2.) VIGILANCE.[263]

Secondly, a vigilant press, bar, civic or non-governmental organizations which monitors unjustified attacks on public officers, would aid in the development of an accountable press. Press associations should provide for internal rules of discipline and strictly implement the same. Bar associations should promptly come to the defense of unjustifiably beleaguered judges whose reputations have been maligned without reason. The Integrated Bar should monitor criticisms hurled against judges and should help answer the same if untrue. Civic associations, non-governmental organizations and patriotic-minded citizens should also do the same, as their interests in the promotion of the truth and the maintenance of a high morale among persons in the government service cannot be over-emphasized. Lastly, a relevant education available to all would effectively arm the citizens with the power to discern truth from untruth, with the end in view of eventually withdrawing public support for irresponsible broadcast and print media.

[263] Bernas, *supra* note 260, 274.

AN ANALYSIS OF SUPREME COURT DECISIONS WITH ECONOMIC IMPACT

FRANCES T. YUYUCHENG*

In express terms, the Philippine Constitution confers judicial power upon the Supreme Court. Traditionally, this power is to be exercised in a passive manner; in other words, the Supreme Court is expected to discharge the bulk of its functions by applying a given set of laws to existing legal controversies, nothing more. This oversimplified perception, however, belies the Court's potential as an active participant in the national arena; for the Court has on occasion been asked to pass upon the validity of executive and legislative acts. As the effects of such decisions are not limited to the parties immediate thereto but extend to the rest of the community, the Court, in the exercise of the very power granted it by the Constitution, goes beyond the field of adjudication and enters that of policy-making.

Admittedly, policy-making is regarded as a function best left to the discretion of the executive or legislative branches. Thus, the Court must recognize established legal limitations on its power of judicial review, such as the political question doctrine. In more practical terms, the Court must realize that policy-making demands technical expertise and skill which it has in scarce amount and which functionally pertain to the executive and legislative branches.

This thesis analyzes selected Supreme Court decisions and demonstrates that although the Supreme Court recognizes such limitations, it persists in resolving economic controversies laid before it. In effect, the Court formulates economic policy - and a protectionist one at that – in the guise of settling constitutional issues.

Furthermore, the Court, through such action, oversteps the bounds of its authority.

This thesis also establishes the often blatant inconsistency between Court decisions and executive and legislative determinations and discusses the adverse effects such inconsistencies have on the Philippines' fledgling economy. Finally, based on the above analysis of Court decisions and their consequences, this thesis offers available courses of action that will help set guidelines for the proper exercise of judicial power in the context of practical economic considerations.

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INTRODUCTION

The Supreme Court has traditionally been regarded as the ultimate arbiter tasked with the mechanical duty of applying the law and interpreting the Constitution. This common perception has diverted public attention away from the Court as a political institution possessed with great potential to determine economic policies through its power of judicial review, instead focusing it on the Court as a passive legal institution exercising cautious objectivity.

There have been instances, however – the most recent of which being the case of *Garcia vs. Board of Investments*[1] – wherein the Court appears to have departed from tradition to actively participate in charting the course of the Philippine economy. In direct recognition of this judicial aberration, President Ramos has recently formed a body to study Supreme Court decisions pertaining to the economy and other matters affecting the government's development plans and strategies.[2]

Were economic matters within the province of the judiciary, there would be no conflict whenever the Court would opt to exercise its power to sustain or strike down economic policies formulated by the executive or legislative department. Unfortunately, the Philippine Constitution assigns no specific economic role to the Supreme Court,[3] and economic matters clearly fall within the exclusive realm of the executive and legislature. The Court itself has acknowledged this strict delineation of responsibilities, stating that: "...this Court is not concerned with the economic, social, and political aspects of this case for it does not possess the necessary technology and scientific expertise...this Court is not about to delve into the economics and politics of this case."[4]

On occasion, however, the Court proceeds to invoke broad constitutional principles and decides on the merits of a case despite such a declaration of deference to executive or legislative discretion in economic matters. In such instances, the question of whether or not the Court has acted beyond the scope of its judicial power arises. In addition, the propriety of intentionally or inadvertently substituting judicial wisdom for executive or legislative expertise in matters specifically

[1] 177 SCRA 374 (1989), 191 SCRA 288 (1990).

[2] The Philippine Star, January 8, 1994, at 3.

[3] J. GROSSMAN & R. WELLS, CONSTITUTIONAL LAW AND JUDICIAL POLICY-MAKING 321 (1980). [hereinafter GROSSMAN]

[4] *Garcia v. BOI*, 177 SCRA 374, 380 (1989).

pertaining to the latter poses problems of practical economic considerations. Economic policy seeks to regulate relations rooted in an atmosphere of negotiation, flexibility, and trade-offs; and the adaptability of such issues to a judicial atmosphere governed by the rigid rule of precedents based on concrete constitutional principles is, at the very least, questionable.

Considering that the Philippine economy is heavily dependent on intensive foreign and local investments, the implications of such Court action are serious. The Court's "interventionist" and "legitimizing" roles send conflicting signals to the economic-business sector regarding governmental policies on the economic and investment climate. Already having to contend with a vast executive bureaucracy, the economic sector is forced to ask: Are economic policies still subject to judicial scrutiny and constitutional tests? If so, must the economic sector treat these decisions as policy-setting precedents?

Was the Supreme Court consciously laying down economic policy when it classified residential lands as agricultural which therefore could not be the subject of foreign ownership,[5] when it upheld the constitutionality of the Retail Trade Naturalization Act,[6] when it applied the "grandfather rule" in the determination of alien holdings of a corporation engaged in the exploitation of natural resources,[7] when it ruled that a foreign investor should not have the final say in the choice of its plant site and its raw materials,[8] and when it affirmed the validity of the Foreign Investments Incentives Act of 1991?[9] More importantly, was it aware of the possible effects on the economy that these decisions may have had?

In this light, this paper aims to "delve into the politics and economics" of five Supreme Court decisions which have made a considerable impact on the economy: *Krivenko v. Register of Deeds*,[10] *Ichong v. Hernandez*,[11] *Palting v. San Jose Petroleum, Inc.*,[12] *Garcia v. Board of Investments*,[13] and *Garcia v. Executive Secretary*.[14] The cases selected display the Court's

[5] *Krivenko v. Register of Deeds*, 79 Phil. 461 (1947).

[6] *Ichong, etc., et. al. v. Hernandez*, 101 Phil. 1155 (1957).

[7] *Palting v. San Jose Petroleum*, 18 SCRA 924 (1966).

[8] *Garcia v. BOI*, 177 SCRA 374 (1989), *Garcia v. BOI*, 191 SCRA 288 (1990).

[9] *Garcia v. Executive Secretary*, 204 SCRA 516 (1991).

[10] 79 Phil 461 (1947).

[11] 101 Phil 1155 (1957).

[12] 18 SCRA 924 (1966).

[13] 177 SCRA 375 (1989), 191 SCRA 288 (1990).

[14] 204 SCRA 516 (1991).

general tendency in favor of developing a protectionist economic stance where foreign interests in the Philippine economic sphere are concerned.

Particularly, this study shall: a) determine the role of the Supreme Court both in the Constitutional set-up and in the economy; b) draw out common factors, issues, and decision-making patterns from a reading of the cases; c) analyze why and how the Supreme Court decided the way it did; d) determine the propriety and legal soundness of the Court's decision to either take or not take cognizance of the case; and e) assess the implications of these decisions, if any, on the economy. From these considerations, the writer shall prove that the more prudent course in the resolution of these cases would have been a dose of judicial restraint and deference to executive wisdom and legislative discretion.

I. The Role of the Supreme Court in the Constitutional Set-up

A clear understanding of the specific role which the Constitution assigns the Supreme Court in the constitutional scheme is crucial to any attempt to justify judicial action or to determine the limits thereof. More importantly, such an understanding will permit a visualization of the exact nature of the Court's relationship with the other branches of government as well as with specific areas of national life.

A. Passive Arbiter

In clear and undisputable terms, the Philippine Constitutions have vested judicial power in the Supreme Court.[15] This express designation of the Court as the repository of all judicial power may, to a large extent, be responsible for the common perception that the Court, as the ultimate dispenser of justice, confines itself to hearing cases and performing the consequent ritual of impartially interpreting and applying the law to a given set of facts concerning the controversy at hand, with nothing more. At first glance, it seems logical to conclude that it is judicial power alone that is exercised by the Supreme Court, since such power is the only thing that the Constitution defines and grants thereto.

[15] Article VIII, Section 1 of the 1935 Constitution states:

> The judicial power shall be vested in one Supreme Court and in such inferior courts as now exist or may from time to time be established by law.

Article X, Section 1 of the 1973 Constitution states:

> The judicial power shall be vested in one Supreme Court and in such inferior courts as may be established by law x x x

Article VIII, Section 1 of the 1987 Constitution states:

> The judicial power shall be vested in the Supreme Court and in such lower courts as may be established by law.
>
> Judicial power includes the duty of courts of justice to settle actual controversies involving rights which are legally demandable and enforceable and 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.

Contributing to this common notion is the principle of separation of powers deeply ingrained in our constitutional system, in accordance with which the functions of government are compartmentalized to a certain degree. The assignment of special roles to each of the three branches of government bolsters the fiction of a judiciary performing its exclusive functions without encroaching upon those of the others. Traditionally viewed as set apart from and independent of the executive and legislative branches which wield political power, the Court is rarely considered a participant in the policy-making process. Alexander Hamilton observed in the Federalist Papers, No. 78 that:

> ...in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution....The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of the citizens are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse... and can take no action whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend on the aid of the executive arm even for the efficacy of its judgments.[16]

Finally, there is every democracy's need to assure itself of the existence of a sufficient check and balance mechanism to curb its basic distrust of elected officials and the latter's suspected penchant for politicking and coddling huge interests. When either the executive or legislative branch oversteps its power, the Court steps in to apply the constitutional brake; when either neglects to perform its mandated duties, the Court fills the gap. The Court acts as the guardian of the

[16] GROSSMAN, *supra* note 3, at 77-78.

Constitution in a society that looks to the latter as a source of political stability. The Court enforces the rules of the game, acts as a stable anchor for the political system, and most importantly, protects the rights of unrepresented minorities.[17]

B. Silent Policy-Maker

A subscription to the view that the Court exists as a purely legal institution creates a distorted idea of the national policy-making process. The Court is as much a political institution as it is a legal one, and its decisions cannot be confined solely to the legal realm without ignoring the considerable impact such decisions have on the rest of society.

The twin roles performed by the Court are best elucidated in the following words:

> It is at once a judicial and a political body. It is judicial in that its usages are of a court of law.... It is political in that its orders extend far beyond the individuals immediately involved; it fixes conditions and sets bounds about the resort to law; it revises the pattern of the separation of powers among the agencies of government; it endows with intent, discovers latent meaning, and resolves conflicts between legislative acts; it invokes Constitution, statute, and its own decisions to hold Congress, department, and administrative body in its place. Even when it imposes self-denial upon itself, politically, it extends the frontiers of some other agency of control. Judgments along this line are political, not legal decisions.[18]

It is conceded that not all decisions of the Court have political impact or amount to a statement of public policy. Those which do, however, are of the nature of both judgment and policy. As judgments, such decisions possess the character of finality and conform to the processes and principles fixed by law. As policies, they are a conscious choice between competing values, which choice results in a standard for future action. In these instances, the judges' individual value preferences, perceptions of facts, and approaches to the problems come into play.

Inasmuch as the Court is limited in the sense that the nature of the controversies and issues laid before it depend largely on the initiative

[17] *Id.* at 100.

[18] W. Hamilton and G.D. Braden, *The Special Competence of the Supreme Court*, 50 YALE L.J. 1319, 1324 (1941).

of a litigant, it is nevertheless duty-bound to resolve a proper case where the validity of a statute is questioned directly.[19] Presented with contemporary social, political, or economic issues, the Court cannot decline to take cognizance of cases where constitutional guarantees such as due process or equal protection are squarely attacked. In these cases, the political utility of the myth of mechanical jurisprudence surfaces. When the Court makes a policy decision, it can seek to legitimize this decision by asserting that, as a court, it had little choice in deciding the matter in a particular way.[20] Therefore, what was originally beyond the pale of the Court's jurisdiction, is transformed into a legal question which the Court "must" decide.

Confronted with changing needs and situated in critical moments in history, the Court is expected and obligated to come up with appropriate responses. In doing so, the Court cannot decide in a vacuum; rather, it acts as a participant "in the living stream of our national life, steering the law between the dangers of rigidity on the one hand and formlessness on the other."[21] In deciding these cases, therefore, the Court does not shed its role as policy-maker in favor of that of plain arbiter. Assuming that it does betray a basic understanding of the decision-making process and underestimates the capacity of the Court to influence critical stages in Philippine history.

II. THE ROLE OF THE SUPREME COURT IN ECONOMIC POLICY-MAKING

A. Definition of Economic

Throughout this study, the term "economy" shall be used in the general sense of "the management of the resources of the community."[22] The term "economic" shall be understood as "pertaining to the production, distribution, and use of income, wealth, and commodities."[23]

[19] Abad Santos, *The Role of the Judiciary in Policy Formulation*, 4 PHIL. L. J. 567 (1966).

[20] GROSSMAN, *supra* note 3, at 6.

[21] H. ABRAHAM, THE JUDICIAL PROCESS, 317 (1993).

[22] WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE, 1051.

[23] *Id.*

B. Constitutional Basis for Supreme Court Participation in Economic Policy-making

1. ABSENCE OF EXPRESS GRANT

Previously, it was observed that the Constitution assigned no specific economic role to the Court.[24] Traditionally, economic planning has always been regarded as an executive function.[25]

> Economic policy-making is fundamentally and characteristically an executive or administrative function. It is often based on authorization by congressional statute, but the key decisions are usually made by or in the name of the president or by one of several independent regulatory agencies over which the president has appointive influence, if not actual control... Most of the economic decisions in this category are made by the exercise of constitutional powers long considered proper – or unreviewable – by the Supreme Court.

It would seem then that since the Constitution recognizes economic policy-making as an executive function and is silent with regard to its inclusion in judicial power, it removes the conferment of the same function on the Court.

2. INDIRECT PARTICIPATION THROUGH JUDICIAL REVIEW

Notwithstanding the absence of express constitutional authorization, the Court directly or indirectly exercises its influence on the economy when it enters the sphere of policy-making, particularly through its exercise of its constitutionally enshrined duty of judicial review.[26] Although both the Constitution and prevalent views preclude the Court's participation in economic matters, Philippine society's "constant pre-occupation with the constitutionality of legislation which makes us

[24] Grossman, supra note 3.

[25] *Id.* at 326.

[26] Art. VIII, Sec. 5(2)(A) of the 1987 Philippine Constitution reads:

> The Supreme Court shall have the following powers:
>
> x x x
>
> (2) Review, reverse, modify, or affirm on appeal or certiorari as the law or the Rules of Court may provide, final judgments and orders of lower courts in:
>
> A) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.

think that a law is all right if it is constitutional,"[27] paves the way for the Court's involvement in economic policy-making through the process of judicial review. Rooted in judicial power, judicial review refers to the authority of the courts, more particularly that of the Supreme Court, to pass upon the constitutionality or validity of legislative, executive, or administrative acts; and to disregard, or direct the disregard of, such acts as are held to be unconstitutional or violative of applicable statutes.[28] While essentially judicial power, judicial review enters the policy-making sphere because of the very nature of the Court's duty to interpret the Constitution, in the performance of which it is given vast discretion to read a particular judicial intent into broad and often generalized constitutional principles.[29] Thus, where economic legislation and policy are attacked as being violative of constitutional principles, the Court finds itself constitutionally obligated to step in.

Historically, the power of judicial review has played a dominant role in justifying the Court's involvement in the development of capitalism in American constitutional history. Then, as now, the invocation of substantive due process as a gauge for testing the constitutionality of economic legislation posed problems of delving too deeply into the "wisdom and policy goals" of an act, in order to determine its "reasonableness":

> The ascendancy of the Court as an economic policy maker rested largely on its use of the due process clause of the Fourteenth Amendment and also on its revisionist views of Marshall's treatment of the commerce clause and the Tenth Amendment....Emphasis then was switched to the due process clause. It was argued that the courts had a positive duty to scrutinize legislative pronouncements, not only to determine that no procedural norms had been violated but also to see whether or not, in the opinion of the judges of a particular court, a statute was "unreasonable."[30]

[27] A. MASON & W. BEANEY, THE SUPREME COURT IN A FREE SOCIETY, 305 (1959).

[28] Feliciano, *The Application of Law: Some Recurring Aspects of the Process of Judicial Review and Decision Making*, 37 Am. J. Juris. 17, 19 (1992).

[29] *Cf.* the position stated in 1 Cranch 137 (1803):

> Because the key phrases of the Constitution have such grand ambiguities, the Court has wide discretion in passing on matters with a constitutional dimension, and because such matters are likely to concern and affect the larger issues of American life, the court, in passing them, exercises great political power.

[30] GROSSMAN, *supra* note 3, at 322.

Furthermore, the 1987 Philippine Constitution expands the definition of judicial power to include the duty "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[31] The inclusion of this duty has thus inadvertently provided another avenue for judicial incursion into the policy-making process. Whether the heightened possibility of judicial involvement in areas of national life reserved for the other branches of Government was considered in drafting this provision is unclear. In similar fashion, whether it proves to be a wise inclusion remains to be seen.

Nevertheless, the true import of the said phrase may be culled from the proceedings of the Constitutional Commission, particularly from the Sponsorship Speech of the Chairman of the Committee on the Judiciary, former Chief Justice Roberto Concepcion. It is significant to note that the inclusion of this provision, like many other new provisions in the 1987 Constitution, was "actually a product of our experience during martial law," where:

> ... the role of the judiciary during the deposed regime was marred considerably by the circumstance that in a number of cases against the government, which then had no legal defense at all, the Solicitor-General set up the defense of political questions and got away with it. As a consequence, certain principles concerning particularly the writ of habeas corpus,... failed because the government set up the defense of political question.[32]

Given this historical background and read together with Commissioner Felicitas Aquino's proposal to "...'explicitate' that responsibility on the part of the court...essentially to adjudicate civil rights,"[33] the intent of the framers of this particular provision appears to be aimed at the protection of basic individual political rights. This is as it should be, if the Court is to preserve the free and democratic structure of our society which is dependent on these rights.

Save for the relatively new economic policies set forth in the Article on National Economy and Patrimony,[34] the Constitution not only embodies a particular economic philosophy; it incorporates a

[31] PHILIPPINE CONST. art. VIII, sec. 1.

[32] 1 RECORD OF THE CONSTITUTIONAL COMMISSION 434 (1986).

[33] *Id.* at 475.

[34] PHILIPPINE CONST. art. XII.

particular political theory as well. Essential to that theory are the freedoms enshrined in the Constitution. If it is to be effective as a policy-making institution yet remain true to its Constitutional obligations, the Court would do well to pursue its role as guardian of civil and political rights.[35]

III. FACTUAL CONSIDERATIONS OF SELECTED SUPREME COURT DECISIONS

Certain similarities in the facts and issues of the cases and the manner in which they were each presented and appreciated indicate the existence of a pattern in the Court's decision-making process. In each case, a brief statement of the facts gave rise to two discernible factors found crucial to the determination of the respective issues.

A. The Economic Import

Evidently, the cases do not essentially involve the exercise of political rights for they are not confined to a resolution of whether certain constitutional guarantees have been breached. Indeed, the facts of the cases uniformly indicate a resort to the judicial process for the determination of the existence of some economic right. In all the cases, a conflict arises when there is an attempted or actual exercise of a claimed economic right, i.e., registration of land, licensing of sale of securities, choice of a plant site, right to engage in retail trade, and regulation of foreign investments. These positive acts are either opposed by an interested party, rejected by the respective licensing agency concerned, or regulated or prohibited by the legislature.

[35] A. MASON AND W. BEANEY, THE SUPREME COURT IN A FREE SOCIETY 316-317 (1959) *quoting* Justice Robert H. Jackson:

> ... The presumption of validity which attaches in general to legislative acts is frankly reversed in the case of interferences with free speech and assembly, and for a perfectly cogent reason. Ordinarily, legislation whose basis in economic wisdom is uncertain can be redressed by the processes of the ballot box or the pressures of opinion. But when the channels of opinion or of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event the Court, by intervening, restores the processes of democratic government, it does not disrupt them.

Clearly in point are the cases of *Krivenko v. Register of Deeds*,[36] *Palting v. San Jose Petroleum*,[37] and *Garcia v. BOI*.[38]

Krivenko involved the right of aliens to acquire lands of the public domain. Therein petitioner, an alien, bought a residential lot and sought to register it. The Register of Deeds denied his application contending that aliens could not acquire lands in Philippines inasmuch as the 1935 Constitution, which was then in force, prohibited foreign ownership of agricultural, timber, and mineral lands of the public domain. The failure to include residential lands within the enumeration gave cause for confusion.

Similarly, *Palting* involved the right of San Jose Petroleum, a corporation organized and existing under Panamanian law, to register and license the sale of its shares of capital stock in the Philippines with the Securities and Exchange Commission (SEC). It was alleged that the entire proceeds of the sale would be devoted exclusively to finance the operations of San Jose Oil, a domestic corporation and furthermore, that each purchaser of the shares would not receive a stock certificate but a registered or bearer-voting-trust certificate from the voting trustees who were residents of the United States. Significantly, the Securities and Exchange Commission granted the application. The controversy ensued when petitioner, a prospective investor of San Jose, opposed said registration and licensing as being violative of the Constitution, the Corporation Law, and the Petroleum Act of 1949. San Jose Petroleum countered by claiming that it was a business enterprise enjoying parity rights through the medium of a domestic corporation, San Jose Oil, of which the former was the holding company.

The two preceding cases plainly illustrate what are, at first glance, simple assertions of rights of ownership, specifically, the right to register one's property. Despite the fact that they seemed to be addressed to the discretion of particular administrative agencies for the determination of incidents of ownership, however, the Court deemed the resolution of such controversies therein as dependent upon a constitutional dimension or question.

[36] 79 Phil. 461.

[37] 18 SCRA 924.

[38] 177 SCRA 374, 191 SCRA 288.

The *Garcia v. BOI* case is in a class of its own for the economic underpinnings are too obvious to be ignored. In this case, Taiwanese investors formed the Bataan Petrochemical Corporation (BPC) and applied for registration with the Board of Investments. Its application specified Bataan as the plant site. Furthermore, one of the conditions for the grant of the application was the use of "naphta cracker" and "naphta" as fuel for its plant. In return, the BOI and Congress granted BPC incentives and tax exemptions. Subsequently, BPC sought to amend the original registration certificate by: first, increasing its production capacity and investment by US$100 million; second, changing the project site from Bataan to Batangas, allegedly due to Bataan's unstable political and labor climate and the presence of a liquified petroleum gas depot in Batangas; and third, changing the feedstock from "naptha only" to "naphta and/or liquified petroleum gas." Despite vigorous governmental opposition, the BOI approved the petition.

The original petition questioned the application's lack of publication. On motion for reconsideration, the choice of plant site and change in raw materials was squarely attacked. The last mentioned mode of attack is what sets *Garcia* apart from the other cases, for the choice of plant site and raw materials obviously do not present any particular constitutional significance. From a practical viewpoint, these issues are matters of business expediency that factor into the considerations of costs and returns of a business concern. By and large, they are best addressed and left to the "proponent who would in the final analysis provide the funding or risk capital for the project."[39]

On the other hand, the cases of *Ichong v. Hernandez*[40] and *Garcia v. Executive Secretary*[41] directly address two vital sectors of the economic sphere. While these cases challenge nothing but the constitutionality of Republic Acts Nos. 1180 and 7042 entitled "An Act to Regulate the Retail Business" and "The Foreign Investments Act of 1991," respectively, the economic factor surfaces when one considers that the areas of retail trade and foreign investment are vital components of any economy.

[39] Testimony of BOI Vice-Chairman Tomas I. Alcantara before the Senate, *cited in* 191 SCRA 293.

[40] 101 Phil. 1155.

[41] 204 SCRA 516 (1991).

It is a recognized fact that any country's economic activity is heavily dependent on the retail trade. In *Ichong*, the Court found it worthwhile to discuss the "(i)mportance of retail trade in the economy of the nation" and even considered such importance in ruling upon the issue:

> Under modern conditions and standards of living, in which man's needs have multiplied and diversified to unlimited extents and proportions, the retailer comes as essential as the producer, because through him the infinite variety of articles, goods and commodities needed for daily life are placed within easy reach of consumers. Retail dealers perform the functions...thru which all the needed food and supplies are ministered to members of the communities comprising the nation.[42]

Likewise, the case of *Garcia v. Executive Secretary* calls upon the Court to rule on a vital economic issue, namely, the regulation of foreign investment. Although what was directly in question was the legislative policy of adopting a "negative list"[43] that tended to "abdicate all regulation of foreign enterprises," the practical economic import of this decision lies in the allowable participation of foreign investors in specific areas of the country's economy. The propriety of the judicial response in these cases will be measured largely by the recognition of the economic import in these cases.

B. The Presence of Alien Interests

A common theme that runs through all five cases is the presence of foreign interests. Although varying in degree with regard to the extent of the perceived threat to Filipino interests, the gist of the conflicts in the petitions stems from the allowable involvement and participation of foreigners in the Philippine economy. A reading of the facts discloses that a particular economic activity only gains consitutional significance when a "foreign" element is factored into the equation. Either directly or indirectly, the issue is raised: Can an alien enter into a particular sphere of economic activity or engage in a certain business or economic act without offending constitutional provisions?

[42] 101 Phil. 1155, 1166-1167.

[43] A negative list under the Foreign Investments Act of 1987 reserves certain areas of economic activity to Filipino citizens.

Of course, the presence of the foreign factor needs no deep scrutiny in the case of *Garcia v. Executive Secretary*. Clearly at issue there is the constitutionality of the Foreign Investments Act of 1987 which authorized foreign investments in areas not otherwise contained in "negative lists." If at all, the case was transformed into an arena wherein foreign interests and Filipino interests clashed as regards certain economic areas. Thus it was contended that "the law... gives (foreign enterprises) unfair advantages over local investments which are practically elbowed out in their own land with the complicity of their own government"[44] and "[i]n other words, "small to medium enterprises are reserved for Philippine nationals; in effect Filipinos are not encouraged to go big."[45]

Most definite and emphatic in its assessment of the alien as an "economic problem sought to be remedied"[46] is the case of *Ichong*. The Court presents its case in strong and plain terms: "[a]dmittedly springing from a deep, militant and positive nationalistic impulse, the law purports to protect citizen and country from the alien retailer."[47] Almost literary in style, the Court expresses its perception of an alien retailer as such:[48]

> The alien retailer must have started plying his trade in this country in the bigger centers of population. (Time there was when he was unknown in provinces, towns and villages.) Slowly but gradually he invaded towns and villages; now he predominates in the cities and big centers of population... it is an undeniable fact that in many communities the alien has replaced the native retailer.... Derogatory epithets are hurled at him, but he laughs these off without murmur.... The community takes no note of him, as he appears to be harmless and extremely useful.

To further establish the fact of alien dominance in the retail trade, the decision resorted to "the best evidence (of) statistics on the retail trade...(which) point out the ever-increasing dominance and control by the alien of the retail trade."[49] Thus, the decision concludes: "We,

[44] *Garcia*, 204 SCRA at 517.

[45] Id. at 518.

[46] *Ichong*, 101 Phil. 1155, 1167.

[47] *Id.* at 1160.

[48] *Id.* at 1167-1158.

[49] *Id.* at 1168-1169.

therefore, find alien domination and control to be a fact, a reality proved by official statistics, and felt by all sections and groups that compose Filipno society."[50] Based on these data, the Court also took judicial notice of the "grave abuses (which) have characterized the exercise of the retail trade by aliens."[51]

The discussions in *Krivenko* and *Palting* closely resemble each other in the manner in which they address the foreign element. Both decisions presented preliminary issues concerning the exercise of the right to register one's own property. As incidents of ownership, these rights should have been granted as a matter of course. However, the issue in these cases assumed the character of a constitutional problem when the aliens' very right of ownership was assailed directly on the ground that it was subject to certain constitutional limitations.

Thus, *Krivenko* states: "[T]here is no dispute as to the facts. The real point in issue is whether or not an alien under our Consitution may acquire residential land."[52] In like manner, *Palting* opposed the application for the sale of securities on the ground that: "the tie-up between the issuer, SAN JOSE PETROLEUM, a Panamanian corporation, and SAN JOSE OIL, a domestic corporation violates the Constitution,... the Corporation Law and the Petroleum Act of 1949."[53] Later, the case actually came to terms with the issue of determining the meaning of the term "citizen." The presence of foreign interests in these two cases therefore served to draw out underlying constitutional issues.

Finally, the case of *Garcia v. BOI* presents an unusual assertion of "sovereign prerogative" over foreign interests. Maintaining that the petrochemical industry was impressed with national interest, the Court deemed it appropriate to scrutinize the "right of final choice of plant site" of the foreign investor. On its face, the case obviously involved a conflict between the right of the State to regulate foreign investments and the right of the foreign investor to manage his business in a manner that best protects his investment. The issue, however, is more apparent than real.

[50] *Id.* at 1172.

[51] *Id.* at 1173.

[52] *Krivenko*, 79 Phil. at 465.

[53] *Palting*, 18 SCRA at 933.

In the first *Garcia* case,[54] the approval of the amended application was put into issue as the Court concerned itself "simply with the alleged violation of due process and the absence of due notice and opportunity to be heard"[55] in the processing of the investor's amended application and related documents.

The second *Garcia* case was more blatant. In the absence of a constitutional provision specifically dealing with "the investor's right to the final choice," the Court grasped at a strained constitutional intendment to create an issue. The case seems to suggest that what is, in essence, a business decision (that is, the choice of a plant site and raw materials) which under ordinary circumstances is outside the court's jurisdiction, must be treated differently and more strictly because of the presence of foreign interests. In doing so, it adverts to "national interest."[56]

Admittedly, the presence of foreign interests in areas of the economy is subject to state regulation. Nevertheless, these cases seem to exhibit a dangerous trend of subjecting economic laws and acts which pertain to the participation of foreigners in the economy to exacting constitutional tests.

IV. RAISING THE ISSUE OF CONSTITUTIONALITY

This section shall identify the constitutional issues that make the cases characteristic of petitions for review. It is observed that the petitions challenge the constitutionality of a law which grants or prohibits a right, or the actual exercise of such right as an underlying or direct issue, in either of two ways.

A. Interpreting Constitutional Provisions on the National Economy and Patrimony

A law or act may be challenged directly by claiming that it violates the broad economic principles of the constitution which call for judicial interpretation. Particularly, the provisions under Article XIII of the

[54] *Garcia*, 177 SCRA 375.

[55] *Id.* at 382.

[56] *Garcia*, 191 SCRA at 294.

1935 Constitution, Article XIV of the 1973 Constitution, and Article XII of the 1987 Constitution on National Economy and Patrimony link the Constitution and the economic issues. Belonging to this category are *Krivenko, Palting, Garcia v. Executive Secretary,* and the second *Garcia v. BOI* case.

Originally, *Krivenko* revolved around an alien's capacity to acquire residential land under the 1935 Constitution. Had the 1935 Constitution included residential lands in its enumeration of lands reserved for Filipino ownership, the Court would have been obligated to apply the law as worded. However, the enumeration was limited to agricultural, timber, and mineral lands of the public domain, leading the Court to look into the "acquired...technical meaning (of) public agricultural lands."[57] Thus, the crucial issue in the case revolved around a correct interpretation of Article XIII, entitled "Conservation and Utilization of Natural Resources," particularly Section 1 thereof.[58]

Similarly, *Palting* effectively illustrates how the simple issue of registration develops into a constitutional issue requiring a resort to the interpretative power of the Court:[58]

> Consequently, the issue is much alive as to whether respondent's securities should continue to be the subject of the sale....
>
> But more fundamental than this consideration, we agree...that while apparently the immediate issue in this appeal is the right of respondent SAN JOSE PETROLEUM to dispose of and sell its securities to the Filipino public, the real and ultimate controversy here would actually call for the construction of the constitutional provisions governing the disposition, utilization, exploitation, and development of our natural resources.[59]

Again, the focus is on the same Section 1, Art. XIII of the 1935 Constitution. Unlike *Krivenko*, however, where the Constitution was

[57] *Krivenko*, 79 Phil. at 468.

[58] Art. XIII, Sec. 1 of the 1935 Constitution reads:

> SECTION 1. All agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, and other natural resources of the Philippines belong to the State, and their disposition, exploitation, development, or utilization shall be limited to citizens of the Philippines, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, subject to any existing right, grant, lease, or concession at the time of the inauguration of the Government established under this Constitution...

[59] 18 SCRA 924, 933.

silent regarding limited ownership of "residential lands," the prohibition against foreign utilization of natural resources is explicit. Thus, while both *Krivenko* and *Palting* dealt with the same provision, they presented the Court with different issues. In the latter, the dispute centered on a proper interpretation of the phrase "shall be limited to citizens of the Philippines, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens...."

It was contended that San Jose Petroleum was a Panamanian corporation and failed to comply with the "citizenship" requirement set forth in said provision. Furthermore, said corporation acted as a "holding company"[60] for or was engaged in a "tie-up"[61] with San Jose Oil, a domestic mining company. Thus, it was argued, the domestic sale of its shares should not be permitted. As if to amplify the need for interpretation, San Jose Petroleum claimed entitlement to the parity rights contained in the 1946 Ordinance appended to the Constitution and the 1954 Laurel-Langley Revised Trade Agreement. Both the ordinance and the agreement stated that the same privilege of utilization and development of Philippine natural resources shall, "if open to any person, be open to citizens of the United States, and to all forms of business enterprises owned or controlled, directly or indirectly, by citizens of the United States, in the same manner as, and under the same conditions imposed upon, citizens of the Philippines."[62] Hence, the meaning of the word "citizen" became the pivotal question upon which San Jose Petroleum's entitlement to parity rights depended.

Without the usual confusion of sifting through the case to pinpoint the constitutional question, *Garcia v. Executive Secretary* clearly expressed the issue in this unpretentious opening statement: "The petitioner challenges R.A. No. 7042 on the ground that it defeats the constitutional policy of developing a self-reliant and independent national economy effectively controlled by Filipinos and the protection of Filipino enterprises against unfair foreign competition and trade practices."[63] Like the previous cases, the validity of the law hinged upon the court's interpretation of certain terms, namely," self-reliant

[60] This was San Jose Petroleum's contention.

[61] This was petitioner's contention.

[62] *Id.* at 935.

[63] *Garcia*, 204 SCRA 516 (1991).

and independent national economy." However, unlike the previous cases, the terms in question were not susceptible to strict definition. The Court dealt with the problem by treating the problematic terms as having no particular meaning, but as carrying a particular intent which the Court itself would supply.

In contrast, the clarity in which the issue was identified in *Garcia v. Executive Secretary* is nowhere to be found in *Garcia v. BOI*. Such clarity is not indispensable, however, for justiciability is determined not by the presence or absence of categorical statements, but by the facts obtaining in the case. Thus, the Court saw fit to rule on the matter, albeit on the basis of rather vague references to the "national interest" and to its "constitutional duty to step into the controversy and determine the paramount issue,"[64] thus:

> There is before us an actual controversy whether the petrochemical plant should remain in Bataan or should remain in Batangas, and whether its feedstock originally of naphta only should be changed to naphta and/or liquified petroleum gas as the approved amended application of the BPC... shows. And in the light of the categorical admission of the BOI that it is the investor who has the final choice of the site and the decision on the feedstock, whether or not it constitutes grave abuse of discretion for the BOI to yield to the wishes of the investor, national interest notwithstanding.[65]

Among all the constitutional principles used as a basis for controverting the validity of an act, the principle of "national interest" throws the avenues for interpretation wide open.

B. Measuring the Executive or Legislative Act Against The Bill of Rights

A law or act may also be challenged by contending that it violates specific constitutional guarantees found in the Bill of Rights, such as due process and equal protection. These safeguards against excessive governmental action provide an indirect and flexible recourse to the constitutional check and balance system. When these basic rights are invoked, the Court usually resolves the issue by measuring the law or act challenged against standards set by the Constitution. The cases of *Ichong v. Hernandez* and the first *Garcia v. BOI* case illustrate this point.

[64] *Garcia*, 191 SCRA at 294.

[65] *Id.*

Petitioner in *Ichong* filed an action on behalf of other alien residents, corporations, and partnerships questioning the constitutionality of the Retail Trade Naturalization Act. The latter sought to nationalize the retail trade business by prohibiting persons not citizens of the Philippines, and corporations the capital of which was not wholly owned by citizens of the Philippines, from engaging directly or indirectly in the retail trade. Petitioner argued that the Act "denies to alien residents the equal protection of the laws and deprives them of their liberty and property without due process of law."[66] In response, the Solicitor-General contended that "the Act was passed in the valid exercise of the police power of the State, which exercise is authorized by the Constitution in the interest of national economic survival."[67] On the one hand, the issues of due process and equal protection are invoked; on the other, police power. In deciding which would prevail, an inquiry into the policy of the law was necessary.

Due process was again invoked in the first *Garcia v. BOI* case. Petitioner in that case opposed the BOI-approved transfer of the plant from Bataan to Batangas. While the deeper issue seemed to center on whether or not the investor had the final choice of the plant site, in this case, petitioner drew the Court's attention to the issue of want of hearing and publication, claiming grave abuse of discretion on the part of the Board of Investments:

> a) in not observing due process in approving without a hearing, the revisions in the registration of the BPC's petrochemical project;
>
> b) in refusing to furnish the petitioner with copies of BPC's application for registration and its supporting papers in violation of the Government's policy of transparency;[68]

In the next breath, however, new issues conveniently entered the picture. Now, the questioned abuse of discretion had extended to:

> c) ... approving the change in the site of BPC's petrochemical plant from Bataan to Batangas in violation of PD Nos. 949 and 1803 which establishes Lamao, Limay, Bataan as the "petrochemical industrial zone;"

[66] *Ichong*, 101 Phil. at 1162.

[67] *Id.*

[68] *Garcia*, 177 SCRA at 381-382.

d) ... approving the change in feedstock from naphta only to naphta and/or LPG.[69]

These last two issues hint at an inquiry into the propriety of the approval itself. Thus, the petitioner indirectly sought the invalidation of the approval of the amendment by attacking the proceedings that attended it. In effect, petitioner managed to attack the wisdom of the approval of the transfer of the plant site via an indirect route by alleging a violation of due process.

In these cases, the Court did not face the duty of interpreting principles. Rather, it faced the task of applying fixed standards to the questioned law for the purpose of determining whether the law or act conformed or complied with certain requirements or standards. As the ultimate arbiter in the constituional scheme of things, the Court is inevitably saddled with the duty of maintaining the balance between individual rights and state power.

V. Common Factors in the Decision-Making Process

The respective processes the Court went through in ruling on the merits of each case bear significant similarities to each other. Each process went through a series of steps that serve to justify the Court's decision as to whether or not to take cognizance of the case. This section will show that while the Court consistently offers token recognition to the limitations upon its power to rule upon economic matters, it nevertheless rules on the issue and justifies such action by referring to its beholden duty to pass on constitutional questions.

A. Acknowledgment of Duty to Abstain from Ruling Upon Economic Matters

It cannot be said that the Court was unaware of the fact that it did not possess the necessary expertise to determine economic issues for it has consistently made statements devoted to the recognition of its duty to abstain from ruling upon economic matters. The inconsistencies that arise when the Court proceeds to resolve such controversies despite such statements and fails to present any convincing

[69] *Id.*

justification for its intervention affect the soundness of its decisions and raise the question that such decisions might produce adverse effects on matters which should have been left alone in the first place. The Court may possess the power of judicial review; nevertheless, such power remains subject to specific limitations. As the cases will show, however, knowledge and awareness of the existence of these limitations do not necessarily connote an intent to be bound by them.

1. RECOGNITION OF THE PRINCIPLE THAT THE ISSUE OF CONSTITUTIONALITY MUST BE UNAVOIDABLE

As every statute or act is presumed constitutional, it is a well-settled rule that the Court will not touch upon the issue of unconstitutionality unless it is unavoidable or is the very *lis mota* of a case. Furthermore, the mere fact that a question of constitutionality is raised by the parties does not mean that such question will be ruled upon, for if the record presents some other ground upon which the Court may raise its judgment, that course will be adopted and the question of unconstitutionality will not be considered unless such question becomes unavoidable.[70]

This principle was properly recognized and applied in *Garcia v. Executive Secretary*. In deciding against resolving the case on the merits, the Court referred to "(t)he policy of the courts... to avoid ruling on constitutional questions and to presume that the acts of the political departments are valid in the absence of a clear and unmistakable showing to the contrary."[71] Considering that the law was directly challenged on constitutional grounds, the certainty which attended the Court's decision not to rule on the issue manifests the propriety which should characterize each and every judicial response.

In contrast, *Krivenko* is a classic example of how this principle is disregarded. After appealing to the Supreme Court, petitioner had filed a motion for withdrawal, to which the Solicitor-General had agreed. While said motion was pending, the Department of Justice issued a circular instructing all Registers of Deeds to accept for registration all transfers of residential lots to aliens. In light of the principle just mentioned, the motion for withdrawal, and the supervening DOJ circular

[70] 2 Joaquin Bernas, The Constitution of the Republic of the Philippines: A Commentary, 280 (1988) *citing Sotto v. COMELEC*, 76 Phil. 516, 522 (1946).

[71] Garcia, 204 SCRA at 523.

which clearly expressed the decided government policy to allow foreigners to acquire residential lands, the Court should have taken the expedient course and simply dismissed the case. Considering further the Constitution's silence with regard to ownership of residential lands, the Court had even less reason to rule on the matter.

Undoubtedly, the Court was aware that a decision on the merits was "unnecessary" for not only did the Court acknowledge this fact,[72] it even defended its decision to rule otherwise. As such, the Court couched its decision to rule on the issue of constitutionality in circumlocutory terms:

> ... It cannot be denied that the constitutional question is unavoidable if we choose to decide this case upon the merits. Our judgment cannot be made to rest upon other grounds if we have to render any judgment at all. And we cannot avoid our judgment simply because we have to avoid a constitutional issue. We cannot, for instance, grant the motion withdrawing the appeal only because we wish to evade the constitutional issue.[73]

Apparently, the Court overlooked the fact that its duty in such cases is to avoid the constitutional issue if other grounds to dispose of a case exist. Instead, the Court viewed the avoidance of the constitutional issue in the opposite light, that is, as a failure to comply with its duty to resolve constitutional issues. To justify its decision, the Court voiced its apprehension that a refusal to rule on the merits would result in the petitioner's victory "not by a decision of this Court, but by the decision or circular of the Department of Justice."[74] Similarly, the Court was fearful that not to rule on the merits of the case would result in a loss of the "possibility for this Court to voice its conviction in a future case."[75] Rather than strengthen the case for intervention, however, these reasons display a misplaced notion of judicial supremacy and functions. More significantly, these reasons depict a Court which, faced with its limitations, refuses to be bound by them.

It may be argued further that no justifiable reason existed to refuse to implement the Department of Justice circular, as the latter's validity had neither been questioned nor ruled upon. The circular was the

[72] *Krivenko*, 79 Phil. at 465-466.

[73] *Id.*

[74] *Id.* at 467.

[75] *Id.*

latest pronouncement of the government on the matter; hence, the same should have created valid effects until annulled. In *Krivenko*, no such annulment or attack had been made. In their dissenting opinions, Justices Paras and Bengzon correctly pointed that the Court has no monopoly over the interpretation of the Constitution or of supplying its deficiencies.[76] Justice Bengzon further elaborated that other coordinate branches may interpret such provisions acting on matters coming within their jurisdiction and although merely persuasive and not binding upon the courts, such branches may not be deprived of this power.[77] Thus, there is nothing constitutionally offensive in exercising rights in accordance with a valid administrative circular.

Moreover, the nature of its function in settling actual controversies limits the Court with regard to the matters it may rule upon. Whether to its liking or not, the Court cannot rule on the constitutionality of a matter that is not squarely brought before it. It must patiently wait for the issue to reach it. The apprehension brought about by the risk of losing the opportunity to rule on a matter has no sound basis in law for taking cognizance of a case. In fact, such a justification concedes that the case in question does not directly present the issue of constitutionality and hence, is not ripe for adjudication.

2. RECOGNITION OF THE POLITICAL QUESTION DOCTRINE

In instances wherein the Court does refrain from passing upon the wisdom of an act or law, the political question doctrine is the doctrine most likely invoked. Though extensively discussed and repeatedly defined, its application admits of certain difficulties. In the leading case of *Tañada v. Cuenco*,[78] the term "political question"

[76] *Id.* at 539.

Justice Paras, *dissenting*:

I cannot accept the excuse of the majority that the denial of the motion for withdrawal was prompted by the fear that "our indifference of today might signify a permanent offense to the Constitution," because it carries the rather immodest implication that this Court has a monopoly of the virtue of upholding and enforcing, or supplying any deficiency in the Constitution.

Justice Bengzon, *dissenting*:

Moreover, the interpretation of the provisions of the Constitution is no exclusive function of the Courts.

[77] *Id.*

[78] 103 Phil. 1051, 1067 (1965), *citing* 16 C.J.S. 413.

was 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." Applying this doctrine is no easy task, however, for many difficulties arise in the determination of which questions are addressed to the full discretionary authority of the executive and legislative branches. Nevertheless, attempts have been made to formulate guidelines for determining the existence of a political question.

However, the political question doctrine is useful only insofar as it is able to keep the Court's power in check. When properly applied, the doctrine functions as a mechanism of self-restraint available to an entity exercising the otherwise illimitable power of judicial review. Obviously, the doctrine's effectivity depends on the Court's willingness to admit that certain questions are of policy and not of law. It cannot be gainsaid that any entity which looks to no other but itself to determine its limitations will occasionally succumb to the temptation to exercise unlimited power.

Excluding decisions during the Martial Law period, Philippine jurisprudence has consistently applied the political question doctrine to issues involving the exercise of Congressional functions.[79] Nonetheless, matters of economic policy addressed to executive or legislative discretion are also covered by this doctrine and should therefore be legally beyond the Court's power of review.

This is evident in *Garcia v. Executive Secretary* where the Court, despite petitioner's invocation of due process and economic nationalism, did not mince words and refused to enter the "political arena" as it categorically stated:

> 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....Justice Laurel made it clear that "the judiciary does not pass upon questions of wisdom, justice, or expediency of legislation." And fittingly so for in the exercise of judicial power we are allowed only "to settle actual controversies involving rights which are legally demandable and enforceable" and may not annul an act of the political departments simply because we feel it unwise or impractical.

[79] See discussion in BERNAS, *supra* note 70, at 280-284.

> But his (petitioner's) views are expressed in the wrong forum... His objections to the law are better heard by his colleagues in the Congress of the Philippines who have the power to rewrite it...[80]

In other cases dealing with economic matters, however, the Court seemed content to merely acknowledge the doctrine, proceed to treat them as justiciable questions, and rule on their merits. *Ichong* is a case in point.

Ichong bears striking factual similarities to *Garcia v. Executive Secretary*. Both involved economic legislation, directly challenged the constitutionality of such legislation, and raised the issues of due process and economic nationalism. Furthermore, the Court considered the respective laws challenged in each case as valid. However, the manner in which the Court resolved the constitutionality of the challenged laws bore a marked difference. More than thirty years separate the two decisions, and the felt urgency of the times in *Ichong* was apparently viewed as justifying a ruling on the merits then. For while the Court refrained from ruling in *Garcia v. Executive Secretary*, it chose to enter the political fray in *Ichong*, even after recognizing that the function to determine factual considerations belonged to the legislature:

> e. Legislative discretion not subject to judicial review.
>
> ... 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, or reasonableness and wisdom, of any law in the exercise of police power, or of the measures adopted to implement the public policy or to achieve the 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. They have done so early where there has been a clear, patent, or palpable arbitrary and unreasonable abuse of legislative prerogative. Moreover, courts are not supposed to override legitimate policy, and courts never inquire into the wisdom of the law.[81]

Despite having said that, the Court proceeded to determine whether the factual considerations necessitated the enactment of the law. For

[80] *Garcia*, 204 SCRA at 523 (1991).

[81] *Ichong*, 101 Phil. at 1165-66.

whatever reason it had in acknowledging the function of fact-finding as legislative, the Court nevertheless went on to duplicate what the legislature had accomplished in drafting the law. The step was an unnecessary reconsideration of facts: the alien retailer's traits, alien domination of the retail trade, and the policy of the law to protect national interest; all of which the Legislature had already pondered, and competently at that.

In the same case, the Court goes further and persists in its inconsistency by selectively applying the political question doctrine to some of the provisions of R.A. 1180, but not to others. Ruling that the law was reasonable, the Court states that "a cursory study of the provisions of the law immediately reveals how tolerant, how reasonable the Legislature has been,"[82] listing down the provisions of R.A. 1180 to prove the point: "the law is prospective, recognizing the right of those aliens already engaged in the retail trade to continue therein during the rest of their lives and the right or privilege is denied only upon conviction of certain offenses."[83]

Confronted, however, with the issue of whether the same privilege should have been extended to the heirs of the aliens so engaged in the trade, the Court opts to radically shift its position and adopt the course of restraint. Immediately, the Court states that including a provision to that effect would defeat the law itself, its aims and purposes. Then, it resorts to the political question doctrine:

> Besides, the exercise of legislative discretion is not subject to judicial review... the Court will not inquire into the motives of the Legislature, nor pass upon matters of legislative judgment... and though the Court may hold views inconsistent with the wisdom of the law, it may not annul the legislation if not palpably in excess of the legislative power.[84]

In its next bout with indecision, the Court states: "the test of validity of a law attacked as violative of due process, is not its reasonableness, but its unreasonableness and we find the provisions are not unreasonable."[85] Ironically, the utility of the political question doctrine may be as easily discarded as it may be resorted to depending

[82] *Id.* at 1187.

[83] *Id.*

[84] *Id.*

[85] *Id.*

on which issues the Court seeks to avoid. As just demonstrated, the patent inconsistency in which this doctrine is used can be manifest not only in a comparison of cases, but also in a comparison of issues within a case.

3. RECOGNITION OF INCOMPETENCE AND LACK OF EXPERTISE IN ECONOMIC MATTERS

The practical argument in favor of an exercise of judicial restraint when it comes to economic matters rests on considerations of technical competence and expertise which the Court does not possess. While these may factor into the political question doctrine, the lack of expertise and competence deserves greater attention because of the immediate results caused, not on the exercise and allocation of power which the political question doctrine treats of, but on actual economic situations. Here, what is emphasized is not the illegality of the Court's usurpation of power of coordinate branches but rather the Court's incapacity to deal with economic matters effectively.

It must be admitted that a Court accustomed to resolving legal issues and interpreting legal concepts on the one hand, and the Executive or Legislative branch equipped with the skills and mechanisms necessary for gathering and interpreting facts which form the bases of economic policies, on the other, view the factual and technical considerations involved in any economic controversy from radically different perspectives. The Court, limited as it is, cannot confront a broad economic issue or solve it in a comprehensive fashion.[86] Lacking the necessary fact-finding machinery, the Court cannot acquire the pertinent knowledge upon which intelligent action must be based.[87] Lastly, the Court cannot make the subtle and delicate distinctions which the legislature can, and must, make.[88]

The limitation is real and if government is to function effectively and efficiently, must remain a prime consideration of the Court in ruling on issues of a technical and specialized nature. Declining to rule on the constitutionality of the Foreign Investments Act, the Court stated in *Garcia v. Executive Secretary* that "the theory is that as the

[86] J. Skelley Wright, *The Role of the Supreme Court in A Democratic Society*, CORNELL L. REV., 1, 3 (1968).

[87] *Id.*

[88] *Id.*

joint act of Congress and the President of the Philippines, a law has been carefully studied and determined to be in accordance with the fundamental law before it was finally enacted."[89]

Garcia v. BOI remains the classic example of how the Court does its traditional dance with economic issues, taking one step forward in stating that it does not possess the competence and taking another step backward in ruling on the merits. Writing for the Court in the first *Garcia v. BOI* case, Justice Grino-Aquino most emphatically stated

> This Court is not concerned with the economic, social, and political aspects of this case for it does not possess the necessary technology and expertise to determine whether the transfer of the proposed BPC petrochemical complex from Bataan to Batangas and the change of fuel from naphta only to "naphta and/or LPG" will be best for the project and for our country. This Court is not about to delve into the economics and politics of this case.[90]

Based on the Court's own admission, one would expect a submission to executive discretion. Considering further that the matters of location and raw materials to be used do not, by any stretch of imagination, involve judicial inquiry, but are more properly dealt with by technical and feasibility studies, the Court should not even have thought twice about applying a hands-off policy. Nevertheless, in a display of the same eagerness and zeal shown in *Krivenko*, the Court jumps at the opportunity to have a say in the issue by shifting the focus to an alleged violation of due process and to the alleged abuse of power and discretion of the Board of Investments in approving the transfer without notice and hearing. As Justice Melencio-Herrera, however, points out in her dissent, the determination of the plant site and change of feedstock are matters "fall(ing) within (the BOI's) special knowledge and expertise gained by it from handling the specific matters falling under its jurisdiction."[91]

Failing to hit the nail on the head on its first try, the Court vowed not to "skirt" the real issue of who had the final choice of location and raw materials in the second *Garcia v. BOI* case. Ironically, it was in this case where resolution of the question was clearly beyond judicial

[89] *Garcia*, 204 SCRA at 523.

[90] *Garcia*, 177 SCRA at 382.

[91] *Id.* at 392.

competence that the Court made no mention whatsoever about its lack of competence to deal with the issue. Instead, it proceeded in a rather nonchalant manner, resolving the issue as it would any other legal controversy.

This time, Justice Griño-Aquino found herself joining the dissent:

> Only the BOI or the Chief Executive is competent to answer that question, for the matter of choosing an appropriate site... 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 foreign investments into our country), is empowered to make.[92]

With this realization, Justice Grino-Aquino further warns against any attempt at substituting judicial for executive discretion, stating that the "petitioner's recourse is by an appeal to the President (sec. 36, Investments Code), not to this Court."[93]

Garcia v. BOI depicts the refusal of the Court to come to terms with its inherent limitations. As a judicial institution, it cannot be judge and implementor at the same time. The fact that other agencies are precisely tasked with performing specialized functions suggests that the Court should accept that "it does not have a panacea for all the ills that afflict our country nor a solution for every problem that besets it."[94]

B. Decision on the Merits: Choosing to Deal with the "Unavoidable" Constitutional Question

In cases of judicial review, the Court is not limited to a pronouncement that a certain act is constitutional or unconstitutional. A third option is open to it, specifically, that of avoiding the constitutional issue altogether. As the cases show, however, it is an option that the Court seldom takes, even in instances where it admits of limitations on the exercise of its review powers. It would appear that the Court views a decision to rule on the merits as a fulfillment of a duty that cannot be ignored and, on the other hand, the choice of restraint as a "skirting" of that duty. Yet, although the duty to intervene in these cases may have been brought about by the circumstances of the period in which they were made, the legal basis and propriety of taking cognizance thereof

[92] *Garcia*, 191 SCRA at 299.

[93] *Id.* at 302.

[94] *Id.* at 300.

are doubtful. In effect, when the Court chooses to rule on the merits of a constitutional question brought before it, it disregards its well-established duty to refrain from so ruling unless the proper conditions exist. Thus, two crucial points must be considered: Should the Court have taken cognizance of the case in the first place, and having thus taken cognizance, how did it dispose of the constitutional issue?

Rather than explain the legal grounds for its decision to rule on such a constitutional issue, the Court in *Krivenko* premised said decision on the possible effects of a contrary course of action. This approach thus seeks to remedy hypothetical consequences, not legal issues. While the apprehension is clear, the basis in law is not:

> What is material and indeed very important is whether or not... we may still allow our conviction to be silenced, and the constitutional mandate to be ignored or misconceived, with all the harmful consequences that might be brought upon our national patrimony. For it is but natural that the new circular be taken full advantage of by many, with the circumstance that perhaps the constitutional question may never come up again before this court, because both vendors and vendees will have no interest but to uphold the validity of their transactions, and very unlikely will the Register of Deeds venture to disobey the orders of their superior... with the result that our indifference of today might signify a permanent offense to the Constitution.[95]

The Court's duty is confined to settling "actual controversies." If the Court is to be faithful to such duty, then its decisions must be controlled by the facts presented. In any case, it is not the Court's business to enunciate its stand on current issues, notwithstanding its noble intent to protect national patrimony. To do so would be akin to issuing advisory opinions, which is prohibited. Furthermore, doing so simply because it might lose the opportunity to rule on the same matter in the future robs the decision of the expected judicial objectivity, based as it is on speculation and contrived issues. If it must act, the Court must be governed by the limitations imposed by law upon it, therefore it must wait for the issue to be directly addressed to it.

The strained logic that "justified" the Court's decision to take cognizance in this case permeates the entire decision as well. In ruling on the issue of whether residential lands come within the prohibition against alien ownership of lands, the Court resorted to forced judicial

[95] *Krivenko*, 79 Phil. at 467.

construction. The prohibition contained in the 1935 Constitution only contained three classifications of lands of the public domain subject of said prohibition: agricultural, timber, and mineral. Disregarding the basic rule in statutory construction that a statute clear upon its face need not be interpreted and need only be applied, the Court went on to rule that since residential lands are neither mineral nor timber lands, then they must necessarily be classified as agricultural. The Court went on to justify such a ruling by stating that "public agricultural lands" had acquired a technical meaning at the time of the adoption of the Constitution so as to include residential lands. Clearly, this partakes of a case of judicial legislation.

The Court pursued the same task of construction in *Palting*. In deciding against the entitlement of San Jose Petroleum to parity rights, the Court applied the "grandfather rule" in tracing the ownership of a corporation. Since the Constitution stated that a corporation sixty *per centum* of the capital stock of which is owned by Filipino or American citizens may exploit natural resources, the determination of the ownership of San Jose Petroleum was sufficient for that purpose. The Court, however, opted to examine the chain of ownership up to the third level; to wit, it considered the fact that San Jose Petroleum was owned by Oil Investments, a Panamanian corporation, which in turn was owned by two more Venezuelan corporations, Pantepec and Pancoastal. All this the Court did in spite of the Securities and Exchange Commission's approval of San Jose Petroleum's application to register the sale of its securities.

Another argument in favor of restraint is *Ichong*. Although the constitutionality of the Retail Trade Nationalization Act was squarely attacked in this case, it could be seen from the issues raised that an inquiry into the policy behind the law and the facts justifying said policy was necessary. Again, it was evident that the Court's decision to take cognizance of the case was, to a certain extent, based on the need of the times:

> Through (the law), Congress attempts to translate national aspirations for economic independence and national security, rooted in the drive and urge for national survival and welfare... so that the country can be free from a supposed economic dependence and bondage. Do the facts and circumstances justify the enactment?[96]

Once more, the Court was called upon to remedy a situation that the legislature had already addressed. For the Court to rule on the

[96] *Ichong*, 101 Phil. at 1161.

validity of the law in this case, it would have had to reassess factual considerations, statistical data, and prevailing circumstances that the Legislature had already passed upon in drafting the law. Not only would such an exercise have been redundant, it was doubtful then (as it is doubtful now) that the Court possessed the necessary expertise to pass upon such matters.

In upholding the constitutionality of R.A. No. 1180, the Court took judicial notice of the damaging effects of alien dominance of retail trade. The proven existence of these circumstances served as the Court's basis for ruling on the constitutional issues raised.

On the ground of substantive due process, the Court reasoned that economic independence is a legitimate aspiration that can never be beyond the limits of legislative authority and found the act to have complied with the standard of "reasonableness." On the ground of equal protection, the Court noted the validity of citizenship as a basis for classification. Based on the objectionable characteristics of the exercise of retail trade by the aliens, the Court accordingly ruled that substantial distinctions existed which required classification and therefore stated that the law conformed to the equal protection clause.

Significantly, the Court went through a tedious process which resulted in affirming legislative policy. Had it deferred to the legislature in the first place, the Court would not have had to go through the unnecessary task of legitimizing the law. *Garcia v. Executive Secretary* took this latter path and achieved the same result: a valid law. The strongest argument against judicial intervention in economic matters is *Garcia v. BOI*. The latter case is the best example of how an issue may be formulated, appreciated, and decided in wanton disregard of the legal limitations attendant upon the Court. From the beginning, the invocation of due process is misplaced:

> The provision in the Investments Code requiring publication of the investor's application for registration in the BOI is implicit recognition that the proposed investment or new industry is a matter of public concern on which the public has a right to be heard. And when the BOI approved BPC's application..., the inhabitants of the province... acquired an interest in the project which they have a right to protect. Their interest in the establishment of the petrochemical plant in their midst is actual, real, and vital because it will affect not only their economic life but even the air they will breathe.[97]

[97] *Garcia*, 177 SCRA at 383.

The statement seems to imply that with the approval of BPC's application for registration of its petrochemical plant project in Bataan, the latter's inhabitants had a claim or right that they could enforce even against the basic right of the investor to run his business as he may see fit. In other words, the Bataan residents could choose the proper site. Apparently then, mere publication of the original application was not sufficient. An investor should consult and seek the approval of the inhabitants of Bataan (or any locality where his project is situated, for that matter) before he may implement any business decision different from or inconsistent with the conditions stated in the application. In support of this position upholding the right of the affected community to be informed of the transfer of site, the Court conveniently cited the constitutional right of a citizen to have access to matters of public concern.

In a final show of judicial supremacy, the Court categorically ruled that an investor does not have the final say in choosing the site of its plant nor the raw materials it shall use. The basis for saying so was hardly legal. Instead, the decision contained conclusions that interfered with policy and wisdom, instead of adhering to legal principles. Thus, the decision justifies denying the investor the final say in the choice of plant site and materials in the following manner:

> First, Bataan was the original choice... That is why it organized itself into a corporation bearing the name *Bataan*. There is available 576 hectares of public land... There is no need to buy expensive real estate in the proposed transfer to Batangas... The site is ideal. It is not unduly constricted and allows for expansion.
>
> Second, ... (BRC) can provide the feedstock requirement of the plant. On the other hand, the country is short of LPG... The local production of Shell can hardly supply the needs of consumers... Scarce dollars will be diverted unnecessarily, from vitally essential projects...
>
> Fifth, ... the capital requirements would be greatly minimized if LPC does not have to buy the land for the project and its feedstock shall be limited to naphta which is certainly more economical...
>
> Sixth, if the plant site is maintained in Bataan, the PNOC shall be a partner in the venture to the great benefit and advantage of the government...[98]

[98] *Id.* at 295.

Clearly, these are matters taken up at the bargaining table and are subjects of negotiation and careful study. They do not enter the realm of judicial decisions, much less, form the basis of a sound precedent. Considerations of availability of materials, economy of production, suitability of plant site, costs, and risks are evidently beyond the competence of the judiciary. Effectively, the Court not only questioned the BOI's discretion on the basis of expediency, economy and feasibility, it likewise substituted the BOI's decision with its own.

If at all, these cases show that a forced resort to judicial review results in contrived reasoning to resolve the issues presented. More often than not, the Court finds itself rendering a decision that is "something less than good craftmanship."[99] The root of the problem lies in the Court's tendency to rely on broad principles as bases for resolving specific problems that call for differentiation.[100] For all the legal and practical considerations discussed, the Court would do well to admit that in cases involving economic matters, judicial restraint is always a prudent option.

VI. COMMON POLICY: PROMOTING A PROTECTIONIST ECONOMIC POLICY

When faced with conflicts involving the right of foreigners to exercise certain economic freedoms, or the infusion of foreign capital, the Court invariably takes cognizance of the issue and in ruling, adopts a protectionist policy. The nationalist sentiments are evident in the decisions, obviously at the expense of the foreigners concerned. The cases lay down strict ownership laws, prohibit or permit limited participation in the economy, regulate areas where participation is allowed, and subject business decisions to judicial scrutiny. More often than not, the Court allows itelf to be consciously guided by and promotes a nationalist policy in ruling on economic issues.

In *Krivenko*, although the Court originally cited jurisprudence and laws to support its inference that residential lands are agricultural lands, it eventually read an intent to "insure the policy of nationalization"[101] into the questioned constitutional provisions. The Court further stated that:

[99] MASON, *supra* note 27, at 318.

[100] *Id.*

[101] *Krivenko*, 79 Phil. at 473.

> One of the fundamental principles underlying the provision of Article XIII of the Constitution... is that lands, ... and other natural resources constitute the exclusive heritage of the Filipino nation. They should, therefore, be preserved for those under the sovereign authority of that nation and for their posterity.
>
> ...With the complete nationalization of our lands and natural resources it is to be understood that our God-given birthright should be one hundred percent in Filipino hands...[102]

The protectionist approach was likewise evident in *Palting*, although it was without the usual express declarations. This case is significant because of the implications of the application of the "grandfather rule" in determining the ownership of corporations. *Palting's* contribution to the nationalist policy is that it extends the scope of the foreign ownership prohibition not only to the "mother" corporation, but also to that which owns the latter. Although the possibility of dilution of Filipino ownership of capital stock is lessened with the application of such a rule, the net effect is that corporations which are covered by nationality requirements are given stricter ownership requirements, with a view to reserving ownership in these corporations to Filipino citizens.

Ichong makes an even stronger case for the nationalist leanings of the Court. The choice that the Court had to make in this case was clearly for or against a nationalist economy. Throughout the decision, the Court notes as a fact that the alien retailer is a threat to the economy. It is this factual basis of alien domination that prompts the Court to declare the law a valid and necessary enactment. The Court explained its choice as such:

> We are fully satisfied upon a consideration of all the facts and circumstances that the disputed law is not a product of racial hostility, prejudice, or discrimination, but the expression of the legitimate desire and determination of the people, thru their authorized representatives, to free the nation from the economic situation that has been unfortunately saddled upon it, to its disadvantage. The law is clearly in the interest of the public, nay of national security itself...[103]

Even in *Garcia v. BOI*, the Court displayed a staunch, albeit stubborn, assertion of its nationalist policy. In this case, however, the Court took the policy to the extreme by imposing its will on what it perceived

[102] *Id.* at 476.

[103] *Ichong*, 101 Phil. at 1174-75.

to be an act of "foreign dictation." Unlike *Krivenko*, which supported its conclusion that the alien retailer was a danger to the economy with statistical data showing dominance in the trade, *Garcia v. BOI* arrived at a conclusion which, apparently, was not supported by the facts. Choosing to amend the site is a practical consideration that, in the absence of malice or fraud, arises in the ordinary course of business. Nevertheless, the Court viewed this act as a "repudiation of the independent policy of the government expressed in numerous laws and the Constitution to run its own affairs the way it deems best for national interest."[104]

Economic nationalism is consistently invoked in the *Garcia* decision to justify the ruling that the foreign investor should not have the last say in determining the project site. In its final statement, the Court expresses its nationalist fervor, however misplaced, as follows

> One can but remember the words of a great Filipino leader who in part said he would not mind having a government run like hell by Filipinos than one subservient to foreign dictation. In this case, it is not even a foreign government but an ordinary investor whom the BOI allows to dictate what we shall do with our heritage.[105]

In the absence of proof that the foreign investor exercised an economic right that it was not entitled to or dictated its will upon the government, such an invocation of economic nationalism rings hollow.

VII. EFFECTS OF THE SUPREME COURT POLICY-MAKING ON THE PHILIPPINE ECONOMY

In deciding cases involving economic issues, the effects seem to be of concern only to the opposing parties whose rights and relations are immediately affected. Yet, it cannot be denied that when the Supreme Court definitively settles issues, as when it prohibits aliens from engaging in retail trade, owning land, or having the final say in its investment, these decisions affect Philippine economy as a whole.

It is with regard to these effects that the concepts of judicial precedent and economic flexibility find themselves at opposite ends. The certainty that characterizes precedents causes uncertainty in the

[104] *Id.* at 297.

[105] *Id.*

economic sphere and absolute legal truths do not find application in the world of trade-offs and negotiation. This incompatibility translates into tangible effects, which, in the context of the cases just analyzed, mean conflicting governmental policy pronouncements and a decline in the inflow of foreign capital. In particular, this last section will focus on the impact of the decision in *Garcia v. BOI* on foreign investments, for it was in the latter case that the Supreme Court opted to take an active hand in what was a purely economic decision.

A. Conflicting Policy Pronouncements

The past four years have seen the Philippine government adopt a more outward-oriented economic policy aimed at attracting more foreign investments. This move is a shift from the "import-substitution, protectionist policies"[106] existing since World War II. Almost all independent analyses of the Philippine economy have traced the country's economic problems to these inward-oriented protectionist policies.[107]

As a developing economy, the Philippines has neither the capital nor sufficient technological resources to sustain a significant rate of growth, particularly in the area of creating jobs at reasonable wage levels.[108] Of late, the government has responded by restructuring its economic program in order to encourage greater foreign investments. Among the concrete reforms that then President Corazon Aquino had initiated, and which President Ramos is continuing, were the passage of the New Foreign Investments Act, the deregulation of foreign exchange transactions, the liberalization of import restrictions, the lowering of tariff rates, and the 75-year land lease.

Thus, on the one hand, there is the executive pronouncement encouraging foreign investments. On the other, there is the judicial practice of staunchly promoting a nationalist, protectionist economic policy. The confusion that results only serves to create an impression that the country's economic environment is highly susceptible to and not insulated from conflicting political interests and internal bickering

[106] AYC Consultants, Inc., *Enhancing the Investment Climate*, PHILEXPORT/PITO-P EXECUTIVE SUMMARY AND RECOMMENDATIONS 1 (1993).

[107] *Id.* at 9.

[108] *Id.* at 5.

among its branches. The highly interventionist role of the Court deviates from the usual practice of recognizing executive or legislative discretion in formulating economic policies, and in presuming these to be correct unless the same are tainted with fraud or abuse.

As a matter of fact, the Philippine Export-PITO-P Report lists the involvement of the Supreme Court in executive branch or technical business decisions as the first of five main concerns among businessmen with respect to the judicial system.[109] The Report also recommends changes that the judiciary can effect, and implores the Court to refuse nonsense cases and define the Supreme Court's role more clearly.[110] Similarly, the Makati Business Club referred to the controversy involving the petrochemical plant subject of *Garcia v. BOI* as an "effort to politicize investment decisions to protect reported hidden interests."[111] The Club also expressed its skepticism regarding the contry's intention to attract investments.[112]

The ability of the Court to permanently reject or otherwise substitute judicial pronouncements for economic policies enunciated by the executive or legislative branch creates an unstable investment climate and, to the foreign eye, increases the risks of doing business in the Philippines. Considering its urgent need of foreign investments, the country can ill-afford such a display of inconsistency.

B. Decline in Foreign Investments

As a tangible effect of the Court's interventionist role in the economic sphere, foreign investments have declined significantly.

Subsequent to the promulgation of the *Garcia v. BOI* decision on November 9, 1990, the entry of foreign investors into the country suffered a marked decrease. A sense of wariness gripped the business community. The Philexport-Private Investment and Opportunities-Philippines Report singled out the Luzon Petrochemical case as having caused untold damage to the Philippines investment climate. The Report directly attributed the loss of "not only US$ 370 million in investments

[109] *Id.* at 89.

[110] *Id.* at 96.

[111] Villegas, *Scenarios for Foreign Investments*, GETTING BACK ON THE TRACK 27 (1990).

[112] *Id.*

but hundreds of millions of downstream associated investment and hundreds of millions more of potential investment"[113] to the said case.

More particularly, the *Garcia* rebuffed USI Far East Investment, a Taiwanese concern, and may have been the cause of a 50% decrease in Taiwanese investments from 1990 to 1992.[114] Effectively, the withdrawal of the USI Far East investment cost the Philippines the latter's projected investment of US$ 370 million, plus an additional US$ 560 million in other Taiwanese investments (assuming a conservative 12% growth over 1990 levels over the period of 1991 to 1993). The actual amount of such losses was almost certainly considerably higher because of the likely number of other foreign investors who would have followed USI Far East but were turned off by the decision.[115]

The decrease in foreign investments concretized the apprehension and reluctance of the foreign business sector to do business in the Philippines.

CONCLUSION

Much of the confusion regarding the role of the Supreme Court in our society lies in the failure to recognize the Court as a potentially active player in policy-formulation. The traditional view of the Court as a mere arbiter not only disregards its capacity to direct critical stages in history, but also relieves it of all responsibility for the effects of its decisions. In addition, because the Supreme Court does not operate in a vacuum, its policy-making decisions do not only affect the immediate parties and circumstances involved in a case, but affect significant areas of political, social, and economic life as well.

Economic policy-making has traditionally been regarded as an executive or legislative function. This is but a logical conclusion since the executive and the legislature are the branches equipped with both the expertise and machinery necessary to deal with highly specialized and technical economic matters. However, the Supreme Court has consistently ruled on the constitutionality of the government's economic policies, supposedly as a response to the urgency of the times

[113] *Supra* note 106 at 11.

[114] *Id.*

[115] *Id.*

and in order to protect national interest. In such instances, although the zeal with which the Court goes about its task of judicial review is commendable, the propriety of its taking cognizance of the cases is not.

The exercise of judicial review in the cases discussed is inextricably linked with the issue of power, which, although theoretically apportioned and delineated among the three branches of government, assumes the character of illimitability by virtue of the Court's refusal to be bound by inherent restrictions. The Court may appear to acknowledge its limitations, as it consistently makes statements to the effect that it avoids the constitutional issue whenever possible, adheres to the political question doctrine, or recognizes its own incompetence in economic matters. As conveniently as these limitations are recognized, however, they are nevertheless disregarded as the Court proceeds to decide the case, ostensibly in the performance of its foremost duty to resolve constitutional issues whenever such issues involve economic principles or the Bill of Rights. And so, the Supreme Court writes policy into precedent and precedent into economic history. The policy is protectionist, such that Filipino interests prevail over foreign capital, whether warranted or not by practical considerations. Although there is no question that the Court should uphold the nationalist principles embodied in the Constitution, an unnecessary application of these principles in taking cognizance of cases which clearly belong to its co-equal branches is obviously in excess of its authority.

The result is a clash of the irreconcilable concepts of absolute legal truths and practical economic considerations requiring flexibility and bargaining. Furthermore, Court decisions upon matters beyond its expertise bring about repercussions that may prove to be fatal to a Philippine economy that requires stability to insure growth. The interventionist role of the court renders suspect all attempts of the executive and legislative branches to institutionalize their economic policies.

If the Supreme Court is to make any real contributions to the economy, it would do well to be more prudent in the exercise of its constitutionally granted judicial power. It goes without saying that not all cases which raise constitutional issues are ripe for judicial review. There may be little room for doubt when the validity of a constitutional question in a case dealing with political rights is put in issue; however, the propriety of taking cognizance of such questions in cases involving economic matters is questionable, to say the least.

Judicial restraint in economic matters is, therefore, in order.

RECOMMENDATION

The main argument against Supreme Court participation in economic policy-making is its lack of expertise to properly deal with business or economic issues brought before it. While judicial restraint is the ideal remedy, jurisprudence clearly shows that the Supreme Court usually opts to take cognizance of cases involving economic issues under its expanded power of judicial review. Therefore, the necessity of adopting measures to address the problem of judicial zeal in cases involving technical economic matters becomes imperative.

The Supreme Court would do well to employ a group of experts skilled in resolving economic issues to act as an advisory committee. In this manner, the Court shall refer all cases involving technical matters to this committee.

A special agency or court for economic affairs may also be created to rule on economic issues. The decisions of this court shall be authoritative and its findings shall be conclusive upon other courts.