colonial master was seen as a stab into the heart of nationalistic pride. The framers of the constitution did not foresee that those provisions in the constitutions would only complicate the life of the nation without deriving the expected gains. Those provisions only advertised the impediments to future policy. There were many ways of achieving the same objectives of channeling foreign capital when the country became fully independent, and not before. By incorporating intended iron laws in the constitution, the country's new leaders simply invited strong pressure and even retaliation. Having those measures written in the constitution incited the fear of confiscation among foreign investors who already had a vested position in the sectors of the economy that were targeted.

Third, the policy environment for promoting the entry of foreign capital along with domestic investment became more difficult to navigate. The provisions of the constitution brought in many inconsistencies in policy making, encumbering the legislative branch in designing laws that could attract foreign investments and making it difficult for the executive branch to make suggestions along the same line as well as holding back its treaty making powers on international economic relations. Of course, the provisions buttressed further the xenophobic content of laws concerning the role of foreign capital in the economy while at the same time increasing the power of domestic industrial interests to extract more state support of their activities without the corresponding increase in their ability to become externally competitive.

In the meantime, from the outside world, the Philippine economy was seen as a reserve for American capital. Since the constitutional provisions gave Americans the privilege of parity with Filipinos, and Philippine economic policy making could not grant full reciprocity and most-favored-nation treatments for their capital when directed to the Philippines that gave free advertising to unequal rights obtained by Americans at the expense of other nationalities.

From the Filipino viewpoint, however, the parity rights that Americans enjoyed was only a temporary right given as a result of special historical relations. Special privileges for a particular nationality were meant to serve as the model for international economic negotiations. But until those special privileges disappeared from the treaty commitments, the country could not negotiate treaties and arrangements that yielded most favored nation treatment and other reciprocity benefits.

This was the policy dilemma of the period of early political independence up until 1974. This was the reason that until the establishment of the World Trade Organization (WTO) in the 1990s, the Philippines was essentially out of the world trading system because it could not accede to the General Agreement on Tariffs and Trade (GATT). The reason was that accession to GATT would have meant MFN treatment for all other members of GATT on issues enjoyed by the parity amendment extended to American citizens.

The two branches of the government were thus impaired in their choices. The legislative branch found it difficult to craft laws that focused on foreign direct investments because the constitutional restraints already presented a high bar toward liberalizing the policies on this account. The executive branch had the same quandary. If it wanted to improve the laws pertaining to the attraction of foreign direct investments, it was always hampered by the constitutional restraints that were always there to block it. Moreover, those provisions themselves provided impetus for further tightening economic policy to give it a flavor of creating opportunities mainly for Filipinos in a discriminatory manner.

Hence, Filipino First was a principle that gained enormous currency as the fulcrum of domestic industrial policy. It seeped into all sectors of the economy, whether it was retail, banking and finance, education, construction, and so on. Of course, it was most pervasive in the original areas of economic policy reservation for Filipinos – agricultural activities, public utilities, mining and exploitation of natural resources. Despite the relative lack of capital, the participation of foreigners was restricted in areas in which capital and technology was sadly.

The country's mineral industry began to decline by the 1970s. New explorations were limited. The amount of known resources in the country was discovered long before. Mining projects of the period were mainly those that were part of this early exploration work. The wake up call came when the energy crisis revealed the lack of new discoveries of energy resources. The policies that had supervened limited the exploration of natural resources to Philippine owned companies. The country had need for capital to do this job and there was none available.

Production sharing contracts were adopted during the martial law period while toeing in line with the constitutional prescriptions. As a result, it was possible for fully owned foreign companies to engage in mineral explorations under a contract with a national government entity – an agency or a department of the government. This was the major solution to the constitutional issue at a time when the world energy crisis found the country extremely in need of a search for energy resources to reduce dependence on imported energy. In the production sharing agreement, the government entity was the key element of the constitutional requirement. The government represented in fact 100 percent control by the sovereign entity. It was a Solomonic solution to the problem posed by the economic restrictions imposed in the constitution on foreign capital participation in the natural resources sector. This, however, would meet a further test during the 1990s. The constitutionality

issue would be raised to derail progress in its utilization until the Supreme Court finally resolved in 2004.[24]

The pursuance of government investment projects often has suffered from major legal obstacles. Many countries can pursue their public infrastructure projects with great speed. But in the Philippines, public investment projects often get tangled up in legal knots during before, during, and sometimes even after their construction. Litigations involving property rights, valuation of properties being used, local zoning issues, impositions that involve local governments and contractors for projects in infrastructure where rights of way, contracting issues, including the payment of local taxes become causes of major delays. Sometimes, faulty or inconsistent processes in the implementation at the project level lead to complications in the finalization of project execution.

In a recent attempt to solve the impasse affecting the implementation of public infrastructure projects, the NEDA held a forum on the issue.[25] Many of government's implementing agencies participated in this, with the Supreme Court administration having been reported to have sent participants in the exchange of views on improving the project execution. Salient conclusions from this meeting pointed to the following points. Infrastructure projects are vulnerable to lawsuits due to substantive and procedural lapses on the part of government instrumentalities and the contractors. Right-of-way issues are serious, especially for transportation projects. In this case, the issue of just compensation often leads to prolonged legal delays. Just compensation arises in the valuation of land for public infrastructure. The conclusions of the meetings were not different from government experience in the past.[26]

One aspect of the lack of coordination is the non-involvement of some critical agencies until a late stage of the project when the legal problems have arisen. Then some serious problems are unearthed that could have been avoided if appropriate inter-agency coordination had taken place to map out potential issues of conflict and delays. For instance, the tax authorities are excluded projects are likely to include tax issues. Procedural lapses complicate implementation of certain phases of the work, leading to unnecessary delays in project execution. The zonal planning of land use could help delineate land value issues in the case of negotiated settlements, including the application of property taxes. But the lack of such zoning delineation complicate land valuation problems. Prolonged settlements between the government and the parties encourage the adoption of quick fix but defective arrangements, leading to poor governance. Local governments insist on their rights to the taxation, such as operating fees, permits, and even the need for a local franchise. Securing a local franchise for some activities that have national permits introduces new uncertainties concerning the calculation of the benefits of the project. All these situations raise the propensity for litigations between parties, often affecting the various parties to the project.

Within this environment for problems, the vehicle of resorting to temporary restraining orders (TROs) has become a weapon of choice to derail a project's implementation schedule or to

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[24] See footnote 1 and the subsequent discussion natural resources and mining issues, *passim*.

[25] This was a workshop sponsored by the NEDA to brainstorm and coordinate issues on legal issues in infrastructure development, on November 23, 2006, at the Shangri-la Hotel, EDSA.

[26] Problems discussed in this forum were practically the same types of problems that have bedeviled the government infrastructure programs for years.

derive often concessions from the implementing agency. With the issuance of TROs, a large infrastructure project could be stopped momentarily or even permanently. Problems of this type have led the executive branch to suggest that the judiciary undertake a prioritization of project schedules to help resolve public infrastructure completion.

VI. Impact on the operations of the courts of justice

The high number of caseloads and backlog in the administration of justice, described earlier, is the result of diverse forces that produce legal disputes. Some of these could be traced to those laws that are inherently linked to the constitutional framework, including the provisions dealing with economic issues. They also arise from the effective use of the government's power of enforcement of existing laws on society. Of these, the presence of laws that criminalize certain forms of behavior or which sets up regulations that permit or bar certain types of activity naturally play an important role in creating the large number of lawsuits. All these result from the evolution of the legal and institutional practices within the country. In no small way, the various influences of this legal setup encouraged a litigious tendency in the settlement of disputes and conflicts among persons.

Litigation is a legitimate tool in settling disagreements. However, it can be abused. It can be used as a weapon for harassment. The filing of frivolous complaints imposes nuisance costs on business projects. Such legal costs primarily help to lengthen the time for implementing the project. Oftentimes, delays in the use of already committed resources to the project can have damaging consequences. Indirectly, they foster something worse. They encourage the growth of unproductive activities. This includes rent seeking practices in business and social relations among the stakeholders. Often, they invite corruption as well as negligence.

Of the above, a subset of behavior relate to social and economic legislation that directs the country in order to obtain certain national or specific sector objectives. What would appear to be natural economic activities in some societies might be condemned as unacceptable in another. Laws on property rights constitute one such area of legal issues. Laws on citizenship rights represent another set of issues. Subset of both relate to limitations on citizenships that are set for the acquisition and enjoyment of property rights. In some societies, laws defining these are simply set in ordinary legislation.

In the Philippine context, the higher law (stated in the constitution) is the specific provision on the definition of citizenship rights. That is the initial basis for definition of the Filipino citizens. The rights of citizens are then those provisions that distinguish the rights of Filipino citizens against those of foreigners. Further legislation affecting citizenship rights would have to conform to the strictures found in the constitutional statement. As already mentioned, many of these strictures are stated in the economic provisions in the constitution which limits the rights of foreign corporations and foreign citizens in the acquisition of certain property rights with respect to land, to public utilities, and the exploitation of natural resources.

No such provisions curtail the rights of foreigners in the constitutional provisions in most countries, except to indicate them in general terms to be specifically provided by ordinary legislation. This simplifies immensely the interpretation of laws in those countries. In short, while constitutional and ordinary laws might represent two different levels of legislation, they could be in

greater harmony when general principles are not encumbered with details when stated as in the form initially of higher laws. This means that the place for specific details of policies is in the ordinary, or lower level of, legislation. In such cases then, the issues of constitutionality and of conflict of statutes would tend to be less likely to occur often. In particular, insofar as the issue of the rights of citizens is concerned in relation to those of foreigners, the details are made clear in the ordinary laws and not in the constitution.

One example of a source of conflict in society involves the area of social and economic legislation. Laws on social and economic reforms are based on philosophical visions about the "proper" balance between property rights and social ideals about human progress. Legal issues setting forth conflicts in labor laws, in tenancy and in land ownership, land reform, and tribal rights are the result of legislation in these areas of social and economic reform. These laws emanate from general principles that often get translated into new legislation that specify the nature of the policy enunciated in these areas of reform.

Social justice is a major principle in the 1935 Constitution. It reiterated and even amplified in the 1987 Constitution. Not all of these statements of general principles can be consistent with one another. Most of the philosophies that lead to these ideas are framed on the basis of a given social product – let's call it economic output – that is given and the idea is to devise an equitable (or fair) way of dividing it among members of society. In general, none of these remedies will work if the growth of economic output is endangered by a need to subdivide it among the existing claimants without regard toward market rules of allocation.

Beliefs and objectives that make sense in isolation may prove inconsistent when taken together. Preambles and principles of nation building are generally found in the constitution to inspire and motivate the citizens. They also carry an enormous list of desirable objectives that are often impossible to attain with the types of policies in effect and the amount of resources available to the nation. Hence, there is need to take a realistic view of what can be attained at specific times and under what reasonable objectives that might be feasible to work with. In short, many objectives of nation building often require some kind of ordering of what could be feasible. A reading of the 1987 Constitution will bring out the fact that there are more idealized objectives compared to those in the 1935 Constitution. In fact, too, the 1935 Constitution as already discussed contain a lot of objectives which has led to the adoption of restrictive economic provisions.

The large content in terms of human, political, economic and social principles, preambles in the constitution provides many citizens with myriad interpretations about what the constitution promotes. Almost any ideology can be accommodated with these principles. This is where knowledge of the implications of particular decisions on the country's economic future would be important. Knowledge of the economic implications would at least convey the cost of the economic decision, should it be adverse. Decisions have to be seen with a proper understanding of their impact on the economy.

This state of affairs helps to strengthen the hand of those who have to make the proper interpretations when legal doubts are posed before them. There is in such cases a strong possibility that the judges of these issues might be starting from a perspective or philosophy of social and

economic conflict removed from what the government seeks to promote in its actions. This is amply illustrated in some landmark cases that have come out from the Supreme Court, for instance.[27]

Many factors account for the clogging of the courts with legal disputes. In the case of the Supreme Court, the "grave abuse clause," already discussed earlier.[28] This clause raised the demand for legal suits on constitutionality. These increased with regularity after its introduction in the 1987 constitution. As already stated, the grave abuse clause was like Pandora's box toward questioning the actions of the government. The Supreme Court rather than the political arms of the government became the arbiter of the nation's forward movement even in matters of economic policy. It became the constitutional loophole for questioning any act of the government that could be linked with critical new actions of the government affirming economic policy.

Perhaps this was partly the additional cost of volatile post-martial law politics of the country. The matter however cannot be simply relegated to political activity for it happened in regular frequency. The fact was that parties to a conflict found the grave abuse clause as a convenient opening for dragging in questions of constitutionality. The increase in the constitutionality cases created a more serious backlog in the cases brought before the Supreme Court. Because constitutionality cases required en banc discussions of the full court and were of higher order of priority, all other cases followed a thickening queue of unsettled appeals. Faced with the complex set of constitutional objectives and principles before it, the Supreme Court seldom shied away from the issue of its jurisdiction over a case. This was apparent even in cases where the issues at stake appeared more like a private settling of business scores.[29]

Economic legislation and major acts of the government have been brought to the court for rulings on constitutionality. Reforms on the liberalization of telecommunications, on energy, on mining, on industry, or on actions involving privatization projects were stalled for a considerable amount of time before final adjudication took place. Sometimes, the resulting ruling held back progress on the matter at hand.

There are other factors that lead toward clogging of the courts in general. The court procedures might tolerate excessive leniency on postponements and other kinds of legal tricks that prolong the litigation of cases. These cases then tend to drag on and are not only cumbersome to prosecute but become also very costly. Court cases may drag on ever so slowly until their abandonment becomes a natural solution. Thus, they could languish and die as court cases without the dockets being cleared of them.

The increase of court litigations might also reflect the influence of a rapidly growing population. More people means more social and legal interactions and the failure of some contracts to proceed as expected. A cynical reason could also be offered – the country is producing too many

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[27] In the privatization of the Manila Hotel – a government owned hotel -- the winning bidder, a foreign corporation, was denied the right to buy the assets of the Manila Hotel. The Supreme Court ruled that the Filipino group that bidded was entitled to the purchase because the hotel was part of national patrimony and as a result a domestic corporation had the right to buy it before any foreign corporation could. Another example is the decision to tell a foreign corporation planning to set up a petrochemical power plant to locate not in Batangas province, where it had planned to set up the plant, but in Bataan, where a petitioner had wanted the petrochemical plant to be set up.

[28] See section II, p. 6, above.

[29] For instance, see footnote 27, on the Manila Hotel privatization and the Bataan/ Batangas petrochemical plant.

lawyers in proportion to all other professions. This directly contributes to the emergence of a very litigious society. A cynical view arising from this condition is that that lawyers have to create jobs for themselves.

Despite all these factors, however, the provisions of the Constitution on economic issues keep the courts of law busier than they need to be. In most countries, the laws covering commerce, industry, finance evolve outside the direct framework of the Constitution but arise from general principles of commerce as they evolve in practice and within certain bounds of competition and regulation. Their constitutional framework is silent on specifics of economic policy. Instead, economic policy making arises from ordinary legislative activity.

In the Philippines, the constitution has specific provisions dealing with these. Such provisions provide undue circumspection of the true role played by legislation in crafting laws pertaining to economic and social policy. The 1935 Constitution, amplified further by the Constitution of 1987, assured that this state of affairs continued to guide ordinary legislation. Hence, the conduct of commercial, industrial and other sectors of the economy has been unduly hampered by constitutional restrictions.

VII. Doing Business indicators and how other countries do business

Businesses in a private enterprises economy interact with the government through the legal, regulatory, institutional and other practices that define the economic policy framework. That framework helps to provide the filter for the success or failure of economic activity. Business enterprises use scarce resources at their disposal in order to operate as going concerns.

The World Bank, with the help of its international set of cooperating multilateral regional banking institutions, recently took these issues directly through questionnaires that asked questions about doing business operations across the wide net of countries around the world. The result was an international survey of how countries and their governments permit private enterprises to do business. The problem is to understand how the legal and institutional frameworks of countries impinge on the ability of enterprises within their boundaries to undertake their usual business activity. Interviewing knowledgeable people in each country – from administrators, policy makers and legal experts – and using the inside analytical knowledge of its economic, legal and private enterprise staffs to evaluate the survey results, the World Bank came up with a Doing Business report.[30] Such a report is updated periodically and today there are two annual set of data available. The objective of this brief section is to report on the implications for the Philippines of the 2005 and 2006 Doing Business reports. The topic is highly relevant to the topic at hand, which is to review the legal and constitutional aspects of business regulation and promotion.

The *Doing Business* report provides information that summarizes how countries do business with an aggregative indicator that asserts the relative ease or difficulty of doing business

[30] The methodology and various steps undertaken by the World Bank are reported in www.doingbusiness.com or www.worldbank.org.

for particular countries. The indicator helps to measure the relative cost of undertaking business operations in each country. The measured indicators provide the basis for ranking countries by way of judging the "ease of doing business." A country judged high by this indicator allows business operations to proceed with relative ease. But a country that is ranked low in terms of this indicator provides the information that many procedural and other cost implications raise the cost of doing business in the country.

What is the significance of the doing business indicators? They help provide country comparisons about how different countries permit business to be done in their home fronts. It is possible to follow a particular business practice in a given country and assess relative experience in terms of economic performance as a result. Countries that view regulation as a sovereign act – and as a result might not care much about its implication – might still consider how their policies permit or deter business activity in terms of their cost of doing business and how this compares with other countries doing the same things. Within a global context, a comparative picture could help in assessing how economically competitive is the country. The statistical information is therefore valuable.

Each of the "doing business" indicators provide a judgment about how a country's legal and regulatory framework affects the transaction costs of doing business. Ten typical business problems are tracked – setting up a business; securing licenses to operate; employment and firing of workers; registering of property rights; securing credit; protection of investors once committed in the business; the payment of taxes; ability to trade across country boundaries; the enforcement of contracts; and obtaining closure of a business out of bankruptcy or insolvency.

The specific activities are made to pass through the filter of legal, administrative, and regulatory framework in a moment of time (year). The problem is defined but the institutions and legal and economic policies differ by countries. The resulting measure provides an indication of how the country in question solves that particular problem. Such an outcome is evaluated in terms of the costs that it implies -- time delays involved in specific procedure and numerical cost in terms of actual economic resources used in completing the specific business process.

The resulting indicators could be interpreted as measures how an uncommitted investor might evaluate the prospects of making some future investment in the country. The case of the actual investors is different. Often, that investor already possesses some direct and specific insights about operating a business within the country. For instance, such an investor might already have knowledge of specific institutions, personalities, processes, and other significant details that are often the product of their experience.

How does the Philippine economy fare in terms of these *doing business* measures? For one, some of these findings substantiate the analysis provided in this paper concerning the effects of complex and excessive regulations. There are economic costs associated with inflexibilities of some types of investment regulation. Labor hiring regulations and intricate guarantees to protect the welfare of workers already employed often make it difficult to employ new workers and to expand employment. Often, innocuous sounding legal requirements and high sounding objectives about protecting specific sectors and interests encourage litigations and introduce unforeseen legal complications.

Thus, more important major objectives fail to get achieved. The effort to protect owners and workers from creditors prevent the restructuring and rebirth of more dynamically efficient enterprises. In the aggregate, the country finds itself far off from the list of countries that facilitates "ease of doing business." In terms of the implications of this set of measures on the agenda of government for economic policy and legal reform, there is a lot of work to be done!

Table 1 shows the scores of the Philippines compared with some other East Asian neighbor countries. In the first part of the table, the comparison of the total country ranking of the Philippines with other prominent neighbors is indicated. In the second part of the table, there is greater detail of the country rankings for the ten specific measures of doing business for the Philippines. Again, the measurement here is in terms of rankings with respect to the total number of countries for which the World Bank undertook to measure their doing business indicators.

Table 1. World Bank *Doing Business* Survey: The Philippines Compared to Other Countries in 2005 and 2006

	2006 rank AMONG 175 COUNTRIES	2005 rank AMONG 155 COUNTRIES	Change in rank
Ease of *Doing Business Ranking:* PHILIPPINES	*126*	*121*	*-5*
Overall Ranking Of East Asian Countries			
Singapore	1		
Hong Kong, China	5		
Japan	11		
Thailand	18		
South Korea	23		
Malaysia	25		
Taiwan, China	47		
China	93		
Taiwan, China	47		
Indonesia	135		

	2006 rank AMONG 175 COUNTRIES	2005 rank AMONG 155 COUNTRIES	Change in rank
Ease of *Doing Business Ranking:* PHILIPPINES	*126*	*121*	*-5*
Sub Indicators of Doing Business: PHILIPPINES			
1. Starting a Business	108	99	-9
2. Dealing with Licenses	113	112	-1
3. Employing Workers	118	118	0
4. Registering Property	98	91	-7
5. Getting Credit	101	96	-5
6. Protecting Investors	151	151	0
7. Paying Taxes	106	96	-10
8. Trading Across Borders	63	61	-2
9. Enforcing Contracts	59	50	-9
10. Closing a Business	147	143	-4

Source: World Bank, Doing Business Surveys. See www

For the year 2005, the Philippines ranks in 113th place among 155 countries. Among the countries with excellent indicators coming from the East Asian region are close neighbors: Singapore (number 2), Hong Kong (7), Japan (10), Thailand (20), Malaysia (21), and South Korea (27). Ninety one countries separate Thailand and Malaysia from the Philippines in this ranking!

The World Bank's *Doing Business Report* for 2006 shows that the Philippines fell a few notches below the 2005 ranks. The indicators went down to rank number 126, roughly and essentially as low as the rank for the year before, with the addition of around 20 countries in the count to a total of 175 countries. In the later survey, the indicators for the close neighbors on the aggregate remained as follows: Singapore (number 1), Hong Kong (5), Japan (11), Thailand (18), Malaysia (25), and South Korea (23). But now 108 countries separate the ranking of Thailand and 101 countries of Malaysia from the Philippines.

The Philippines does poorly in terms of issues related to "starting a business," "dealing with licenses," "employment of workers," "getting credit," "protecting investors," the payment of taxes, and the matter of "closing a business." The worst ranks occur for "protecting investors" and for "closing a business." These are very unnerving judgments, and some of these scores echo a number of business episodes that are related to major projects that are discussed elsewhere in this paper.

Going through the list of the ten doing business sub-measures, Philippine scores tend to create higher costs, more procedures or delays in terms of days lost, and higher relative rigidity of processes compared to those in the countries in the Asia and Pacific region. In 2006, the Philippines scored relatively well in the measurements related to "trading across country borders" and in the "enforcement of contracts" – the overall rating for these business practices were ranked 63 and 59 (out of 175 countries). But in the other seven measures, the Philippine rank is above 100 (out of 175 countries).

It could be argued that these variations result from a subjective interpretation of legal and regulatory framework. It is possible that these scores could be affected the prejudice that is caused by high profile cases that are of wide public knowledge.[31] For instance, those engaged in undertaking the ratings of specific processes could be influenced by exuberance of staff that monitors the adoption of economic reforms that are yet untested in terms of outcomes. Or the same might be frustrated by pessimism when rating countries that face difficult current issues. In such cases, they might suffer from a myopic bias arising from their exposure to these individual cases.

These errors in judgment could affect individual countries and place them off their true position in the spectrum of cases being compared. Reputation, whether good or bad, can play lead to a myopic bias in grading. A complex situation could be mistyped. Possibly, such errors would be minimized in an aggregate of many countries. In general, some such bias could be partly swamped by the large number of similar cases, so that countries would tend to fall within the group of scorers to which they would naturally belong. The large number of situations would tend to reduce the amount of variations among countries with relatively similar characteristics. Such a similarity often provides a reflection of their poor economic performance.

[31] See the references to cases in footnote 26, above.

The doing business indicators provide a clue to the reasons why the country has fallen behind in economic performance compared with its high growth neighbors of East Asia. These indicators validate many of the points that were already stated in this study. The indicators describe how businessmen perceive the business and regulatory framework. Although the Philippine economic and business framework has improved, there is still a lot of effort that is needed to improve the business climate. The intricacies of business practices tend to raise transactions costs due to bureaucratic procedure and the like, involving longer waiting times for resolution of required documentations and licensing, sometimes the tendency to resort to litigation of business issues and contribute toward higher costs of doing business. In comparison, the other economies of East Asia have smoother business practices and are not as hampered by legal and other stumbling blocks as those found in the country.

Table 2 shows the ten business indicator scores of the Philippines for 2006. Such scores are reported and set in comparison with the average regional scores. If there is any institution that can undertake such measurements, it is the World Bank. Assisted by its many country desk staff of lawyers, business experts and economists, and its contacts with client countries, this development assistance institution has the best vantage point. If there are momentary changes that happen which alter a country's means of doing business, the institution is well placed to sense them for they have field staff in the countries involved that could provide the appropriate cross-check.

The Philippines belongs to the region of the Asia and Pacific region,[32] so its scores affect the regional averages. The country scores when compared to those of Malaysia and Thailand are relatively low. Even more glaring is the comparison with Singapore and Hong Kong. In some instances, the Philippine scores compare favorably with those of Taiwan and South Korea. But that is deceptive because these two countries have now moved into a different league of developed countries. These countries have the average performance range of OECD countries that also includes Japan. The Philippine scores in fact appear to be in the range of measures found for OECD countries when it comes to social and regulatory framework, and somewhat too high in level compared to those of its true regional competitors.

Table 2. Philippines: Ten Measures of "Doing Business" Compared to the Asia and Pacific Region and OECD Countries, 2006

1. Starting a Business (2006)			
The challenges of launching a business: the number of steps entrepreneurs can expect to go through to launch, the time it takes on average, and the cost and minimum capital required as a percentage of gross national income (GNI) per capita.			
Indicator	Philippines	Region	OECD
Procedures (number)	11	8.2	6.2
Time (days)	48	46.3	16.6

[32] The Asia and Pacific Region is a grouping of countries comprising those in East Asia and the Pacific island economies. The region prominently includes all those countries in East Asia, those that are members of the ASEAN grouping and all the island Pacific economies.

Cost (% of income per capita)	18.7	42.8	5.3
Min. capital (% of income per capita)	1.8	60.3	36.1

2. Dealing with Licenses (2006)

The procedures, time, and costs to build a warehouse, including obtaining necessary licenses and permits, completing required notifications and inspections, and obtaining utility connections.

Indicator	Philippines	Region	OECD
Procedures (number)	23	17.6	14.0
Time (days)	197	147.4	149.5
Cost (% of income per capita)	113.4	207.2	72.0

3. Employing Workers (2006)

The difficulties that employers in face in hiring and firing workers. Each index assigns values between 0 and 100, with higher values representing more rigid regulations. The Rigidity of Employment Index is an average of the three indices.

Indicator	Philippines	Region	OECD
Difficulty of Hiring Index	56	23.7	27.0
Rigidity of Hours Index	40	25.2	45.2
Difficulty of Firing Index	20	19.6	27.4
Rigidity of Employment Index	39	23.0	33.3
Hiring cost (% of salary)	8.5	9.4	21.4
Firing costs (weeks of wages)	91.0	41.7	31.3

4. Registering Property (2006)

The ease with which businesses in can secure rights to property. Included are the number of steps, time, and cost involved in registering property.

Indicator	Philippines	Region	OECD
Procedures (number)	8	4.2	4.7
Time (days)	33	85.8	31.8
Cost (% of property value)	5.7	4.0	4.3

5. Getting Credit (2006)

Measures on credit information sharing and the legal rights of borrowers and lenders. The Legal Rights Index ranges from 0-10, with higher scores indicating that those laws are better designed to expand access to credit. The Credit Information Index measures the scope, access and quality of credit information available through public registries or private bureaus. It ranges from 0-6, with higher values indicating that more credit information is available from a public registry or private bureau.

Indicator	Philippines	Region	OECD
Legal Rights Index	3	5.0	6.3
Credit Information Index	3	1.9	5.0
Public registry coverage (% adults)	0.0	3.2	8.4
Private bureau coverage (% adults)	4.8	10.1	60.8

6. Protecting Investors (2006)

Three dimensions of investor protection: transparency of transactions (Extent of Disclosure Index), liability for self-dealing (Extent of Director Liability Index), shareholders ability to sue officers and directors for misconduct (Ease of Shareholder Suits Index) and Strength of Investor Protection Index. The indexes vary between 0 and 10, with higher values indicating greater disclosure, greater liability of directors, greater powers of shareholders to challenge the transaction, and better investor protection.

Indicator	Philippines	Region	OECD
Disclosure Index	1	5.2	6.3
Director Liability Index	2	4.4	5.0
Shareholder Suits Index	7	6.1	6.6

Investor Protection Index	3.3	5.2	6.0

7. Paying Taxes (2006)

The tax that a medium-size company must pay or withhold in a given year, as well as measures of the administrative burden in paying taxes. These measures include the number of payments an entrepreneur must make; the number of hours spent preparing, filing, and paying; and the percentage of their profits they must pay in taxes.

Indicator	Philippines	Region	OECD
Payments (number)	59	29.7	15.3
Time (hours)	94	290.4	202.9
Total tax rate (% profit)	53.0	42.2	47.8

8. Trading Across Borders (2006)

The costs and procedures involved in importing and exporting a standardized shipment of goods. Every official procedure involved is recorded - starting from the final contractual agreement between the two parties, and ending with the delivery of the goods.

Indicator	Philippines	Region	OECD
Documents for export (number)	6	6.9	4.8
Time for export (days)	18	23.9	10.5
Cost to export (US$ per container)	1,336	885	811
Documents for import (number)	7	9.3	5.9
Time for import (days)	20	25.9	12.2
Cost to import (US$ per container)	1,336	1,037	883

9. Enforcing Contracts (2006)

The ease or difficulty of enforcing commercial contracts. This is determined by following the evolution of a payment dispute and tracking the time, cost, and number of procedures involved from the moment a plaintiff files the lawsuit until actual payment.

Indicator	Philippines	Region	OECD
Procedures (number)	25	31.5	22.2
Time (days)	600	477.3	351.2
Cost (% of debt)	16.0	52.7	11.2

10. Closing a Business (2006)

The time and cost required to resolve bankruptcies. The data identifies weaknesses in existing bankruptcy law and the main procedural and administrative bottlenecks in the bankruptcy process. The recovery rate, expressed in terms of how many cents on the dollar claimants recover from the insolvent firm, is also shown.

Indicator	Philippines	Region	OECD
Time (years)	5.7	2.4	1.4
Cost (% of estate)	38.0	23.2	7.1
Recovery rate (cents on the dollar)	4.0	27.5	74.0

Source: World Bank, Doing Business Surveys. See www

In a number of areas, Asia and Pacific Region is at par with OECD countries (but this is also in part because at least four major countries in the Asia and Pacific Regions – Japan, South Korea, Australia, and New Zealand – are members of OECD). These scores of doing business attempt to measure business practices in relation to one another. They do not however indicate the level of efficiency under which firms operate in these countries. Because of the wide provision of public and business infrastructure in these countries, that level of operational efficiency tends to be higher too.

The scores for the Philippines in relation to the Asia and Pacific region countries indicate that business activity involve more time delays in business procedures, a higher incidence of red tape and therefore longer waiting times in terms of days of getting certain business activities finished or undertaken. These involve higher relative costs in terms of the use of economic resources.

For instance, in the case of labor markets – "employing of labor" – the difficulty of hiring index is twice as hard compared to the regional average of the OECD average. In terms of rigidity of hours worked, difficulty of firing of workers, and the cost of firing workers, the Philippine score is either at par with the more advanced countries if not more difficult. The scores for securing credit are considerably more difficult than in the region or OECD. The same is true for the measures related to the protection of investors.

The scores for "closing a business" indicates the process of getting insolvent firms and essentially bankrupt enterprises to move toward either bankruptcy or closure of business. The speed with which this is done often enables the surviving capital of these firms to be reallocated to more productive use, thus essentially saving part of the assets of these firms for continued economic activity. The logjam that could result from a slow recognition of bankruptcy issues often causes further loss of assets and waste of economic resources. The low score on this aspect of doing business indicates long drawn out processes before bankrupt firms are finally made to close. This means that bad debts take too long to get resolved properly and the cost of closure is quite high to the company and to its creditors alike. The low scores that the Philippines obtains in this regard is an indication of the need for the reform of laws dealing with bankruptcy.

All these indicators underscore the need for the government to streamline reforms in doing business. The form of attack is to simplify the resulting processes that delay doing business properly. This goes to the all important problem of undertaking reforms affecting economic and business policy. The changes in policy need to focus on improvements of the regulatory environment, the reform of investment laws to enable quicker attraction of investors, the revision of labor laws, and the installation of quicker procedures to deal with bankruptcy and other forms of insolvency. At the heart of these issues are the reforms that improve the legal and institutional framework for undertaking business – reducing the excessive resort to litigation and other forms of legal maneuvers that help derail investment projects.

VIII. Impact on the national economy

In this last section, three aspects of the impact on the economy are discussed. First, the path of development under the restrictive economic provisions of the economy is explained as a result of the "original sin" of Philippine development policy. The discussion takes into account the special economic relations with America soon after independence and the options that were available to the newly independent republic in dealing with the demand for parity rights for American citizens after independence. Second, the framework of development policy under the 1987 Constitution is elaborated upon to bring out the complications that continue to hamper the proper design of current development policy. Third, the device of a counterfactual is used to analyze grand question: What might have been the path of Philippine development if the country were not hampered at the very beginning by the economic restrictions in the 1935 Constitution. A counterfactual examines the set

of developments that would have taken place given the course of the world economy – specifically the course of world development – and under the assumptions that the Philippines had removed the restrictive economic provisions from the framework of the constitution.

A. Economic regime under the parity rights amendment

The debate of 1946 was the proposition to amend the 1935 Constitution by giving the same rights of citizenship to Americans citizens in matters pertaining to the economy. This was to correct the economic restrictions in the constitution. The Liberal party under Manuel Roxas favored the grant of parity rights. The Nacionalista party under the incumbent Commonwealth president Sergio Osmena opposed parity rights. The debate was decided by referendum as a rider to the first presidential election that would lead to the election of the first president of the republic. The euphoria of independence and the popularity of the Liberal party position led easily to the victory of Manuel Roxas and his party in the elections and in the campaign for constitutional amendment. The *quid pro quo* for that amendment was attractive – the promise of war damage payments, the continuation of a twenty year adjustment period of bilateral trade preferences, in short continued access to the American market. Having been leveled by the destruction of the previous war, the "pain" of the parity provision was overlooked.

The more sensible policy option for the amendment at the time would have been to strike out the limiting provisions in the Constitution. That would have left all issues pertaining to economic issues and the promotion of economic development to the realm of ordinary legislation. Then, the Constitution would have treated all investors – domestic and foreigner alike – as far as the Constitution was concerned. That would have put the Philippines at par with the rest of the world in terms of these issues and in particular in dealing with issues affecting the mobility of economic resources, especially of capital.

Among the Philippine constitutional framers and the early leaders of the republic, no one was wise enough to offer a more sensible and non-discriminatory option that would treat all foreigners alike. The presence of special political and economic relations with America provided the expedient excuse that the grant of parity rights would cushion the effects of independence, provide resources for rehabilitation (the war damage law promised to pay compensation for war destruction), and was only for a temporary period of adjustment.

The country's leaders for years believed in working around these restrictions so that they could encourage other methods of promoting a flow of resources that would be favorable to economic development. During the first two decades after independence, the provisions of the constitution played this role of defining the limits of the future. Even with parity rights to Americans, the foregone conclusion was that these rights would end after the termination of the special economic relations with America. Those relations were renegotiated and amended in some details in 1955 under the Laural-Langley Agreement, but the essence of the main provisions remained: special relations with the United States would end by 1973.

The national economy developed under these constraints of policy imposed by the constitutional restrictions on foreign capital. Succeeding governments bravely sought mechanisms to improve the country's approach toward attracting foreign investments. This was done by operating

around the boundaries of the constitutional provisions that governed the encouragement of foreign capital. Even as the sentiments for the opening of the economy had grown, the basic tenets arising from the prohibitions of the constitution were respected as provisions that would not and could not be amended. They would open the country toward a divisive national debate on the issues that were already long debated – about creating an economy that was propelled by domestic investments in major sectors.

The foreign investments incentives made a clear distinction between two types of foreign capital – American and non-American. Americans capital enjoyed national treatment or the rights of all Filipino citizens under the constitution. All other foreign investments were subject to the investment restrictions on foreign capital. This discriminatory situation failed to produce the kind of inflows of American investments that other countries in the region enjoyed. What it did was provide a timing demarcation for the termination of parity rights for American investors. Further conditioned by the inward looking framework of the industrial promotion policy of the period, the growth of private investments in the economy became relatively limited to those investments fueled by the protectionist policies, which often encouraged mainly domestic investments. The promise of a robust economic independence fueled by efficient domestic industries with a strong competitive external posture in their growth did not materialize. The paradox was that the rules that framed the investment climates were fostered by nationalistic ideals of giving mainly the benefits of market success to Filipino enterprises.

The adoption of the restrictive economic provisions in the constitution was therefore a grand strategic failure. Almost no one recognized that failure at that time. Those who harbored the idea of a strong economy owned by Filipinos, making the common citizen more prosperous and creating an economy with much larger enjoyment of the fruits of progress, high productivity and access to the modern conveniences of advanced technology were unable to take full advantage of what was in their control at the time.

At the beginning of independence, the country was well positioned to achieve spectacular growth because the investments that were needed to restore facilities and improve them were already in place. Even though there was massive damage from the Second World War, the inflow of immediate war damage payments from the United States helped to restore liquidity in the domestic economy, rehabilitate American- and Philippine-owned property and investments, and inject seed money on which to base new expenditure demand. The main problem was to continue to attract American capital to remain in place and even to expand it to lay the foundations for more industries to progress in the country. However, the policies that were adopted at this critical time led quite a lot of the American-owned property that was compensated after the war damage payments to be eventually repatriated back to America or to go to other countries. The welcoming home in the Philippines for that investment was not made clear by the adoption of quite contrary industrial policies.

American direct investments with established domestic markets tried to remain and hold on to their markets, some expanding just modestly in line with domestic import substitution policies. This was true of some food companies, cosmetics and pharmaceutical companies, and energy companies. So did the public utilities that continued for a time to be owned substantially by American capital continued to remain in business, waiting for a time to make a final sellout as soon

as soon as parity rights expired. A future sellout appeared inevitable. There was therefore little incentive to expand and improve operations by enlarging capacity and efficiency. Parity rights were an uncertain prospects for extension as these were seen to end by 1974.

Foreign investments in highly promoted industries did not fear for rights termination. Many import substituting industries found the climate of an inward-looking industrialization a profitable area of business. So, many of the home market import substituting fabrications – in consumer goods, in pharmaceuticals, in food industries and chemicals – continued to be present even though during the period of development until the present time, none of these had become major export industries – except those that were initially already in export industries from their inception – some of the traditional exports in the agricultural and mining industries.

B. Economic regime under the 1987 Constitution

The 1987 Constitution did not undo the economic provisions in the constitution from the 1935 Constitution. In fact, the new constitution even widened the restrictions to cover other sectors like media, schools, and other issues like professional practice. In the past, the constitution was quiet in regard to these sectors so that any regulation of them would simply be subject to ordinary legislation. Further elucidations of other economic and social rights in the constitution added new specific restraints in the constitution. The constitution therefore became more restrictive in these details. The number of constitutional bodies was also increased in number. In short, instead of becoming a simpler document, the constitution became more restrictive and complex..

The euphoria of restoring political institutions also brought in new hopes for social and economic change. These were however as flawed as before without tackling the restrictive provisions on capital in the constitution. The language of the new provisions was of course in generalities without even requiring that these be spelled out in particular legislation. Of course, that left new opportunities for all potential areas of conflicts that lead to legal disputes to invoke rules and principles and objectives enshrined in the constitutional text. Moreover, the *grave abuse clause* opened the gate for the review of political and economic policy issues before the Supreme Court for ruling as to constitutionality.

The economic provisions enshrined in the 1935 Constitution continued to provide the key statement on restrictions to foreign capital. These provisions, aided by the introduction of the grave abuse clause that was referred tp earlier, raised the opportunities to question major economic activities that had a significant content of foreign capital participation. The questions of constitutional intent are more plentiful than ever today than in the past. For this reason the courts, especially the Supreme Court, have been kept busier than ever. When the courts take on a case, it is true that the basis of decisions is the law. When the Constitution and various laws provide ample provisions and objectives that are in the grey area of specific legal provision, the potential case for conflict has widened.

Lawyers look for exceptions, loopholes and escape clauses from mazes of legal provisions and regulations to support their reasoning. Legal vehicles to sidetrack a restriction could be devised often at some higher cost. And the grave abuse clause could often provide that additional latitude for

pressing a legal point when other points appear weak. In part this accounts for the proliferation of legal cases. In issues that are constitutional in nature, land in the docket of the Supreme Court.

All these broaden the power of the courts even more than in the 1935 Constitution. The content of jurisprudence on economic issues is rich precisely because of the enormous amount of cases surrounding all the issues – civil issues, statutory cases of conflict of laws and questions of constitutionality – that have arisen from the complex of legal provisions in the country. The interventionist nature of the provisions of the constitution on economic issues has accounted for many of these cases – hence, the jurisprudence has extended to the rights of foreigners acquired under parity arrangements, to virtually all issues affecting property rights related to land, to exploitation of resources, of mining rights, to privatization, and so on.

The increase in the number of cases brought before the courts is partly the result of having their foundation in the law as an excuse for the legal suits. In any interaction between parties to a contract or to an on-going activity, laws govern the relationships among different persons. But laws are man-made, just as constitutions are man-made. Mistakes in the elaboration of details often have unintended outcomes and conflicts. The prevalence of labyrinthine steps, exceptions, and qualifications in legal or regulatory provisions open up opportunities for legal disputes.

The government's ability to perform its task is impaired when nuisance and unnecessary legal blocks are put in its way. They throw off planned actions and hinder implementation schedules from proceeding properly. Such cases hold up major actions of the government – such as when a court issues a temporary restraining order. Or a certain government action is held by some aspect of law that prevents the government from continuing the undertaking of a project, such as those in public construction. Government infrastructure projects are held up by side issues that relate to acquisition of rights of the last few holdouts in a property settlement or in an expropriation case. Gridlock comes about in many forms on the direct recipients of public projects. Public welfare ultimately suffers.

Invoking constitutional issues over actions that appear to be the realm of business decisions of the government and other contracting parties also promote this gridlock. Within the framework of the 1987 Constitution, invoking the grave abuse clause could itself be subject to abuse. Issues of constitutionality often arise from the desire of specific groups in the country to implement a specific course of action according to some grand constitutional principles. But as many of these grand principles could be in conflict within the time frame at hand, the process of litigation could be hijacked simply by the presence of the grave abuse clause. This is in fact the case. The actions of the government are often prevented or held up by reference to grave abuse clause in the 1987 Constitution. A result of this is the "abnormal" increase in the number of litigations that are brought to the Supreme Court and the lower courts.

Impediments toward achieving reforms in major areas of the economy have been placed before the constitutional barrier with the Supreme Court as arbiter. Obstacles have helped slow down many questions in the area of industrial and investment promotion, trade and commercial policy, privatization, public works construction, project identification, and those that deal with the finalization of contracts to pursue specific activities. The cases are controversial and they impact on social and economic welfare of the nation. They cover bureaucratic processes, corruption, or simply

contract obligations. At the level of government actions, some of these are often related to the pursuit of government agencies and instrumentalities to set appropriate tariff rates for certain government services.

Looking back in history, many landmark decisions of the Supreme Court which tried to solve knotty topics would have saved the nation from further convolutions of logic and legal maneuvers if the constitution had remained silent on many of the issues. Of course, the country's difficult economic course has marked the nation's limited economic accomplishments compared to more dynamic neighbors. Those questions that it tried to solve – in accordance with the well argued arsenal of legal provisions that have been imposed upon the nation – restricted the nature of foreign economic participation in the economy. In today's frantic efforts of trying to make up for lost time, the country's policy-makers continuously make an effort to advertise the need to attract foreign capital to assist in the country's developments only to find that, as in the past, there are constitutional impediments.

The questions that the court had settled dealt with the rights of foreigners to own land – they could not continue to own land beyond a limit set after the end of parity in 1974. So argued the Supreme Court in its decision on parity rights acquired when the question was brought before it. In the country's review of the benefits of that law at the time, there was euphoric support of the decision. Yet, if the 1935 provisions simply did not contain the restrictive rule on foreign land ownership that was the basis of the problem, such a case would not have occurred. The country's development of the land market would have continued to evolve, and the Philippine land market would have a much higher economic value and a much higher turnover of property sales today. The market would be many times more prosperous as a segment of the economy.

The investment in the creation of new lands – through shoreland reclamation projects – would have provided the urban metropolis with new land and higher property values. But these projects were unduly hampered by land disputes issues related to the property rights linked with the use of foreign capital. A case in point is the coastal road land reclamation project along the shorelines of Manila and Cavite province. Major attempts to get this project going had been intermittently blocked by land issues related with the participation of foreign capital. The lack of domestic capital to undertake such a massive project often meant the participation of foreign capital. The implication on the land expansion for the urban area, with rising land values and the improvement of commerce, industry, and new lands for public facilities were enormous. The constitutional restrictions on land ownership and the role of foreign capital here has clouded each major project. In turn, the inability to mobilize the capital that is needed to make such projects successful within a reasonable period of time has caused all these projects to be very much delayed and quite full of litigious obstacles.[33]

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[33] The Philippine Estates Authority-Amari case involving the Manila reclamation project has a long history. During the late 1950s, the American investor Harry Stonehill committed resources that led to the reclamation land that includes the site of the Cultural Center and the nearby lands. Subsequent land reclamation projects under different auspices were undertaken during the late 1970s. The government eventually became involved in this land reclamation when the project failed and the Philippine Estates Authority was created to assume control and ownership of the assets.

In Singapore and in Hong Kong – two of the most dynamic regions in the East Asian region – land is extremely limited and strict rules on land use and expansion are in place. But in both countries, there is enough flexibility within the framework of laws for foreign capital to participate in ventures that involve land for commercial, industrial and even some residential use. In fact, the participation of foreign capital in property development in these economies has made them into very expensive cities, in part because property values have risen so much.

One case that has often been cited as an aberration in the application of the many principles of national patrimony was the issue of privatization of the Manila Hotel, where the winning bidder, a foreign company, was disallowed from buying the hotel because of preference for a Filipino company on grounds of the hotel being a kind of "national historical treasure." This ruling put into question the credibility of the country's court system as being an objective arbiter of government initiated contracts.

The Supreme Court ruling in the early 1990s on the petrochemical project interfered with the decision on the location of the project and led to the project being completely abandoned. That project would have created a major petrochemical project that would have established a raw material base for many important plastics industries in the country. Today, the country has yet to go ahead with a petrochemical project of the same dimension. The country would have been much more industrialized with heavy industries owned by foreign investors looking for relocation other countries. The Philippines has missed out on many of these industries in part because of the many restrictive policies that were in part conveyed by decisions on litigations in which the courts could have exercised restraint because the matters were essentially in the nature of business decisions.

The Supreme Court reversed its own wrong to declare the mining law unconstitutional, therefore in effect allowing the entry of fully owned mining companies that are engaged in a production sharing contract. This new decision in 2005 put new lease on life to a mining industry that had become practically in severe depression over two decades when the very foundation of the production sharing contract was put to question. To some extent, the Supreme Court's acceptance of the legality of the contract represents a turning point in the collegial thinking of the court about some of the major problems of restrictive legislation and the many conflicting laws that apply on public issues that have to do with projects that either promote or hinder economic progress.

C. The grand missed opportunity: a progressive economy ahead of the rest of developing East Asia

What would have happened if the Philippines did not adopt the restrictive economic provisions of the constitution? What if the nation's founding leaders had not committed this serious mistake in strategic thinking? What if they did not commit the original sin of development policy? The analysis now turns to these questions.

The brief answer: it was a very costly experience. It would pre-destine a large part of the country's future generations into poverty. It would lead to the mis-governance of the development process that has taken the country several decades to correct and is still trying to correct.

The oft-mentioned prophecy among experts during the 1950s was that among the countries in the East Asian region with a good prospect for rapid development, the Philippines stood the best chance of rapid growth, next only to Japan. The ingredients for that future were all present with the initial conditions of the Philippine economy at the time. Of the countries in the region, the wealth of human resources in the Philippines was among the best in the region. The country had benefited immensely from the programs of public education, public health and bureaucratic tutelage in public administration that prepared the young republic for a better life. Through the measure of literacy, knowledge of English, and public health indicators, the country had a superior position over many of the developing countries of East Asia at the time. Of course, World War II and the destruction that it wrought had set back the country's economy and industry. But most of the other countries had suffered also from the war.

After independence in 1946, these were positive factors favored a sound course for development. In addition, massive rehabilitation of the economy benefited from the war damage compensation program that fueled an early economic recovery. The amount of foreign exchange resources were further helped by massive military spending and economic assistance. US military presence in the Pacific at the time predicated continued sources of stimulus to the economy. This was a condition of the world tensions at the time, including the problems of the war in the Korean peninsula and later in Vietnam. The proxy wars of the Cold War made for a high degree of military spending that benefited the country's macroeconomic situation. Large levels of aggregate demand led to heavy foreign spending that were captured within. In addition, there was the normal growth of pent up consumption that accompanied the period of postwar prosperity. All these factors played a very important role in the rapid growth of the East Asian tiger economies during this period.

In addition to all these, the unique bilateral trade preference with the US economy gave continued access to that large developed market. The preferential trade involved special quotas and preferential trade access for some primary products – sugar, coconut products, and other traditional products that had grown and which occupied a high volume of trade and income for the country's industries. More important that these special exports however was the preferential tariff on other Philippine exports for which no production quotas existed. That aspect of the trade arrangement covered all other potential exports that the country could have produced for the American market. If it allowed the flow of American capital to contribute to the country's development in all areas and of course retained the investments that were already in place and encouraged it to continue, immense export growth in many new commodities would have arisen.

During this period, Philippine policy makers could have turned the provisions of the bilateral trade agreement to work in favor of the country by encouraging the growth of exports for the American market. The framework for doing that was very propitious. American investments were then well positioned to continue exploiting the American market for Philippine made goods. But instead, the country caused the industrial promotion to turn inward. The government focused most of its attention toward buttressing the position of the country's traditional exports to the US. The problem of these traditional exports was to maintain the market access and quotas for Philippine sugar, coconut products and other traditional agricultural products. At the same time, policy makers ignored the export opportunities that could be created in the industrial sector. The advantage from

this bilateral trade preference environment continued until the end of the Laurel-Langley agreement in 1974.[34]

The required turnabout in industrial policy did not happen however. By the mid-1960s to the 1980s, vested economic interests were already too strong to resist further reform of economic policy.. Although some of the lessons learned from those years had become apparent to some policy makers and leaders, the turnaround that was required was no longer possible. So, trade and import controls designed to manipulate the industrial promotion climate to favor industries aimed at home production took to roost. In the meantime, the message of the constitutional provisions about reducing foreign participation in the country's industrial efforts became the dominant policy statement of the day despite the oft-repeated political rhetoric about the desirability of foreign capital in the nation's growth.

The dominant policies became import substitution and a highly protectionist program of industrialization. Foreign capital in public utilities and in mineral and natural exploitation continued to be defined along the restrictive rules. Much economic reform was plainly designed to overcome the framework of this economic policy. The illusion of this policy was that domestic industry that was heavily supported by industry would one day become more competitive as the learning process improved. These policies starved the nation of scarce foreign exchange resources and made it difficult to develop strong industries that would earn new export revenues. Eventually, many of the protected industries would fail to develop competitiveness and would lose their markets to cheaper goods imported from abroad.

The opportunities for the growth of textiles, garments, shoes and other labor intensive products – the major exports that propelled the early postwar growth of Japan, South Korea, Hong Kong, Taiwan, Singapore, and later Thailand, and Malaysia, as well as China, Vietnam, and Indonesia were all available at an early time to the Philippines. The key toward having foreign direct investments were like a bird in the hand at the dawn of independence. American capital was in place in the Philippines in substantial quantities. (The impact of the restrictive constitutional provisions on foreign investments was to be a heavy influence on the framework of economic policy that was to encourage displacement of those investments by Filipino capital instead of building on that strong suit to further encourage more growth in the economy.) The huge postwar boom of the American economy and the recovery of world trade helped to raise growth rates in the countries surrounding the Philippines – some in double digit growth – during this period. This growth pace enabled all these countries to build their economies rapidly and to create large internal markets for themselves as their export markets grew.

The success of these economies and their rapid growth required all the above countries to exploit the markets offered by the US economy. As they expanded their orders for more exports,

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[34] During the 1960s, the developing countries obtained a unilateral system of trade preferences from the rich industrial countries after discussions of world trade and development under the auspices of UNCTAD. The GSP (as the general system of preferences was called) benefited many developing countries, including the Philippines. However, one of the major outcomes of the industrial policy regime that dominated Philippine industry then was a failure to take full advantage of the GSP privileges in much the same way the country also failed to take full advantage of the bilateral tariff preferences with the US under the Laurel-Langley agreement. In fact, these lost opportunities were a natural outcome of the inward looking development that the country fostered, a posture that was hostile toward the creation of export opportunities.

their economies began to build huge export surpluses. And as these economies built their domestic growth on the basis of a strong growth of the inflow of foreign capital, domestic enterprises also began to strengthen until eventually, the domestic enterprises became very strong internationally competitive enterprises. These accumulating external surpluses caused their currencies to remain stable for a long time and then appreciate in value in time.

What happened specifically to South Korea and to Taiwan was a phenomenon that could have happened much earlier in the Philippines. But of course, for many reasons explained in this paper, these set of events did not happen.

During the early years of independence until 1981, the growth of the economy had been on average strong – at around 5.5 percent per year – but this was not anywhere near the performance of the East Asian "miracle" countries. In contrast, the East Asian economies were growing at real growth rates of 8 percent to 10 percent per year. An aspect of their strong performance was the growth of external account surpluses in view of the export performance of their economies. The strong external performance was fueling further domestic growth through the expansion of new investments in raw material supplying industries that supported the export sector and in the buildup of construction and further investment in domestic infrastructure. In that market, they never had the kind of preferential access that the Philippines had to the US market in view of the Laurel-Langley trade agreement. Taiwan and South Korea had the same amount of massive US military and economic aid flows that the Philippines had enjoyed during a comparative period, but they did not have preferential trade access to the US market.

In time, the build up of strong dollar reserves encouraged by the export surpluses of these countries and the continued inflow of foreign investments in these economies stabilized their balance of payments. In contrast, the ambivalent if not hostile attitude toward foreign direct investments in the Philippines encouraged further the inward looking development, despite efforts to move away from the tight grip of this policy regime on the country's economic course. The inefficiency of the regime of protection and the prevalence of trade and import controls to support that regime led to balance of payments problems and toward a dependence on foreign loans rather than foreign direct investments to propel the efforts of the economy. The crisis prone nature of these developments would in fact foster the kinds of weakness that the economy inherited, and would sap the strength of the economy.[35]

The early years needed a major demonstration of rapid growth that could have been achieved if the country's openness to foreign direct investments was a major aspect of the development policies of the early 1950s. If the Philippines had only encouraged the inflow of foreign direct capital in the garments and textiles industry, and later electronics and other consumer goods, selling these goods to America in those days, the early demonstration of the possibilities of high gains from the trade regime with that country would have deflected the wrong direction that economic policy took. The major force of development of the miracle Asian countries in those years was via this route of growth of export intensive industries based on garments and textiles and other labor-

[35] Another impact of a policy regime that involved many restrictions and protected markets was to foster rent-seeking activities in the economy. Such a regime created a politics of accommodation. Close supporters of those in power appropriated the benefits from protection. In the end, all these would promote a weakening of the body politic. It would create an economy that was crisis prone.

intensive outgrowths of related industries. After finding a comfortable growth niche, they built on their success further to propel even higher export performance.

But the tone of policies in the Philippines during this period had been set by the restrictive policies toward foreign investment. As a result, more attention was paid to the promotion of industries that replaced almost any consumer item that was imported from abroad. And country's entrepreneurs and investment resources were directed into activities that produced consumer goods that the high wall of protection that was provided through trade and exchange controls.

The Philippines needed new, export-based industries with unlimited growth potentials in hiring labor at the time. The required inputs toward achieving this were the access of foreign capital to locate their enterprises in the Philippine economy. Had that been made possible, then the dynamics of an export-oriented growth model in the country would have been set in motion. (Incidentally, the germ of that development is today being partly demonstrated by the growth of electronics as a leading sector in the Philippine growth. But many aspects of that growth is in part hampered by the many constitutional and legal restrictions that continue to hamper the overall climate of investment policy.) Then the Philippines would have become a case of strong growth well ahead of the early boom that was experienced in these countries East Asian countries. The key to it was tied up with a highly open economy not only on the goods side but more importantly open in the sense of welcoming to foreign direct investments for which there was already ample American presence. That would have been the key toward bringing also further new expansion of domestic investments, exports, and eventually currency appreciation.

In summary, the Philippine economy would have been far more developed today. Certainly, it would have developed well ahead of other countries in the region as predicted then. The failure to become the vanguard NIC (newly industrializing country) is tied up with the problems that are discussed in this paper. The original sin of the country's economic development strategy, installed in 1935, still continues to haunt the country, for it still exists in the constitutional document of today. Those provisions are the ones that need to be addressed in the current discussion of the reform of the Philippine constitution.

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APPENDIXES.

Appendix 1. The plunder cases

The Sandiganbayan court has the highest ratio of backlogs to caseloads. It handles the most political of the corruption cases. Some of the backlogged cases relate to those linked to the plunder cases filed by the government against Ferdinand Marcos who fled the country in 1986. A large part of the current work of the court is also devoted to the on-going trial of the case against Joseph Estrada, who was deposed in 2001. The failure to resolve these cases tells about the sensitive nature of the cases especially from a political angle. The plunder cases will eventually reach the Supreme Court on appeal or review. They therefore further add pressure on the Supreme Court as the institution that will deal with these cases.

The plunder cases involve criminal cases filed by the government, to include the recovery of plundered assets. The case of plunder, including the case of tagged or sequestered assets, requires legal proof. The state has settled some of these cases. The time that it has taken to establish the government claims have been inordinately long. The results obtained from these cases are somewhat few and at least are inordinately different from the hoped for claims. The cases will blur with time unless evidence is found and can stand up in court.

There is need to get these cases resolved if only to get tarnished and sequestered assets freed from the legal freeze and brought to full participation in the creation of income and wealth within the economy. Although it can be argued that some of these assets continue to participate in the creation of income and wealth – for instance the case of the coconut levy funds – the legal attachments and encumbrances bring uncertainty to the issue of property rights and puts on hold future business plans. A lot more assets that have immense economic value are put on uncertain dispositions.

The long standing failure to get the issue resolved is a combination of reasons that either point out to the lack of resolve or incompetence of the government body in charge of the process (PCGG), the influence of politics on the courts, the elasticity of the rules of court that enable prolonged debates and postponements, the turnover of the courts in terms of personnel, and the tolerance of legal maneuvers in favor of the accused. Reconciliation with settlement would be one way out to the future, but the political atmosphere does not favor it.

The outcome of highly politicized issues needs quick resolution or the country’s future is hampered and great uncertainty follows actions that have tentative settlements as solution. Revolutionary or politically traumatic events – and acts arising from such events -- require quick resolution as part of the national healing process. Revolutionary justice (which is quick and could be very cruel) or some kind of political bargain often is resorted to in the interest of that quick resolution.

The bargain could be through political reconciliation or a settlement that allows the parties to begin with a clean slate. A prolonged division of society through indecisive action in the courts makes the process lose credibility. It eventually puts the country into continued deep divisions. The courts have an obligation to speed up the resolution of these cases in their hands. Otherwise, the

country is held in suspense, as in the case of the plunder cases, which appear to be nowhere else to go.

When World War II ended, the issue of collaboration was one that could have prolonged the country's agony. That issue was decided through a quick resolution through court trials and convictions. For the rest, amnesty, reconciliation, and restoration of political rights was the key toward resolution. The nation was able to restore the lives of a lot of people who were involved on both sides of that political fence. Part of the Hukbalahap rebellion was settled through amnesty.

The plunder cases were filed because of an impassioned political and moral compass. However, the plunder trials have taken a long time and are nowhere near an apparent conclusion. Delays and changes in trial personnel on the part of the state are indications of a weakening resolve. Are the political institutions too weak to make a decision or is this part of a failure scenario? The political institutions and the courts need to bring them to final resolution or they lose credibility in the pursuit of their tasks. Prolonged indecisiveness on the cases promotes its own great injustice. The sequestered assets might produce some income and wealth but their beneficiaries are uncertain, with a great possibility of many freeloaders gaining from the process. Property rights are left undetermined. The prospects for the mismanagement and neglect of the assets in question could happen. If decisions cannot be rendered within sufficient time, a solution to the plunder cases by way of compromise for a final settlement would be a forward step. That solution cannot be a fully satisfactory outcome to any party, but it allows the nation – and the parties involved -- to move on.

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Appendix 2. Statistical Appendix

Table A1. Justice System: Higher Courts and Special Courts

Name of Court	1998	1999	2000	2001	2002	2003	2004	2005	Distribution Weights 2004
A. New Cases	14,162	6,402	17,737	16,416	14,723	16,395	17,254	18,475	1.000
Supreme Court	4,371	3,573	3,998	3,992	4,290	4,307	4,538	4,423	0.263
Court of Appeals	8,953	1,854	12,850	11,749	9,642	11,745	12,370	13,483	0.717
Sandiganbayan	699	697	661	517	582	132	112	215	0.006
Court of Tax Appeals	139	278	228	158	209	211	234	354	0.014
B. Caseload	39,823	42,770	46,729	47,308	46,117	47,962	49,419	50,635	1.000
Supreme Court	9,897	8,353	9,087	9,535	10,127	10,072	11,200	10,636	0.227
Court of Appeals	25,529	29,777	32,731	33,241	31,509	34,332	34,973	36,581	0.708
Sandiganbayan	3,908	4,074	4,324	3,964	3,875	2,810	2,433	2,388	0.049
Court of Tax Appeals	489	566	587	568	606	748	813	1,030	0.016
C. Backlog	25,260	28,842	30,802	31,095	31,412	32,086	32,511	32,215	1.000
Supreme Court	4,780	5,089	5,543	5,837	5,765	6,662	6,882	6,772	0.212
Court of Appeals	16,923	19,881	21,492	21,667	22,587	22,603	23,098	22,521	0.710
Sandiganbayan	3,272	3,513	3,357	3,197	2,629	2,296	1,892	2,145	0.058
Court of Tax Appeals	285	359	410	394	431	525	639	777	0.020
D. Backlog to Caseload Ratio (=C/B)	48.30%	60.92%	61.00%	61.22%	56.93%	66.14%	61.45%	63.67%	
Supreme Court	66.29%	66.77%	65.66%	65.18%	71.68%	65.84%	66.05%	61.56%	
Court of Appeals	83.73%	86.23%	77.64%	80.65%	67.85%	81.71%	77.76%	89.82%	
Sandiganbayan	58.28%	63.43%	69.85%	69.37%	71.12%	70.19%	78.60%	75.44%	
Court of Tax Appeals									
E. Total Hig Courts– Backlog to Caseload Ratio									
Simple Average (All High Courts)	63.43%	67.44%	65.92%	65.73%	68.11%	66.90%	65.79%	63.62%	
Weighted by 2004 Caseload distribution	62.94%	66.35%	65.26%	65.11%	68.14%	66.76%	65.79%	63.66%	
Weighted by 2004 Backlog distribution	63.34%	66.60%	65.45%	65.32%	68.33%	66.91%	66.00%	63.93%	

Source: Supreme Court; National Statistical Coordination Board, Philippine Statistical Yearbook
Supreme Court, 2005: In absence of data, average of two previous years.

Table A2. The Lower Courts: Cases, Caseloads, and Backlogs by Types of Court

	1998	1999	2000	2001	2002	2003	2004	2005	Distribution Weights 2004
A. Lower Courts -- New Cases									
Regional Trial Courts	155,275	180,706	181,336	173,671	181,566	199,998	183,204	165,764	0.411
Metropolitan Trial Courts	159,342	151,787	132,734	113,957	98,876	98,821	87,978	73,196	0.197
Municipal Trial Courts in Cities	126,465	126,370	110,307	79,674	99,714	94,474	69,076	69,181	0.155
Municipal Trial Courts	100,410	97,351	91,385	79,101	69,071	67,117	52,617	41,219	0.118
Municipal Circuit Trial Courts	51,924	56,444	52,802	46,169	50,009	49,331	52,617	34,222	0.118
Total	593,416	612,658	568,564	492,572	499,236	509,741	445,492	383,582	1.000
B. Lower Courts –Caseload Court									
Regional Trial Courts	387,876	426,791	465,661	462,865	483,777	526,876	539,401	542,491	0.424
Metropolitan Trial Courts	353,168	345,855	355,549	309,180	304,823	292,604	264,032	237,772	0.208
Municipal Trial Courts in Cities	328,996	318,215	313,422	259,821	273,087	258,828	214,562	203,187	0.169
Municipal Trial Courts	242,302	225,099	216,817	201,986	162,457	160,894	139,342	127,228	0.110
Municipal Circuit Trial Courts	114,058	123,860	122,110	117,051	119,308	120,820	113,602	106,914	0.089
Total	1,426,400	1,439,820	1,473,903	1,350,559	1,343,452	1,360,022	1,270,939	1,217,592	1.000
C. Lower Courts --Backlog Court									
Regional Trial Courts	225,188	251,351	266,157	279,728	301,431	330,901	348,312	349,722	0.449
Metropolitan Trial Courts	183,024	186,799	185,192	190,160	180,003	165,808	153,427	140,484	0.198
Municipal Trial Courts in Cities	177,935	182,956	167,199	159,282	147,395	134,650	121,249	114,472	0.156
Municipal Trial Courts	121,214	118,255	117,010	89,048	88,210	83,224	83,019	76,372	0.107
Municipal Circuit Trial Courts	64,153	66,191	67,454	66,006	67,467	66,934	69,607	62,829	0.090
Total	771,514	805,552	803,012	784,224	784,506	781,517	775,614	743,879	1.000
D. Lower Courts –Backlog to Caseload Ratio (=C/B)									
Regional Trial Courts	58.06%	58.89%	57.16%	60.43%	62.31%	62.80%	64.57%	64.47%	
Metropolitan Trial Courts	51.82%	54.01%	52.09%	61.50%	59.05%	56.67%	58.11%	59.08%	
Municipal Trial Courts in Cities	54.08%	57.49%	53.35%	61.30%	53.97%	52.02%	56.51%	56.34%	
Municipal Trial Courts	50.03%	52.53%	53.97%	44.09%	54.30%	51.73%	59.58%	60.03%	
Municipal Circuit Trial Courts	56.25%	53.44%	55.24%	56.39%	56.55%	55.40%	61.27%	58.77%	
Simple Average: Backlog to Caseload Ratio	54.09%	55.95%	54.49%	58.05%	58.39%	57.46%	61.03%	61.09%	
Weighted average based on 2004 Caseload	55.05%	56.46%	54.94%	58.65%	58.83%	57.73%	61.03%	60.98%	
Weighted average based on 2004 Backlog	55.05%	56.32%	54.96%	58.37%	58.75%	57.74%	61.07%	60.95%	
E. Total Counts									
Newly filed cases	593,416	612,658	568,564	492,572	499,236	509,741	445,492	383,582	
Caseload	1,426,400	1,439,820	1,473,559	1,350,903	1,343,452	1,360,022	1,270,939	1,217,592	
Backlog	771,514	805,552	803,012	784,224	784,506	781,517	775,614	743,879	
F. Per 100,000 inhabitants Data									
Newly filed cases	790.8	797.8	723.5	627.0	622.4	622.6	533.2	449.9	
Caseload	1,900.9	1,875.0	1,875.0	1,719.6	1,674.8	1,661.1	1,521.0	1,428.1	
Backlog	1,028.1	1,049.0	1,021.8	998.2	978.0	954.5	928.2	872.5	
G. Number of JUDGES									
TOTAL	1,529	1,503	1,513	1,487	1,502	1,521	1,578	1,627	
H. Judges per 100,000 Inhabitants	2.038	1.957	1.925	1.893	1.872	1.858	1.889	1.908	
Memo items:									
Population in millions	75.0	76.8	78.6	78.6	80.2	81.9	83.6	85.3	
RP population in (100,000)	750	768	786	786	802	819	836	853	

Source: National Statistical Coordination Board, Philippine Statistical Yearbooks

Definition: Court caseload refers to the sum of pending cases at the end of the preceding period and of case inflow during the reference period. Ratio of Backlog to Caseload measures the percentage of court cases that are unsettled or undecided, with the Caseload used as base.