

MAP POSITION PAPER ON THE PROPOSED AMENDMENTS TO THE ECONOMIC PROVISIONS OF THE 1987 PHILIPPINE CONSTITUTION

February 20, 2023

Over the past few years, Congress has made significant strides in liberalizing the country's economy and in encouraging foreign investment. In the past two years alone, Congress has successfully amended three key laws related to foreign investment, namely the Retail Trade Liberalization Act, the Foreign Investment Act, and the Public Service Act.

The most salient of these laws, the Public Service Act, now allows 100% foreign ownership in industries that were previously regarded as public utilities subjected to the nationality restrictions under the 1987 Constitution.

Taken together, these amendments are projected to bring in more investment into the country, which would in turn introduce much needed capital, technology, and know-how into the economy. In addition, these amendments would bolster competition in domestic markets, expand and deepen existing value chains, and stimulate productivity, growth, and employment in undercapitalized sectors.

All of these legislative developments were made in spite of the harsh economic restrictions imposed by the 1987 Constitution. Since these restrictions are found in no less than the Constitution, these restrictions will continue to limit what Congress can do in relation to the national economy. Lawmakers would always have their hands tied in fear that the laws they pass would be in contravention of the Constitution. As a result, these economic restrictions will continue to deter foreign investment, notwithstanding the recent amendments; and Congress can do nothing about it.

The Management Association of the Philippines (“MAP”) has been consistent in its view that the 1987 Constitution's economic provisions are “too detailed” and “too restrictive” to “cater to the changing needs and challenges of market fluctuations.”¹ As witnessed during the COVID-19 pandemic, the country requires some degree of flexibility to adapt and respond to unforeseen economic crises and disruptions. Similarly, these economic restrictions stifle or even prevent the Philippines from fulfilling its international and regional economic obligations, such as the ASEAN Economic Community.

For these reasons, there is a need to amend the following provisions of the 1987 Constitution, namely:

1. Article II, Section 19
2. Article XII, Section 10, Paragraph 2
3. Article XII, Section 22

Focusing on just amending three (3) provisions is a quicker and more cost-effective alternative to a comprehensive review of the Constitution. This also allows the public and the relevant stakeholders to participate in the consultations and debates in a deeper, more vigorous, and more meaningful manner. In this regard, the more effective mode to amend these provisions is through a Constituent Assembly.

¹ MAP Position Paper dated November 22, 2016.

The 1987 Constitution expressly allows Congress, upon a vote of three-fourths ($\frac{3}{4}$) of all its Members, to propose any amendment to the Constitution. Unlike a Constitutional Convention, which is likely to propose a diverse set of amendments, a Constituent Assembly can practically narrow it down to the three (3) aforementioned provisions. It is worth noting that amending the Constitution through a Constituent Assembly does not foreclose public participation. In fact, the public and the relevant stakeholders can participate in at least three (3) significant ways:

1. Ratification of the proposed amendments in a plebiscite;
2. Consultations and debates in public hearings; and
3. Creation of a Constitutional Commission, composed of representatives from various sectors, to advise the Constituent Assembly.

In the exercise of its broad constituent power to introduce amendments to the Constitution², the Congress has the prerogative to restrict the scope of the proposed constitutional amendments and, in this case, determine that the amendments to be deliberated upon and submitted for the people's ratification shall be limited to the three (3) economic provisions only.

Proposed Amendment to Article II, Section 19, on the Nationalist Approach to Economic Development

The first provision, Article II, Section 19 states that "[t]he State shall develop a self-reliant and independent national economy effectively controlled by Filipinos."

This provision embodies the "Filipinization" policy of the 1987 Constitution, which was relevant when the Philippines was trying to support and promote Filipino-owned businesses amidst American dominance in the post-war economy. Article II, Section 19 emphasized the need for Filipinos, particularly Filipino-owned enterprises, to assert "effective control" over the Philippine economy and protect it from any form of foreign economic dominance.

Such protectionist policy, while laudable for having served its purpose in the past decades, currently deserves careful reconsideration in light of the need to further open up the Philippine economy amidst the increased economic cooperation among countries in the ASEAN, regional, and global economy.

Given this, this may be an opportune time to re-examine the already anachronistic policy of Filipinization of the Philippine economy.

Accordingly, we are proposing that the phrase "effectively controlled by Filipinos" under Article II, Section 19 of the 1987 Constitution be deleted and replaced with the phrase "consistent with its regional and international commitments."

Proposed Amendment to Article XII, Section 10, Paragraph 2, on Giving Preference to Qualified Filipinos in the Grant of Rights, Privileges, and Concessions

The second paragraph of Article XII, Section 10 on National Patrimony reads, "[i]n the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos."

² The only limitation for the exercise of Congress' constituent power is that any proposed constitutional revision or amendment must comply with the three-fourths ($\frac{3}{4}$) vote requirement.

In his commentary on the 1987 Constitution, the late constitutionalist Fr. Joaquin G. Bernas, S.J. highlighted that the second paragraph of Article XII, Section 10 commands the State to give preference to qualified Filipinos, even if a foreigner is “more qualified.”³

The record of deliberations of the 1987 Constitutional Commission clearly reveals the intent of the framers to impose this preference, to wit:

MR. FOZ. Madam President, I would like to request Commissioner Nollado to please restate his amendment so that I can ask a question.

MR. NOLLEDO. "IN THE GRANT OF RIGHTS, PRIVILEGES AND CONCESSIONS COVERING THE NATIONAL ECONOMY AND PATRIMONY, THE STATE SHALL GIVE PREFERENCE TO QUALIFIED FILIPINOS."

MR. FOZ. In connection with that amendment, if a foreign enterprise is qualified and the Filipino enterprise is also qualified, will the Filipino enterprise still be given a preference?

MR. NOLLEDO. Obviously.

MR. FOZ. If the foreigner is more qualified in some aspects than the Filipino enterprise, will the Filipino still be preferred?

*MR. NOLLEDO. The answer is "yes."*⁴

The landmark case of *Manila Prince Hotel v. GSIS*⁵ involved the bidding for the purchase of the shares of the Government Service Insurance System (“GSIS”) in Manila Hotel Corporation (“MHC”), where the Malaysian corporation, Renong Berhad, gave a higher bid and was supposed to receive the purchase award. However, the Supreme Court, in applying Filipino First Policy embodied in the second paragraph of Article XII, Section 10, directed that the shares be sold to the Filipino corporation, Manila Prince Hotel Corporation which, contrary to the GSIS’ bidding rules, belatedly and prematurely tried to match the higher bid by the foreign corporation.

The undue partiality for qualified Filipino enterprises in the grant of rights, privileges, contracts, and concessions, despite the presence of a more qualified foreign enterprise, is clearly anti-competitive. Such a restrictive economic policy is unwarranted, not only because it runs contrary to the modern spirit of free trade and competition, but also because the Philippine economy stands to lose the opportunity to receive capital from foreign businesses who are considered leaders and innovators in their respective sectors.

Moreover, the absolute policy of preference for qualified Filipinos is also premised on the outdated impression that Filipino trade and business enterprises are unable to compete with foreign ones, and that the State has to step in and provide a handicap against foreigners to even out the economic playing field. In light of contemporary experience, the Philippine economy should outgrow such an antiquated notion that Filipinos cannot compete against foreigners.

In this regard, we are proposing that the phrase “qualified Filipinos” in the second paragraph of Article XII, Section 10 of the 1987 Constitution be deleted and replaced with “qualified investors.”

Proposed Deletion of Article XII, Section 22, on Penal Sanctions

³ Bernas, Joaquin G. *The 1987 Constitution of the Republic of the Philippines: A Commentary*, p. 1171.

⁴ Record of the 1986 Constitutional Commission, Proceedings and Debates, Volume III, page 616; Emphasis supplied.

⁵ G.R. No. 122156, February 3, 1997.

Article XII, Section 22 reads: “[a]cts 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.”

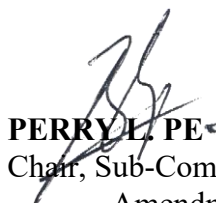
First, this provision is an obvious superfluity. Even in the absence of such a provision in the Constitution, Congress will not be deprived of its power and prerogative to enact laws that identify and define violations of Article XII and prescribe penalties for such violations.

Second, the broadly-worded threat of criminal and civil prosecution for violating the economic provisions of the Constitution tends to send a sweeping but vague message to all interested foreign investors.

In this regard, we are proposing that the entire Section 22 be deleted altogether.



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