The Long and Arduous Journey to Institutionalization

A Review and Commentary on the C4CC Constitutional Reform Proposals

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Introduction

Constitutional reform proposals have a marked tendency to become "wish lists" for the particular groups or sectors advocating them. With many organizations advocating sectoral issues or interests having acquired a substantial level of proficiency in pursuing "reform" through legislative initiatives, i.e. working for the amendment/repeal of existing statutes or the adoption of new ones, elevating this entire process to the plane of constitutional engagement seems the logical, and inevitable, next step.

Unfortunately, the business of constitutional reform is not a simple matter of taking a list of specific proposals and packing them into one, neat package for revision. Unlike statutes, which may be conceptualized and designed to address particular, even narrow, interests and objectives, constitutional reform proposals must take into account that a Constitution must be able to stand as a general framework that embodies the, oftentimes conflicting, concerns of various groups and sectors in society. Furthermore, constitutional rules are intended to address broader and more far-ranging concerns as compared to prescriptions that may be generally found in statutes. More specifically, constitutional rules are meant to *last* – not to be subject to the erratic changes that sometimes characterize the statutory order.

As stated by the Supreme Court in the recent case of Lambino v. COMELEC:[1]

> "The Constitution, as the fundamental law of the land, deserves the utmost respect and obedience of all the citizens of this nation. No one can trivialize the Constitution by cavalierly amending or revising it in blatant violation of the clearly specified modes of amendment and revision laid down in the Constitution itself.
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> To allow such change in the fundamental law is to set adrift the Constitution in unchartered waters, to be tossed and turned by every dominant political group of the day. If this Court allows today a cavalier change in the Constitution outside the constitutionally prescribed modes, tomorrow the new dominant political group that comes will demand its own set of changes in the same cavalier and unconstitutional fashion. A revolving-door constitution does not augur well for the rule of law in this country."

This sentiment can be clearly gleaned from the more tedious process of constitutional revision and amendment, even as compared to the often frustrating pace of conventional law-making. The process of changing the Constitution is *designed* to be difficult in furtherance of the intention to grant this document a far greater degree of permanence and stability. While providing for the possibility of change – for the purpose of coping and adapting to the continuously evolving social and historical context – the process is not made easy – to discourage hastily conceived and ill-advised changes.

Any serious effort to propose amendments to or a revision of the Constitution must therefore begin with a recognition of this core principle in its design. It is unfortunate, that the Philippine experience with constitutional change, quite to the contrary, more often than not has revealed a pronounced lack of respect for the status of the Constitution as document intended to

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[1] G.R. No. 174153, October 25, 2006.

stand as a semi-permanent blueprint for our system of government and the legal framework to support it. It has been less than 75 years since the formal adoption of the first "official" Constitution of the modern Philippine state, and yet there have been two near-total overhauls and a significant number of specific amendments undertaken within that relatively brief period.

While compelling arguments have certainly been put forward to support the idea of revision of the present Constitution, they nonetheless must be assessed with care, and put forward with an appropriate awareness and respect for the pivotal role that this core instrument plays in ensuring the stability of many modern societies.

It is partly from this perspective that this review of specific constitutional reform proposals, submitted as part of several studies commissioned by the Coalition for a Citizens' Constitution (C4CC), is being made. The studies cover a broad range of concerns and interests, from asset reform in a wide range of sectors to the youth development agenda, from a proposed shift to the parliamentary form of government to ideas on rethinking the current concept of national patrimony. This review aims to look at the results of each study, in particular the specific proposals for amending or revising the current Constitution, and assess and analyze them, bearing in mind the above-discussed nature and function of a constitution, and the specifics of the institutional processes that go into any effort at constitutional change.

Due attention is attempted to be given to the general objectives and interests sought to be addressed by the proposals put forward by the studies, as opposed to particular details of individual proposals. It is hoped that this approach will be able to provide a more firmly grounded foundation for continuing discussions on the various proposals and ideas for constitutional reform.

Coverage

This paper will review various papers dealing with various sectoral interests and other, broader issues – such as, for instance, federalism – in relation to the present Constitution and initiatives to change it.

A substantial number of these papers relate to asset reform, covering a broad spectrum of concerns ranging from agrarian reform, fisheries, the rights of labor, and the interests of the urban poor.

Three papers deal with issues specific to sectors identified and expressly provided for under the 1987 Constitution – indigenous peoples, women, and the youth.

Several other papers deal with broader issues and proposals that cut across all these various sectoral concerns. Largely concerned with changes to our overall political framework for government, these issues include federalism, the shift to a parliamentary form of government, and revisions to the constitutional concept of national patrimony.

Agrarian Reform

The paper *Constitutional Reform and the Agrarian Reform Agenda* authored by Ernesto G. Lim, Jr. of the People's Campaign for Agrarian Reform Network, Inc. (AR Now!), discusses certain concerns in relation to the issue of agrarian reform in the light of (then) initiatives being undertaken by the Arroyo administration to amend or revise the 1987 Constitution. The paper starts out with a review of the historical development of various "agrarian reform provisions" in the 1935, 1973, and 1987 Constitutions, as well as a comparison of the different provisions. It

likewise discusses how the provisions of the present Constitution have been translated into law, and analyzes problems/difficulties in implementation.

At the end, the paper concludes with a brief set of proposed amendments to the 1987 Constitution intended to pave the way for a more "radical" implementation of the "agrarian agenda." Despite the presentation of these proposals, however, the paper ultimately closes with the statement that "there is no pressing need to introduce any substantial amendments to the 1987 Philippine Constitution."

This conclusion is not really surprising considering that most of the proposals presented in the paper, as well as the supporting discussion, revolved around *details of implementation* as opposed to the *general framework* or *fundamental foundation* for pursuing agrarian reform. This choice of emphasis goes directly to the heart of the issue raised in the Introduction to this paper – that is, the purpose of a constitution and its distinction from a mere statute.

While Lim's paper presents an extremely comprehensive and well-grounded (at least, in terms of actual experience of agrarian beneficiaries) critique of the agrarian reform program implemented pursuant to the provisions of the 1987 Constitution, it is nonetheless a critique of *process* more than *principle*. In other words, the main thrust of the criticism against the existing agrarian reform program is with regard to the specific manner of its implementation as opposed to the adequacy of its constitutional foundation.

A look at the proposed amendments bears this out. Three amendments are involved. The first aims to expand the express objective of Section 4, Article XIII – the direct foundation for agrarian reform in the 1987 Constitution – by emphasizing that *all* farmers and farmworkers should "own, control and possess" (and not merely own) the lands they till. The second amends Section 5 of the same article by mandating State support not simply for "agriculture," in general, but to "agrarian reform beneficiaries," in particular. The third and last amends Section 8, also of the same article, this time to specify a State obligation not merely to generally "provide incentives" to encourage investing the proceeds of agrarian reform to industrialization and employment creation, but to provide "sufficient funding and fiscal incentives" to achieve the same goal.

While the proposed changes do indeed touch on State policy vis-à-vis agrarian reform, open closer scrutiny they are readily revealed to be concerned mainly with specific program details. For instance, introducing the phrase "own, control and possess" is an attempt to compel not simply transfer of legal rights of ownership on paper, but to promote actual physical custody of land. This is apparently in response to some concerns regarding arrangements where the agrarian beneficiaries, despite receiving legal title, never actually held on to the land for a significant period. In the same vein, the other two amendments are clearly aimed at increasing the level of government support, in terms of budget and other incentives, to the agrarian reform program.

While these objectives are undoubtedly worthy of support, the question must nonetheless be asked – should they be pursued through the process of constitutional reform? As previously noted, the Constitution is intended to stand as basic law – the framework for our social order. Should programmatic details, such as the extent and form of government support for a particular program, really be defined in the Constitution itself and not left to statute?

Most who would answer in the affirmative will probably anchor their response, in no small part, on a fundamental (if justified) distrust of legislatures and executive officials. Making the Constitution as specific as possible guards against the possibility of an unsympathetic Congress or Executive hijacking or derailing social reform proposals through the enactment of statutes. But should this – what amounts to a distrust of government – be a premise on which we base our perspective on constitutional reform?

Perhaps a more essential issue insofar as agrarian reform is concerned is the actual constitutional foundation for the program in the first place. Under our current constitutional order, the notion of agrarian reform is founded on the broader mandate to promote "social justice."

Social justice has been defined as the adoption of the government "of measures calculated to insure economic stability of all component elements of society, through the maintenance of a proper economic and social equilibrium in the interrelations of the members of the community."[2]

In other words, social justice is a concept principally concerned with the task of correcting inequities in the distribution of wealth, for the specific purpose of preventing social unrest. Proceeding from this perspective, land reform law, in the words of the Court, is "social legislation designed and enacted to solve agrarian unrest, one of the country's most pernicious problems that have strangled the economic growth of the nation."[3]

So although Section 4, Article XIII of the Constitution expressly talks about a "right" of farmers to own the lands they till, the grant of this right is still very much tied to a functional purpose – the quelling of social unrest – rather than to an actual recognition of a fundamental entitlement.

International human rights law may be able to provide the beginnings of an alternate perspective on the issue of agrarian reform. For while there is, as of yet, no express recognition of a "right to land," the goal of equitable wealth distribution is nonetheless consistent with certain recognized human rights. Similarly, various treaties make reference to agrarian reform as a means for insuring the fulfillment of these rights.

So, for instance, Articles 7.1 (Right to Remuneration)[4] and 11.1 (Right to Adequate Standard of Living),[5] of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) deal with concepts closely related to the idea of agrarian reform. In fact, Article 11.2 of the same Covenant, which recognizes a right to be free from hunger, expressly refers to "reforming agrarian systems" as a way of fulfilling this right.[6] In the same vein, Article 14 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which mandates elimination of discrimination against rural women, provides an entitlement to equal treatment in "land and agrarian reform" as well as to access to agricultural credit and loans.[7]

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[2] Victoriano v. Elizalde Rope Workers' Union, et al, G.R. No. L-25246, September 12, 1974.

[3] Padasas v. CA, 82 SCRA 250 (1978)

[4] The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
(a) Remuneration which provides all workers, as a minimum, with:
(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant

[5] The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

[6] The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or **reforming agrarian systems** in such a way as to achieve the most efficient development and utilization of natural resources; [emphasis supplied]

[7] States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
x x x

Fisheries

Bas Umali's paper entitled *Citizens' Constitution Making Research on the Aquatic Reform and Fisheries Development Agenda of the Small Fishers Sector* treads down many of the same paths as the previous paper on agrarian reform. It focuses on analyzing the possible effects of proposed charter changes, e.g. a shift to a federal form of government, on the fisheries industry, as opposed to advocating for specific amendments or revisions to the current Constitution. As earlier stated, it adopts the familiar approach of surveying the historical evolution of laws and constitutional principles relating to the issue, followed by an assessment of the current state of the sector.

In sum, it finds the existing provisions of the 1987 Constitution as generally adequate, identifying as a main problem, instead, the lack of "consistent implementation of the related policies" embodied in laws – such as the Fisheries Code – implementing the constitutional framework. In fact, the paper goes as far to say that the proposed amendments to the Constitution (under the Arroyo administration), which it labels as adhering to the "neo-liberal paradigm," will be "disastrous" to the fisheries sectors.

Again, the fact that in the case of fisheries, the main issue is ultimately reduced to the matter of implementation should not be surprising. The elevation of State policy towards subsistence fisherman, with all its details on program implementation,[8] has inevitably led to a situation where even matters of program execution have taken on a constitutional aspect. Whether this is a desirable situation, of course, is something else altogether. Further discussion on this matter will be made under the topic of national patrimony.

Urban Poor

Constitutional Reform and the Urban Poor Agenda from Elisea Saclapuz Adem of the John J. Carroll Institute on Church and Social Issues (ICSI), anchors its assessment of the adequacy of the current constitutional order vis-à-vis the urban poor sector principally on the how deeply the concept of social justice has been enshrined in the Charter. "Social justice," in this regard, is defined by the paper essentially with respect to its character as a concept validating the idea of redistribution of resources in favor of the more disadvantaged members of society.

But while this may be superficially true, i.e. that the concept of social justice has in fact been used to justify resource redistribution, it cannot be overlooked that, as pointed out previously, Philippine law and jurisprudence have often tended towards a functional view of social justice. It has been characterized as involving the adoption of "measures calculated to insure economic stability of all component elements of society."[9]

(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

[8] Section 7, Article XIII. The State shall protect the rights of subsistence fishermen, especially of local communities, to the preferential use of local marine and fishing resources, both inland and offshore. It shall provide support to such fishermen through appropriate technology and research, adequate financial, production, and marketing assistance, and other services. The State shall also protect, develop, and conserve such resources. The protection shall extend to offshore fishing grounds of subsistence fishermen against foreign intrusion. Fishworkers shall receive a just share from their labor in the utilization of marine and fishing resources.

[9] Victoriano v. Elizalde Rope Workers' Union, et al, *supra*.

In the realm of labor relations, for instance, the concept of social justice has consistently been linked with the objective of promoting "industrial peace." Thus, in MacLeod and Co. v. Progressive Federation of Labor,[10] the Supreme Court stated:

> "After the approval of the new Civil Code, the Relations between labor and capital have ceased to be merely contractual. They became impressed with public interest that for their determination, as well as the incidents arising therein, other considerations of moral and social character have to be reckoned with **to promote industrial peace** (Article 1700). **This is in keeping with the spirit of social justice**." [emphasis supplied]

Thus, tying the interests of the urban poor sector to the concept of social justice, at least insofar as it has in fact been interpreted and applied by Philippine courts, may be unduly limiting. This is especially true in view of the fact that a viable, alternative approach is already available.

In the realm of international human rights law, the right to housing, which addresses an issue that lies at the heart of urban poor concerns, has through the years developed into the foremost of the so-called economic and social rights.[11] This right, which is recognized under the ICESCR as part of the right to an adequate standard of living,[12] has likewise been recognized in other human rights instruments and declarations of the United Nations.

Although the paper asserts that "social rights x x x are generally not rights in the strict sense," and even characterizes them as "latecomers in the development of law," this is not completely in tune with emerging developments in international human rights law.

Under Article 2(1) of the ICESCR, it is provided that "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." This, in essence, lays the basic blueprint that a State must follow in working for the realization of the rights specified in the Covenant, including the right to housing.

It is thus clear at the outset that the obligation, under the ICESCR at least, with respect to the right to housing, entails undertaking to "take steps"… "by all appropriate means, including particularly the adoption of legislative measures" with the view of "achieving progressively" the full realization of this right.

"All appropriate means" has been interpreted in the Limburg Principles[13] to include not simply legislative, but also administrative, judicial, economic, social and educational measures.[14] In particular, States Parties must endeavor to provide effective remedies including, where appropriate, judicial remedies for the vindication of the right.[15] According to the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 4 these legal remedies may include a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions; (b) legal procedures seeking compensation

[10] G.R. No. L-7887. May 31, 1955.

[11] Scott Leckie, in *Legal Resources for Housing Rights: International and National Standards* 5 (2000).

[12] Article 11(1), ICESCR

[13] UN Document E/CN.4/1987/17. The Limburg Principles were crafted by a group of distinguished experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, United States of America), in Maastricht on 2-6 June 1986. They are comments as to the nature and scope of the obligations of States Parties to the ICESCR.

[14] Id. par. 17

[15] Id. par. 19

following an illegal eviction; (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; (d) allegations of any form of discrimination in the allocation and availability of access to housing; and (e) complaints against landlords concerning unhealthy or inadequate housing conditions.[16]

On the other hand, progressive realization is to be understood as obligating States Parties to move as expeditiously as possible towards the realization of the right.[17] Some obligations, in fact, may require immediate implementation by the concerned State.[18] This clearly repudiates the practice of some States of exploiting the notion of "progressive attainability" to altogether evade their obligations under the Covenant.[19]

The same idea is expressed by the CESCR in General Comment No. 4 (1991), when it states that "[r]egardless of the state of development of any country, there are certain steps which must be taken immediately." These would include measures required to promote the right to housing that would only require the abstention by the Government from certain practices and a commitment to facilitating "self-help" by affected groups.[20]

Likewise, due priority must be given by States Parties to social groups living in unfavorable conditions by giving them particular consideration when acting towards the realization of the right.[21]

The exact nature of these obligations was further expounded upon in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights drafted in January 1997, ten years from the drafting of the Limburg Principles. Under these guidelines, three specific obligations of States related to economic, social and cultural rights were identified – the obligations to respect, protect, and fulfill.[22] The guidelines specifically mentioned that in the case of the right to housing, a State Party would be breaching its obligation to respect the right if it engaged in arbitrary forced evictions.[23]

Furthermore, the Maastricht Guidelines established that State Parties to the ICESCR had both obligations of conduct, i.e. to undertake actions intended to achieve realization of the economic, social and cultural rights, and obligations of result, i.e. to meet targets to satisfy a detailed substantive standard.[24] The measures adopted by States Parties must therefore deal with both specific actions intended to promote realization of the right and ensure that specific goals relating to standards established for the right are met.

This emerging framework was further reinforced by a 2000 decision of the South African Constitutional Court relating to the right to housing. In Government of the Republic of South Africa v. Grootboom,[25] the court laid down the foundation for the justiciability of the obligation to progressively realize economic, social, and cultural rights, which the court would review on the basis of the "reasonableness" test, and exercise deference, where appropriate, at the stage of remedy. The ruling places the adjudication of economic, social, and cultural rights within a familiar

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[16] CESCR General Comment No. 4, Sixth Session (1991), UN Document E/1992/23, par. 17
[17] *Supra* note 9 at par. 21
[18] Id. par. 22
[19] *See* A.H.M. Kabir, *Development and Human Rights: Litigating the Right to Adequate Housing*, 1 Asia-Pacific Journal on Human Rights and the Law 97, 98 (2002)
[20] *Supra* note 12 at par. 10
[21] Id. par. 11
[22] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, par. 6
[23] Id.
[24] Id. par. 7
[25] 2000 (11) BCLR 1169. (CC)

framework to courts in all jurisdictions. Grootboom was yet another significant step in erasing the supposed distinction, cited in the paper, between civil and political rights, which can be "directly" invoked before courts, and economic and social rights, which "require" legislation.

These developments actually cast some doubt on the paper's ultimate conclusion that there is "no point in coming up with a social reform agenda on the question of social justice." For while it is undoubtedly correct to focus attention on the implementation of the Constitutional mandate – through laws such as the Urban Development and Housing Act (RA 7279) – it may perhaps also be worthwhile to look more deeply into the underlying premises behind the protective mantle created by the charter supposedly to benefit the urban poor sector. "Urban land reform," a concept mentioned in the text of Section 9, Article XIII, but which has never been adequately fleshed out either in statute or in practice, may possibly be more effectively pursued under a framework which treats housing as a fundamental human entitlement, rather than as merely a balm for societal disquiet.

Labor

Ang Saligang Batas at Paggawa (*The Constitution and Labor*), by Arsenio M. Garcia and Arnel Galgo, traces the development of labor-related provisions through the various Philippine Constitutions and concludes that the present Constitution quite possibly has the strongest provisions to protect the rights of labor. Nonetheless, the paper emphasizes the existence of limits in the constitutional framework, specifically with respect to promoting and protecting the rights of workers.

Five specific limitations are identified, with a sixth – the form and orientation of government – mentioned as a possible, broader obstacle to the promotion of labor rights.

Of these limitations, several seem to pertain more to the shortcomings in implementation of the constitutional principles and corresponding laws, as opposed to being indicative of weaknesses in the basic principles themselves. For instance, the point that constitutionally and statutorily protected labor rights are, more often than not, only upheld for organized labor may not actually refer to an inherent gap in the Charter's framework, but more to the practical difficulties of enforcing legal rights in actual practice. It must be noted that the text of the 1987 Constitution itself expressly mandates protection for *all* workers, whether organized or unorganized.[26] In practice, however, it should be easy to see why unorganized workers would have a greater difficulty in asserting their rights as compared to workers who actually belong to a trade union. The principal purpose of trade unions, after all, being to strengthening their bargaining position (i.e. to assert their interests) through collective action. Similarly, it must be pointed out that the Constitution explicitly recognizes the right of *all* workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities.[27]

The point about inadequate workers' representation in government – in Congress through the party-list, and in local governments – is also one largely concerned with shortcomings in implementation. For instance, the paper cites "scope of representation" (as measured in the number of workers' groups who are actually represented in these bodies) and the general "understanding" and "appreciation" of the concept of representation. Both are valid and important concerns which, however, relate more to the actual capacities of existing labor groups rather than to any fundamental defect in the constitutional frame. A third point, on the prescribed extent of

[26] Section 3, Article XIII. The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all. x x x

[27] x x x It shall guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law.

party-list participation in Congress, does however touch on a basic principle and will be discussed later in this paper.

A third point is with regard to the use of the term "living wage" in Section 3, Article XIII.[28] The paper contends that the term is inadequate as it has failed to clearly concretize the "true" meaning of the wage necessary to support a family. Again, this seems a problem more with operationalization rather than essence. A "living wage" has been officially defined by the Institute of Labor Studies (ILS) of the Department of Labor and Employment (DOLE) as –

> "The living wage is defined as the amount of family income needed to provide for the family's food and non-food expenditures with sufficient allowance for savings/investments for social security so as to enable the family to live and maintain a decent standard of human existence beyond mere subsistence level, taking into account all of the family's physiological, social and other needs."[29]

1 This is a definition which is substantially in conformity with the standards set, in relation to wages, under international human rights law. The Universal Declaration of Human Rights (UDHR) provides that "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection."[30] The corresponding provision in the ICESCR similarly states that –

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> "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
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> (a) Remuneration which provides all workers, as a minimum, with:
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> (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
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> (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;"[31]

In light of this, it is difficult to see how the principle could be stated more effectively.

One of limitations identified may be directly tied to possible shortcomings in the constitutional framework itself. This is with respect to the constitutional approach involving "balancing" the rights of labor and capital.[32] As the authors point out, this rather "Solomonic" solution has, in practice, led to curtailment in some situations of workers' interests – in particular when employers' actions detrimental to labor have been upheld as being valid according to "management prerogative." As the Supreme Court has declared –

> "It is well settled that the employer has the right or is at liberty to choose who will be hired and who will be denied employment. The right of a laborer to sell his labor to

[28] x x x They shall be entitled to security of tenure, humane conditions of work, and a living wage.

[29] http://www.ilsdole.gov.ph/PAPs/ResCon/rcon_01ls2.htm

[30] UDHR, Article 23, par. 3

[31] ICESCR, Article 7, par. a

[32] *Supra* note 28: x x x The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.

The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the fruits of production and the right of enterprises to reasonable returns to investments, and to expansion and growth.

such persons as he may choose is, in its essence, the same as the right of an employer to purchase labor from any person whom it chooses. The employer and the employee have an equality of right guaranteed by the Constitution. If the employer can compel the employee to work against the latter's will, this is servitude. If the employee can compel the employer to give him work against the employer's will, this is oppression."[33]

A stronger approach is perhaps called for, taking into account the inherent disparity in economic power that normally exists between employers, on the one hand, and labor on the other. One which, as previously pointed out, departs from the "functional" framework of the social justice paradigm to one that cleaves more closely to the human rights perspective.

Indigenous Peoples

Maxine Tanya Macli-ing Hamada's *Seeing One's Self in the Other: Charter Change and the Politics of Identity* begins by providing a discussion of the emergence of the notion of indigenous peoples as "different" from other "Filipinos" in the course of Philippine history. The paper notes how this "difference" in identity has been used to justify differential treatment – i.e. a denial of rights – in both policy and law, particularly with respect to the issue of rights of land ownership.

The author then proceeds to discuss how the 1987 Constitution has attempted to respond to this issue, introducing provisions concerning indigenous peoples that touch on three key areas – identity, participatory processes, and knowledge systems.

The paper largely views the innovations under the current Constitution as positive steps towards the recognition of the identity and rights of indigenous peoples, but is careful to point out that "the distrust of the 'other', however, still pervades the language of the fundamental law of the land. This observation should not be surprising considering that the Philippines has a long, and appalling, history of applying a policy, through statutes and ratified by the Supreme Court, of emphasizing this "otherness" as a basis for differential – read, "disadvantageous" – treatment.

Since the early part of the 20th century, the Philippine Supreme Court has used the catch-all term "non-Christian" to refer to Muslims and members of indigenous cultural communities.

"Non-Christian" as used in this context, however, does not simply denote a difference in religious persuasion, but an inferiority of intelligence, learning, and capacity. As the Court, speaking through Justice Malcolm, stated in the now infamous case of *Rubi v. Provincial Board of Mindoro*[34] --

> ""Non-Christian" is an awkward and unsatisfactory expression. Legislative, judicial, and executive authority has held that the term "non-Christian" should not be given a literal meaning or a religious signification, but that it was intended to relate to degree of civilization. This has been the uniform construction of executive officials who have been called upon to interpret and enforce the law. The term "non-Christian" refers not to religious belief, but in a way to geographical area, and more directly to natives of the Philippine Islands of a low grade of civilization."

In this case, the Court upheld regulations which restricted the rights of members of a community of Mangyans, arguing that these restrictions were for their own good. In the words of the Court –

[33] International Catholic Migration Commission v. NLRC, 169 SCRA 606 (1989).
[34] G.R. No. 14078, March 7, 1919

> "The name "Manguian" signifies savage, mountaineer, pagan, negro. The Manguianes are very low in culture. From the beginning of the United States, and even before, the Indians have been treated as "in a state of pupilage." The recognized relation between the Government of the United States and the Indians may be described as that of guardian and ward. It is for the Congress to determine when and how the guardianship shall be terminated. The Indians are always subject to the plenary authority of the United States."[35]

Several areas for further constitutional development are identified. These include strengthening the notion of the identities of various "nations" within the Philippine nation state, legal recognition of different systems of land ownership and resource use, and recognition of different, indigenous systems of local governance. At present, while the Constitution "allows" for such recognition by granting Congress the power to "provide for the applicability of customary laws governing property rights or relations"[36] and by stating that indigenous cultures, traditions, and institutions should be "considered" in the formulation of national policies[37], it does "mandate" such recognition.

The stickier point, though, is the extent to which the identities of "nations" within the Philippine state can be recognized. The recent controversy surrounding the proposed creation of a Bangsamoro Juridical Entity underscores just how contentious this issue can be. Details aside, however, the possibility of a constitutional recognition and acceptance of the cultural and historical experiences of indigenous peoples and the Moro people is an avenue that most definitely be explored. A constitution is intended to be a document that reflects that principles of the entire range of the peoples of the Philippines, principles that have been embraced in the context of specific social, cultural, political, economic, and historical experience. As such, it is a document that should be designed to be as inclusive as possible, recognizing differences, yes, but as a means to foster strength and unity in diversity.

And this, perhaps, is the ultimate point of the paper, that regardless of the specifics of any proposed changes to the charter, equally essential as the substance of any amendments or revisions intended to further uphold the interests of indigenous peoples, is the commitment to ensuring that these peoples and communities themselves are able to participate meaningfully and effectively in the process of change.

Youth

Constitutional Reform and the Youth's Development Agenda by Julia Andrea Abad, identifies a handful of key issues that lie at the heart of the youth agenda. These are education, employment, health, and participation. However, the paper posits that the basic policy directions geared at promoting these interests may already be found in the 1987 Constitution, specifically in Articles II and XIII. What is more crucial, similar to the prior discussions, is ensuring faithful implementation of these core policies as opposed to revising them

Areas which require more "faithful implementation" include education – particularly with regard to improving access and quality, the promotion of closer collaboration between employers and educational institutions to improve opportunities for employment, lowering of barriers on return migration to encourage young migrants to come home and live and work in the Philippines,

[35] *Ibid.*
[36] Section 5(b), Article XI
[37] Section 17, Article XIV

promotion of health awareness, and strengthening participation and effectiveness in youth ministries such as the National Youth Commission.

Clearly, more compelling engagements in these areas will not involve charter change, but enactment of effective policies and statutes. However, participation by the youth in any serious attempt to discuss constitutional change must be ensured. This does not simply entail providing the formal opportunity to participate, but taking a more active stance in encouraging youth engagement. A key component of this process will be overcoming distrust and lack of interest on the part of the youth to enable them to participate meaningfully and effectively in any process for charter revision.

Women

Women's Gender and Development Constitutional Reform Agenda by Elena O. Masilungan of PILIPINA-NCR, starts off with an assessment of the constitutional reform proposals propounded under the Arroyo administration. While sympathetic to some of the specific proposals – for instance, the idea of a shift to a parliamentary form of government – it nonetheless concludes that pursuing these changes in the context of the President's being in "survival mode" will not result in desirable constitutional reforms.

The paper then proceeds to outline specific constitutional reform proposals intended to further uphold the interests of women as a sector. Many of these involve strengthening or specifying provisions in State Policies and the Bill of Rights (Articles II and III) to address the issues of gender equality, women's self-determination and bodily autonomy, and protection from gender-based violence.

These are areas which could use some revision, particularly when taken in the light of the principles enunciated on international treaties, such as the CEDAW. For instance, while Section 14, Article II declares that "The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men," this still seems to fall short of the obligation in the CEDAW to "To embody the principle of the equality of men and women in their national constitutions."[38] For while the State is tasked to "ensure equality before the law" it does not "recognize" the fact of such equality but merely "the role of women in nation building." Similarly, the Bill of Rights does not contain an express and comprehensive clause on the non-discriminatory application of its provisions, but instead, relies on the traditional statement on "equal protection of the laws."[39] In contrast, international human rights instruments have adopted very express formulations against discrimination. For instance, both the ICESCR and the International Covenant on Civil and Political Rights (ICCPR) in their common Article 2, state –

> "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, **sex**, language, religion, political or other opinion, national or social origin, property, birth or other status."
> [emphasis supplied]

A stronger and more explicit formulation is perhaps called for in our own fundamental law.

This need for a more explicit statement on equal treatment is further underscored in the light of the rampant discrimination against women that prevails within the Philippine justice system. This discrimination appears most clearly in decisions handed down by the courts. Many

[38] CEDAW, Article 2(a)
[39] Section 1, Article III

of these decisions create and propagate gender stereotypes. These are most vividly emphasized in criminal cases for rape, where the credibility of the complainant, and hence the ultimate outcome of the criminal prosecution as she is usually also the sole witness, is based on her conformity to certain stereotypes.

As Professor Dante Gatmaytan points out in his article "Character, Credibility, and Contradiction: Rape Law and the Judicial Construction of the Filipina,"[40] the credibility of the complainant in a rape case is, in some measure, based upon how the courts believe a Filipina should behave. As Gatmaytan puts it –

> "The typical Filipina is a romanticized version of the country girl. She is known for her traditional modesty, and one who is demure, unsophisticated, protected from the influences of modern, presumably urban life."[41]

In the words of the Supreme Court a typical Filipina is –

> "a very young barrio girl, innocent, unsophisticated and uncontaminated by the destructive modern ways and behaviour and conduct of uncontrolled and licentious urbanites who bury in their journey to life the beautiful tradition and virtues of Filipino barrio girls."[42]

It is clear that this image of the "typical" Filipina as an innocent "barrio lass" is, in turn, determined by the standards of contemporary society. Thus, society has assigned characteristics to women and further divided them into two groups: the good girls who can be raped, and the bad girls who cannot.

In cases where the private complainant conforms to the court-created image of a "good girl," the legal system almost invariably stamps her testimony with the highest degree of credibility. The reason for this, as stated by the Supreme Court –

> "Time-honored is the doctrine that no young and decent woman would publicly admit that she was ravished and her virtue defiled, unless such was true, for it would be instinctive for her to protect her honor. No woman would concoct a story of defloration, allow an examination of her private parts and submit herself to public humiliation and scrutiny via an open trial, if her sordid tale was not true and her sole motivation was not to have the culprit apprehended and punished."[43]

This rule has, through assertion in a long line of Supreme Court decisions,[44] become firmly entrenched as doctrine in Philippine jurisprudence. A more explicit recognition of women's equality in the Constitution would be a definitive initial step in responding to this problem.

A specific example of how a more explicit formulation can be crafted, is demonstrated in the Constitution of South Africa, widely regarded as the most progressive constitution in the

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[40] *Philippine Peace and Human Rights Review* (1998) 117, University of the Philippines Institute of Human Rights.
[41] *Supra* at 134
[42] People v. Gan, G.R. No. 33446, August 18, 1972.
[43] *People v. Canuto*, G.R. No. 169083. August 7, 2006.
[44] See for instance *People v. Corpuz*, G.R. No 168101, February 13, 2006; *People v. Candaza*, G.R. No. 170474, June 16, 2006; *People v. Arango*, G.R. No. 168442, August 30, 2006; *People v. Salome*, G.R. No. 169077, August 31, 2006

world, with a Bill of Rights second to none.[45] This document contains an expanded formulation of the equal protection clause which provides that

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.[46]

An equally interesting point is the paper's proposal for a provision ensuring a gender quota. While gender quotas have, in some cases, been adopted within certain organizations to address the issue of unequal representation, the question must be asked as to whether this should in fact be made a fundamental tenet enshrined in the Constitution. In other words, must the Constitution mandate a rule which though formally unequal – i.e. the imposition of a quota requirement – is nonetheless intended to address a perceived inequality in the actual state of affairs? Or should attempts to address inequality in representation be pursued through other means – education policies, for instance – and not by crafting a specific Constitutional rule. This is an issue that definitely deserves further discussion.

National Patrimony

Joel Rocamora provides an interesting discussion in his paper *What Good is Our National Patrimony If We Can't Make Money Off of It?* He identifies the key point in the entire debate on the proposals to amend the national economy provisions of the Constitution, which is, simply put, will they really make much of a difference?

This query is largely anchored on an appreciation of the fact that despite the existence and, at least in theory, continued effectivity of these provisions, whatever restrictions they imposed have been largely, and easily, circumvented by the government and foreign investors. In fact, it might be accurate to say that the exception – to the application of restrictions on foreign participation/ownership in certain areas of economic activity – has become the rule.

Numerous executive actions and decisions of the Supreme Court have paved the way for foreign entry into what, at least nominally, should be protected areas of investment and economic activity. The 1987 Constitution uses the standard of "Filipino ownership" as the gauge for allowing or disallowing participation in protected areas of investment such as land holding, public utilities, mass media, advertising, and exploitation of natural resources.[47] Participation in these areas is

[45] http://www.southafrica.info/about/democracy/constitution.htm
[46] Constitution of South Africa, Chapter 2, par 9
[47] Article XII, Sections 2, 7-8, 11, and Article XVI, Section 11

formally limited to Filipino citizens or to corporations a specific percentage (from 60-100%) of whose capital is *owned* by Filipino citizens.

For many years, however, this framework was largely undermined due to the application of the so-called "control test." An Opinion of the Department of Justice[48] embodied this rule which essentially provides that "shares belonging to corporations or partnerships at least 60 percent of the capital of which is owned by Filipino citizens shall be considered as of Philippine nationality." Thus actual, direct Filipino ownership could be "diluted" by establishing multiple holding corporations, each with just the minimum required Filipino ownership (60% in most cases), which under the rule would have *all* of its holdings treated as being Filipino-owned, while still remaining compliant with the Constitutional restrictions. It was only fairly recently, in the context of the PIATCO case[49] that the government seemingly abandoned this position.

In the same vein, as Rocamora points out in his article, the Supreme Court has contributed to a weakening of restrictions by establishing a distinction between "ownership of facilities" and "operation." According to the Court in the case of Tatad v. Garcia,[50] which dealt with Filipino ownership of the EDSA Light Rail Transit System, a public utility –

> "In law, there is a clear distinction between the "operation" of a public utility and the ownership of the facilities and equipment used to serve the public. Ownership is defined as a relation in law by virtue of which a thing pertaining to one person is completely subjected to his will in everything not prohibited by law or the concurrence with the rights of another (Tolentino, II Commentaries and Jurisprudence on the Civil Code of the Philippines 45 [1992]). The exercise of the rights encompassed in ownership is limited by law so that a property cannot be operated and used to serve the public as a public utility unless the operator has a franchise. The operation of a rail system as a public utility includes the transportation of passengers from one point to another point, their loading and unloading at designated places and the movement of the trains at pre-scheduled times. The right to operate a public utility may exist independently and separately from the ownership of the facilities thereof. One can own said facilities without operating them as a public utility, or conversely, one may operate a public utility without owning the facilities used to serve the public. The devotion of property to serve the public may be done by the owner or by the person in control thereof who may not necessarily be the owner thereof. This dichotomy between the operation of a public utility and the ownership of the facilities used to serve the public can be very well appreciated when we consider the transportation industry. Enfranchised airline and shipping companies may lease their aircraft and vessels instead of owning them themselves."

The same hair-splitting distinctions can be seen with regard to foreign participation in other public utility businesses such as power and water. For instance, the Electric Power Industry Reform Act of 2001,[51] "unbundles" the business of a power utility into generation, transmission, and distribution, and explicitly provides that –

> "Any law to the contrary notwithstanding, power generation shall not be considered a public utility operation. For this purpose, any person or entity engaged or

[48] Issued January 19, 1989

[49] *See* Palabrica, Raul J., "Nationality Ownership Rule,"
http://business.inquirer.net/money/columns/view_article.php?article_id=95370

[50] G.R. No. 114222. April 6, 1995

[51] Republic Act No. 9136

which shall engage in power generation and supply of electricity shall not be required to secure a national franchise."[52]

Likewise, with regard to the water sector, on July 29, 2004, the Metropolitan Waterworks and Sewerage System (MWSS) Board issued a Resolution declaring that its two concessionaires, i.e. private contractors operating water services within its area of coverage, were *not* public utilities but merely "agents of a public utility."[53] A petition filed with the Supreme Court assailing this Resolution was unfortunately not decided on the merits but denied on technical and procedural grounds.[54]

Any attempt to strengthen the existing constitutional framework would have to take into account these actual practices of circumvention. One possible approach would of course be to simply tighten the language of the said provisions. For instance, Section 11, Article XII, could be amended to include a specific statement to the effect that the Filipino ownership requirement shall not just apply to "operation" but also to "ownership" of public utilities, "and all other facilities relevant or necessary to their operation." This greater degree of specificity would make it more difficult for the constitutional restrictions from being circumvented. Similarly, a definition to determine the "nationality" of corporate entities can be included.

An alternative approach would be to provide for a provision relating specifically to interpretation. Although, Section 22, Article XII already states that –

> "Acts which circumvent or negate any of the provisions of this Article shall be considered inimical to the national interest and subject to criminal and civil sanctions, as may be provided by law."

This provision, however, focuses more on the treatment of attempts to circumvent rather than defining clear parameters for determining what, in the first place, constitutes circumvention. A possible formulation, for example, could be –

> "When interpreting the provisions of this Article, any court, tribunal, or other office must decide in favor of greater Filipino control over the national economy and patrimony, and strictly against foreign entry into areas of investment where participation is preferred for, or exclusively reserved to, Filipino citizens."

This would be a more specific rule than the one found in the second paragraph of Section 10, Article XII,[55] which the Court used to justify its ruling in the case of Manila Prince Hotel v. GSIS[56] --

> "x x x where a foreign firm submits the highest bid in a public bidding concerning the grant of rights, privileges and concessions covering the national economy and patrimony, thereby exceeding the bid of a Filipino, there is no question that the Filipino will have to be allowed to match the bid of the foreign entity. And if the Filipino matches the bid of a foreign firm the award should go to the Filipino. It must be so if we are to give life and meaning to the Filipino First Policy provision of the 1987 Constitution. For, while this may neither be expressly stated nor contemplated in the bidding rules, the

[52] *Ibid.*, Section 6
[53] MWSS Resolution 04-006-CA
[54] Freedom from Debt Coalition, et al v. MWSS, et al., G.R. No. 173044. December 10, 2007
[55] In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos.
[56] G.R. No. 122156. February 3, 1997

constitutional fiat is omnipresent to be simply disregarded. To ignore it would be to sanction a perilous skirting of the basic law."

But while it is true that tightening the restrictions may realistically be achieved through more precise amendments to the Constitutional framework, the question remains, should the framework be preserved? This is a matter that will most certainly require further intensive discussion.

Federalism

Rethinking Federalism in the Light of Social Justice is Agustin Martin G. Rodriguez' attempt to analyze proposals for a shift to a federal form of government in the context of assessing the value of this change to efforts to promote social justice programs, such as agrarian reform, fisheries reform, housing for the poor, and recognition of indigenous peoples. For the most part, the article concludes that all these programs stand to benefit, that is, will most likely be more effectively implemented, from greater participation from local governments, as opposed to that of the national government.

For instance, Rodriguez argues that with respect to agrarian reform, the provision of essential agricultural support services to beneficiaries is a task better suited to local governments. Although he admits that there appears to be, at least at present, "a lack of knowledge or interest on the part of LGUs to support x x x agrarian reform communities and beneficiaries," he nonetheless notes that this is a problem that can be remedied by the presence of "strong civil society groups" pushing local governments to give the necessary support.

In the same vein, while acknowledging many shortcomings in LGU implementation of the constitutionally mandated socialized housing programs – particularly as provided under the Urban Development and Housing Act – the article nonetheless cites "how a persistent and empowered civil society partnered with progressive local government officials can bring about more meaningful housing and urban poverty reforms."

In sum, while there are undoubtedly numerous hurdles that will have to be overcome in relation to local governance, decentralization and devolution still remain the preferred approaches to effective implementation of government social justice programs. In the words of the author – localities are best governed by local governments.

But while it may be true that local governments have the potential to become more effective venues for improving the lives of Filipino citizens, numerous experiences with LGUs have also laid bare the dangers of relying to heavily on local officials that do not have the interests of the poor and marginalized foremost among their concerns. The Mapalad case,[57] vividly illustrates how a local government can stand in the way of social reform programs. In this case, despite a favorable resolution from the Office of the President declaring a tract of land as subject to coverage under the Comprehensive Agrarian Reform Law, the provincial government filed a petition seeking to annul the said resolution alleging that –

> "the Office of the President was prompted to issue the said resolution "after a very well-managed hunger strike led by fake farmer-beneficiary Linda Ligmon succeeded in pressuring and/or politically blackmailing the Office of the President to come up with this purely political decision to appease the 'farmers,' by reviving and modifying the Decision of 29 March 1996 which has been declared final and executory in an Order of 23 June 1997."

[57] Fortich v. Corona, G.R. No. 131457. April 24, 1998.

The petition ultimately led to a decision of the Supreme Court denying coverage to the contested land, a decision which for many proponents of social reform, encapsulated many of the shortcomings in the implementation of the agrarian reform program.

In recognition of these various difficulties that must be overcome, therefore, the article prescribes a set of basic principles to guide the design of transition to federalism. These are that federalism must ensure that local autonomy guarantees local self-determination; that it must guarantee local democratization and people's empowerment; that it must lead to more effective delivery of basic services; that it must guarantee equitable and sustainable development; and that it must strengthen, or at least keep intact, the unity of the nation.

The prescription of these "basic principles," which can actually be understood to stand as "conditions" for the adoption of the federalist frame, springs from the recognition of the fact that a federal government cannot simply be established *in toto* under current prevailing conditions. As the article itself notes, "successful federal arrangements have not been imposed from the outside but have developed indigenously in ways that suit the entities involved." This implies that federalism proposals, such as that made by Senator Aquilino Pimentel,[58] which seeks the *immediate* establishment of 11 states and the Federal Administrative Region of Metro Manila, are not desirable as they do not take into account the level of "readiness" of particular areas.

In lieu of a blanket imposition of a federal system, the preferred approach seems to be for its gradual introduction. Local governance, under the existing framework, will be promoted and developed, and a mechanism to allow for particular regions to elect to form a federal region/state will be put in place. This will allow for an "organic" approach to the adoption, and will ensure that the necessary pre-conditions for an effective adoption of a federal system will be in place before the formal shift is in fact made.

Of course, any attempt to adopt a federalist framework which may result in a broader grant of power to local governments compared to that presently provided under the 1987 Constitution must now necessarily contend with the Supreme Court decision in the case of Province of North Cotabato v. Government of the Republic of the Philippines,[59] which provided that –

> "The MOA-AD cannot be reconciled with the present Constitution and laws. Not only its specific provisions but the very concept underlying them, namely, the associative relationship envisioned between the GRP and the BJE, are **unconstitutional,** for the concept presupposes that the associated entity is a state and implies that the same is on its way to independence.
>
> While there is a clause in the MOA-AD stating that the provisions thereof inconsistent with the present legal framework will not be effective until that framework is amended, the same does not cure its defect. The inclusion of provisions in the MOA-AD establishing an associative relationship between the BJE and the Central Government is, itself, a violation of the Memorandum of Instructions from the President dated March 1, 2001, addressed to the government peace panel. Moreover, as the clause is worded, it virtually guarantees that the necessary amendments to the Constitution and the laws will eventually be put in place. Neither the GRP Peace Panel nor the President herself is authorized to make such a guarantee. Upholding such an act would amount to authorizing a usurpation of the constituent powers vested only in Congress, a Constitutional Convention, or the people themselves through the process of initiative, for

[58] Joint Resolution 10

[59] G.R. No. 183591, October 14, 2008.

the only way that the Executive can ensure the outcome of the amendment process is through an undue influence or interference with that process."

This implies that any attempt to introduce a system granting broader autonomy and powers to local governments, in the context of actual peace negotiations, should first go through the prescribed Constitutional process of amendment or revision, and cannot be pursued through direct agreement with the Executive.

Parliamentary System and the Party List

Two of the papers, the Institute for Political and Electoral Reform's (IPER) *A Proposal for a Bicameral Parliamentary System* and Denver M. Nicks' *Unanswered Prayers: Party List Politics in the Philippines and Opportunities for Change*, deal directly with the idea of overhauling the national government system to promote a greater capacity to cope with various political, economic, and social crises, and to institutionalize a higher level of participation and representation in government from marginalized and, traditionally, underrepresented sectors.

The IPER proposal aims to address three principal "flaws" with the current Presidential system – overcentralization of power in the Presidency; duplication of law-making functions between the two chambers of Congress; and the growth of congressional "dynasties" due to the method by which members of both houses are elected.

What is sought to be established is a bicameral parliament, with the lower house (Parliament) composed of 50% district representatives and 50% party-list representatives, and a Senate, composed of regionally (as opposed to nationally) elected representatives. Parliament will be vested with the sole authority to enact laws, with Senate concurrence required only for bills of national importance (as certified by the Cabinet), treaties and international agreements, and appointments to national positions. A popularly-elected President will serve as head of state, while a Prime Minister, elected by Parliament, will serve as head of government.

Nicks' article also bears some relation to this proposal, particularly with respect to the issue of party-list (proportional) representation in Parliament. His analysis of the shortcomings of the current party-list system touches on many of the issues that support revision of the current national government framework.

In sum, the proposals touch on two basic aspects – first, merging the Executive and Legislative functions of government into one body, Parliament, while retaining some form of oversight to the Senate; and second, changing the composition of Parliament by providing for a greater percentage of members elected through a proportional voting system as opposed to a single representative scheme.

The first aspect of the proposal is apparently intended to provide for a more efficient system of governance by promoting closer coordination between the two branches. For notwithstanding the John F. Kennedy's firm declaration that the principle of separation of powers did not make "the Presidency and Congress rivals for power but partners for progress [with these two branches] being trustees for the people, custodians of their heritage,"[60] for the most part, the formal separation has, by design, established an adversarial relationship intended to promote a system of checks and balances, "a distinct obstruction to arbitrary governmental action."[61] The downside to this system is, of course, a slowdown in the process of governing, even possible "gridlock" in governmental action.

[60] As quoted by the Philippine Supreme Court in TUCP v. Ople, G.R. No. L-67573. June 19, 1985.
[61] Madison, *The Federalist Papers* No. 47

Whether abandoning the traditional system of checks and balances through separation of powers in favor of a system with fusion of powers is an issue that will require further discussion.

The second component of the proposal deals more specifically with the nature of representation. The party-list system as currently embodied in the 1987 Constitution is anchored on two main principles – proportional representation and sectoral representation. Proportional representation "is a category of electoral formula aiming at a close match between the percentage of votes that groups of candidates ("parties") obtain in elections and the percentage of seats they receive." It is often contrasted to plurality voting systems, where disproportional seat distribution results from the division of voters into multiple electoral districts, especially "winner takes all" plurality ("first past the post") districts.[62] Sectoral representation, on the other hand, involves the reservation of legislative seats for identified "marginalized and underrepresented" sectors, such as labor, peasants, women, and the like.

A review of the Record the 1986 Constitutional Commission reveals that the predominant objective is to introduce proportional representation. As stated by Commissioner Christian Monsod –

> "**It means that any group or party who has a constituency of, say, 500,000 nationwide gets a seat in the National Assembly. What is the justification for that? When we allocate legislative districts, we are saying that any district that has 200,000 votes gets a seat.** There is no reason why a group that has a national constituency, even if it is a sectoral or special interest group, should not have a voice in the National Assembly. It also means that, let us say, there are three or four labor groups, they all register as a party or as a group. If each of them gets only one percent or five of them get one percent, they are not entitled to any representative. So, they will begin to think that if they really have a common interest, they should band together, form a coalition and get five percent of the vote and, therefore, have two seats in the Assembly. Those are the dynamics of a party list system.
>
> We feel that this approach gets around the mechanics of sectoral representation while at the same time making sure that those who really have a national constituency or sectoral constituency will get a chance to have a seat in the National Assembly. These sectors or these groups may not have the constituency to win a seat on a legislative district basis. They may not be able to win a seat on a district basis but surely, they will have votes on a nationwide basis.
>
> **The purpose of this is to open the system. In the past elections, we found out that there were certain groups or parties that, if we count their votes nationwide; have about 1,000,000 or 1,500,000 votes. But they were always third place or fourth place in each of the districts. So, they have no voice in the Assembly. But this way, they would have five or six representatives in the Assembly even if they would not win individually in legislative districts.** So, that is essentially the mechanics, the purpose and objectives of the party list system."[63]
> [emphasis supplied]

The confusion with respect to the principal objective has, however, persisted. In Ang Bagong Bayani v. COMELEC[64] the Supreme Court declared –

[62] http://en.wikipedia.org/wiki/Proportional_representation
[63] Record of the Constitutional Commission No. 36, July 22, 1986.
[64] G.R. No. 147589. June 26, 2001.

"That political parties may participate in the party-list elections does not mean, however, that any political party — or any organization or group for that matter — may do so. The requisite character of these parties or organizations must be consistent with the purpose of the party-list system, as laid down in the Constitution and RA 7941.

x x x

The foregoing provision mandates a state policy of promoting proportional representation by means of the Filipino-style party-list system, which will "enable" the election to the House of Representatives of Filipino citizens,

1. who belong to marginalized and underrepresented sectors, organizations and parties; and
2. who lack well-defined constituencies; but
3. who could contribute to the formulation and enactment of appropriate legislation that will benefit the nation as a whole.

The key words in this policy are "proportional representation," "marginalized and underrepresented," and "lack [of] well-defined constituencies."

"Proportional representation" here does not refer to the number of people in a particular district, because the party-list election is national in scope. Neither does it allude to numerical strength in a distressed or oppressed group. Rather, it refers to the representation of the "marginalized and underrepresented" as exemplified by the enumeration in Section 5 of the law; namely, "labor, peasant, fisherfolk, urban poor, indigenous cultural communities, elderly, handicapped, women, youth, veterans, overseas workers, and professionals."

However, it is not enough for the candidate to claim representation of the marginalized and underrepresented, because representation is easy to claim and to feign. The party-list organization or party must factually and truly represent the marginalized and underrepresented constituencies mentioned in Section 5. 36 Concurrently, the persons nominated by the party-list candidate-organization must be "Filipino citizens belonging to marginalized and underrepresented sectors, organizations and parties.""

Thus, in effect legislating an additional requirement that *only* marginalized groups can participate in party-list elections. While this position may provide some short term benefits, it ensures that, in the long run, "marginalized" groups will remain apart from the "mainstream," relegated in perpetuity to the 20% periphery of party-list seats.

A more crucial flaw in the party-list system is the imposition of a cap under Republic Act No. 7941, the Party List Law itself. Under Section 11 of the law, "each party, organization, or coalition shall be entitled to not more than three (3) seats." This "three seat cap" has undercut the very purpose of the party list system as a means for promoting proportional representation. Because rather than encouraging the formation and growth of large, united parties with firm political platforms, it rewards the proliferation of smaller (and weaker) groups, since the only way a particular group will be able to get more seats is to split up and form new parties.

Any constitutional reform aimed at this area must address these issues.