THE SUPREME COURT AND ECONOMIC POLICY: A PLEA FOR JUDICIAL ABSTINENCE

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I. INTRODUCTION

On September 7, 1989, the Supreme Court *en banc* stated in a decision in the case of Garcia v. Board of Investments that it was "not about to delve into the economics and politics of this case."[1] The case was a petition brought by Congressman Enrique Garcia before the Supreme Court, assailing the approval granted by the Board of Investments to the amended application of the Bataan Petrochemical Corporation, seeking, among others, the transfer of the site from Bataan to Batangas. The reason was simple: the Court "did not possess the necessary technology and scientific expertise to determine whether the transfer of the proposed BPC petrochemical complex from Bataan to Batangas... will be best for the project and for our country.[2] Subsequently, on October 24, 1989, in resolving the Petitioner's Partial Motion for Reconsideration, the Court reiterated the position that the matter of "approving or disapproving the application for registration of an enterprise are not reviewable by this Court for they are political and economic decisions which in our system of government are functions of the executive branch over which this Court has no power to review except when the chief executive acts without jurisdiction or with grave abuse of discretion or in violation of private rights".

It was therefore a shocked business community which heard on November 9, 1990 that the Supreme Court, in another case brought by the same petitioner over the same plant, but this time challenging the correctness of the BOI's decision, actually reversed the Board and insisted on maintaining Bataan as the plant site.[3]

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[1]177 SCRA 374 (1989).

[2]*Id*., at 382.

[3]Garcia v. Board of Investments, 191 SCRA 288 (1990).

II. THE CASE FOR JUDICIAL SELF-RESTRAINT IN ECONOMIC MATTERS

A. Constitutional Intent

Although judicial review has long been recognized in the Philippines, it is only in our present constitution that "judicial power" was explicitly defined to include the duty "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."[4] Since the text does not indicate whether judicial scrutiny is to be made with equal vigor and alacrity in every area of national life, or whether it ought to be more vigilant in some rather than others, it would be useful to examine the deliberations of the 1987 Constitutional Commission to ascertain the precise intent behind the explicit inclusion of judicial review in the definition of judicial power.

The idea for an express provision on the extent to which judicial power may be exercised was proposed by the late Chief Justice Roberto R. Concepcion, Chairman of the Committee on the Judiciary, almost as soon as the Committee was organized to perform its task. The members of the Committee readily accepted the proposal for even the resource persons, such as the then Solicitor General Sedfrey Ordoñez, considered it a matter of paramount importance. A preliminary draft of the text was prepared by then Commissioner Florenz Regalado. However, even at that time Commissioner Jose F.S. Bengzon felt that the proposed definition may emasculate the executive and turn the Supreme Court into a superbody compared with the other branches of government.

Chief Justice Concepcion made it very clear in his sponsorship speech on the Article on the Judiciary that the definition of what was included in judicial power is "actually a product of our experience during martial law".[5] He explained:

> ...[T]he role of the judiciary during the deposed regime was marred considerably by the circumstance that in a number of cases against the government, which then had no legal defense at all, the solicitor general set up the defense of political questions and got away with it. As a consequence, certain principles concerning particularly the writ of

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[4]CONST., art. VIII, sec. 1.

[5]1 RECORD OF THE CONSTITUTIONAL COMMISSION 434 (1986).

> *habeas corpus*, that is the authority of courts to order the release of political detainees, and other matters related to the operation and effect of martial law failed because the government set up the defense of political question. And the Supreme Court said `Well, since it is political, we have no authority to pass upon it.' The Committee on the Judiciary feels that this was not the proper solution of the questions involved. It did not merely request an encroachment upon the rights of the people, but it, in effect, encouraged further violations thereof during the martial law regime...[6]

During the period of interpellation, the sponsor further clarified that it was not the intention of the definition to "eliminate the fact that truly political questions are beyond the pale of judicial power."[7] What the provision is saying, according to the Chief Justice, is that "questions involving jurisdiction or abuse in its exercise are non-political but justiciable cases."[8]

The debates thereafter indicate that the protection of civil liberties was a dominant thought behind the definition. The fate of Commissioner Felicitas Aquino's attempt to introduce an amendment is instructive. On July 14, 1986, during the period for amendments, Commissioner Aquino suggested including a provision in the definition of "judicial power" the redress of wrongs for the violation of constitutional rights.[9] She argued that while the amendment did not add to what was already in the definition, there was a need to "explicate that responsibility on the part of the court".[10] The Aquino suggestion was not accepted by the Committee because the members believed that the protection of constitutional rights need not be explicitly stated. After having been assured that the thought was already part of the definition, particularly in relation to a subsequent provision in the Article on the power of the Supreme Court to promulgate rules thereon, Commissioner Aquino withdrew her suggestion on the understanding that "it is the implicit intention of the Committee to likewise read into this provision [definition of judicial power] this kind of a duty on the part of the court".[11]

Clearly, then, while other areas of national life touched by executive or legislative abuse of discretion amounting to lack of jurisdiction

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[6] *Id.*
[7] *Id.*, at 443.
[8] *Id.*, at 439.
[9] I RECORD OF THE CONSTITUTIONAL COMMISSION 475 (1986).
[10] *Id.*
[11] *Id.*

may be proper areas of judicial inquiry, the protection of constitutional rights must be its paramount concern. This is but logical since the existence of a free society and an open political system depends upon the individual's civic rights being upheld and protected against the unwarranted intrusions of a powerful Government. In such cases, the Court has every reason to intervene and exercise its judgment. In other words, protecting oppressed individuals from abuses of government power is the core functions of the Court.

B. Additional Reasons

In any event, other compelling reasons, support the view that in the area of economic and industrial politics, the judiciary ought to exercise self-restraint.

First, the essence of judicial review is really anti-democratic. The members of the Supreme Court are electorally irresponsible and are accountable to no one, except for impeachable offenses. Abraham Lincoln, in his first inaugural address, said it best:

> ...the candid citizen must confess that if the policy of government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation...the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of the eminent tribunal.[12]

In the same vein, Professor Bickel observed that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the actual people here and now, it exercises control, not in behalf of the prevailing majority, but against it".[13]

Second, as admitted by the Supreme Court itself in the first Petrochemical decision, the Court is intrinsically unsuited to deal with economic issues.[14] Whether certain economic and industrial policies are desirable is not susceptible to black and white judgments. One cannot say

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[12]VI J.D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 9-10 (1987).

[13]A.M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-17 (1962).

[14]Garcia v. Board of Investments, 177 SCRA 374, 382 (1989).

with certainty that an economic policy or program for national development adopted by the Government is clearly right or wrong. These are debatable issues since economic programs and politics do not represent absolute truths. A court of law, on the other hand, is structured to decide on the basis of right or wrong. It cannot take a middle ground because it is not an institution through which compromises are made. Moreover, the Court can only decide within the narrow confines of the facts of the particular case brought before it. It cannot take a macro view which is essential when dealing with the economic, industrial and developmental programs of the country.

In any event, there are other ways of changing economic policies, among them pressure of public opinion and the processes of the ballot box.

Ordinarily, legislation whose basis in economic wisdom is uncertain can be redressed by the processes of the ballot box or the pressures of opinion. Third, economic or industrial policies are generally the result of compromise, whether within competing interests in Congress or between Congress and the President. This is as it should be since politics is the art of compromise. The maturity of a political system is measured by its ability to reach a rational compromise over controversial issues. The judiciary does not serve the political process or advance its maturity by giving disgruntled individual politicians or minority groups the ability, through the courts, to derail or upset a consensus often painfully arrived at by the majority.

Fourth, the more the courts essay into areas normally reserved to Congress and the President, the more it will be embroiled in politics and be the object of outside pressure and partisan attack. The lessons learned in the infamous attempt of U.S. President Franklin Delano Roosevelt to pack the Supreme Court that kept obstructing the New Deal should warn us about the consequences of Supreme Court excursions into questions beyond its ken. "It is hostile to a democratic process", says Justice Frankfurter, "to involve the judiciary in the politics of the people".[15]

Fifth, the Supreme Court, in past decisions, and fortunately, in cases resolved recently has prudently deferred to the judgment of the other branches of the Government entrusted with and more qualified to make the decision. In the case that challenged the constitutionality of the Foreign Investments Act of 1991, the Supreme Court, after commending the petitioner, declared that "his views are expressed in the wrong forum. The

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[15]Garcia v. Executive Secretary, 204 SCRA 576, 524, (1991).

Court is not a political arena. His objections to the law are better heard by his colleagues in the Congress of the Philippines, who have the power to rewrite it, if they so please, in the fashion he suggests".[16] Again, in the case involving the question of whether the country should honor its international debt, the Court correctly held that it "is not an issue that is presented or proposed to be addressed by the Court. Indeed, it is more of a political decision for Congress and the Executive to determine in the exercise of their wisdom and sound discretion".[17] There is no overwhelming reason to depart from these precedents.

Sixth, the country is in the process of encouraging entry of foreign investments. The foreign investor, however, must be able to rely on the economic decisions of the Executive Department. They would have a very low level of confidence on policy decisions made by the Executive if these decisions can be overruled by the Supreme Court because it holds a contrary opinion as to where, when and how the country should progress economically. In every forum this author has addressed abroad, the Petro-Chemical case was invariably cited as discouraging foreign investments.

III. CONCLUSION

The whole issue of interpreting the Constitution should be looked upon as a shared responsibility between the three branches of government which, although separate, are supposed to be co-equal. Thus, a construction given by Congress or the Executive on matters allotted to it by the Constitution should be viewed by the Court with becoming deference and accorded due respect, unless it is so outrageous as to be bereft of any rationality.

We must take into account the fragility of our present social, economic and political situation as a transitional democracy, and the consequent difficulty of arriving at a consensus on solutions to national problems. In these circumstances, the Supreme Court should concentrate on the preservation of a democratic society by guaranteeing all citizens free access to the political process and the instruments of political change, while at the same time allowing the majority government to rule, as long as the political process is open and untrammeled.

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[16]Guingona v. Carague, 196 SCRA 221, 239 (1991).
[17]*Id.*