

The Judiciary and the Economy^{*}

Our present Constitution was crafted after a dictatorial regime had been toppled in a bloodless People Power Revolution in 1986. Currently (and I say this, because there are moves to shift to a parliamentary-federal system), our government is republican^[1] in nature and presidential in form.

Governmental powers are shared by three main branches:^[2] Congress, which makes the laws; the President, who executes the legislative enactments; and the Supreme Court, which interprets the laws. By separating legislative, executive and judicial powers, our Constitution aims to avoid concentration of authority in one person or department.

Each of the three great branches of government exercises powers that are separate and independent. They are, however, neither antagonistic nor subservient to any of the others in the discharge of their responsibilities. Rather, they coordinate their functions to achieve governmental objectives; at the same time, they check one another to prevent abuse in the exercise of their respective powers.^[3] These functions of *coordinating* and *checking* characterize our government and differentiate it from many other countries in our region of the world.

Duty to Strike Down

Grave Abuse of Discretion

The Philippine Judicial Department resembles many other judiciaries in the world in terms of structure. At the top is the Supreme Court. As the highest court, its decisions on constitutional, administrative, legal or arbitral issues cannot be passed upon, much less modified or reversed, by any other office or agency. Unlike other jurisdictions, our Judicial Department is centralized and unitary in character. There is only *one* Supreme Court that

performs all the functions of constitutional, administrative, and commercial tribunals in other countries.

Under the Supreme Court are three appellate courts -- the Court of Appeals, the Court of Tax Appeals and the Sandiganbayan -- below which are the regional trial courts and the metropolitan/municipal trial courts.

Two of the most important attributes of our judiciary are its strong independence and steadfast adherence to the Constitution and the law. Unlike most other judiciaries, our courts are expressly mandated by our fundamental law to nullify *any* act of *any* branch or official of the government -- including that of the President or of Congress -- when the act is done with “grave abuse of discretion.”^[4] This specific mandate makes it the judiciary’s “duty” to strike down gravely abusive actions.

Our Constitution has vested this power and duty in the judiciary, in order to prevent any new authoritarian government from taking over our country. As a lesson learned from the Martial Law years, which began in 1972, the framers of our fundamental law believed that by increasing the powers and duties of the courts and making them “activists,” the wielders of executive and legislative powers could be effectively checked. In that way, abuse of discretion could be curtailed.

Well-Functioning Judiciary

Essential to a Sound Business Climate

You must all agree that a well-functioning judiciary is indispensable to the creation of a sound climate for doing business in the country. To a former business executive like me, that makes perfect sense, because investor confidence is necessarily tied up with a stable and predictable justice system.

Thus, I have noted a number of recurring questions and concerns from business,

both here and abroad. The same concerns were raised during my recent meetings with business leaders in New York, Washington DC and the United Kingdom.¹⁵¹ Today I shall present to you some of those questions for consideration.

***No Interference
in Business***

First, why is the Supreme Court unduly interfering in business matters?

Now that question presupposes (1) that the judiciary must refrain from deciding questions involving business and the economy, and (2) that any Decision on a matter concerning a commercial or business transaction constitutes undue interference from the courts.

Please note, however, that commercial or business transactions have long been sources of litigation. For more than a century, our courts have adjudged controversies surrounding the sale or the lease of properties, the construction of buildings and other civil works, the reasonability of interest rates, and the constitutionality of agreements relating to the country's natural resources.

Issues spawned by the information age have been recent subjects of judicial review. Some of those issues concern the patenting of inventions, the copyrighting of intellectual property, and the regulation of new methods of communication. Even problems brought about by the dawning bio-scientific age -- those involving genetically modified organisms, in vitro fertilization, and cloning of living organisms -- have already reached the courts in many countries.

If the judiciary were to be excluded from deciding those questions, who or what agency would then settle them, and by what laws and under what standards? Who would

protect the parties and the public from economic tyrannies, excesses and abuses? The proposal to exclude economic issues from judicial review would simply not solve problems. Instead, it would merely create new ones with no better answers.

As to the alleged interference by the courts in business matters, I have endeavored to give an explanation in many fora. I have also written extensively about the judiciary's role in business and the economy in my book *Leveling the Playing Field*, published in 2004, to point out that the Supreme Court has really been “a friend rather than a foe of legitimate business.” The judiciary exists to level the playing field for business under the rule of law. Thus, I have stressed that the same principle of “fairness” invoked in law applies to the way courts treat business contracts and economic transactions.

Our decisions annulling increases in the rates of electricity^[6] and nullifying certain public contracts^[7] have not been, as incorrectly perceived, anathema to private investments.

True, our fundamental law provides that “the State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments.”^[8] The courts, however, are constitutionally mandated to strike down contracts violating that very same Constitution or the laws. Those contracts enjoy neither protection nor sanctity. Any adventurous excursions into what is legally impermissible, therefore, cannot be tolerated.

May I add that Decisions nullifying commercial transactions are the exceptions, rather than the rule. Those upholding such transactions are definitely many, many more.

No Review of Delegated Acts

Second, does the Supreme Court review or pass upon the wisdom of any and all acts of the other branches of government?

The answer is no.

The Court does not take up issues that 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 either to the legislative or to the executive branch of government.^[9]

As a rule, the Supreme Court respects the actions of the other two departments, contrary to the claims of some critics. In case of doubt, it always upholds the constitutionality of legislative and executive acts and gives the benefit of the doubt to Congress and the President.^[10] Thus, in upholding the constitutionality of the Mining Act of 1995, the Supreme Court^[11] held that it merely “declares what the Constitution and the laws say, interprets only when necessary, and refrains from delving into matters of policy.”^[12]

The same laissez-faire policy, I stress, is generally observed by the Court in reviewing contracts, especially when both parties are private individuals (or nongovernmental entities), and the subject matter is a strictly commercial transaction. Under our laws, “parties are free to stipulate terms and conditions which they deem convenient, provided they are not contrary to law, morals, good customs, public order or public policy.”^[13]

Vigilance over Public Contracts

Third, what is the Court’s stand on public contracts?

The Court is extra vigilant in protecting public interest when one of the contracting parties is a government agency, or when the contract involves the expenditure of public funds. It is especially careful with litigations involving corruption and opaqueness in government transactions. In those cases, as I have said earlier, the Court almost always leans on its constitutional *duty* to strike down grave abuse of discretion. It cannot shirk

from its responsibility. I stress that this function is not just a power, but a duty.^[14] A power can be relinquished, but a duty cannot under any circumstance be evaded.^[15]

Pursuant to this duty, the Supreme Court has nullified laws^[16] passed by Congress and executive orders^[17] issued by the President. The Court has struck down gravely *abusive* acts and contracts^[18] entered into by high-ranking government officials. Again, may I stress that its power to do so does not mean that it is superior to the President and to Congress. When the Court nullifies executive or legislative actions, it merely sees to it that the Constitution and the laws override the desires and caprices of officials. Indeed, the rule of law -- not of individuals -- must prevail at all times.

The power of the Supreme Court to nullify contracts has been a source of concern for some investors. With all due respect, I say that they should have nothing to fear if they observe the following practical advice:^[19]

One, always abide by pertinent laws and regulations. You cannot invoke the protection of the law if you yourself break the law.

Two, secure the assistance of ethical, competent, and credible lawyers **before** -- not after -- entering into a contract. In law as in medicine, an ounce of prevention is worth a pound of cure.

Ask your friends for recommendations, based on their experience, of reputable lawyers to consult. Believe me, there is a difference between a lawyer whose practice of law is murky and another whose practice is aboveboard. Lawyers who have an ethical compass will be able to see more clearly and to help you steer clear of the legal pitfalls ahead.

Three, avoid transactions that require bribery. Keep in mind that the Philippines has an Anti-Money Laundering Act (RA 9160), with requirements on customer identification,

record-keeping, and reporting of covered and suspicious transactions.

While on this topic, may I quickly point out that the judiciary takes a more liberal view when a case involves agreements in which both parties are private individuals (or nongovernmental entities), and the subject matter is a strictly commercial transaction. Under our laws, “parties are free to stipulate terms and conditions which they deem convenient, provided they are not contrary to law, morals, good customs, public order or public policy.”^[20]

Foreign Mining Investments in the Philippines

For those attending the 6th Mining Conference, let me discuss how foreign companies and investors can participate in the mining industry in our country.

Consonant with Section 2 of Article XII of our Constitution, *large-scale* exploration, development and utilization of our minerals may be undertaken by means of mining contracts known as Financial and Technical Assistance Agreements (FTAAs). These FTAAs are entered into by the President of the Philippines with companies that are 100 percent foreign-owned.^[21]

Please note (1) that 100 percent foreign-owned companies (FOCs) are permitted only in the *large-scale* exploration, development and utilization of minerals, petroleum and other mineral oils; (2) that other natural resources -- like forests, fisheries and lands -- are not fit subjects of FTAAs with FOCs; (3) that FTAAs may be entered into by FOCs only with the President of the Philippines, not with private individuals; and (4) that our Constitution reserves *small-scale* mining in favor of Filipino citizens only.^[22]

Aside from FTAAAs, foreign participation is also permitted by our Constitution through Co-Production Agreements (CPAs), Joint Venture Agreements (JVAs) and Mineral Production Sharing Agreements (MPSA).^[23] Foreigners may own up to 40 percent of the equity or capital of these corporations or associations.

In a CPA, the government provides the mining operations with inputs other than the mineral resource itself.^[24] On the other hand, a JVA grants the contractor the exclusive right to conduct mining operations and to extract minerals found in the area.^[25] Both the government and the contractor have equity shares or investments in the JVA. In an MPSA, the government grants the contractor the exclusive right to conduct mining operations within the contract area and obtains shares in the gross output. In this type of agreement, the contractor provides the necessary financing, technology, management and manpower.

Unlike the FTAAAs, the CPA, JVA and MPSA may explore, develop and utilize *any* natural resource, without limitation and regardless of the size or magnitude of the project or operations (except “small-scale” mining, as earlier stated).

Foreigners Allowed to Hold Exploration Permits

Foreign contractors may also apply for and hold a mining exploration permit. The permit grants the holder the right to conduct an exploration of all minerals in specified areas.^[26] The permit, however, does not amount to an authorization to extract and carry off the mineral resources discovered.

If the grantee of an exploration permit meets the necessary qualifications and terms and conditions of an MPSA, a JVA, a CPA, or an FTAA covering the permit area, it may apply for and enter into any of these agreements. The contractor will be in a position to extract minerals only when a mineral agreement or an FTAA is granted.

The exploration permit serves a practical and legitimate purpose. The permit protects the interests and preserves the rights of the exploration-permit grantee (the would-be contractor) -- foreign or local -- during the period when it is spending heavily on exploration works, without yet being able to earn revenues to recover any of its investments and expenditures.

Constitution and Laws

Read into Contracts

When entering into contracts involving the exploration, development and utilization (EDU) of minerals, it must be borne in mind that the provisions of our Constitution and laws are deemed incorporated into the agreements. Thus, regardless of the provisions of the MPSA, JVA, CPA or FTAA, the EDU of minerals is always subject to the “full control and supervision of the State.”^{[1271](#)} This power of control and supervision is exercised by the President of the Philippines and the secretary of the Department of Environment and Natural Resources, who is the Chief Executive’s alter ego.

In an FTAA, the President is given the prerogative to specify the terms and conditions of the contract, especially “the sharing of the net mining revenues between the contractor and the State.” The judiciary will not inordinately interfere in the exercise of this presidential power of control. There may, however, be grave abuse of discretion in the execution of any governmental prerogative, as when the power of control is surrendered or diluted in an FTAA. In this instance, the courts will have to step in, after observing due process in a proper litigation. They may nullify specific provisions of the FTAA that are contrary to law or are manifestly and grossly disadvantageous to the nation.

Judicial Stake

in Development

Ladies and gentlemen, the judiciary realizes that it plays a vital role in business, in the

same way that it affects every aspect of national and community life. As the last bulwark of democracy, it stands as the ultimate recourse in redressing grievances not attended to; or, worse, those committed by other agencies of the government in any area of concern, including the economy.

This last point reminds me of the kind remarks made about our Supreme Court by Mr. Anthony Gerald Toft. He is the World Bank counsel for East Asia and the Pacific region and a keen observer of judicial systems in our part of the world. During his recent visit a few weeks ago, he said that in comparison with other judiciaries in the Asia-Pacific region, the Philippine “Supreme Court x x x not only occupies a pivotal constitutional position in the Philippine polity, but is also viewed by most Filipinos as a fundamentally important public institution and key element of the system of checks and balances x x x.”^[28]

Thus, investors have the assurance that when their legal or contractual rights are trampled upon by others -- including high officials of our government -- they can avail themselves of a final recourse to the Supreme Court, which will decide their cases independently and fairly. In this sense, the Court is a friend, not a foe, of investors. They can avail themselves of its protection whenever their contractual rights are violated by anyone else -- whether by their competitor, by their erstwhile business partner, or by even the highest executive or legislative official of our country.

Closing

As I have said before in my book *Leveling the Playing Field*, the Supreme Court, in upholding the rule of law, acts as “a friend rather than a foe of legitimate business.” This assurance to business I reaffirm in my judicial philosophy of Liberty and Prosperity. The concerns and questions of business, as you may note, have led me to focus on a judicial philosophy that courts must not only safeguard liberty, but also nurture prosperity.^[29]

I hope that, together with you and with your support, the Supreme Court would continue espousing both justice and jobs, freedom and food, integrity and investments,

ethics and economics, democracy and development; in short, **liberty and prosperity**.

Maraming salamat po.

* This is a composite of two speeches I delivered during the 6th Asia Mining Conference and Exhibition sponsored by the ASEAN Federation of Mining Associations (AFMA) on October 12, 2005, at the Makati Shangri-la Hotel and before the Wallace Business Forum on June 15, 2006, at the Makati Shangri-La Hotel. The introductory paragraphs of the two speeches have been omitted in this compendium.

[1] CONSTITUTION, Art. II, Sec. 1, states:

“The Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them.”

[2] The tripartite allocation of powers is provided in the Constitution as follows:

Article VI, Section I. “The legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum.”

Article VII, Section I. “The executive power shall be vested in the President of the Philippines.”

Article VIII, Section I. “The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law. x x x.”

[3] J. BERNAS, SJ, 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 602-603 (1996); I. CRUZ, PHILIPPINE POLITICAL LAW 71-84 (1995). See also *Angara v. Electoral Commission*, 63 Phil. 139, 156-158, July 15, 1936.

[4] CONSTITUTION, Art. VIII, Sec. 1:

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

[5] The meetings with business leaders formed part of the Chief Justice’s Knowledge-Sharing/Lecture Circuit on the Judicial Philosophy of Liberty and Prosperity. The meetings took place in the week of May 10-27, 2006.

[6] *Freedom from Debt Coalition v. Energy Regulatory Commission*, GR No. 161113, June 15, 2004, per Tinga, J; and *Republic v. Manila Electric Company*, GR No. 141314, November 15, 2002, and April 9, 2003, per Puno, J.

[7] *Chavez v. Public Estates Authority*, July 9, 2002, May 6, 2003 and November 11, 2003, per Carpio, J.; *Agan v. PIATCO*, GR No. 155001, May 5, 2003, and January 21, 2004, per Puno, J.

[8] CONSTITUTION, Art. II, Sec. 20.

[9] *Francisco v. House of Representatives*, November 10, 2003, per Morales, J.

[10] *Defensor-Santiago v. Guingona Jr.*, supra; *Arroyo v. De Venecia*, 343 Phil. 42, August 14, 1997; *Tañada v. Angara*, supra; and *Co v. Electoral Tribunal of the House of Representatives*, 199 SCRA 692, July 30, 1991.

[11] *La Bugal B’laan Tribal Association v. Ramos*, GR No. 127882, December 1, 2004.

[12] Id. at 191.

[13] CIVIL CODE, Art. 1306.

[14] In *Tañada v. Angara*, 338 Phil. 546, May 2, 1997, the Court stressed that “[w]here the action of the legislative branch is seriously alleged to have infringed the Constitution, it becomes not only the right but in fact the duty of the judiciary to settle the dispute. The duty (to adjudicate) remains, to assure x x x the supremacy of the Constitution x x x.”

[15] *Francisco v. Nagmamalasakit na Manananggol ng mga Manggagawang Pilipino, Inc.*, 415 SCRA 44, November 10, 2003.

[16] See *Macalintal v. Comelec*, 405 SCRA 614, July 10, 2003; *Manalo v. Sistoza*, 371 Phil. 165, August 11, 1999; *Tatad v. Secretary of Energy*, 346 Phil. 321, November 5, 1997; and *Export Processing Zone Authority v. Dulay*, 149 SCRA 305, April 29, 1987.

[17] See *Ople v. Torres*, 354 Phil. 948, July 23, 1998; and *Civil Liberties Union v. Executive Secretary*, 194 SCRA 317, February 22, 1991.

[18] See *Freedom from Debt Coalition v. Energy Regulation Commission*, GR No. 161113, June 15, 2004; *Information Technology Foundation v. Comelec*, 419 SCRA 141, January 13, 2004 and February 17, 2004; *Jaworski v. Pagcor*, 419 SCRA 317, January 14, 2004; *Agan v. PLATCO*, 402 SCRA 612, May 5, 2003 and January 21, 2004; *PCGG v. Desierto*, 397 SCRA 171, February 10, 2003; *Chavez v. Public Estates Authority*, 433 Phil. 506, July 9, 2002, May 6, 2003 and November 11, 2003; *Iglesia ni Cristo v. CA*, 328 Phil. 893, July 26, 1996; and *Adiong v. Comelec*, 207 SCRA 712, March 31, 1992.

[19] See “The Judiciary and the Economy,” a speech delivered by then Associate Justice Artemio V. Panganiban during the 6th Asia Mining Conference and exhibition on October 12, 2005, at the Makati Shangri-La Hotel, Makati City.

[20] CIVIL CODE, Art. 1306.

[21] CONSTITUTION, Art. XII, Sec. 2, par. (4), provides:

“The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.”

[22] CONSTITUTION, Art. XII, Sec. 2, par. (3).

[23] The pertinent proviso in the CONSTITUTION, Art. XII, Sec. 2, provides:

“x x x. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty *per centum* of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. x x x.”

[24] The Mining Law, Republic Act No. 7942 (1995), Sec. 3 (h), in relation to Sec. 26 (b).

[25] Republic Act No. 7942 (1995), Sec. 26 (c).

[26] Republic Act No. 7942 (1995), Sec. 3 (aq), reads as follows: “aq. ‘Qualified person’ means any citizen of the Philippines with capacity to contract, or a corporation, partnership, association, or cooperative organized or authorized for the purpose of engaging in mining, with technical and financial capability to undertake mineral resources development and duly registered in accordance with law at least sixty *per centum* (60%) of the capital of which is owned by citizens of the Philippines: *Provided, That a legally organized foreign-owned corporation shall be deemed a qualified person for purposes of granting an exploration permit, financial or technical assistance agreement or mineral processing permit.*” Underscoring supplied.

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CONSTITUTION, Art. XII, Sec. 2, par. (1).

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Remarks of Mr. Anthony Gerald Toft during his 8th Lecture in the *Chief Justice Hilario G. Davide Jr. Distinguished Lecture Series* on August 24, 2005, at the Jose P. Laurel Hall of Freedom, Lyceum of the Philippines, Manila.

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In a nutshell, this judicial philosophy advances the view that in cases involving liberty, the scales of justice should weigh heavily against the government; and in favor of the poor, the oppressed, the marginalized, the dispossessed, and the weak; but in conflicts primarily concerned with economic policies, courts must be deferential to the political branches of government; namely, the Presidency and Congress; hence, as a rule, courts will not pass upon the merits or wisdom of economic policies, for these matters have been left by the people to the President and Congress to evaluate and decide.