THE ECONOMIC POLICY DETERMINING FUNCTION OF THE SUPREME COURT IN TIMES OF NATIONAL CRISIS*

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I. INTRODUCTION

Does the Supreme Court make economic policy?

Probably most notable in the development history of the last quarter century is the emergence of newly industrializing countries (NICs) in Southeast Asia.[1] In recent years, however, the second generation of newly industrialized Asian economies[2] has begun to replace the original four countries as the engine of growth in the region.[3] As direct factors, the South and East Asian economic region is now the fastest growing in the world showing remarkable stability and resilience despite an unfavorable international environment.[4]

Amidst this surging regional economic growth, the Philippines, regrettably, is one of only two countries in the region whose population grew faster than their economies,[5] now at the far end in terms of growth performance.

First Place, ROBERTO SABIDO AWARD
FOR BEST LEGAL RESEARCH PAPER S.Y. 1992-1993.

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[1] P. STREETEN, BEYOND ADJUSTMENT: THE ASIAN EXPERIENCE 68 (1988). The newly industrializing countries (NICs) referred to are Hongkong, Singapore, Taiwan, and South Korea.

[2] These are Indonesia, Malaysia, and Thailand.

[3] UNITED NATIONS, WORLD ECONOMIC SURVEY 42 (1992), hereafter cited as WORLD SURVEY.

[4] *Id.*, at 41.

[5] *Id.* The other country is India. In 1992, the Philippine population grew by 2.3 per cent while the economic growth rate was pegged at 0.6 per cent.

Government Role and Response

It is inaccurate to generalize quite hastily that the government under different administrations has been unresponsive to what may now be legitimately described as a national crisis. Nevertheless, it is equally an unfair assessment to state that the government has no glaring fault in dealing with the crisis as it has taken, as traditionally expected, the leading role in economic direction. Nothing prevents one administration, however, from openly claiming that the crisis was caused, or at least aggravated, by the actions of its predecessor as when the Aquino administration had asserted that the economic crisis which faced it was mainly "brought about by errors in economic management and abuse of power" by the Marcos regime,[6] among other causes.

The assertion has basis since the problem became critical only upon a decade ago. Since that time, the government has found itself reaching relatively, on the average, the same poor level of economic performance.[7]

As the government, through the legislative and executive branches, continues to set and implement its policies for national growth under the pretext of law, the threat of an unrecoverable and irreversible economic breakdown pervades, more so if one considers that responses to economic crises are shaped by a range of political factors.[8] For a government plagued by the ills of political influences, such factors may prove fatal especially at a time when stability and adjustment are fundamental requirements for development.

The Supreme Court and This Study

The Philippine system of government theoretically excludes the Judiciary, primarily institutionalized in the Supreme Court to which the judicial power is vested by the Constitution,[9] from any significant role in the

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[6]NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY, MEDIUM TERM PHILIPPINE DEVELOPMENT PLAN 1987-1992 3 (1986), hereafter cited as MEDIUM TERM PLAN.

[7]A detailed discussion of the state of the Philippine economy follows this Introduction. *See* Chapter Two, THIS STUDY.

[8]J. NELSON, ECONOMIC CRISIS AND POLICY CHOICE: THE POLITICS OF ADJUSTMENT IN THE THIRD WORLD 29 (1990).

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

determination or implementation of national economic policy, finding reason and basis under the constitutional framework of government.

As it would be shown, however, such role may largely turn out to be merely an unrecognized one which has been manifested, although not completely but nearly unnoticed,[10] since the early existence and history of the Court.

Today, with the induced and increased activity in the economy coupled by the resultant rise in legal relations among those so involved, and the adding number of controversies thereon being brought before the courts for adjudication, the constitutional doctrines and safeguards which have supported the initial view of the Supreme Court's institutional "non-role" in economic policy making as articulated and upheld by the Court itself in the past are being seriously contradicted by the political and social realities that seem to have greatly influenced its members.

Since the effectivity of the new Constitution then, a trend towards keen judicial interest and activism in cases highly impressed with direct and significant economic implications can be observed. Thus, it can be said that in no other manner may a decision of the Supreme Court in the traditional exercise of its constitutional power of judicial review over legislative and executive action, have such far reaching effects measurable in real economic terms.

It is important to study closely this newly recognized function of the Supreme Court knowing the need for an honest and holistic diagnosis of the Philippines' economic crisis if ever a complete solution thereto can be finally set into place.

The objective is not to undertake a comprehensive economic analysis of law[11] as may be applied to the "economic" decisions of the Supreme Court

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[10]*See* Chapter Two, THIS STUDY, on the pre-1987 Constitution cases.

[11]This approach uses economics as a tool for analyzing a broad range of questions of legal interpretation and policy by connecting economic precepts to concrete legal problems. It involves the application of the theories and empirical methods of economics to the legal system, to common law fields such as tort, contract, and property, to the theory and practice of punishment, to civil, criminal, and administrative procedure, to the theory of legislation, and to law enforcement and judicial administration. It is a fairly new theory involving the use of one academic and technical field (microeconomics) as an analytic framework for explaining the concepts and realities related to the other (law). The economic approach to law, however, has aroused considerable antagonism especially

but to engage in a legal formulation and critique of the Court's activism. The intention of the Court is immaterial, nor is the query of whether it is consciously adopted essential. The main purpose is to inform the traditional policy-makers and economic participants of the Court's role and have it recognized and accepted as such to serve as an additional input in policy-determination, and to advance the evaluation to the Court itself as a full disclosure for its proper consideration.

II. THE ECONOMICS OF GOVERNANCE

The Philippine Economy: Impact, Growth and Prospects

In the 1950's, the Philippines held greater economic promise than any developing country in the South and East Asian region.[12] In a complete turnabout, the Philippines experienced the worst economic and financial crisis in its postwar history in late 1983.[13] In 1984 and 1985, it then underwent the most wrenching stabilization episode in the region and had already been surpassed not only by South Korea and Taiwan, but by its Southeast Asian neighbors with comparable economic structures, namely: Thailand, Malaysia, and Indonesia.[14]

Coming to power in 1986, the Aquino government faced and continued to deal with the problems of a structurally inefficient economy[15] which had pervaded until the present: the persistence of poverty and income inequality, high unemployment and underemployment, and urban/rural and regional disparities and marginalization.[16]

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among academic lawyers who dislike the thought that the logic of law might be economics. For a full discussion, *see* R. POSNER, ECONOMIC ANALYSIS OF LAW (1977).

[12]NELSON, *supra* note 8, at 215.

[13]*Supra* note 6. Certain characteristics of Marcos authoritarianism help explain a number of aspects of the crisis in the early 1980's. First, the growth of the crony sector increased the vulnerability of the entire economy to external shocks. Second, cronyism, the instrumental basis of Marcos's rule, and the high level of executive intervention combined to weaken auditing, oversight, and planning functions. Third, the gradual disaffection of the non-crony private sector contributed to both political and economic vulnerability. *See* NELSON, *supra* note 8, at 218.

[14]*Id.*

[15]These were indentified as the following: high tariffs, an overvalued currency, expansionary fiscal and monetary policies, proliferation of government corporations, large budgetary deficit, and very high interest rates. *Id.*, at 4, 10.

[16]*Id.*, at 3.

After experiencing a period of crippling negative growth during the latter years of the Marcos administration, the economy posted a positive 1.4 per cent growth rate in 1986.[17] This was encouragingly followed by sustained, uninterrupted economic growth and recovery for the next three consecutive years.[18] However, due to some unprogrammed events,[19] the economy began to sharply decline in 1990 but was still able to manage a modest growth.[20] Significantly, the character of that growth signalled that underlying weaknesses persisted in the economy which rendered it extremely vulnerable to external shocks.[21] Such structural defects merely resurfaced as said events served only to heighten weaknesses that were already there and simply remained.[22]

In 1991, the economy finally succumbed by tumbling to a negative 1.4 per cent growth[23] for the first time after the Marcos administration. The following year saw little improvement as the economy barely managed to improve reaching only 0.6 per cent growth.[24]

But perhaps a more telling and disturbing indicator of the plight of the country's economy is its relative position compared with those of its

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[17]*See* Table 6.2, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, HANDBOOK OF INTERNATIONAL TRADE AND DEVELOPMENT STATISTICS 1991 (1992), hereafter cited as UNCTAD.

[18]*Id.* The growth rate in gross domestic product (GDP) was fixed at 5.0 per cent in 1987, followed by a growth of 6.8 per cent in the country's gross national product (GNP) for 1988, and a 5.7 per cent growth in 1989. *See* NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY, 1989 PHILIPPINE DEVELOPMENT REPORT 22 (1990).

[19]Such as the 1989 *coup* attempt, the July 16 earthquake, the August 2 Iraqi invasion of Kuwait, super typhoon "Ruping", drought, and power shortages. *See* NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY, 1990 PHILIPPINE DEVELOPMENT REPORT 23 (1991).

[20]*Id.* The economy only managed to post a positive 3.1 per cent increase in output.

[21]*Id.*

[22]*Id.* The structural weaknesses identified, among others, were a weak and internally inconsistent macroeconomic environment resulting in contraction in investments and double digit inflation, high interest rates, a less than liberal investment environment, widening public sector deficit, and continued heavy reliance on indirect taxation.

[23]NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY, 1991 PHILIPPINE DEVELOPMENT REPORT xlv (1992), hereafter cited as 1991 PDR. As if it were a country condemned to suffer from natural calamities, the June eruption of Mt. Pinatubo caused severe damage to Luzon's main agricultural areas. The contraction in the economy was also caused by the downturn in investment activity and the slackened consumption expenditures.

[24]The Manila Bulletin, February 6, 1993.

Southeast Asian neighbors and the general trends observed and projected worldwide.

The Philippines now rates last among the region's economies, is below the regional average in terms of growth, and has registered the sole negative growth average for what has been a "take-off" decade for the region.[25] Thailand, for one, during such period, has become the fastest-growing economy in the world at one point.[26]

Moreover, although the gross global product -- the total world output of goods and services -- has actually been declining,[27] which means that economic prospects all around the world "seem glum at best,"[28] East Asian growth has remained widespread and fast despite this slow down in world trade and is expected to continue to be rapid.[29] As concrete proof, the so-called "Super Seven"[30] from the region are now leading the entire world in economic growth.[31] The Philippines, on the other hand, has been left far behind and is nowhere near such an achievement.

To determine in real terms the effects of these economic movements, two measures reflect how the people are really faring: the food threshold, and the poverty threshold.[32] Nearing the end of 1992, forty per cent of the

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[25]In 1989, *per capita* GDP for the ASEAN region was placed at U.S. $ 871 while the Philippines recorded a U.S. $ 729 mark. This performance is second to last to Indonesia which, however, had the highest GDP in the region at U.S. $ 94.6 billion that was merely offset by its 181 million population. From 1980 to 1990, *per capita* GDP growth for ASEAN was at 2.9 per cent while the Philippines posted a negative 1.5 per cent average. In terms of *per capita* GDP, the ranking from highest to lowest is as follows: Singapore, Brunei Darussalam, Malaysia, Thailand, Philippines, and Indonesia. *See* UNCTAD, *supra* note 17.

[26]Lim, *U.S. Trade Policy Toward the New NICs of Southeast Asia*, 11 MICH. J. INT'L. L. 466 (1990).

[27]WORLD SURVEY, *supra* note 3, at 1.

[28]Time International, September 14, 1992.

[29]WORLD SURVEY, *supra* note 3, at 1, 7.

[30]Composed of Hong Kong, Singapore, Taiwan, South Korea, Thailand, Malaysia, and Indonesia.

[31]*Supra* note 28. Malaysia, for 1992, is projected to to record its fifth consecutive year of 8 %-plus annual growth; similar performances are being turned in by Thailand (8.6 %), South Korea (7.5 %), Taiwan (6.8 %), Singapore (6.0 %), Indonesia (6.4 %), and Hong Kong (5.4 %).

[32]IBON Facts and Figures, September 15, 1992. The food threshold is the minimum amount a family of six needs every month to provide for its barest nutritional needs. The poverty threshold is the minimum amount a family of six needs every month to satisfy

families in the Philippines are estimated to be living below the food threshold.[33] Furthermore, although in 1988 poverty incidence, or the percentage of families below poverty level, had been placed at fifty per cent,[34] the number has increased by the same proportion over the last four years.[35]

These figures and realities both manifest clearly that the economic issue has in fact reached crisis and emergency proportions as earlier asserted -- evidence of the seemingly inadequate and ineffective means used by the government for the past years, and equally, an indication of the sense of urgency and importance under which the government must act to cope with the same.

The Role of Government in Economic Policy-Making

The Philippine System of Government: The Legislature and the Executive as Traditional Role Players

The major powers of government are actually distributed among the three traditional departments that have been maintained under the new Constitution.[36]

This separation of powers with its corollary system of checks and balances has worked either to limit or isolate the exact authority that may be exercised by one department[37] which remains beyond encroachment but nevertheless correctible to an extent,[38] or, to expand the definition and scope of each of the powers constitutionally conferred as integral or incidental to its exercise[39] other than what could be an outright authority

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almost all of its nutritional requirments and other basic needs such as clothing, shelter, education and utilities.

[33]IBON Philippines, 1993 IBON Survival Calendar.

[34]NATIONAL STATISTICS COORDINATION BOARD, 1991 PHILIPPINE STATISTICAL YEARBOOK.

[35]*Supra* note 33. Poverty incidence as of October 1992 was estimated to be at 75 percent of the families in the country.

[36]I. CRUZ, PHILIPPINE POLITICAL LAW 69 (1991).

[37]*See* Laurel v. Garcia, 187 SCRA 797 (1990).

[38]CRUZ, *supra* note 36, at 71.

[39]*See* Gonzales v. Macaraig, 191 SCRA 452 (1990); Marcos v. Manglapus, 177 SCRA 668 (1989); Angara v. Electoral Commission, 63 Phil. 139 (1936).

that one branch may validly give or delegate to another.[40] At the core of such a function to restrict or allow government acts which is a primary power in itself, by the nature of its constitutional role, is the Supreme Court. It is under this capsulized framework therefore where economic policy-making in its various modes, as theorized, may operate.

Thus, generally, both the legislative and the executive departments, having the most suitable means and authority, are free to engage and deal with the subject of economic issues through the basic exercise of their respective powers. The legislature, for instance, has plenary power to determine economic policy by law[41] within the bounds provided under the Constitution. On the other hand, the Executive through the President, by virtue of its enforcement,[42] administrative,[43] control,[44] budgetary,[45] and commercial or proprietary powers,[46] apparently has unrestricted discretion not only to set but also to implement development policy with its limits identifiable, perhaps, only after being constitutionally tested.[47] And as earlier mentioned, such checking function on both legislative and executive action is largely performed by the Supreme Court. Under these premises, the traditional leading roles of the legislative and the executive branches under our constitutional system are well-established.

Economic Policy-making and Implementation in National Crisis Under The Aquino Administration[48]

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[40]As in the case of the Congress which, "in times of war or other national emergency," may ,"by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. x x x" (CONST., art VI, sec. 23[2]). *See* also CONST., art. VI, sec. 28(2); art. VIII, sec. 2.

[41]2 J. BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 66 (1988).

[42]CONST., art. VII, sec. 1.

[43]*Id.*

[44]CONST., art. VII, sec. 17.

[45]CONST., art. VII, sec. 22.

[46]CONST., art. VII, sec. 20; art. XII, sec. 2.

[47]BERNAS, *supra* note 41, at 167.

[48]A full review of the Aquino government's economic policies is beyond the scope of this Study. Only the major areas of structural adjustments, industry and investments, taxation, import liberalization, and debt management will be discussed to manifest the traditional role of the Executive and the Legislative in economic policy-making. The Congress shall be treated as one under the Aquino administration being largely composed of political parties and broad coalitions which brought Pres. Aquino into power.

The Aquino administration set out its national development policies soon after its assumption into power in 1986.[49] Since then, it has employed a wide range of policy instruments to serve as measures to promote development and to control both general and specific areas of economic policy.[50] All these instruments have been embodied in one form of statutory enactment or another having the same force and effect to work as the modes for government action on the economy.

To attain its development objectives, the government adopted various economic policies and undertook major structural adjustments. To improve the role and structure of government itself, it aimed to apply the key organizational principles of decentralization, minimal government intervention, and regional or countryside development.[51]

Regional Development Assemblies (RDAs), which replaced the former regional development councils (RDCs), were then created to effectively select, prioritize, and allocate funds for projects under the general infrastructure program.[52] Twelve provinces in different regions were declared pilot decentralization areas.[53]

The Organic Acts for two autonomous regions were also enacted.[54] This was followed by an accelerated program for rural development involving irrigation projects within a ten-year period.[55]

To spur development in the critical area of industry and investments, the government aimed for a more favorable investment environment by

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[49]*See* MEDIUM TERM PLAN, *supra* note 6.

[50]For a complete discussion on policy instruments and development alternatives in formulating policy models, *see* G. MEIER, LEADING ISSUES IN ECONOMIC DEVELOPMENT 808-818 (1976), hereafter cited as MEIER. Some of the policy instruments generally available to government are interest rates, taxes, wage rates, subsidies, tariffs, price control, and tax exemptions. On the other hand, the general areas of policy include monetary, fiscal, foreign trade, foreign investment, consumption, and labour. The specific areas of policy involve production, investment, consumption, trade, labour, and natural resources.

[51]MEDIUM TERM PLAN, *supra* note 6, at 38.

[52]EXEC. ORDER No. 366 (1989).

[53]MEM. CIRC. No. 120 (1990.

[54]REP. ACT NO. 6734 (1989) provided for the Organic Act establishing the Autonomous Region in Muslim Mindanao, while Rep. Act No. 6766 (1989) provided the same for the Cordillera Autonomous Region.

[55]REP. ACT No. 6978 (1991).

deregulation, provision of adequate infrastructure facilities and the maintenance of a stable set of investment policies.[56]

To achieve deregulation and growth in countryside business, a "Magna Carta for Countryside and Barangay Business Enterprises (CBBEs)" was established granting exemptions from government rules and regulations through the absence of bureaucratic restrictions and providing other incentives therefor.[57] A complementary legislation was later passed to promote, support, strengthen, and encourage the growth and development of small and medium enterprises[58] in all productive sectors of the economy particularly rural/agri-based enterprises.[59] The cooperative system was also promoted and strengthened.[60]

To provide the required infrastructure facilities, a build-operate-and-transfer scheme which authorized the private sector to finance, construct, operate and maintain infrastructure projects was developed as one of the main programs.[61] What may be considered as supporting measures included the liberalization of the importation of cement[62] and the reduction of import duty rates thereon,[63] the adoption of other measures to ensure its availability,[64] and the strengthening of the local iron and steel industry to promote industrialization.[65]

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[56]MEDIUM TERM PLAN, *supra* note 6, at 42, 43.

[57]REP. ACT NO. 6810 (1989).

[58]Defined as those with total assets of P 20 million or less, exclusive of the land on which the business is located. *See* Rep. Act No. 6977 (1991), sec. 11.

[59]REP. ACT NO. 6977 (1991), sec. 2.

[60]REP. ACT NO. 6939 (1990).

[61]REP. ACT NO. 6957 (1992). Under this unique scheme, a contractual arrangement is entered between government infrastructure agencies, including government owned and controlled corporations and local government units, and a private contractor, whereby the contractor undertakes the construction, including the financing, of a given infrastructure facility, and the operation and maintenance thereof. The contractor operates the facility over a fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges sufficient to enable the contractor to recover its operating and maintenance expenses and its investment in the project plus a reasonable rate of return thereon. The contractor then transfers the facility to the government agency or local government unit at the end of such fixed term which shall not exceed fifty (50) years. *See* sec. 2 thereof.

[62]CB CIRCULAR NO. 1195 (1989).

[63]EXEC. ORDER NO. 353 (1989).

[64]DTI ADM. O. NO. 10 (1991).

[65]REP. ACT NO. 7103 (1991).

On foreign investments,[66] the overall government policy centered on facilitating the entry of such investments through simplified and automatic investment procedures and regulations.[67] Investment legislation was also passed to attract private foreign investments. The accepted belief was that such investment would promote economic growth and development since it brings with it new but scarce resources such as capital, technology, management, and marketing skills, otherwise absent in the host nations.[68] Productive investment, that is, investment in the production of the means of production, was said to be the strategic factor in economic development.[69] Moreover, empirical evidence strongly suggested that prospective foreign investors saw investment laws as an important barometer for gauging the investment climate in a given country.[70] Converting this thinking and analysis into operative form, two notable investment laws were enacted – the Omnibus Investments Code of 1987[71] and more recently, the Foreign Investments Act of 1991.[72]

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[66]EXEC. ORDER NO. 226 (1987), art. 14 defines "Foreign Investments" as "equity investments owned by a non-Philippine national made in the form of foreign exchange or other assets actually transferred to the Philippines and registered with the Central Bank and the Board (of Investments), which will assess and appraise the value of such assets other than foreign exchange."

[67]MEDIUM TERM PLAN, *supra* note 6, at 153, 154.

[68]Kofele-Kale, *Host Nation Regulation and Incentives for Private Foreign Investment: A Comparative Analysis and Commentary*, 15 N. C. J. INT'L & COMP. REG. 361, 361-363 (1990).

[69]MEIER, *supra* note 50, at 804.

[70]Kofele-Kale, *supra* note 68.

[71]EXEC. ORDER NO. 226 (1987). The Omnibus Investments Code of 1987 provides for the reorganization of the Board of Investments (arts. 3 to 7) and its function to prepare an annual "Investment Priorities Plan" which shall be the overall plan containing the specific activities and categories of economic undertakings where investments are to be encouraged (art.26). The law also determines the qualifications (arts. 32 to 37) and the basic rights and guarantees of foreign investors registered under the plan (art. 31) including the granting of incentives to all registered enterprises engaged in a preferred area of investment (art. 39).

[72]REP. ACT NO. 7042 (1991). Under this law, as a general rule, there are no restrictions on the extent of foreign ownership of export enterprises whose products and services do not fall within the Lists A and B of the Foreign Investment Negative List enumerated under Section 8. The "Foreign Investment Negative List" or "Negative List" is a list of areas of economic activity whose foreign ownership is limited to a maximum of 40 per cent of the equity capital of the enterprises engaged therein (Secs. 2, 3[g], 6). In domestic market enterprises, foreigners can invest as much as 100 per cent equity except in areas included in the negative list, or prohibited or limited by existing law. List A is composed of areas limited by the Constitution and specific laws, List B are those regulated pursuant to law, and List C are those already serving adequately the needs of the economy and the consumers and do not require further foreign investments.

In the area of fiscal policy, tax policies were made to focus on raising revenue collections, improving the progressivity of the tax structure, simplifying tax administration, and rationalizing incentive schemes.[73]

The Aquino government began work with the World Bank and the International Monetary Fund on a comprehensive change in tax policy.[74] During the first year in power alone, twenty-nine separate tax measures were approved, including a value-added tax,[75] undertaken in conjunction with a World Bank "Economic Recovery Loan" worth $ 300 million.[76] Several taxes previously imposed on important products were eventually reclassified.[77] To meet government deficits, a controversial import levy which assessed an additional duty of nine per cent (9%) ad valorem on all imported articles was imposed in early 1991.[78]

One of the most controversial reforms was the resumption of the trade liberalization program.[79] By April 1988, import bans and quantitative restrictions have been lifted on 637 out of 1,232 items scheduled for liberalization.[80] As expected, this was followed by the liberalization of more items the following year.[81]

The problem of the huge external debt was met by a surprisingly simple government strategy -- honor all debts but negotiate for better terms. The most siginificant result of this policy would probably be the 1987

Without need of prior approval, therefore, a non-Philippine national may upon registration with the Securities and Exchange Commission (SEC) do business or invest in a domestic enterprise up to 100 per cent of its capital, unless participation, as said, is prohibited or limited to a smaller percentage by existing laws and/or under the provisions of the Foreign Investments Act: provided, however, that any enterprise seeking to avail of incentives under the Omnibus Investments Code of 1987 must apply for registration with the Board of Investments (BOI) (Section 5).

[73]MEDIUM TERM PLAN, *supra* note 6, at 47.

[74]Nelson, *supra* note 8, at 250.

[75]EXEC. ORDER No. 273 (1987). The constitutionality of this system was challenged before the Supreme Court which would be discussed later in this study.

[76]*Supra* note 74.

[77]REP. ACT NO. 6956 (1990) modified the excise tax on distilled spirits, wines, fermented liquor, and cigarettes. Rep. Act No. 6965 (1990) revised the form of taxation on petroleum products from ad valorem to specific.

[78]EXEC. ORDER No. 443 (1991).

[79]Nelson, *supra* note 8, at 251.

[80]*Id.*

[81]CB CIRCULAR No. 1205 (1989), CB CIRCULAR No. 1210 (1989), CB CIRCULAR No. 1212 (1989), CB CIRCULAR No. 1219 (1989).

agreement calling for the restructuring of $ 3.6 billion in debt which fell due within the term of office of President Aquino and $ 5.9 billion from a 1985 agreement.[82]

The Supreme Court: An Unrecognized Role?

From the above presentation, it is clear that no significant role in economic policy determination may be attributed to the Supreme Court in the exercise of its constitutionally defined powers -- *a conclusion easily reached by one well-versed with the law.* He may further validly accept the proposition that no apparent and immediate relation exists between the exercise of judicial power on one hand and economic policy-making on the other.

It is to be revealed, however, that such policy-making function is performed, although largely unrecognized, in the various modes of exercising judicial power. The Supreme Court finds itself in the midst rather than in the periphery of economic change.

III. THE SUPREME COURT AS AN ECONOMIC POLICY-MAKER

The Supreme Court as an Institution: Judicial Review and Judicial Policy-Making

As we have presented, economic policy formulation has been traditionally confined to the executive and legislative departments. In recent times, however, the Supreme Court, as the third force, has come into play in the determination of economic policies exercising such function through adjudication whenever its power is invoked in cases involving questions bearing significant economic weight.

Before examining the Supreme Court as an economic policy-maker, it is necessary to first locate it within the Philippine constitutional form of government.

Under the constitutional scheme, within the context of the presidential form of government, the three great branches of government have emerged as cornerstones in the embodiment of the theory of limited

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[82]Nelson, *supra* note 8, at 249.

government. To the Legislative branch has been charged the power to enact laws;[83] to the executive branch the power to administer the laws;[84] and to the Judiciary the authority to interpret the laws.[85]

The Constitution distributes and allocates power among the three branches to the end that every branch shall not unduly encroach upon the sphere of authority of the other, and at the same time ensuring specific checks so that concentration of authority in a single branch may be avoided.

Checks and balances, like separation of powers, seek to protect the people from the emergence of a tyrannical and unaccountable government by creating multiple heads of government which continuously struggle against each other, the intent of which being to deny any of them the capacity to consolidate all government authority in itself.[86]

Within this political arrangement, it is the Supreme Court's authority to interpret laws with finality. In declaring what the law is, it thereby "upholds the supremacy of the Constitution."[87] Included in this task is what is commonly known as the power of judicial review.

The Power of Judicial Review

The Constitution expressly defines judicial power. Thus:

> Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.[88]

Implicit in our constitutional form of government is the power of judicial review, that is, the power of the Supreme Court to pass upon the constitutionality of a treaty, international or executive agreement, law,

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[83]CONST., art. VI, sec. 1.
[84]CONST., art. VII, sec. 1.
[85]CONST., art. VIII, sec. 1.
[86]Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Columbia L. Rev. 573, 578 (1984).
[87]Angara v. Electoral Commission, 63 Phil. 139 (1936).
[88]CONST., art. VIII., sec.1.

presidential decree, proclamation, order, instruction, ordinance, or regulation,[89] such power being first articulated in *Marbury v. Madison*.[90]

The power of judicial review is thus ingrained in the Constitution itself as an indispensable cog in the democratic machinery. Such principle has been considered as one of the most cherished principles of American Constitutional Law which has made its way into the Philippines[91] and "since the organization of the Supreme Court and other inferior courts by the Judiciary Act of 1901 (Act No. 136) of the former Philippine Commission, the power of judicial review has become part of the legal system of the Philippines."[92]

The power of judicial review, however, through its legal history as a fundamental principle, has not been free from controversy. Since it involves a limit to the power of the other branches of government, it has naturally invited criticism, both in effect and in theory.

As aptly observed, "the controversy over the power of judicial review has not totally died down. Everytime the Court wields it in a rather rash and reckless manner, the reaction of its opponents is rather violent."[93]

Judicial review has come under serious antagonism especially in those cases where a decision adverse to the exercise of the power of another department has far reaching implications. Not even in the United States, where the doctrine was first applied, have all the issues been clearly resolved. It seems that our Supreme Court has mimicked even the nuances in the exercise of such powers by its American counterpart. Thus, in the United States, "the Court's power has been exercised differently at different times: sometimes with reckless and doctrinaire enthusiasm; sometimes with a degree of weakness and timidity that comes close to the betrayal of trust. But the power exists, as an integral part of the process of American government."[94]

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[89]CONST., art. VIII., sec.4 (2).

[90]1 Cranch 137 (1803).

[91]*Id.*, at 4.

[92]*Id.*, at 7.

[93]Esguerra, *The Need For a New Perspective On The Power of Judicial Review*, 28 U.S.T. L. REV. 4, 12 (1977-1978).

[94]Rostow, *The Democratic Character of Judicial Review*. 66 HARV. L. REV. 193, 196 (1952).

Notwithstanding the myriad of issues involved in the power of judicial review, it remains as a potent check –perhaps the *only* check outside of direct State action -- against the excesses of the other branches in the exercise of their concomitant powers. It is a wall that keeps one branch of government within its bounds. Through the exercise of such power the Court enforces the Constitution's goal in providing, allocating, and limiting the powers of government. The wisdom behind this is explained:

> (I)t was probable, if indeed it was not certain, that without some arbiter whose decision should be final the whole system would have collapsed, for it was extremely unlikely that the Executive or the Legislature, having once decided, would yield to the contrary holding of another Department . . . . The courts were undoubtedly the best "Department" in which to vest such a power, since by independence of their tenure they were least likely to be influenced by diverting pressure. It was not a lawless act to import into the Constitution such grant of power. On the contrary, in construing written documents it has always been thought proper to engraft upon the text such provisions as are necessary to prevent the failure of the undertaking. That is no doubt a dangerous liberty, not lightly to be resorted to; but it was justified in this instance, for the need was compelling.[95]

From a reading of the above text, it becomes apparent that the exercise of judicial review has become indispensable in preserving the system of limited government.

In establishing a correlation between such power and a free society, it has been stated that "it is error to insist that no society is democratic unless it has a government of unlimited powers, and that no government is democratic unless its legislature has unlimited powers, Constitutional review by an independent judiciary is a tool of proven use in the American quest for an open society of widely dispersed powers."[96]

Expanded Judicial Power Under the New Constitution

Having presented the background of the Philippine economy, it becomes clear that in order to achieve sound economic development, the government must come out with a single coherent economic policy to be

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[95]M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 54 (1982), *citing* LEARNED HAND, THE BILL OF RIGHTS 27-29 (1958).

[96]Rostow, *supra* note 94, at 199.

vigorously and jointly implemented, and such policy considerations are traditionally lodged in the executive and the legislative branches. But this is precisely where the problem arises.

A trickle of reason leads one to believe that such coherence cannot be achieved when there are several policy-makers who, instead of assuming complementary roles, actually and unceasingly contradict each other. Stability, as a factor for reform, is compromised and the road to economic development is unnecessarily blocked by artificial obstacles. It is within this context that the policy-making function of the Supreme Court must be viewed.

The Political Question Doctrine

The problem of the existence of another branch declaring economic policy is compounded by the abovementioned provision of the Constitution defining judicial power.[97] The controversy lies in the second clause wherein the court has the power 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."[98]

This clause was undoubtely a response to the situation that prevailed during the Marcos administration where the Supreme Court avoided ruling on the constitutionality of certain acts of the executive department on the ground that they were political questions,[99] defined as "those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government."[100]

Under the provision, there is a marked expansion of judicial power. It has been further observed that "the above-quoted constitutional provision erodes the political question doctrine and, as the Supreme Court notes, broadens the scope of judicial inquiry into areas which the Court, under

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[97]*Supra* note 93.

[98]*Id.*

[99]*See* De la Llana v. COMELEC, 80 SCRA 525 (1977); Javellana v. Executive Secretary, 50 SCRA 30 (1973).

[100]Tanada v. Cuenco, 103 Phil. 1051 (1958).

previous constitutions would have normally left to the political departments."[101]

The implication of this provision is made clear -- the Supreme Court's constitutional power to check the actions of the legislative and executive departments has been strengthened by now requiring a mere majority vote to declare a law or official act invalid or unconstitutional.[102] The experience of martial law under the Marcos administration has shifted judicial power to its extreme where the Supreme Court can now sit as a superlegislature and superpresident, and if there is such a thing as judicial supremacy, then this is it.[103]

Notwithstanding the above pronouncement, it has been viewed that the political question doctrine has not been totally disregarded.[104] Nevertheless, problems still remain.

In the session of the Constitutional Commission on July 19, 1986, it was agreed that the above provision would not do away with the political question doctrine. "It is not clear, however, what discretionary acts are subject to judicial review, outside of those specifically mentioned in the Constitution, and what acts remain prerogatives of the political departments that, even with the said enlargement of judicial power, cannot be examined by the courts of justice."[105]

This backdrop places the Supreme Court at the crossroads of judicial supremacy and judicial restraint. And in many cases it has chosen to be supreme, probably not totally mindful of the economic and social impact that such choice may bring.

In describing the judicial process, judicial preference in statutory interpretation is said to be largely, by itself, policy-based. "The Justices bring to the interpretative task ideological frameworks and policy preferences that inevitably influence the choices made." For example, the United States Supreme Court has been described as having strong institutional preferences to avoid decisions and rules that it believes itself

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[101]Agabin, *The Politics of Judicial Review Over Executive Action: The Supreme Court and Social Change*, 64 PHIL. L. J. 189, 209 (1989).

[102]CONST., art. VIII, sec. 4(2).

[103]Agabin, *supra* note 101, at 209-210.

[104]CRUZ, *supra* note 36, at 83.

[105]*Id.*

incompetent to make.[106] Yet, the Supreme Courts of both the United States and the Philippines have occassionally transcended its own limits, and in both experiences, causing a major economic stir too extensive to be ignored.

The political implication of the judicial function suggests its social impact. The American experience with judicial review is a perfect lesson. To lift the country from the Great Depression, then President Roosevelt, supported by a majority of the U.S. Congress, obtained passage of his New Deal enactments expressing urgent social and economic policies called for during the rehabilitation period. But a conservative Supreme Court, "on the whole a die-hard adherent to the *laissez-faire* ideology and friendly to big business interest, struck a serious blow to the general program of reform legislation as it voided the power of Congress in twelve cases in three years, five of which were decided in a single year . . . . By 1933, Justice Jackson observed, the Supreme Court was no longer regarded as co-equal of the other departments; it had become an acknowledged and supreme authority."[107]

It has similarly been perceived that in the United States, the great issue has been that of Government versus business; and the position from which the Court has predominantly approached this issue has been that of the *laissez-faire* theory of political economy, where "the government is the villain of the piece, private enterprise the spotless hero."[108]

The exercise of such power may have been easily negated by a firm commitment by the United States Congress in its own acts, especially those involving policy formulation. But this is where the strength of the Supreme Court lies, despite the fact that it is not a politically accountable body.

In explaining why the Congress does not simply override more of the Supreme Court's statutory decisions, the reason suggested is the existence of conflictual demand patterns. Many Supreme Court statutory decisions involve big stakes and sharply clashing interests. The Supreme Court's most controversial statutory decisions are usually not overridden because there are strong interest group alignments on both sides of the issues, leaving the Court's decisions firmly intact. This explanation is a troubling one in a representative democracy, for it suggests that the Court is often able to read

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[106]Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 374 (1991).

[107]Abad Santos, *The Role of the Judiciary in Policy Formulation*, 1 ICAM 38, 43 (1977).

[108]Esguerra, *supra* note 93, at 106.

its preferences into statutes, against the desires of the nationally elected officials.[109] As shall be evident in later discussions, the same may be said of the Philippine Supreme Court.

Judicial Supremacy

> Judicial supremacy posits that (i) the Supreme Court has ultimate authority to interpret the Constitution's meaning; (ii) the Court's constitutional decisions should be taken as binding on, and by, all other government actors --including Congress and the President; and (iii) only by amending constitutional text can the electorate supercede the Court's declarations of Constitutional law.[110]

It is argued that the United States Supreme Court indeed occupies a high position in its exercise of "judicial supremacy" in the real sense of the word, as contrasted to the Philippine Supreme Court's stand that what is supreme is the Constitution, without however taking pains to explain, or possibly admit, that the Justices do find it irresistible at times to express their own ideologies through their decisions. The American authors, in turn, are firm about their Supreme Court's role in molding government policy.

An example is the perception that apart from the Judiciary, the American government is a negative, do-nothing system. The frequent inability of the Congress and the President to cooperate in directing the State does not mean that decisions are not made. But judges are willing and ready as well. Thus, they are America's professional decision-makers. Of course, they depend on the other branches of government for enactment of laws but such are subject to scrutiny at all levels of the judicial system, which scrutiny is most authoritative when made by the Supreme Court.[111]

In this jurisdiction, the Supreme Court has not spared itself from the syndrome that has plagued its American counterpart for it seems that the tendency to enter the area of policy formulation is deeply rooted in the very nature of its imperfect existence and composition.

The Supreme Court is composed of Justices who, in accepting the task of settling controversies, have not shed off their vulnerability to

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[109]Eskridge, *supra* note 106, at 377-378.

[110]Chang, *A Critique of Judicial Supremacy*, 36 VILL. L. REV. 281, 283 (1991).

[111]H. SPAETH, SUPREME COURT POLICY MAKING: EXPLANATION AND PREDICTION 95-96 (1979).

external influences. Thus, "Justices and judges are political animals, especially when they resolve policy problems, because invariably, the contending groups press conflicting claims upon them."[112]

It appears then that the seeping of extraneous influences into the halls of the Supreme Court is well nigh inevitable. Yet in some quarters it has been considered desirable. And it is in these influences where the Court finds its strength, for in acknowledging them, the Court does not merely create opposition. It also gains adherents.

One author makes the following account:

> When Jose Abad Santos was Secretary of Justice, he had occasion to say that "as the agency of the government in the administration of justice, it would be well for the courts to understand the trends and the people's thinking and to adjust their own prejudices to the changing ideologies of the people." I suggest that the judiciary is precisely following that advise right now.[113]

But a query arises as to how the availability of the power to formulate policy, especially economic policy, is exercised without doing damage to the traditional conception of the Supreme Court as being a "passive body" principally charged with adjudicating judicial controversies -- a Court which concerns itself not with matters which pertain to the expertise of the other branches of government. This has importance because once the Court encroaches into an area previously considered as an exclusive domain of a particular department other than the Judiciary, the Court must walk on a tightrope and maintain its balance; otherwise, it would flagrantly violate the constitutional allocation of powers.

Dual Approach In Decision-Making

A court which actively engages itself in policy formulation has been called an "activist court" as differentiated from a court which exercises self-restraint. Thus:

> Two methods of approach to constitutional cases have been followed by the Courts in exercising the power of judicial review. One is the liberal approach which permits the Court, especially the Supreme Court, to engage in judicial activism, and the other is to observe self-restraint. If

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[112]Agabin, *supra* note 101, at 191.
[113]Abad Santos, *supra* note 107, at 47.

> the Supreme Court is not very discriminating in the choice of cases it takes cognizance of, and is wont to give the "justiciable" character to doubtful cases, it becomes an activist court, if out of respect to an equal and coordinate branch of the Government (the Congress or the Executive) and to avoid possible embarassment to them when it knocks down a law or executive order, and becomes more cautious in assuming, or exercising that power, it observes self-restraint.[114]

In engaging in judicial activism, the Supreme Court must undoubtedly justify itself in terms of constitutional standards. This it finds easy to do due to the express grant of expanded judicial power under new Constitution. But this is not to say that the Supreme Court never engaged in such activism previous to the above-mentioned grant of power. On several occasions, for example, the Supreme Court had the opportunity to impose its determination as to how backwages was to be paid to discriminatorily dismissed laborers, often going against unambiguous legislative policy. In *Mercury Drug Company v. Court of Industrial Relations,*[115] it fixed the amount of backwages to a just and reasonable level without qualification and without deduction. In *Feati University Club v. Feati University,*[116] the Supreme Court fixed backwages to their total equivalent for three years without deduction or qualification. Then in *Luzon Stevedoring Corporation v. Court of Industrial Relations,*[117] the Supreme Court granted backwages not to exceed three years. Such judicial policy-making has come under attack from some quarters.

Such judicial policy denies to the discriminatorily dismissed employees their right to what is morally and legally due them. It ignored the positive law that clearly provided that discriminatorily dismissed employees or laborers shall be entitled to reinstatement *without loss of rights.*[118]

This policy has been legitimized on the ground that:

> It avoids the long time to gather evidence and present it in court to support the claim for backwages (although this is clearly the problem of the parties-litigants) and the equally long time to appreciate it and arrive at a decision (which is after all the very burden of the job of the courts) as well as the possibility of employees or laborers to agree to

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[114]Esguerra, *supra* note 93, at 9-10.
[115]56 SCRA 694 (1974).
[116]58 SCRA 694 (1974).
[117]61 SCRA 154 (1974).
[118]C. PASCUAL, INTRODUCTION TO LEGAL PHILOSOPHY 343 (1989).

> unconscionable settlement (which is the concern really of the legislative branch of the government)... The "judicial policy" no doubt plays on the need of dismissed employees or laborers to survive economically and worse puts a premium on illegal or discriminatory dismissals since only a portion of what is actually due the employees or laborers is to be paid by insensitive employers.[119]

No matter how text writers argue, it is undeniable that judicial policy making exists and since it seems to be urealistic to demand its abatement, it would be more practical to study and analyze it, and maybe to set some standards by which it may be exercised, if it must be exercised at all.

"The traditional notion that policy-making is the exclusive domain of government underestimates the power of the Court to influence societal change." The idea of the Supreme Court as being an apolitical body which merely applies the law is too simplistic. It does not help us understand why the Court behaves as it does. It fails to consider the Supreme Court's position in national policy-making. Yet these traditional notions are still necessary to maintain the Court's prestige as the ultimate interpreter of the Constitution and impartial umpire of the Executive and the Legislature.[120]

In such context, the Supreme Court is caught in a penumbra where the otherwise extreme powers of adjudication and legislation come to a blend. And a failure to make them coalesce into a pleasant hue may impair its credibility.

An author attributes the continuing role of the Supreme Court in participating in national policy making to two factors, namely, the Supreme Court's duty to determine whether 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 as laid down in Article VIII, Section 1 of the Constitution, and the fact that there are vague and general policy statements in the Constitution which serve as a cause for constitutional adjudication and interpretation.[121] But it is the first factor which carries much significance at present.

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[119]*Ibid.*

[120]Cristobal, *The Supreme Court and Judicial Policy-Making*, 36 ATENEO L. J. 89, 90 (1991).

[121]*Id.*, at 90.

Now that we have located the Supreme Court within the constitutional framework of government with all its nuances, it is now ripe to enter into a discussion of relatively new cases in which the Supreme Court assumes policy-making functions relating to the economy as well as cases in which the Court seems to be caught in a quandary in rendering the "proper" decision. We will observe how it arrogates upon itself the power to make policy considerations, and how it debates against itself through its members on whether or not it is acting correctly.

The Economic Decisions of the Supreme Court

There are a number of cases wherein the Supreme Court's decisions carry with them the heavy burden of determining not only past facts and the application of the law to such facts, which is the essence of judicial determination, but also deciding questions that would affect future conduct in terms of economic policy formulation, which traditionally pertains to the province of the Legislature and the Executive. In these decisions, the emphasis would not be on the result but on the methodology involved in making such determinations of overbearing weight. How does the Supreme Court come to a decision involving delicate matters of economic policy? Are there any standards?

The Pre-1987 Constitution Cases

Before the 1987 Constitution, the Supreme Court was not well known for rendering controversial decisions dealing with the field of the economy. If it ever made determinations of such color, at least the weight was not as heavy as the decisions would be today and the decisions were more convincingly and carefully made. As a matter of fact, decisions that encroach upon the area of the other branches of government in the manner that they do now were difficult to find.

One author noted that "with respect to the review of executive action by the Philippine Supreme Court during the Colonial period, the American-dominated Court had to perform a *legitimating function* to the actions taken by the American Governor-General."[122]

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[122]Agabin, *supra* note 101, at 196. *Emphasis supplied.*

He noted that the turning point came in 1920 where the dominant political groups in the United States made *laissez faire* a plan for dynamic action. It was at this stage where the influence on the Philippine judiciary was born regarding the protection of property interests against the assualts of the Filipino legislature, as evident in the early decisions rendered in *U.S. v. Ang Tang Ho*[123] and *People v. Pomar.*[124] In the first case, the Court made itself a reviewing branch of economic legislation; in the second, a champion of free enterprise.[125]

The most popular legitimating economic decision of the Supreme Court in the past was the lengthy one rendered in *Ichong et. al. v. Hernandez, etc., and Sarmiento.*[126] In this case the petitioner questioned the constitutionality of Republic Act No. 1180 entitled "An Act to Regulate the Retail Business." In effect, it nationalized the retail trade business by limiting it to Filipino and American citizens. It was a response to the growing dominance of Chinese retailers and certain unfair practices by them such as smuggling, tax evasion, violation of import and export prohibitions, control laws and the like, as well as corruption of public officials. The Supreme Court upheld the constitutionality of the Act on the grounds that there existed substantial distinctions between Filipino citizens who owed allegiance to their country, and Chinese businessmen who merely wanted to make a profit, owing loyalty to neither people nor country and that they could not be relied upon in times of national emergency. They were not "an isolated group of harmless aliens retailing goods among nationals" but were "well-organized and powerful groups that dominate the distribution of goods and commodities in the communities and the big centers of population."[127]

In tackling the issue of whether the Act violated the Treaty of Amity between the Republic of the Philippines and the Republic of China, and the Charter of the United Nations and the Declaration of Human Rights, the Court held that the Declaration of Human Rights contained "nothing more than a mere recommendation"; that other countries such as Denmark and Norway prohibited foreigners from engaging in retail trade;

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[123]3 Phil. 1 (1932).
[124]46 Phil. 440 (1924).
[125]Agabin, *supra* note 101, at 198-200.
[126]101 Phil. 1155 (1957).
[127]*Id.*, at 1174.

and that a treaty is always subject to qualification or amendment by subsequent law.[128]

Aside from the above pronouncements, the Court took pains to expound on its inherent limitations vis-a-vis legislative discretion. Thus:

> Now, in this matter of equitable balancing, what is the proper place and role of the courts? It must not be overlooked, in the first place, that the legislature, which is the constitutional repository of police power and exercises the prerogative of determining the policy of the State, is by force of circumstances primarily the judge of necessity, adequacy of reasonableness and wisdom, of any law promulgated in the exercise of police power, or the measures adopted to implement public policy or to achieve public interest. On the other hand, courts, although zealous guardians of individual liberty and right, have nevertheless evinced a reluctance to interfere with the exercise of the legislative prerogative. Moreover, courts are not supposed to override legitimate policy, and courts never inquire into the wisdom of the law.[129]

From this decision, it is clear that the Court then was of the traditional and passive disposition. The borders separating the departments were clear and, in this particular case, there were only two justices who dissented. But as time passed, the dividing lines have become hazy. However, this observation is not to be taken as a conclusive pronouncement on the matter.

The 1987 Constitution Cases

In *Garcia v. Executive Secretary,*[130] the Supreme Court exercised its legitimating function. In this case, the petitioner challenged the validity of Republic Act No. 7042 (1991) on the ground that it defeated the constitutional policy of developing a self-reliant and independent national economy by allowing foreign investors to invest in a domestic enterprise up to 100 per cent of its capital without prior approval. The Court observed that under Rep. Act No. 7042, the case-to-case authorization by the Board of Investments (BOI) had been removed. With the introduction of the "Negative List," areas of investments not open to foreign investors were already determined and outlined. Thus, registration with the Securities and Exchange Commission was made the initial step to be taken by foreign investors.

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[128]*Id.*, at 1190.
[129]*Id., at* 1165-1166.
[130]204 SCRA 516 (1991).

The Court continued to observe that the 100 per cent ownership allowed to the investors referred only to areas of investments outside the prohibitions and limitations imposed by the law to protect Filipino ownership and interest. Furthermore, Section 8 thereof reserved to Filipino citizens sensitive areas of investments. The Act opened the door to foreign investments only after securing to Filipinos their rights and interests over the national economy with due respect to the provisions of the Constitution.

The Court thus ruled:

> What we see here is a debate on the wisdom or the efficacy of the Act, but this is a matter on which we are not competent to rule. The judiciary does not pass upon questions of wisdom, justice, or expediency of legislation. It is true that, under the expanded concept of political question, we may also determine whether or not there has been a grave abuse of discretion amounting to lack or in excess of jurisdiction on the part of any branch or instrumentality of the Government. We find, however, that that irregularity does not exist in the case at bar. . . . The 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.[131]

At any rate, economic decisions are now rendered in a more unrestrained manner, revealing the political and economic inclinations of the Justices behind each ruling. The political forces are now more evident. It is perhaps the present economic turmoil that is responsible for such judicial attitude. As significantly but perhaps unwittingly admitted by the Court itself in another decision, the "precarious state of the economy is of common knowledge and is easily within the ambit of judicial notice."[132]

The seemingly insurmountable problems that an economic crisis brings have divided our people into antagonistic camps, each espousing its own analysis, theory and corresponding remedy to the situation, and the Supreme Court has not insulated itself from such diversity of views and positions. It is also perhaps because of the urgency and critical nature of present decisions too heavily laden with the burden of responsibility that an apparently innocuous decision rendered during kinder times transforms itself into a ruling of such magnitude that a slight deviation from what is believed to be a "proper" question for the Court is met with severe

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[131] *Id.*, at 523-524.

[132] Marcos v. Manglapus, 148 SCRA 668, 698 (1989).

excoriation from those who do not approve. And it turns worse when popular opinion is turned against it, especially when its decisions lack theoretical as well as practical justification, regardless of whether it affirms or objects to determinations of the other departments. For in all cases, as long as as an economic question is presented for determination, the Court will inevitably be laying down economic policy.

Today, cases arise and are decided in such a way that many feel that the Court either overrides or concurs when it should not, and stands aside when it would have been both popular and acceptable to interfere.

Consider *Guingona v. Carague*[133] where petitioners questioned the automatic appropriation for debt service in the 1990 budget for government expenditure based on certain Presidential Decrees issued by former President Marcos. It was contended that such appropriation went against Article XIV, Section 5 of the Constitution[134] which gives the highest budgetary priority to education.

The 1990 budget consisted of ₱98.4 billion in automatic appropriation (with ₱86.8 billion for debt service)[135] and ₱155.3 billion appropriated under the General Appropriations Act, or a total of ₱233.5 billion, while appropriations for the Department of Education, Culture and Sports amounted to ₱27 billion.

The Supreme Court ruled that while the above constitutional provision insures that teaching will attract and retain its rightful share of the best available talents through adequate remuneration, it did not follow that the hands of the Congress were so hamstrung as to deprive it of the

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[133]196 SCRA 221 (1991).

[134]Art. XIV, Sec. 5 (5) reads: "The State shall assign the highest budgetary priority to education and ensure that teaching will attract and retain its rightful share of the best available talents through adequate remuneration and other means of job satisfaction and fulfillment."

A similar situation involving a conservative attitude by the Supreme Court toward the application of a specific constitutional provision arose in the case of *Kapatiran v. Tan*, 163 SCRA 371 (1988). In this case, Exec. Order No. 273 (1987) which adopted the value added tax system was declared to be constitutional despite the provision in the Constitution prescribing that "The Congress shall evolve a progressive system of taxation" (CONST., art. 6, sec. 28[1]). This decision ignored the fact that the value added tax system is an indirect form of taxation which promotes a regressive rather than a progressive scheme of taxation.

[135]"Debt service" refers to actual payments of interest on total debt plus actual amortization payments on long-term debts.

power to respond to the imperatives of the national interest, without declaring what this "national interest" was. Was it debt service?

The Court further held that since 1985, the educational budget was tripled. On the other hand, compensation for teachers was doubled. This was seen as clear compliance with the Constitution. Having faithfully complied therewith, the Congress was not without power to provide an appropriation that can service the country's enormous debt since the very survival of the economy was at stake.

Of course, the above reasoning can easily be debunked by those who believe that it is precisely debt servicing which is stifling economic growth.

In this case, the Court chose to favor the Congress. The case could have been decided the other way around. Upon closer examination , it would be apparent that the substance behind such concurrence is not altogether convincing. The Court reasoned in effect that compliance with the constitutional provision at one time excused non-compliance at another. We may therefore imagine the Court ruling otherwise. It may have been held that the Constitution is exacting and precise in its language and all governmental policy should defer to its mandate at all times without exception.

It is significant to note that the majority vote only had a margin of three votes, the voting being nine Justices to six.Thus, six Justices were actually against the decision. Perhaps they were against the policy of allocating the largest chunk of the budget for debt servicing.

The effect of this decision is that many who favor either a "selective repudiation" of external debt or an imposition of a debt cap feel that this could have been a good opportunity for the Court to enforce the clear mandate of the Constitution, thereby increasing scarce funds for local development programs and improving basic social services. It would have been an exercise of economic policy-making, but nonetheless, a constitutional exercise of it. But the Court chose to defer. Moreover, after going through all of the legal justifications for its decision, it further posited that:

> As to whether or not the country should honor its international debt, more especially the enormous amount that had been incurred by the past administration, which appears to be the ultimate objective of this petition, 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.[136]

Another borderline decision is that of *Maceda v. Energy Regulatory Board.*[137]

Upon application of three large oil corporations, the Energy Regulatory Board (ERB) authorized the provisional increase of oil prices. Senator Ernesto Maceda questioned such authorization because no hearing was conducted. The Supreme Court upheld the ERB, holding that a provisional judgment by the Board was allowed under the law, without prejudice to a later hearing.

The ERB then conducted hearings. Maceda now claimed that no substantial evidence was adduced to support the increase. The Court held that the ERB had the power to grant said provisional increase, having taken judicial notice of the depreciation of the peso, the Oil Price Stabilization Fund deficit, the trade deficit, and the situation in the Persian Gulf. The Court lamented its helplessness over the price increases and held that it was a question best judged by the political leadership.

The Court here took judicial notice of certain events that it apparently held to be conclusive on the need of a price increase in oil products. It thereby entered into a half-baked analysis of the causes of a price increase. It did not expound on how these facts indicated the need for such an increase. Of course, it did not have the capacity and expertise to do so. Yet it made the considerations. Are we to take at face value the pronouncement that the facts judicially taken notice of indeed pointed to the need to raise the prices of oil products? The answer must be in the affirmative. This is because there may have been other facts less legitimate than the ones judicially taken note of which were the real reason behind the increase.

Let us consider the dissenting opinion of Mr. Justice Sarmiento. Justice Sarmiento argued that the real score behind the oil price hikes and the ERB's quickness in granting them has been left unstated. He said,

> The truth is that petroleum prices have been dictated by the government's economic maneuvers, and not rather by the vagaries of the

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[136]Guingona v. Carague, 196 SCRA 221, 238 (1991).
[137]199 SCRA 457 (1991).

> world market. The truth is that the recent oil hikes had nothing to do with Saddam Hussein or the Gulf crisis (during which oil prices in fact dropped) and are, rather, the natural consequences of calculated moves by the government in its effort to meet so-called International Monetary Fund targets.[138]

He made an account that in 1989, the government submitted its letter of intent to the International Monetary Fund outlining the country's economic program from 1989 to 1992. In paragraph 19, it stated that the "The government intends to continue with the floating exchange rate system established in October, 1984." Since exchange control was abolished and the floating rate system was established, the Philippine peso had seen a series of devaluations that had progressively pushed up prices, significantly those of petroleum.

He further concurred with Justice Padilla when the later referred to the scheme of allowing provisional price increase as a "scheme to defraud the people." But Justice Sarmiento went further:

> As I indicated, the ERB does no more than to punch calculators for the Government -- which decides oil price increases. The comedy of December, 1990, when the Board adjusted prices in a matter of days, is a confirmation of this point. As Justice Padilla noted, the readjustment of December, 1990, was in fact prompted by `presidential requests' which does not speak well of the Board's independence and which in fact bares the truth as to who really makes the decision. . . .I agree with Justice Padilla that it amounts to defrauding the people to make them believe that the ERB can give them a fair hearing, indeed, if it can do anything at all.[139]

This view is supported by the independent finding that the country was adversely affected by and was less resilient to the Middle East crisis because it faced "large macroeconomic imbalances prior to the crisis."[140]

Judging from this separate opinion, the Court could have seized the opportunity to overturn the ERB's decision based on denial of due process or grave abuse of discretion. Yet it did not. In any case, it would have been a decision interesting enough to discuss. It would have saved the people from a crippling oil price hike. On the other hand, it would have also have raised the question of whether or not the Court has the power to intrude into the

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[138]*Id.*, at 467.

[139]*Id.*

[140]INTERNATIONAL MONETARY FUND, ANNUAL REPORT 8 (1992).

realm of economic and political decisions. It would have posed a complex question on the interplay between the three departments.

Justice Paras also took exception to the decision. He argued that the ERB had no power to tax which it was in effect doing by "getting money from the people to *ultimately* subsidize the ravenous oil companies." He also held that the "stubborn refusal of the ERB to effectively rollback oil prices is a continuing bestial insult to the intelligence of our countrymen, and a gross abandonment of the people in their hour of economic misery."[141]

It is noteworthy that, as in the case of *Guingona v. Caragüe,* the voting margin was close. Seven Justices concurred with the majority opinion and six took exception. Thus, we see a trend in the Court towards making decisions affecting the economy based on certain extra-legal considerations. However, as we have pointed out, many would have favored such intrusion.

In the field of the economy and monopolies, two cases, both involving the Philppine Long Distance Telephone Company, stand out as the most controversial, the latest of which leading to the cases of *Philippine Long Distance Telephone Co. v. National Telecommunications Commission, et. al.* [142] hereafter referred to as the ETCI case, and *Philippine Long Distance Telephone Co. v. Eastern Telecommunications Philippines, Inc., et. al.*,[143] hereafter referred to as the ETPI case.

As an initial insight, the Aquino government achieved some success in the elimination of inefficient monopolies particularly those in the coconut and sugar industries.[144] The Philippine Long Distance Telephone Company (PLDT), however, has remained untouched. A cynical yet practical reason would be perhaps that the Cojuangco family has controlled the company for the last 25 years.[145]

The Philippine Long Distance Telephone Company (PLDT) is technically not a monopoly but a dominant telephone company. Yet it has a

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[141]Maceda v. Energy Regulatory Board, 199 SCRA 457, 463 (1991).

[142]190 SCRA 717 (1990).

[143]G. R. No. 94374, August 27, 1992. As of March 11, 1993, this case is still pending, a motion for reconsideration having been filed by ETPI. The authors invoke fair comment.

[144]NELSON, *supra* note 8, at 250-251.

[145]Asiaweek, August 21, 1992.

virtual monopoly in overseas calls which can be made only through PLDT's international gateway. It is a natural monopoly requiring huge capital investments to provide vital telecommunication services which must be operated on a large scale. However, like most monopolies, it tends to become inefficient and, since the public interest is at stake, it is thereby subject to regulation. Supposedly then, the PLDT is regulated by the National Telecommunications Commission.[146]

The ETCI case involved the order of the National Telecommunications Commission (NTC) granting Express Telecommunications Co., Inc. a "provisional authority to install, operate and maintain a cellular mobile telephone system" in Metro Manila, and requiring PLDT to enter into an interconnection agreement providing for adequate interconnection facilities between the ETCI's cellular mobile telephone switch and PLDT's telephone network.

PLDT claimed that ETCI had no right to operate a cellular mobile telephone system because the latter's franchise under Republic Act No. 2090 only gave it "the right and privilege of constructing, installing, establishing and operating in the entire Philippines radio stations for *reception and transmission of messages* on radio stations on the foreign and domestic public fixed point-to-point and public base, aeronautical and land mobile stations, with the corresponding relay stations *for the reception and transmission of wireless messages on radiotelegraphy and/or radio telephony.*" The NTC interpreted the word "radio telephony" liberally, citing its dictionary meaning as "telephony carried out on by aid of radiowaves without connecting wires." The International Communications Union also defined a "radio telephone call" as a "telephone call originating in or intended on all or part of its route over the radio communications channels of the mobile service or of the mobile satellite service." In a cellular mobile telephone system, a message is carried part of the way by radiowaves and part of the way by connecting wires. Hence, this concept was within the ambit of the franchise granted by Rep. Act No. 2090.

On the issue of "interconnection", the Supreme Court cited Section 1 of Republic Act No. 6849 which provides that "all domestic telecommunications carriers of utilities... shall be interconnected to the public switch telephone network." This imposition, the Court held, is an

[146]IBON Facts and Figures, August 21, 1990.

exercise of police power expressly recongnized under Article XII, Section 6 of the 1987 Constitution.[147]

The Court also cited Department of Transportation and Communication (DOTC) Circular No. 87-188 which provides that "all public communications carriers shall interconnect their facilities pursuant to comparatively efficient interconnection as defined by the NTC in the interest of economic efficiency," and revenue sharing in the interconnection of telecommunication facilities as provided for in DOTC Circular No. 90-248.

The Supreme Court did not stop with the above discussion. It made the following "ultimate considerations" in upholding the right of ETCI to interconnect with PLDT:

> 1. Public need, public interest, and the common good are the overriding considerations, and the service of the PLDT, which has a virtual monopoly of the telephone industry, is sadly inadequate;
>
> 2. A modern and dependable communications network is also indispensable for accelerated economic recovery and development;
>
> 3. The PLDT has no right to a monopoly position; and
>
> 4. Under Art. XII, Sec. 19 of the Constitution,[148] the State has the power to decide whether monopolies should be regulated or prohibited.[149]

In his dissenting opinion, Justice Gutierrez objected to the liberal interpretation of R.A. 2090. But his principal objection was that ETCI cannot exist without availing of PLDT's facilities worth P16 billion.

Barely two years after the ETCI case, the dissenting Justice became the *ponente* of the majority opinion of the ETPI case. In this case, ETPI had

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[147]"Sec. 6. The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands."

[148]Section 19 states that: "The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed."

[149]Philippine Long Distance Telephone Co. v. National Telecommunications Commission, 190 SCRA 717, 736-737 (1990).

the franchise "to land, construct, maintain and operate telecommunications systems by cable, or any other means now known to science or which in the future may be developed for the transmission of messages to and between any point in the Philippines to points exterior thereto."[150]

NTC granted ETPI a Certificate of Public Convenience and Necessity to "install, and maintain in an International Digital Gateway Facility in Metro Manila," and in the process, compelled PLDT to interconnect its domestic telephone facilities with ETPI's international gateway switch under a revenue sharing arrangement.

In a sudden reversal of judicial thinking, the Court chose to strictly interpret the franchise of ETPI to cover only transmission of messages by cable, thus upholding PLDT's contention that "no one`transmits' on the telephone his or her `message'." Contrast this with the more acceptable view of Justice Florentino Feliciano in his dissenting opinion to the effect that the franchise is comprehensive enough to cover both voice and non-voice transmission of messages. A "message" is defined as "any written or oral communication or other transmitted information sent by messenger or by some other means (as by signals). The franchise "does not distinguish between voice or oral and data or non-voice messages and transmissions."[151]

The majority opinion stressed that PLDT does not have a monopoly because another firm was granted a Certificate of Public Convenience and Necessity to operate an international gateway facility. It accused ETPI of trying to "ride piggyback" on PLDT's infrastructure built at a cost of billions of pesos.

Such a holding completely ignored the concept of public interest that was considered the primary consideration in the ETCI case. The underlying concern in this case was therefore the protection of PLDT's substantial investment in the telecommunications system.

This decision failed to take notice of the inadequacy of PLDT's services to the public which charges among the highest rates in Asia, second only to Japan. The nation has only a little more than a million phones for 62

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[150]REP. ACT NO. 5002 (1967).

[151]Philippine Long Distance Telephone Co. v. Eastern Telecommunications Philippines, Inc., et al, G.R. No. 94374, August 27, 1992.

million people.[152] Such fact was admitted by top PLDT officials to NTC Commissioner Simeon Kintanar when they disclosed that the phone company is capable of meeting only a third of the existing demand in Metro Manila for 599,781 lines by 1988. Its backlog nationwide stands at 789,259 lines.[153]

The importance of telecommunications to the economy cannot be denied. Industry and business to a large extent depends on efficient communication, especially at a time when the trend is towards globalization. Any businessman will tell us that a smoothly functioning communications system is an integral part of commercial growth. The maintenance of monopolies in the field of telecommunications may impede economic development, particularly when, as in this case, the monopoly proves to be inadequate and inefficient despite being in operation for nearly 64 years.

"To protect their profits, monopolies resist the entry of other companies into their market and even seek government help to exclude competitors. In the absence of serious threats, they may resist or delay the adoption of new technology, maintaining a large amount of obsolete equipment."[154] In this case, government help was given by the judiciary.

Garcia v. Board of Investments: A Judicial Adventure Into Economic Policy-Making

Perhaps no other case shall compare with *Garcia v.Board of Investments*[155] when it comes to flagrant judicial intrusion into economic policy-making. The relevance of this case is more understood when juxtaposed with its precursor case, which even has the same title: *Garcia v. Board of Investments.*[156] As we shall present, these two cases involve a shocking change of policy by the Supreme Court wherein the second totally reversed the first in a fine display of legal confusion and fickleness.

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[152]*Supra* note 145. The joke in the Philippines, it says, is that 98 per cent of the population are waiting for a telephone, while the other 2 per cent are waiting for a dial tone.

[153]Philippine Daily Inquirer, Feb. 19, 1993.

[154]*Supra* note 146.

[155]191 SCRA 288 (1990).

[156]177 SCRA 374 (1989).

The first *Garcia v. Board of Investments* case involved Proclamation No. 361 (1968) which reserved a parcel of land in Bataan for "industrial estate purposes" in line with the state policy of promoting and rationalizing Philippine industrialization.

Taiwanese investors formed the Bataan Petrochemical Corporation (BPC) and applied with the Board of Investments (BOI) for registration as a new domestic producer of petrochemicals. Its application specified Bataan as the plant cite. BPC was accorded pioneer status and given fiscal and other incentives after being granted a Certificate of Registration in 1988.

In February, 1989, A.T. Chong, the Chairman of USI Far East Corporation, the major investor in BPC delivered a letter to Trade Secretary Concepcion advising him of the desire to amend the original registration certificate by changing the project site from Bataan to Batangas due to the insurgency and unstable labor situation in Bataan as well as the availability of liquefied petroleum gas in Batangas.

The Congressmen from Bataan, including petitioner Garcia, vigorously opposed the transfer. President Aquino also expressed her preference for Bataan. But despite speeches in the House of Representatives opposing the transfer, the BOI approved such transfer.

In June, 1989, the petitioner filed a Petition for Certiorari and Prohibition with Preliminary Injunction against the BOI, alleging, among others, the denial of due process in approving the transfer without hearing and for violation of Presidential Decrees Nos. 949 and 1803, establishing the site in Bataan as the "petrochemical industrial zone."

The Supreme Court, showing judicial deference, held that it was not concerned with the economic, social, and political aspects of the case since it did not have the necessary technology and scientific expertise to determine whether the transfer will be best for the country. However, it ruled that the Omnibus Investments Code of 1987 required the publication of applications for registration and consultations with affected communities. Thus, the Court ruled that this denial of due process amounted to a grave abuse of discretion on the part of the BOI. The Court then directed the BOI to make the necessary publication and to conduct the proper hearings.

In this case, the Court was able to make full use of its expanded power under Article VIII, Section 1 of the Constitution in finding grave abuse

of discretion without rendering inefficacious the political question doctrine. The Court was able to recognize and be sensitive to the strong economic underpinnings that characterized the controversy brought before it. It was a prudent exercise of self-restraint and deference.

In the second *Garcia v. Board of Investments* case, however, the tables were completely and unexpectedly turned. The Supreme Court made a surprising and rather incomprehensible reversal.

In this later case, there remained the bottom-line issue of who had the final choice regarding the project site of the petrochemical plant. The Court ruled that, at the outset, there was an actual controversy whether the plant should be transferred from Bataan to Batangas.

The Court made the following considerations in resolving the issue:

> 1. The original choice was Bataan where there would be no need to buy land because of the reservation made by Proclamation No. 361 of 1968;
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> 2. Bataan produces 60 % of the national output of naphtha and the country is short of liquefied petroleum gas;
>
> 3. Naphtha as feedstock has been exempted from the ad valorem tax;
>
> 4. The State has the duty to regulate and exercise authority over foreign investments under the Constitution;[157]
>
> 5. The fact that the investor is raising a great portion of the capital for the project from local sources which led to the so-called "petroscam scandal"; and
>
> 6. If the plant is maintained in Bataan, the Philippine National Oil Corporation shall be a partner to the venture to the great advantage of the government.

The Court went further on to say that:

> In the light of all the clear advantages manifest in the plant's remaining in Bataan, practically nothing is shown to justify the transfer to Batangas except a near absolute discretion given by the BOI to investors not only to freely choose the site but to transfer it from their own first choice for reasons which remain murky to say the least.[158]

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[157]CONST., art. XII, sec. 10.

[158]Garcia v. Board of Investments, 191 SCRA 288, 296 (1990).

The Court then ruled that through the BOI, the government has surrendered even the power to make a company abide by its initial choice, a choice free from any suspicion of unscrupulous machinations and a choice which is undoubtedly in the best interests of the Filipino people. The Court held that the BOI committed a grave abuse of discretion in approving the transfer. Moreover, in the Court's resolution dated January 17, 1990, it stated that the investor's choice is subject to processing and approval or disapproval by the BOI. By applying to the BOI, the investor recognizes the sovereign prerogative of our government to approve or disapprove after determining whether its proposed project will be feasible, desirable and beneficial to the country.

We can observe from the method of reasoning used by the Court how it shifted from a passive to an interventionist stand regarding the issue presented. It is clear in the decision how the Court blatantly disregarded their earlier policy of deferring judgment to the department with the proper expertise. Here, the Court articulated itself for clarity by even itemizing the considerations behind the judgment which gave the appearance of a regular feasibility study. This it could not have done in the earlier case, considering the tenor in which the Court spoke therein.

In specifying the main reasons why the Court decided against the transfer, *the Court made considerations which only an expert in the field of petrochemical production could convincingly do.* It formulated policy judgments using technical management tools which could have been better made by the BOI and the investors. The mundane effect of the decision was to reject the investors' study on the viability of their business venture evaluated by all the parties involved and to forcibly substitute the Court's business decision on the matter. It was then a fatal error on the part of the investors and their local partners to have confidently relied on the Executive and not to have identified the Supreme Court as one of the factors of consideration in their project analysis.

The first consideration, for instance, was actually telling the investor that it would be less expensive for them if the plant remained in Bataan because of the availability of free land. *The Court, not surprisingly, failed to consider the site in the overall context as a business environment which only a competent capital venturist or businessman could do.*

The third consideration, however, revealed the Court's true sentiments by dragging in an issue totally unrelated to the question presented in this case: the so-called "petroscam scandal."

Without expounding, this extraneous matter undoubtedly influenced the Court in reaching the decision. It provided the necessary bias. The Court could have skipped this issue to preserve its image as an impartial court, thereby rendering the ruling free from an apparent prejudgment of the case. According to Justice Grino-Aquino, "not even the much publicized 'petroscam scandal' involving the financial agreements (not the issue in this case) for the LPC project would justify the intervention of the Court in a matter that pertains to the exclusive domain of the executive department."[159]

The sixth consideration also ruled on matters not within the domain of the judiciary. Who should decide on what would be favorable to the government? Whatever the answer is, it would not include the courts. For these are questions put within the discretionary power of either the executive or the legislative branches of the government which are the politically accountable trustees of the State.

The Court arrogated upon itself the power to decide on the wisdom behind the transfer when it decided on the "clear advantages manifest in the plant's remaining in Bataan."[160] This is obviously a policy formulation which the Court had no authority nor competence to make. It was an unprecedented encroachment upon the prerogatives of the executive branch.

In a pointed dissenting opinion, Justice Grino-Aquino insisted that the matter was beyond the Court's competence. On the issue of the transfer, she convincingly argued that:

> Only the BOI or the Chief Executive is competent to answer that question, for the matter of choosing an appropriate site for the investor's project is a political and economic decision which, under our system of separation of powers, only the executive branch, as implementor of policy formulated by the legislature (in this case, the policy of encouraging and inviting foreign investments into our country) is empowered to make.[161]

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[159] *Id.*, at 300.
[160] *Id.*, at 296.
[161] *Id.*, at 299.

Again, the Court made a policy statement when it ruled that the initial choice of Bataan was free from unscrupulous machinations and was for the "best interests" of the people. In unabashedly revealing its suspicion of unscrupulous machinations, the Court violated the presumption of regularity in official transactions.[162] It may have been a good ground for finding grave abuse of discretion but the absence of evidence made it a matter of pure speculation. If this matter alone had been sustained by relevant and competent evidence, there would have been no need to make the considerations which the Court did since grave abuse of discretion alone is a reversible error. In this case, however, the finding of grave abuse of discretion was grounded on policy formulations.

Hard evidence of the "unscrupulous machinations" could have saved the Court from revealing its fickleness and vulnerability to extrinsic influences. Justice Melencio-Herrera expressed concern about this actuation of the Court. In referring to the majority opinion, she claimed that:

> It has made a sweeping policy determination and has unwittingly transformed itself into what might be termed a "government by the Judiciary," something never intended by the framers of the Constitution when they provided for separation of powers among the three co-equal branches of government and excluded the Judiciary from policy-making.[163]

This case could have well been an aberrant one. But, as presented, there is an apparent trend towards judicial activism during times of economic crisis.

What were the economic effects of this decision? USI Far East Corporation pulled out of the country. Following the subsequent pullout of USI Far East, investments from Taiwan, which rivalled Japan as the largest foreign investor in the Philippines,[164] nosedived from P 3.4 billion in 1990 to P 328 million in 1991.[165] Total investment activity slowed down resulting in a 23 per cent decline in the amount invested in terms of project cost.[166]

The Main Factors in Decision-Making

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[162]RULES OF COURT, Rule 131, sec. 3, par. (m).
[163]Garcia v. Board of Investments, 191 SCRA 288, 302 (1990).
[164]Lim, *supra* note 26, at 467.
[165]The Manila Bulletin, Sept. 23, 1992.
[166]1991 PDR, *supra* note 23, at 177.

Jurisdiction

In relation to the economic decisions presented above, the various factors that went into these cases are to be considered.

The first issue to be determined by any court is whether or not it has jurisdiction over the case, which is otherwise known as the "threshold issue." In determining constitutional questions, the courts have always been guided by the following requirements:[167]

1. There must be an actual case or controversy;

2. The question of constitutionality must be raised by the proper party;

3. The constitutional question must be raised at the earliest possible opportunity; and

4. The decision of the constitutional question must be necessary to the determination of the case itself.

All these requirements must concur. Nevertheless, the mere presence of all would not guarantee the assumption of jurisdiction by the court as, for instance, the issue may be a political question.

However, it is possible for the Supreme Court to use these requirements to blur the presence of a political question in preparation for its assumption of jurisdiction whenever it decides to do so. In the second *Garcia* case, the Court, oblivious to the possibility that the issue may be a political question, ruled that "There is before us an actual controversy whether the petrochemical plant should remain in Bataan" and "whether or not it constitutes a grave abuse of discretion for the BOI to yield to the wishes of the investor, national interest notwithstanding."[168]

In that case, the "actual case or controversy" test was used to push the political question doctrine to its peripheries where it was eventually left untouched. Even the Court's mention of the "national interest" was not

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[167]Dumlao v. Commission on Elections, 95 SCRA 392 (1980).
[168]Garcia v. Board of Investments, 191 SCRA 288, 294 (1990).

sufficient to make it flinch due to the possibility of having a political question in its hands.

Constitutional Standards

At present, there is the often-mentioned constitutional principle to which all governmental bodies vested with discretionary powers must adhere. It is the test of whether there is grave abuse of discretion amounting to lack of excess of jurisdiction. Such abuse exists "where the respondent acts in a capricious, whimsical, arbitrary or despotic manner in the exercise of his judgement as to be said to be equivalent to lack of jurisdiction."[169]

Although such concept has already been discussed, it remains important to stress that the constitutional test must not be used indiscriminately as to negate the political question doctrine, as intended by the framers of the Constitution.[170] Again, this happened in the second *Garcia* case.

We may then conclude that in the above-mentioned case, the Court used a two-pronged approach to defeat the political question doctrine: the "actual case or controversy" test and the "grave abuse of discretion" test. This proves that the Court has two seemingly impregnable weapons with which to defeat an attack based on its incapacity to decide questions of wisdom and policy.

Economic Standards

This standard is not commonly used as a legal basis in judicial decision-making. In the survey of different cases, such standard had not been used as a standard in itself. In other cases,[171] the Court used other standards well-recognized in constitutional law, hiding the economic questions from

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[169]Abad Santos v. Province of Tarlac, 67 Phil. 480 (1939); Alafiz v. Nable, 72 Phil. 278 (1941).

[170]CRUZ, *supra* note 36.

[171]In U.S. v. Ang Tang Ho, 3 Phil. 1 (1932), for example, although Agabin attributes the decision to the Court's desire to preserve private interest pursuant to the *laissez faire* ideology then prevailing, the Supreme Court nevertheless decided the case on the issue of whether there was an improper delegation of legislative power, such issue being within the jurisdiction of the Court as a basic constitutional principle. In People v. Pomar, 46 Phil. 440 (1924), the Supreme Court anchored its decision on the freedom to contract which is also a constitutional liberty.

the issues it presented as real. But in the second *Garcia* case, the Court was bold enough to state its ultimate factors of consideration in support of the decision, enumerating them just like an economic adviser to the President would do.

Metalegal Standard

This kind of standard had pervaded ever since the Supreme Court was constituted. It may be said that this is actually inherent in every court. As we have presented earlier, it arises from man's natural fallibility to external pressures.

Adherents of functional jurisprudence argue that courts should not think in terms of conceptual jurisprudence alone but also in terms of societal interests. Modern realist jurisprudence, in contrast, insists that there are hidden factors affecting the judging process. To them, the judge is a real person and there is need to consider his economic status, his moral and religious views, his legal theories and political opinions, his intellectual indications, even his temperamental traits. In any case, it is said that not all bias is harmful and no person can be free from any prejudice.[172]

In *Inchong v. Hernandez*,[173] for instance, the Court was influenced by the illegal and unjust practices of Chinese businessmen who lived off the basic needs of the Filipino consumers. In *U.S. v. Ang Tang Ho*[174] and *People v. Pomar*,[175] by the *laissez faire* ideology, and in the latest case of *Garcia v. BOI*, by the "petroscam scandal."

All these metalegal considerations have been instrumental in the outcome of every decision. In most cases, there is need to carefully examine the metalegal considerations behind the decision. The *Garcia* case, however, presents no difficulty. Here, there was a convergence of both economic and metalegal factors which put the Court in the forefront of economic policy-determination.

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[172]PASCUAL, *supra* note 118, at 315-316.
[173]101 Phil. 1158 (1957).
[174]3 Phil. 1 (1932).
[175]46 Phil. 440 (1924).

IV. ISSUES IN THE POLICY-MAKING FUNCTION OF THE SUPREME COURT

Legal Issues

The Political Question Doctrine as a Limitation to Judicial Review

The most relevant legal issue raised by the Supreme Court's exercise of economic policy-making is whether the political question doctrine has been gradually rendered inefficacious. This is especially true when we consider the expanded powers of the courts under the 1987 Constitution.[176]

However, "although this addition was introduced because of the frequency with which the Supreme Court had appealed to the political question doctrine during the period of martial law, it is not meant to do away with the political question doctrine itself. In reply to a pointed question, Commissioner Roberto Concepcion said: 'It definitely does not eliminate the fact that truly political questions are beyond the pale of judicial review.' "[177]

The leading case on the political question doctrine is *Baker v. Carr*[178]

An important aspect of the political question doctrine enunciated in the above-mentioned case is the doctrine's source in the principle of separation of powers. The Court stated therein that the political question doctrine is "primarily a function of the separation of powers."[179] It is a self-imposed rule of restraint on the exercise of judicial review in recognition of the fact that there are certain powers committed exclusively to another branch of government.

The common thread underlying these factors is that they serve to identify a potential conflict between the exercise of judicial review and the

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

[177]1 RECORDS OF THE CONSTITUTIONAL COMMISSION 434 (1986), quoted in BERNAS, *supra* note 41, at 255.

[178]369 U.S. 186 (1962).

[179]*Id.*

constitutional powers of another branch of government. It is the confrontation between the judiciary and another branch of government created by the exercise of judicial review over actions of the other branch which lies at the root of any political question.[180]

Political questions are "those which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of government. They are dependent upon the wisdom, not the legality, of a particular measure."[181]

The political question is one of a family of technical devices, that includes the requirement of a genuine case or controversy, that of standing, the seasonal raising of a constitutional issue, the discretionary nature of declaratory relief as well as the remedies of *certiorari*, prohibition, *mandamus*, and injunction. One cumulative import of this family of technical doctrines, including political questions, is that the courts have a very substantial area of discretion in accepting or declining jurisdiction to review the constitutionality of a particular challenged congressional or executive measure, and in deferring and controlling the timing of constitutional adjudication.[182] Thus, the doctrine has been evolved out of respect to the other co-equal branches of government. But had it really been effective?

During the martial law period under President Marcos, it has often been invoked by the Court to avoid embarrasing the President to the frustration of many. Yet "where our Supreme Court has wished to speak on the merits of the constitutional question raised, the availability of one or more of the technical grounds for declining jurisdiction has not prevented it from so speaking."[183]

It is also to be observed that despite the accepted definition of a political question, such has proven to elude an exact and unambiguous categorization. This is true also in the United States where it had been noted that "to the chagrin of lawyers and legal scholars, Court policy about what constitutes a political question is anything but clear. For each rule

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[180]Millet, *The Supreme Court , Political Questions and Article V: A Case For Judicial Restraint*, 23 STA. CLARA L. REV. 745, 761 (1983).

[181]Tanada v. Cuenco, 103 Phil. 1051, 1067 (1958).

[182]Feliciano, *On the Functions of Judicial Review and the Doctrine of Political Questions*, 39 PHIL. L. J. 457, 451-452, (1964).

[183]*Id.*, at 453.

there seems to be exceptions, leading some experts to conclude that a political question is whatever a majority of the court at a given time is prone to allege a political question is."[184]

Another writer posits that the "the term `political questions' is applied to a species of the genus `non-justiciable questions'. . . . It is one of the least satisfactory terms known to the law. The origin, scope, and purpose of the concept have eluded all attempts at precise statement. . . it is a legal category more amenable to description by infinite itemization than by generalization."[185]

In this jurisdiction, almost the same observations have been made. One writer says that "the evolution of the political question doctrine in our jurisdiction has also diminished its significance as a limitation on the policy- making function of the Supreme Court. This is due partly to the doctrine's inherent ambiguity, which prompts many scholars to ask whether there is such a thing as a political question or is it just `whatever a court says it is.'"[186]

Being developed through history as a self-imposed check by a traditionally prudent judiciary, the political question doctrine has nevertheless been continuously recognized as a necessary and inherent limit to the judiciary's power to interpret the laws and has thus evolved by force of necessity.

One author divides the grounds for the doctrine into four categories which overlap and frequently butress each other. They are the following:

> 1. There is the need for a quick and single policy, especially in the field of foreign affairs;
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> 2. Judicial incompetence, as when a particular problem is in fact solvable by a legislative solution which a court is totally incapable of providing, or where action requires information which a court cannot have or get;
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> 3. Clear prerogative of another branch of government, which includes cases in which courts do not pass upon claimed rights because someone

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[184]O. STEPHENS, THE SUPREME COURT AND THE ALLOCATION OF CONSTITUTIONAL POWER 89 (1980).

[185]E. CAHN, SUPREME COURT AND SUPREME LAW 36 (1954).

[186]Cristobal, *supra* note 120, at 76.

> else has a clear and unequivocal responsibility to make the particular decision; and
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> 4. Avoidance of unmanageable situations, which involves the reluctance of the courts to give orders which will either be not enforced or are practically unenforceable, and on occasion may be hesitant to precipitate situations which may outrage the popular attitude. [187]

Mr. Justice Black of the United States Supreme Court had insisted that the Court oversteps its authority when it, instead of Congress regulates interstate commerce.[188]

The activist stance of the Philippine Supreme Court may also be guided by some of the experiences of its American counterpart in the latter's efforts to make an influential dent in American history.

In reviewing the decision of the United States Supreme Court over specific periods in its history, an American author holds that a series of dramatic decisions threatened from time to time the power of the national government to cope with problems of national concern. But for the most part, these decisions did not have a radiating or enduring effect. The *Dred Scott* decision [189] was "perhaps the most spectacular, but the issues of civil war or peaceful solution of the slavery problem hardly turned on that case, though it stands as a grim reminder that the Court cannot by a rash employment of the judicial veto shape the political and social destiny of the nation."[190]

However, the Philippine Supreme Court may also be encouraged to impose its own theories on economic development when it realized how its American equivalent was somehow able to squeeze in some of its mettle in the field of economic regulation.

In the field of economic regulation, the impediments to national power thrown up by the Court proved to be more pervasive. For instance, the *Income Tax Cases*[191] rested on a special economic theory regarding the meaning of the direct taxation clause in Article I of the United States Constitution. The decision did not have ramifying effects, but it was serious enough in its direct application to the fiscal needs of the Government and

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[187]*Id.*, at 38-39.
[188]*Id.*, at 100.
[189]Scott v. Sandford, 19 How. 393 (1857).
[190]CAHN, *supra* note 186, at 92-93.
[191]Pollock v. Farmer's Loan and Trust Co., 157 US 429, 158 US 601, (1895).

the establishment of a soundly-based revenue system. "Perhaps the best commentary on that span of the Court's life was the observation reported to have been made by Mr. Justice Cardozo: 'We have ceased to be a court.'"[192]

It is thus a convincing argument that no matter how vague and equivocal it is at certain times, the political question doctrine will continue to occupy a very important role in constitutional law and as a new legal development, in economic growth.

Technical Competence and the Doctrine of Primary Jurisdiction

Another issue involved in the Court's undue exercise of economic policy-making is its utter lack of technical competence in the specialized and quantitative field of business and economics. Managing the economic recovery of a country struggling to catch up with its Asian neighbors is an undertaking best lodged in the executive and legislative bodies. The need for fast solutions is an overriding consideration which must put the court on guard whenever questions involving economic policy are raised in cases which appear to be justiciable.

The lack of technical competence, however, is not an exclusive characteristic of the courts. It even extends to the legislative department and, as a result, gave rise to what is now termed as the "fourth branch" of the government: the administrative bodies.

The development of the administrative agencies is the outcome of the prolixity of the modern age and the increasing difficulties facing the government which, given the sophisticated nature of the problems it must address, is no longer able to employ, with the same effectiveness, the traditional powers assigned to its several branches under the doctrine of separation of powers.[193]

The growing complexity of modern living has put the traditional functions of even the Legislature --the maker of policy-- beyond the pale of effective government management.

It was felt that the legislative and judicial departments no longer had either the time or the needed expertise to attend to these new problems,

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[192]CAHN, *supra* note 186, at 92-93.
[193]C. CRUZ, PHILIPPINE ADMINISTRATIVE LAW 2 (1991).

not to mention the lack of interest, particularly in the legislature, as most of these problems did not immediately affect the constituents of its members. Insofar as the courts were concerned, there was a natural reluctance to interfere with these problems which they felt were the concern of and consequently be resolved by the executive department.[194]

These important reasons resulted in the delegation of powers by the legislature in favor of administrative bodies belonging to the executive department. But it did not stop there. The courts have also recognized the need for such administrative bodies for the efficient management of governmental power. Thus, just like the political question doctrine, another doctrine has evolved, namely, the doctrine of primary jurisdiction.

This doctrine, also a consequence of judicial respect for the more competent agencies, has been invoked to disentangle courts from complex questions which were better be addressed to the specialists.

"The precise function of the doctrine of primary jurisdiction is to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question arising in the proceeding before the court."[195]

A more comprehensive treatment of the doctrine is made in one case. Thus:

> In recent years, it has been the jurisprudential trend to apply the doctrine of primary jurisdiction in many cases involving matters that demand the special competence of administrative agencies. It may occur that the Court has jurisdiction to take cognizance of a particular case, which means that the matter involved is also judicial in character. However, if the case is such that its determination requires expertise, specialized skills and knowledge of the proper administrative bodies because technical matters or intricate questions of facts are involved, then relief must first be obtained in an administrative proceeding before a remedy will be supplied by the courts even though the matter is within the proper jurisdiction of a court.[196]

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[194]*Id.*, at 3. For an illustrative case where the Supreme Court acted as a specialized body in determining purely factual and technical questions, *see* Banco Filipino Savings and Mortgage Bank v. Monetary Board , Central Bank of the Philippines, 204 SCRA 767 (1991).

[195]DAVIS, ADMINISTRATIVE LAW TREATISE 2 (1958), quoted in Quintos v. National Stud Farm, 54 SCRA 210 (1973).

[196]Industial Enterprises, Inc. v. Court of Appeals, 184 SCRA 426 (1990).

The Supreme Court is thus bound by these principles which have been developed by expediency. As earlier presented, much of economic policy-making is located within the executive and legislative departments, as evidenced by the various pertinent laws, administrative orders, circulars, and executive orders. Thus, it is a convincing argument that the Court must always be conscious of its lack of expertise when questions involving the economy is involved, for "it behooves the courts to stand aside even when apparently they have statutory power to proceed in recognition of the primary jurisdiction of an administrative agency."[197] The Supreme Court is not, and can never be, an economic authority.

The Supreme Court as a Non-Representative Body

The Supreme Court is a tribunal composed of Justices appointed by the President from a list of at least three nominees prepared by the Judicial Bar and Council.[198]

The Justices are therefore not politically accountable to the people. They do not have constituents. As a matter of fact, "it is a general principle that no civil action can be sustained against a judicial officer for the recovery of damages by one claiming to have been injured by the officer's judicial action within his jurisdiction."[199]

It is this peculiar character of the judicial branch which militates against its participation in the formulation of economic policy. The question of what path the country is to take and how it will build that path is arguably a decision which must be left to those who are directly accountable to the people; and these decision-makers are to be found in the political departments of the government. In making decisions, these political decision-makers naturally will not welcome the intrusion of a judicial body.

Many constitutional authors have been troubled by a sense that judicial review is undemocratic and the question had been asked as to why should a few judges be permitted to outlaw acts of elected officials. They say that this is bad political doctrine which produced bad political results.

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[197]*Id.*

[198]CONST., art VIII, sec. 9.

[199]F. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS 391, quoted in H. DE LEON, LAW ON PUBLIC OFFICERS AND ELECTION LAW 184-185 (1990).

The Court's strength has weakened other parts of the government. "At the same time, we are warned , the participation of the courts in this essentially political function will inevitably lead to the destruction of their independence and thus compromise all other aspects of their work."[200]

The Dangers of an Expanded Jurisdiction

Lack of Standards

Perhaps one of the more convincing objections against the Supreme Court's participation in the economic process is the absolute lack of stable standards with which to render a decision if it so chooses to assume jurisdiction over cases where economic questions may arise. This refers to standards used *after jurisdiction has been acquired,* as distinguished from standards used *in deciding whether the Court should assume jurisdiction,* which had already been discussed. In the second *Garcia* case, for example, had the Court been more aware of the economic implications of the decision and the complexity of the issues involved, it would have been more careful and less predisposed to impose its judicial will in a rash manner as it did.

Subjectiveness

In relation to the above-mentioned problem of the lack of standards, the Court's subjectiveness in rendering decisions with an economic color shall also prove to be injurious to its credibility as the highest adjudicating body in the government. The sheer technicality of economic issues would naturally either confound the Court or scatter its attention, ultimately making the Court rely on its subjective judgment when the problem may call for a more objective and technical study by some other agency.

In rendering "economic" decisions perceived to be policy mistakes, the Court also opens itself not only to intellectual criticism but also to unfavorable -- maybe even unfair -- speculations as to why a decision was rendered in a particular way, especially when an issue involves powerful contending parties, vested interests, and enormous amounts of money. In a society where every public position is easily subject to suspicion due to pervasive corruption, the Court will need some reprieve from public excoriation, lest the people lose faith in the judiciary.

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[200]Rostow, *supra* note 94, at 193-194.

V. A QUESTION OF PROPRIETY

Interference or Self-Restraint?

The ultimate question presented by this study is whether the Court, when economic questions are deeply involved in cases presented before it, should assume jurisdiction and confront the issue head-on, as in the second *Garcia* case, or should display a more restrained disposition.

Judicial activism, which we may define as the tendency of the judicial department to impose its will, using either constitutional or statutory grounds, upon questions which may at the same time pertain to the other branches of government, is not inherently invalid. However, it may damage much needed unity in policy formulation, especially in times of economic crisis.

A judicial activist is concerned with a definite objective and the right result in a controversy, rather than the judicial process involved. Judicial legislation to him is the heart of judicial process. He is guided by great ideals and visions to be used for the greatest good. He is concerned with justice which is to be imposed, if necessary, on other branches of government. He feels this to be a personal obligation. He is more ready to declare acts of the legislature unconstitutional when they do not accord with his philosophical beliefs or policy preferences.[201]

In exercising this kind of activism, no matter how well-intentioned the Court may be, it can be a serious obstacle to national development if its policy preferences do not concur with that of the Executive or Legislature. In the United States, the experience has been enlightening.

One test of practical judicial influence or of the significance of judicial restrictions upon other agencies of government might be in terms of the public policy importance of measures which the Court has upset. A few measures of prime importance in the life of the nation may be found in the list of the powers denied in certain cases [202] such as the *Dred Scott* case, the Income Tax cases, the upset of the New Deal laws.[203]

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[201]K. GRIFFITH, JUDGE LEARNED HAND AND THE ROLE OF THE FEDERAL JUDICIARY 208, 209 (1973).

[202]Railroad Retirement Board v. Alton R. R., 295 US 330 (1935); Schecter Poultry Corp. v. U.S., 195 US 495 (1935); Louisville Joint Stock Land Bank v. Radford, 295 US

When the United States Supreme Court declared unconstitutional parts or the whole of Congressional Statutes of the New Deal Legislation during the first term, I933-I937, of the late President Franklin D. Roosevelt, the reaction of the administration was unpleasant. The exercise of the power of judicial review aroused chagrin and later resentment on the part of those who in good faith believed that the legislations were necessary for the recovery of the nation from the Great Depression."[204]

An Argument For Self-Restraint

In the conduct of government, it is therefore necessary to arrive at a certain mode of conduct among the different branches that will ensure the proper functioning of each without the undue intrusion of the other in order that unity is preserved, thereby resulting in the pursuance of a common goal without sacrificing the traditional concept of checks and balances.

It is believed by one author that while it is the courts that must delimit the dividing line between judicial lawmaking and legislative lawmaking, the courts should exercise that function in a manner that maximizes preservation of the policy judgements of the legislative branch. Separation of powers assumes that some governmental functions lie within the primary authority and responsibility of each branch and that each branch is, by its nature, best able to perform these functions. Courts are within their sphere when they identify large principles of Constitutional Law.[205]

Judicial restraint, just like the doctrines of primary jurisdiction and political question, had its origin in expediency and judicial prudence, although it is a more loose term and, apparently, less established than the mentioned doctrines.

Judicial restraint became the rallying cry of those who sought accomodation of judicial policy making with the social and economic reforms of the New Deal. Since the I880's judicial policy making prevented

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555 (1935); U.S. v. Butler, 297 US 1 (1936); Carter v. Carter Coal Co., 298 US 238 (1936).

[203]CAHN, *supra* note 186, at I50.

[204]Esguerra, *supra* note 93, at 10-11.

[205]Lee, *Preserving Separation of Powers: A Rejection of Judicial Legislation Through the Fundamental Rights Doctrine*, 25 ARIZ. L. REV. 805, 811 (1983).

governmental regulation that was against business or in favor of labor and the United States Supreme Court needed something to allow it to "have its cake and eat it too," a rationale whereby the Court could make policy while having a semblance of objectivity.[206]

The wisdom and necessity of judicial restraint are based on the postulates that judges are remote from the needs and wishes of the public and their decision-making capacity is limited. Thus, they must defer to the decision makers who are publicly accountable. Moreover, many issues, such as economic questions, are too technical and complex and must be left to the experts.[207]

Expedient and prudent as it may seem to be, judicial restraint, however, is not free from controversy. Just like the political question doctrine which has been observed to be simply what the court says it is,[208] Judicial restraint has not been consistently practiced in the United States.

The staunchest advocate of judicial restraint was Justice Felix Frankfurter. But whether he practiced what he preached can be discovered, since judicial restraint, unlike other legal principles, is amenable to empirical analysis.[209]

Data show that Frankfurter's friends supported the states when they regulated labor, but not when they regulated business, and the conclusion is that those Justices voted so because of their attitude towards business and labor. "Frankfurter and associates are simply good economic conservatives -- probusiness and antilabor. Just as clearly, Black, Douglas, and Warren are economic liberals -- antibusiness and prolabor. What about judicial restraint? It provides a convenient rationale for supporting state action when such action supports a Justice's economic attitude. But does it evenhandedly guide judicial policy making? Hardly."[210]

Even considering the uneven manner in which judicial restraint has been practiced in the United States, mere non-uniformity is not an argument against it. The fear against abuse is not an argument against the conferment of discretion. What needs to be realized is the merit behind the doctrine.

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[206]SPAETH, *supra* note 111, at 75.
[207]*Id.*
[208]Cristobal, *supra* note 120.
[209]SPAETH, *supra* note 111, at 78-79.
[210]*Id.*

One of the most respected judges in the United States, Judge Learned Hand, believed that the capacity of the American system to endure depended on the exercise of judicial restraint and that the power to review was limited by the necessity that justified it. Judicial restraint maintained the system by preserving the allocation of powers and by protecting the unique function of the courts.[211]

Learned Hand believed that those who devised the Constitution and allocated the functions of government in separate departments intended that the legislatures express the people's will. He did not know what the Founding Fathers meant by "common will" but he knew that the Constitution gave the legislature, not the courts, responsibility for its enunciation. He thought that the great advantage of judicial restraint were that it compelled the legislature to assume its proper responsibility for resolving the basic conflicts in society and that the people may have the advantage of the political education which accompanied the resolution of critical issues through the democratic process. Restraint helps keep the legislature responsible and the people alert.[212]

The success with which the doctrine of judicial restraint may be effectively practiced depends of the Justices themselves, just as any other general doctrine. What is needed is a more comprehensive awareness of the issues presented before the Court so that rash and haphazard decisions may be avoided. And this is most relevant in the field of economic decision-making where every ruling must be meticulously thoughtout.

One author has cited the dissenting opinion of Justice Stone of the United States Supreme Court who, with a wise understanding of judicial power, stated that "While unconstitutional exercise of power by the executive and legislative branches is subject to judicial restraint, the only check on our exercise of power is our own sense of self-restraint."[213]

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[211]GRIFFITH, *supra* note 202, at 211.
[212]*Id.*, at 212.
[213]CAHN, *supra* note 186.

VI. CONCLUSION

Inevitably, the Supreme Court will have to pass upon controversies which present real constitutional questions but highly impressed with far reaching economic implications, by reason of its being the highest constitutional body mandated to declare what the law is. The law provides that the courts must not decline to render judgment due to the silence, obscurity or insufficiency of the laws.[214]

Gauging from the decisions discussed, a definite trend towards judicial activism is observed and its economic and social impact has been both material and pervasive.

The various legal principles such as the political question doctrine, the observance of judicial self-restraint, the doctrine of primary jurisdiction, the doctrine of separation of powers, and the general principle of judicial deferment to the technically competent body, have been evolved through a careful process inspired by necessity, expedience, and prudence.

At a time when stability in the role and structure of government and uniformity in policy-making are essential factors for economic development, potential sources of conflicts in the institutional systems that would create rivalry between departments which should otherwise have a consistent and coherent objective, are to be avoided.

If there would be any source that would cause detrimental inconvenience to the formulation of uniform policy, no other body by virtue of its constitutional powers would be more damaging than an intrusive Supreme Court. Decisions rendered by a politically non-accountable tribunal have the inherent quality of being beyond immediate correction considering the realities of our constitutional system. When the Supreme Court renders a decision perceived to be a policy error by the Executive, which is more often than not the branch with the technical resources and competence, the most effective remedial measure available would be a resort to a legislative pronouncement on the matter expressly overturning that made by the Court. If the Congress concurs with the Executive, adherence to constitutional procedures would inevitably lead to delay. If the Congress does not so concur and chooses to support the Court's ruling by either express ratification or mere non-action, the Executive is left without remedy. In either case, it

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[214]CIVIL CODE, art. 6.

would have been too late. We would have once more forefeited another opportunity, often rare, to bring the gains of economic development, presently enjoyed by a growing community of nations, to our people who have been condemned by an irresponsible few to live in penury since the inception of our existence as a nation-state.

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The continuing increase in printing costs has considerably delayed the publication of the PHILIPPINE LAW JOURNAL. At any rate, the student editorial board is exerting its utmost effort to update the same. However, we are forced to raise its local subscription rate from P25.00 to P50.00 per copy or from One Hundred Pesos (P100.00) to Two Hundred Pesos (P200.00) per volume/year and for foreign subscription from $5.00 per copy to $6.25 or from $20.00 to $25.00 per volume/year.

This increase shall begin with the March 1993 issue and shall affect all new subscribers as well as over-the counter purchases.

Thank you.