DECONSTRUCTION OF CONSTITUTIONAL LIMITATIONS AND THE TARIFF REGIME OF THE PHILIPPINES: THE STRANGE PERSISTENCE OF A MARTIAL LAW SYNDROME*

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I. PRELIMINARY CONSIDERATIONS

This article proposes to identify and address certain Philippine constitutional law problems that originated during the Martial Law Period (1972-1986) which former President Ferdinand E. Marcos imposed upon the Philippines. These problems which lie in the zone of contract between constitutional law and trade law relate to certain consequences brought about by the disregard of constitutional standards and norms relating to the tariff system of the country. The consequences of these problems in the real world, their impact upon important sectors of the national economy, and the prospects of economic development of the Republic of the Philippines are dealt with by a colleague elsewhere.[1] In this essay, we will observe and analyze constitutional mandates and policies which help shape the permissible strategies and courses of action available in trade law. It is widely known that the realities under which the application of trade law takes place have profound effects upon the application of constitutional principles and policies.

It is much less widely known that certain measures taken by Mr. Marcos in 1978 during Martial Law in the internal public order have had structural consequences which persist today. Those measures continue to be invoked and utilized, largely unnoticed, more than two decades after the end of martial law in the Philippines.

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[1] *See* Maria Lourdes Sereno, *Impact of the Unilateral Tariff Reduction Program of the Philippines on its Flexibility in Trade Negotiations and Industrial Policy* (2007) (unpublished manuscript).

II. THE DELEGATED TARIFF-SETTING POWER OF THE PRESIDENT – A LIMITED LEGISLATIVE POWER

We begin by noting that the power to establish, modify and terminate tariff rates – including import and export quotas, tonnage and wharfage dues, and other duties and charges – is essentially legislative in nature.

The 1987 Constitution of the Philippines, like the constitutions of many other sovereign states, distributes and allocates governmental powers and functions among the three major institutions of government: the Legislative Department (Article VI), the Executive Department (Article VII), and the Judicial Department (Article VIII).[2] Article VI, Section 1 of the Constitution begins by stating that "[t]he legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and a House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum." Certain types of legislation are required to originate not just from the Legislative Department but from component House of that Department. Thus, Article VI, Section 24 prescribes that "all appropriation, revenue, and tariff bills" as well as "bills authorizing increase of the public debt" shall "originate exclusively in the House of Representatives." However, the other House of Congress, i.e. the Senate – may propose or concur with amendments to such type of bills. The authority of the Executive Department in respect of tariff bills (as well as appropriation and revenue bills) enacted into law by the Legislative Department is generally limited to vetoing a particular item or items of the statute establishing or revising tariff rates.[3]

The item veto power of the President in respect of tariff bills is confined to the particular item objected to by the President. Items to which he does not object are specifically saved from the consequences of an exercise of the presidential item veto power.

The power to enact legislation fixing or revising tariff rates, import and export quotas, tonnage, and wharfage, and other dues and impositions is thus clearly lodged by the Constitution in the Legislative Department. Nevertheless, there is express constitutional authorization to Congress to delegate exercise of this power to the President, subject however, to certain

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[2] Unless otherwise indicated, references to the Constitution of the Philippines are to the Constitution adopted by the people of the Philippines in a plebiscite held on 2 February 1987 and hereafter referred to as the 1987 Constitution of the Philippines.

[3] CONST. art. VI, § 27(2).

limitations and restrictions. Article VI, Section 28(2) of the Constitution sets out his authorization in the following terms:

> (2) The Congress may, by law, authorize the President to fix within specified limits, the subject to such limitations and restrictions as it may impose, tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts within the framework of the national development program of the Government.

This constitutional authorization to Congress to delegate some of its own powers and functions to the President in respect of the setting and modification of tariff rates, quotas, and other duties and impositions, is not unlimited. To the contrary, examination of this authorization reveals that it is subject to certain important limitations and restrictions. Analysis of this authority may be carried out on at least two levels. The first level relates to textuality, that is to say, the language actually utilized by the Constitution in authorizing Congress to delegate exercise of the power to set or revise tariff rates. The second level is concerned with general limitations which flow from the essentially legislative nature of the power to fix and modify tariff rates.

We examine first the actual language employed by the Constitution. The relevant provision states that: "[t]he Congress may, by law, authorize the President to fix within specified limits, and subject to such limitations and restriction as it may impose, tariff rates, import and export quotas, tonnage and wharfage dues, other duties or imposts..." The provision stresses that it is Congress itself that must decide whether or not, or to what extent, it will delegate to the President the power to fix or revise tariff rates, import and export quotas, and so on. The constitution withholds that power from the President. It follows that, constitutionally, the President has no power or authority to order that Congress delegate the power to set or revise tariff rates to him. The power to decide here is vested in Congress itself.

The constitutional provision requires Congress – should it in fact decide to delegate to the President authority to establish or revise tariff rates – to set out "specified limits" and "such limitations and restrictions as it may impose" on the power delegated to the President and on that exercise of that power. It appears entirely clear therefore that Article VI, Section 28(2) of the Constitution does not contemplate that the delegation of the power to the President to fix and modify tariff rates is either plenary or permanent. The determination of the substantive contents of the "limits" of, and the "limitations and restrictions" on, the authority delegated to the President is a power and function that is not delegable to the President. To suppose that

such determination may be left to the President as delegate, is to reduce those "limitations and restrictions" to inutility and redundancy. The permission to Congress to delegate found in Article VI, Section 28(2) is not a permission or authority to Congress to abandon the power clearly lodged in it in the first instance. It is not, in other words, an authority to Congress to divest itself of a significant portion of its sovereign legislative power. It is, still further, not a license to the President to take over that power and keep it for himself or herself for an unlimited or unspecified period of time.

There is another category of limitation and restriction on the delegated authority which is referred to textually in Article VI, Section 28(2): the establishment of tariff rates, import and export quotas, and other duties and imposts must be done "within the framework of the national development program of the Government." The strong inference arising from this language is that the President, by wielding his delegated power to fix or revise tariff rates, may not drastically redo or revise the "framework of the national development program of the Government." This limitation is new for it is not found in the versions of Article VI, Section 28(2) that existed in the 1935 nor in the 1973 Constitution. Further, there appears no single statute or code setting out a comprehensive social and economic development program for the Republic of the Philippines.

In this situation, it seems of particular importance to stress that the Constitution itself states, albeit in language of high abstraction and generality, certain basic goals of national, social, and economic development programs of the Government. Article XII, Section 1 of the Constitution outlines these goals in the following terms:

> ARTICLE XII
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> NATIONAL ECONOMY AND PATRIMONY
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> Section 1. The goals of the national economy are a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged.
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> The State shall promote industrialization and full employment based on sound agricultural development and agrarian reform, through industries that make full and efficient use of human and natural resources, and which are competitive in both domestic and foreign markets. However, the State shall protect Filipino enterprises against unfair foreign competition and trade practices.

> In the pursuit of these goals, all sectors of the economy and all regions of the country shall be given optimum opportunity to develop. Private enterprises, including corporations, cooperatives, and similar collective organizations, shall be encouraged to broaden the base of their ownership. (emphasis supplied)

It is also important to note that the formulation and articulation of the "national development program of the Government" is specified in the Constitution as a power and function vested in the Legislative Department. Thus, Article XII, Section 9 of the Constitution states that:

> Section 9. The Congress may establish an independent economic and planning agency headed by the President, which shall, after consultations with the appropriate public agencies, various private sectors, and local government units, recommend to Congress and implement continuing integrated and coordinated programs and policies for national development.
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> Until the Congress provides otherwise, the National Economic and Development Authority shall function as the independent planning agency of the Government. (emphasis supplied)

The basic thrust of the textual limitations may thus be seen to be that the exercises of power by the President under a delegation of power by Congress under Article VI, Section 28(2) of the Constitution must be consistent with the pluralistic, multi-sectoral "framework" of the national development program or programs adopted by Congress. The extent to which this limitation may be substantial and not merely notional may be expected to depend on, among other things, the existence of a fairly detailed and comprehensive national development program prescribed in statutory form by Congress. Such a program has yet, however, to be formulated, considered and adopted by Congress.

We turn to a second level of analysis of the requirements of Article VI, Section 28(2) of the Constitution. The principal reference here is to the widely known principle of democratic government designated as the *separation of powers* and the institution of *checks and balances*.[4] We earlier referred to this principle in noting the distribution of the powers and functions of Government among three major departments of Government: the Legislative, the Executive, and the Judicial Departments. It is commonly

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[4] Government v. Springer, No. 26979, 50 Phil 259, Apr. 1, 1927; Angara v. Electoral Commission, No. 45081, 63 Phil. 139, Jul. 15, 1936; Lansang v. Garcia, G.R. No. 33964, 42 SCRA 448, Dec. 11, 1971; Scott v. Inciong, G.R. No. 38868, 68 SCRA 473, Dec. 29, 1975; In re Laureta, 148 SCRA 382, Mar. 12, 1987; Bengzon v. Senate Blue Ribbon Committee, G.R. No. 89914, 203 SCRA 767, Nov. 20, 1991; Neri v. Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, 549 SCRA 77, Mar. 25, 2008.

understood that the allocation of these powers among the three major departments of Government is indispensable if a government is to be or to remain a democratic and representative government.[5] Most simply put, a government which, instead of separating and distributing the functions and powers of government among several departments, consolidates and concentrates those powers and functions into one department, is the antitheses of a government of limited powers.

It is of course also frequently argued that the principle of separation of powers is not an absolute and immutable principle, like principles of mathematics. Because the separation principle is to be applied in the world of men and women by institutions staffed by human beings, that principle must contain in itself a certain amount of flexibility if it is to survive in a world marked by a high degree of change and development. For this reason, among others, the principle of separation of powers is widely held to be consistent with the competing principle that legislative power may be delegated by the original repository of that power, as the requirements of evolving time and circumstances may demand.[6] Delegation of legislative power, if it is to remain consistent with the principle of separation of powers, must, however, be circumscribed by limitations. Those limitations may be limitations *ratione materiae,* limitations *ratione temporis,* or limitations *ratione personae.* Unlimited or permanent delegation is simply and fundamentally repugnant to and inconsistent with the principle of separation of powers and the republican nature of the Philippine constitutional system.

All authorizations for delegation of power by the Legislative Department are subject to express or implied limitations found in the Constitution itself. Delegation of power to the President by the Congress "in times of war or other national emergency" is perhaps the best known of this species of constitutional permission.[7] Article XI, Section 23(2) of the Constitution sets forth this permission to Congress:

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[5] THE FEDERALIST NO. 47 (James Madison); Abueva v. Wood, No. 21327, 45 Phil 612, Jan. 14, 1924; Angara v. Electoral Commission, 63 Phil 139 (1936); Rodriguez v. Gella, No. 6266, 92 Phil 603, Feb. 2, 1953; Kilosbayan, Inc. v. Guingona, G.R. No. 113375, 232 SCRA 110, May 5, 1994; Macalintal v. Commission on Elections, G.R. No. 157013, 405 SCRA 614, Jul. 10, 2003; Lambino v. Commission on Elections, G.R. No. 174153, 505 SCRA 160, Oct. 25, 2006.

[6] People v. Rosenthal, No. 46076, 68 Phil 328, Jun. 12, 1939; Pangasinan Transportation Co., Inc. v. Public Service Commission, No. 47065, 70 Phil 221, Jun. 26, 1940; Calalang v. Williams, No. 47800, 70 Phil 726, Dec. 2, 1940; Echegaray v. Sec. of Justice, G.R. No. 132601, 297 SCRA 754, Oct. 12, 1998; Equi-Asia Placement, Inc. v. Dep't. of Foreign Affairs, G.R. No. 152214, 502 SCRA 295, Sep. 19, 2006; Gerochi v. Dep't of Energy, G.R. No. 159796, 527 SCRA 696, Jul. 17, 2007; Soriano v. Laguardia, G.R. No. 164785, Apr. 29, 2009.

[7] The constitutional limitations surrounding delegation of legislative power in times of war or other national emergency are dealt with in e.g.: Araneta v. Dingalasan, No. 2044, 84 Phil 368, Aug. 26, 1949; Rodriguez v. Gella, 92 Phil 603 (1953); Republic v. Court of Appeals, G.R. No. 103882, 299 SCRA 199, Nov. 25, 1998; David v. Arroyo, G.R. No. 171396, 489 SCRA 160, May 3, 2006.

> In times of war or other national emergency, the Congress, may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof. (underlining supplied)

The principal limitations upon this delegated "war power" of the President are both substantive and mandatory in character: firstly, delegation may take place only in the most pressing of circumstances, such as war or "other national emergency." Much like Article VI, Section 28(2), it is Congress that must decide whether an appropriate occasion for delegation of authority to the President has arisen. In such exigencies as war or "other national emergency," Congress itself must impose the limitations upon the authority it delegates to the President: (1) the delegation must be limited in point of time and in point of substantive content, and (2) the powers delegated must be "necessary and proper" for the carrying out of an identified "national policy." The limitations *ratione temporis* are independent of the will of the delegate – the President: the delegated powers terminate *ex proprio vigore* "upon the next adjournment of [Congress]," although they may expire sooner should Congress enact a new and separate resolution on the duration thereof.[8]

A second category of delegation by Congress of some power ordinarily vested in itself, expressly recognized in the Constitution, is said to be the delegation of power to the people at large to propose amendments to the Constitution. Amendments or revision of the Constitution may be proposed by Congress itself or by a constitutional convention called by Congress. A distinct mode of amendment is provided for in Article XVII, Section 2 which provides as follows:

> Sec. 2 Amendments to this Constitution may likewise be directly proposed by the people through initiative upon a petition of at least twelve *per centum* of the total number of registered voters, of which every legislative district must be represented by at least three *per centum* of the registered votes therein. No amendment under this section shall be authorized within five years following the ratification of this Constitution nor oftener than once every five years thereafter.
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> The Congress shall provide for the implementation of the exercise of this right. (underlining supplied)

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[8] The limited period of effectiveness of the emergency powers delegated to the President is a fundamental basis of the decisions in *Araneta* and *Rodriguez*.

There has been some debate as to whether the power to initiate a process of amendment of the Constitution constitutes a delegation of constituent power, or whether it is in fact a reservation to the people of power that properly belongs to them and not originally granted to the Congress. The more relevant point appears to be that the power of initiative itself is circumscribed by limitations expressly articulated in Article XVII, Section 2, not all of which are procedural. In *Lambino, et al. v. Commission on Elections,*[9] the Supreme Court discussed at great length the limitation imposed upon exercise by the electorate itself of this power to initiate a process of amendment (but not revision) of the Constitution. Although in a loose sense the constituent power to amend or revise the Constitution might be considered as "legislative" in nature, it is not a power that is granted to Congress in the allocation of governmental powers and then delegated by it to the people. But if there is here a delegation at all of power by Congress to the people at large, it is certainly a limited delegation.

Delegation by Congress of power and authority recognized as legislative in nature to local government units is expressly referred to in Article X, Section 5. Once more, however, the pertinent provision makes clear that the delegable power is a limited power and that Congress in effecting such delegation must specify such limitation. Article X, Section 5 provides as follows:

> Section 5. Each local government unit shall have the power to create its own sources of revenues and to levy duties, fees, and charges subject to such guidelines and limitations as the Congress may provide, consistent with the basic policy of local autonomy. Such taxes, fees and charges shall accrue exclusively to the local government. (emphasis supplied)

In *People v. Vera,*[10] the Supreme Court clarified that legislation creating municipalities "is not regarded as a transfer of general legislative power but rather as the grant of authority to prescribe local regulations, according to immemorial practice, subject, of course, to the interposition of the superior, in cases of necessity."[11]

Still another kind of permissible delegation by Congress of some portion of its sovereign legislative power is constituted by the delegation through an enabling statute of quasi-legislative power of the power of

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[9] G.R. No. 174153, 505 SCRA 160, Oct. 25, 2006.

[10] No. 45685, 65 Phil 56, Nov. 16, 1937.

[11] *Id.* at 113-14. *See also* Pepsi-Cola Bottling Co. v. Municipality of Tanauan, G.R. No. 31156, 69 SCRA 460, Feb. 27, 1976; Solicitor General v. Metropolitan Manila Authority, G.R. No. 102782, 204 SCRA 837 Dec. 11, 1991.

"subordinate legislation" to executive and administrative officials, for the crafting and promulgation of regulations to implement statutory objectives defined in the enabling statute itself. This particular species of permissible delegation is so well entrenched in constitutional law doctrine as not to have called for embodiment in an express provision of the Constitution.[12] In this category of permissible delegation, the mechanism of restraint and limitation is built into the doctrine itself. What is said to be delegable is only the power to "implement" or "fill in the details" and not the power to determine the content of, or to revise, the legislative policy objective itself. The statute to be implemented must be "complete in itself" so that the executive and legislative officials are said to be charged with the implementation merely of the statutory policy, and not with the determination of the shape and content of the statutory goal or goals to be enforced. Whether or not these broadly cast classical judicial standards impose effective restraints upon the officials charged with their implementation and enforcement may be a matter for spirited debate. What is crystal clear, however, is that while the scope and frequency of recourse to delegated subordinate legislation tend to grow as the needs for society multiply and become increasingly complex, the fundamental need for circumscribing the discretion delegated to executive and administrative officials continues to be recognized and insisted upon.

It is also helpful to note the history of Article VI, Section 28(2) of the Constitution. This provision was not an invention of the 1986 Constitutional Commission created by President Corazon C. Aquino after the martial law regime of former President Ferdinand E. Marcos had come to an end. Even a cursory look into this history reveals a remarkable degree of consistency in the formulation and expression of the authorization to Congress to delegate the power to set tariff duties to the President.

The 1935 Constitution of the Commonwealth of the Philippines – promulgated for the period when the Philippines remained a territory of the United States, although vested with a high degree of autonomy in respect of its internal affairs – provided in Article VI, Section 22(2) as follows:

> (2) The Congress may by law authorize the President, subject to such limitations and restrictions as it may impose, to fix, within specified limits, tariff rates, import or export quotas, and tonnage and wharfage dues. (underlining supplied)

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[12] *See e.g.*, Edu v. Ericta, G.R. No. 32096, 35 SCRA 481, Oct. 24, 1970; Bautista v. Juinio, G.R. No. 50908, 127 SCRA 329, Jan. 31, 1984; Tablarin v. Gutierrez, G.R. No. 78164, 152 SCRA 730, Jul. 31, 1987; Echegaray v. Sec. of Justice, G.R. No. 132601, 297 SCRA 754, Oct. 12, 1998; Gerochi v. Dep't of Energy, G.R. No. 159796, 527 SCRA 696, Jul. 17, 2007; Abakada Guro Party List. v. Purisima, G.R. No. 166715, 562 SCRA 251, Aug. 14, 2008.

In the 1973 Constitution which was promulgated during the Martial Law regime invented by former President Marcos, Article VIII, Section 17(2) set out the same authorization to the *Batasang Pambansa* (the national legislature) to delegate to the President its authority to exercise its tariff-setting power:

> (2) The *Batasang Pambansa* may by law authorize the President to fix within specified limits, and subject to such limitations and restrictions as it may impose, tariff rates, import or export quotas, tonnage and wharfage dues, and other duties or imposts. (underlining supplied)

The close similarity of the pertinent provision of the Martial Law Constitution of Mr. Marcos, both to the provision of the 1935 Constitution of the Commonwealth of the Philippines and to the subsequent 1987 Constitution of the Republic of the Philippines, is noteworthy. That similarity was not merely inadvertent. The 1987 post-martial law provision may be quoted once more:

> (2) The Congress may, by law, authorize the President to fix within specified limits, and subject to such limitations and restrictions as it may impose, tariff rates, import or export quotas, tonnage and wharfage dues, and other duties or imposts within the framework of the national development program of the Government. (underlining supplied)

The constitutional limitations, which emerge from both textual examination of Article VI, Section 28(2) of the 1987 Constitution and its counterpart provisions in the 1935 and 1973 Constitutions, and from consideration of the other instances of express permission in the same 1987 Constitution to the Legislative Department to delegate a portion of its legislative power to the President, may be outlined in the following terms. That power to delegate is:

> a.) A power that belongs to Congress itself: whether or not delegation is to take place and, if so, the extent thereof, is to be determined by Congress alone;
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> b.) The substantive scope of the power delegated is to be prescribed by Congress alone and not by the President who as delegate must act within the limits established by the delegating authority.
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> c.) The power delegated does not, by the fact of its delegation to the President cease to be a legislative power. As such, it belongs fundamentally and properly to the Legislative Department of Government. This constitutional permission to delegate tariff-fixing power to the President is not a power to impose structural, that is,

> permanent, changes in the distribution of the fundamental powers of Government among the major Departments;
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> d.) Like all other constitutional permissions to the Legislative Department to delegate a portion of its lawmaking power, the tariff-setting authority so delegated must be circumscribed by limitations: limitations *ratione materiae,* limitations *ratione temporis* or limitations *ratione personae.*

It is scarcely necessary to stress that the appropriate exercise of the power to fix tariff rates is of high importance for the charting of the economic course of the country and accordingly for the economic development of the Republic. It is not only the power to control access to the internal market of the Republic; it is also an essential bargaining mechanism in negotiations for securing access to the markets of other countries for the exports of the Republic. It is, moreover, effectively a power to determine which sectors are to be allowed to slide into the oblivion of bankruptcy, or to be encouraged to survive and improve their competitiveness and productivity.

III. CONGRESSIONAL EXERCISE OF THE CONSTITUTIONAL PERMISSION TO DELEGATE TARIFF SETTING POWERS TO THE PRESIDENT: REPUBLIC ACT NO. 1937, THE PRE-MARTIAL LAW TARIFF AND CUSTOMS CODE OF 1957

1. SECTION 401, TARIFF AND CUSTOMS CODE OF 1957

In the course of enacting the Tariff and Customs Code of 1957 (hereinafter 1957 Code), the Congress of the Philippines wielded for the first time its power to delegate tariff-fixing authority to the President. Two provisions of this 1957 Code are of particular importance in this connection. Section 401 of the 1957 Code – frequently called the "Flexible Tariff Clause" – represents the first and still the only exercise by Congress of its power to delegate its tariff-fixing authority to the President. The relevant portions of Section 401 read:

> Section 401. Flexible Clause. –
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> a. The President, upon investigation by the Commission and recommendation of the National Economic Council, is hereby empowered to reduce by not more than fifty per cent or to increase by not more than five times the rates of import duty expressly fixed by statute (including any necessary change in classification) when in his judgment such modification in the rates of import duty is necessary in the interest of national economy, general welfare and/or

> national defense.
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> b. Before any recommendation is submitted to the President by the Council pursuant to the provisions of this section, the Commission shall conduct an investigation in the course of which it shall hold public hearings wherein interested parties shall be afforded reasonable opportunity to be present, to produce evidence and to be heard. The Commission may also request the views and recommendations of any government office, agency or instrumentality, and such office, agency or instrumentality shall cooperate fully with the Commission.
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> c. The President shall have no authority to transfer articles from the duty-free list to the dutiable list nor from the dutiable list to the duty-free list of the tariff.
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> d. The power of the President to increase or decrease rates of import duty within the limits fixed in subsection "a" shall include the authority to modify the form of duty. In modifying the form of duty the corresponding *ad valorem* or specific equivalents of the duty with respect to imports from the principal competing foreign country for the most recent representative period shall be used as basis.
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> ….
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> g. Any order issued by the President pursuant to the provisions of this section shall take effect thirty days after its issuance.
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> h. The provision of this section shall not apply to any article the importation of which into the Philippines is or may be governed by Section 402 of this Code.
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> i. The authority herein granted to the President shall be exercised only when Congress is not in session. (underlining supplied)

The limitations on the exercise by the President of the power delegated to him are of two kinds: substantive limitations relating to the extent to which pre-existing tariff rates could lawfully be modified by the President thereunder, and procedural limitations to be observed by the President and officials under his supervision and control in the process of exercising the delegated tariff-fixing authority.

Substantive Limitations

The substantive limitations imposed by Section 401 are specific limitations on the extent to which pre-existing tariff rates could be revised by the President. Firstly, Section 401 set a floor below which no tariff rate

could be reduced or dropped: the tariff rate may not be reduced by more than 50% of the import duty rate fixed in the statute [the Most Favored Nation (hereinafter MFN) rates established in Section 104 of the 1957 Code]. Secondly, Section 401 established a ceiling on permissible increases of import duty tariffs at not more than five times (i.e. 500%) the relevant MFN import duty rate fixed under Section 104 of the 1957 Code.

A second substantive limitation established in Section 401 requires the President, in effecting revisions in the rates of import duties, to have determined that such revision "is necessary in the interest of national economy, general welfare and/or national defense." In itself, the limitative clause may not seem a robust limitation. This clause, however, must be taken in conjunction with the requirement, noted below, of certain findings having been made by the Tariff Commission and recommendations by the National Economic Council. Cast in somewhat different terms, findings by the Tariff Commission and the recommendations by the National Economic Council must sustain the actions of the President as "necessary," in terms of consequences for the "national economy, general welfare and/or national defense."

A third substantive limitation imposed on the President was that the President has no authority to transfer articles from the "duty-free list" to the "dutiable list", nor any authority to transfer items from the "dutiable list" to the "duty-free list", of the Tariff and Customs Code. Reading "duty-free list" as goods with 0% import tariff duty rate, this limitation may be seen to be consistent with the floor and ceiling rates set in Section 401.

Procedural Limitations

Other limitations, which might be called procedural in nature, were also established by Section 401 of the 1957 Code. Thus, prior to modification by the President of any tariff rate, inquiry or investigation by the Tariff Commission must have been carried out of the "necessity" of the proposed revised tariff rates.[13] Such investigation must have included a public hearing where parties, public or private, affected by the proposed tariff changes are given an effective opportunity to present their views and positions, to produce evidence for or against the proposed modified tariff rate, and to be heard. It is submitted that the right to be heard of affected parties in this connection was intended to be a meaningful right, a right to have their views considered and taken into account, a right that goes beyond

[13] *See* Southern Cross Cement Corp. v. Cement Manufacturers Ass'n of the Phil., G.R. No. 158540, 465 SCRA 532, Aug. 3, 2005.

the submission of "position papers" which are then duly stored and preserved in the desk drawers of bureaucrats.[14] A second requirement is a recommendation by the National Economic Council that sustains the "necessity" of the revised tariff rates, considered from comprehensive perspectives that we call national interest.

Procedural limitations include time limitations – limitations *ratione temporis* – on the exercise by the President of his delegated power to modify tariff rates. Thus, any order issued by the President under Section 401 of the 1957 Code may take effect, not immediately, but on the 30th day after issuance thereof. More importantly, the delegated power cannot be exercised while Congress is in session. That is to say, the delegated power may be exercised by the President only while Congress is not in session. The evident purpose of this limitation is to avoid the concurrent or parallel or countervailing exercise of legislative power by Congress on the one hand and the President on the other hand in respect of tariff rates. Further, this time limitation gives Congress the opportunity to take back its delegated authority, or to modify the limitative provisions in that delegation, and even to modify the tariff rates prescribed by the President in exercise of his delegated power. The limitation *ratione temporis* is far from a meaningless limitation.

2. SECTION 402, TARIFF AND CUSTOMS CODE OF 1957: THE TRADE AGREEMENT CLAUSE

The 1957 Code authorized the President to establish or modify tariff rates by two modes: first, by the issuance of executive orders under Section 401, dealt with above; and second, by entering into executive agreements with other countries. The use of executive agreements is authorized in Section 402 of the 1957 Code, the relevant terms of which are as follows:

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[14] In Ang Tibay v. Court of Industrial Relations, No. 46496, 69 Phil 635, Feb. 27, 1940, the cardinal primary rights which must be respected even in administrative proceedings are the following: (1) the right to a hearing, which includes the right of the party interested or affected to present his own case and submit evidence in support thereof; (2) the tribunal must consider the evidence presented; (3) the tribunal must have something to support its decision; (4) the evidence must be substantial; (5) the decision must be rendered on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected; (6) tribunal or body or any of its judges on its own independent consideration of the law and facts of the controversy and not simply accept the views of a subordinate in arriving at a decision; and (7) the board or body should, in all controversial question, render its decision in such a manner that the parties to the proceeding can know the various issues involved, and the reason for the decision rendered. *See also* Commissioner of Internal Revenue v. Court of Appeals, G.R. No. 119322, 257 SCRA 200, Jun. 4, 1996) Globe Telecom, Inc. v. Nat' Telecommunications Commission, G.R. No. 143964, 435 SCRA 110, Jul. 26, 2004; Solid Homes v. Laserna, G.R. No. 166051, 550 SCRA 613, Apr. 8, 2008.

Section 402. Promotion of Foreign Trade

a. For the purpose of expanding foreign markets for Philippine products as a means in assisting in the economic development of the country, in overcoming domestic unemployment, in increasing the purchasing power of the Philippine peso, and in establishing and maintaining better relationship between the Philippines and other countries, the President, upon investigation by the Commission and recommendation of the National Economic Council, is authorized from time to time:

(1) To enter into trade agreements with foreign governments or instrumentalities thereof; and

(2) To modify import duties (including any necessary change in classification) and other import restrictions, as are required or appropriate to carry out and promote foreign trade with other countries: Provided however, That in modifying import duties, no increase shall exceed by five times or the decrease be more than fifty percent of the rate of duty expressly filed by this Code.

b. The proclaimed duties and other import restrictions shall apply to articles the growth, produce or manufacture of all foreign countries, whether imported directly or indirectly: Provided, That the President may suspend the application of any concession to articles the growth, produce or manufacture of any country because of its discriminatory treatment of Philippine commerce or because of other acts (including the operations of international cartels) or policies which in his opinion tend to defeat the purposes set in this section; and the proclaimed duties and other import restrictions shall be in force and effect from and after such time as is specified in the proclamation. The President may at any time terminate any such proclamation in whole or in part.

c. Every trade agreement concluded pursuant to this section shall be subject to termination upon due notice to the foreign government concerned at the end of not more than five years from the date on which the agreement comes into force and, if not then terminated, shall be subject to termination thereafter upon not more than six months' notice.

d. The authority of the President to enter into trade agreements under this section shall terminate on the expiration of five years from the date of enactment of this Code: Provided, That trade agreements concluded pursuant to the provisions of this section and subsisting as of the date of the expiration of this authority shall remain in full force for the period fixed in the agreement in and may not be extended but may sooner be terminated in accordance with the preceding subsection.

> e. Nothing in this section shall be construed to give any authority to cancel or reduce in any manner any of the indebtedness of any foreign country to the Philippines or any claim of the Philippines against any foreign country.
>
> f. Before any trade agreement is conducted with any foreign government or instrumentality thereof, reasonable public notice of the intention to negotiate an agreement with such a government or instrumentality shall be given in order that any interested person may have an opportunity to present his views to the Commission which shall seek information and advice from the Department of Agriculture and Natural Resources, the Department of Commerce and Industry, the Central Bank of the Philippines and from such other sources as it may deem appropriate… (underscoring supplied)

Section 402 of the 1957 Code, known as the "Trade Agreement Clause," authorized the President to enter into trade agreements with foreign countries, subject, once more, to certain substantive, procedural and other related limitations.[15] The substantive limitations on the power to agree with foreign countries to modify tariff rates and other restrictions are substantially the same as those established upon the delegated power of the President to issue executive orders modifying tariff rates under Section 401. The MFN rates set out in Section 104 of the 1957 Code could be increased by a trade agreement to the maximum extent of 500%, while the maximum decrease of those same MFN rates was set at 50% of those rates. It will be noted that these are the same floor and the same ceiling on revised tariff rates established by Congress in Section 401.

The procedural limitations applicable in respect of executive orders under Section 401 of the 1957 Code were also applicable in respect of executive trade agreements entered into by the President pursuant to Section 402 of the 1957 Code. Thus, prior notice of intent to negotiate a trade agreement with a foreign state must be published by the President. A public hearing where private sector parties that may be affected by any proposed revised tariff rates are given the opportunity to present their views must be held by the Philippine Tariff Commission. The Tariff Commission itself is required to seek information and advice from executive departments whose respective sector may be expected to be affected: the Department of Agriculture and Natural Resources, the Department of Trade and Industry and Central Bank of the Philippines, and so on. A substantive legislative standard was also set out in Section 402 of the 1957 Code. The trade agreement must have for its purpose the expansion of foreign markets for

[15] Akbayan v. Aquino, G.R. No. 170516, 558 SCRA 468, Jul. 16, 2008.

Philippine products "as a means of assisting in the economic development of the country, in overcoming domestic unemployment, and increasing the purchasing power of the Philippine peso."

Limitations *ratione temporis* on the exercise of power by the President to enter into executive trade agreements were also established. The authority of the President under Section 402 had a terminal date: upon expiration of five (5) years from the date of enactment of the 1957 Code, no additional trade agreement could be negotiated and concluded. The presidential authority under Section 402 thus would have expired under its own terms in 1962.[16] Further, the trade agreements entered into by the President under Section 402 had limited life spans. Such a trade agreement was subject to termination by the Philippines at the end of not more than five years from the date on which it came into force. If such trade agreement was not so terminated, it could nevertheless be terminated thereafter by the Philippines upon not more than six months' notice to the other party thereto.

IV. DECONSTRUCTION DURING MARTIAL LAW OF SECTIONS 401 & 402 OF THE 1957 CODE – PRESIDENTIAL DECREE NO. 1464 AS AMENDED, THE TARIFF AND CUSTOMS CODE OF 1978

Martial Law was imposed in the Philippines in September 1972 by former President Marcos. Five years later, on December 21, 1977, Mr. Marcos began the process of deconstructing Sections 401 and 402 of the pre-martial law 1957 Code. In his first decree amending Section 402 of the 1957 Code, Mr. Marcos was relatively restrained. He issued Presidential Decree No. 1268 (hereinafter P.D. 1268) amending Section 402 but not Section 401 of the 1957 Code, and then only in respect of the tariff adjustments called for by the Agreement on ASEAN Preferential Trading Arrangement ratified by the Philippines a few months later.[17] Section 402, as first amended by Mr. Marcos, read as follows:

> Section 402. Promotion of Foreign Trade –
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> a. For the purpose of expanding foreign markets for Philippine products as a means of assistance in the economic development of the country, in overcoming domestic unemployment, in increasing the purchasing power of the Philippine peso, and in establishing and maintaining better relations between the Philippines and other

[16] *See however* the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA) (1992), and the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China (2002); both these agreements were entered into by the Philippines purportedly under the authority of Section 402 of the 1987 Code.

[17] Pres. Dec. No. 1268 (1977).

countries, the President is authorized from time to time:

> (1) To enter into trade agreements with foreign governments or instrumentalities thereof;
>
> (2) To modify import duties (including any necessary change in classification) and other import restrictions, as are required or appropriate to carry out and promote foreign trade with other countries: Provided, however, that in modifying import duties or fixing import quota the requirements prescribed in subsection "a" of Section 401 shall be observed: Provided, further, That any modification of import duties and any fixing of import quotas made pursuant to the agreement on ASEAN preferential trading arrangements ratified on August 1, 1977 shall not be subject to the limitations of the aforesaid subsection "A" of Section 401. (underscoring supplied)

It is important to observe that in issuing P.D. 1268, Mr. Marcos did not purport to exercise the power delegated to him by Section 402 of the 1957 Code. He did not purport to act as the delegate of the Congress contemplated in Article VIII, Section 17(2) of the 1973 Constitution (the martial law counterpart provision of Article VI, Section 28(2) of the 1987 Constitution). Mr. Marcos instead in effect acted as the delegating authority; he purported to exercise legislative power which he had unilaterally taken over from Congress when he declared martial law in the Philippines on 21 September 1972. In so acting, Mr. Marcos also delegated to himself as President the tariff-setting power that he was at the same time enlarging considerably.

The following year, Mr. Marcos undertook to carry out a far more extensive revision of both Sections 401 and 402 by issuing Presidential Decree No. 1464, the Tariff and Customs Code of 1978 (hereinafter 1978 Code). It is necessary to quote extensively from this 1978 Code, which as we shall see later, has persisted in effect up to today:

> Section 401. Flexible Cause
>
> a. In the interest of national economy, general welfare and/or national security, and subject to the limitations herein prescribed, the President, upon recommendation of the National Economic and Development Authority (hereinafter referred to as NEDA), is hereby empowered: (1) to increase, reduce or remove existing protective rates of import duty (including any necessary change in classification). The existing rates may be increased or decreased to any level, in one or several stages but in no case shall the increased rate of import duty be higher than a maximum of one hundred (100) per cent *ad valorem;*

> (2) to establish import quota or to ban imports of any commodity, as may be necessary; and (3) to impose an additional duty on all imports not exceeding ten (10%) per cent *ad valorem* whenever necessary; Provided, That upon periodic investigations by the Tariff Commission and recommendation of the NEDA, the President may cause a gradual reduction of protection levels granted in Section One Hundred Four of this Code, including those subsequently granted pursuant to this section.
>
> ….
>
> Section 402. Promotion of Foreign Trade
>
> a. For the purpose of expanding foreign markets for Philippine products as a means of assistance in the economic development of the country, in overcoming domestic unemployment, in increasing the purchasing power of the Philippine peso, and in establishing and maintaining better relations between the Philippines and other countries, the President, is authorized from time to time:
>
> (1) To enter into trade agreements with foreign governments or instrumentalities thereof;
>
> (2) To modify import duties (including any necessary change in classification) and other import restrictions, as are required or appropriate to carry out and promote foreign trade with other countries; Provided, however, That in modifying import duties or fixing import quota the requirements prescribed in subsections "a" of Section 401 shall be observed: Provided, further, That any modification of import duties and any fixing of import quotas made pursuant to this agreement on ASEAN Preferential Trading Arrangements ratified on August 1, 1977 shall not be subject to the limitations of aforesaid section "a" of Section 401. … (underlining supplied)

The most important change which Mr. Marcos wrought on the original delegation (in 1957) by the Congress of the Philippines of its tariff-fixing power to the President was the elimination of the quantitative limits – the floor and ceiling of the reduced and increased tariff rates – on the tariff-setting delegated power of the President. The floor limitation of decreases of tariff rates was removed: the original floor in Section 401 of 50% of the MFN rates set out in Section 104 of the 1957 Code was reduced to 0% of those rates. At the same time, the ceiling on increases of tariff rates was lowered from 500% to 100% *ad valorem.* The prohibition under the same Code of shifting by executive order of articles from the "duty-free" (i.e. 0% tariff) list to the "dutiable" list, and vice versa, was also dispensed with.

The limitation *ratione temporis* which prohibited exercise by the President of his delegated tariff power while Congress was in session was simultaneously done away with by Mr. Marcos.

Turning to the trade agreements clause (Section 402), the limitation *ratione materiae* imposed by the 1957 Code was eliminated: the floor of permissible decreases of tariff rates was set by Mr. Marcos at 0% of the MFN rates. At the same time the ceiling on increases of tariff rates was dropped from 500% to 100% *ad valorem.* This appeared to say that the import tariff rates could at most either remain where Section 104 had placed them, or be brought back to original levels if they had previously been reduced. Accordingly, no quantitative limits on decreases of tariff rates remained, whether the revision was effected by executive orders (Section 401) or by executive trade agreements (Section 402). The time limitations established in Section 402 were also eliminated. The five-year time period within which the President could carry out tariff-fixing or tariff modification via the executive trade agreement route was stricken off. So also was the five-year limitation on the life span of the executive agreements concluded with foreign countries under Section 402 wiped out.

All the limitations on tariff reductions textually embodied in Section 401 and 402 of the 1957 Code were thus torn down. The practical effect was to make possible the collapsing of the entire tariff regime of the country at any time the President might think that desirable. That former President Marcos retained the legislative standard originally prescribed by Congress for exercise by the President of this tariff-setting power might seem strange to non-Philippine observers. Mr. Marcos, a lawyer of marked astuteness, however, well understood that the interpretation of that legislative standard was subsumed in the legislative power he had unilaterally vested upon himself. He could therefore afford to maintain in place the rhetoric of the legislative standard since the content of that standard depended upon the will and intent of Mr. Marcos as the Administrator of Martial Law.

V. THE CONSTITUTIONAL STATUS OF SECTIONS 401 AND 402 OF THE (MARTIAL LAW) 1978 CODE

Some Considerations Relating to the 1973 Constitution

Sections 401 and 402 of the Tariff and Customs (Martial Law 1978) Code, we have stressed earlier, were shorn of all the limitations found in the pre-martial law (1957) Code. Those limitations and restrictions were, it may be recalled, expressly anticipated and authorized in both the Commonwealth

Constitution of 1935 [Article VI, Section 22(2)] and the 1973 Marcos Constitution [Article VIII, Section 17(2)]. It would follow, it is submitted, that former President Marcos plainly disregarded not only the pre-martial law 1935 Constitution but also the 1973 Constitution, the ceremonial adoption of which he went to great lengths to have the people of the Philippines go through.

It has been suggested by a few local observers that former President Marcos, by promulgating the 1978 Code, could be regarded as having acted pursuant to Amendments Nos. 5 and 6 of the 1973 Constitution. This suggestion, however, does not withstand scrutiny.

Amendment No. 5 of the 1973 Constitution, read as follows:

> 5. The incumbent President shall continue to exercise legislative powers until martial law shall have been lifted.

Amendment No. 6 of the 1973 Constitution provided:

> 6. Whenever in the judgment of the President (Prime Minister), there exists a grave emergency or threat or imminence thereof, or whenever the *interim* Batasang Pambansa or the regular National Assembly fails or is unable to act adequately on any matter for any reason that in his judgment requires immediate action, he may, in order to meet the exigency, issue the necessary decrees, orders, or letters of instructions, which shall form part of the law of the land.[18]

It is at once apparent in neither Amendment No. 5 nor in Amendment No. 6 is there any reference to the effectiveness of the constitutional limitations set out in the body of the 1973 Constitution [Article VIII, Section 17(2)] upon decrees and issuances of former President Marcos (like P.D. No. 1464, the 1978 Code). The relevant issue is of course whether or not Mr. Marcos was bound by the terms of the 1973 Constitution.

Amendment No. 6 does not purport to authorize former President Marcos to amend the 1973 Constitution. In any case, by issuing P.D. No. 1464, he did not claim to be amending Article VIII, Section 17(2) of his Martial Law Constitution. Once more, the critical issue is whether he was obligated to follow the terms of the 1973 Constitution.

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[18] These two provisions were proclaimed by former President Marcos to have been ratified by the Filipino people in a "referendum-plebiscite" held on 16-17 October 1976 and in full force and effect as of 27 October 1976. *See* Proc. No. 1595 (1976).

To contend that because Amendments Nos. 5 and 6 did not expressly subject acts of Mr. Marcos to the limitations of the 1973 Constitution, he was not bound by such limitations – is in substance to say that Mr. Marcos could lawfully amend the 1973 Constitution by himself, at his own will and pleasure. That in effect is to concede that the 1973 Constitution essentially was elaborate theatre, an Alice-in-Wonderland Constitution, compliance with which was optional on the part of Mr. Marcos legally as well as factually.

It might be supposed that Amendments Nos. 5 and 6 constituted autonomous direct grants of legislative power from the people at large to former President Marcos, not burdened with the express restrictions set out in the 1973 Constitution. So to suppose is to posit that during the effectivity of that Constitution, there were parallel streams of legislative power – one the martial law Legislature (the *Batasang Pambansa*) burdened with the limitative provisions of the 1973 Constitution; and the other, Mr. Marcos hypothetically exercising unlimited powers given to him directly by the people. It is here submitted that such a position is in effect to say once more that the 1973 Constitution was grand theatre, a vast stage play that actually imposed no limits, legal or otherwise, so far as the presidential issuances of Mr. Marcos were concerned.

Some Considerations Relating to the 1987 Constitution

Going beyond constitutional history, it may be assumed, *arguendo* merely, that Sections 401 and 402 of the Martial Law Tariff and Customs Code of 1978, were *de facto* in effect while martial law persisted in the Philippines. The critical question is this: do Sections 401 and 402 of the 1978 Code continue in effect today – 23 years after the 1973 Constitution and Amendments 5 and 6 thereof passed into history, and 22 years after the 1987 Constitution went into effect?

The submission here made is that Sections 401 and 402 of the 1978 Code are plainly inconsistent with Article VI, Section 28(2) of the 1987 Constitution. The (a) wiping away of the "specified limits" within which the President may fix or revise tariff rates by executive orders or executive trade agreements, and (b) the removal of the time limitations when the President's tariff-fixing power may not be exercised by executive order or executive agreement, are not reconcilable with the constitutional mandate that the delegation of tariff power to the President shall be subject to limitations and restrictions imposed by Congress. The Transitory Provisions of the 1987

Constitution addressed the problem posed by presidential issuances inconsistent with constitutional limitations. Article XVIII, Section 3 states:

> Sec. 3. All existing laws, decrees, executive orders, proclamations, letters of instruction, and other executive issuances not inconsistent with this constitution shall remain operative until amended, repealed, or revoked. (underlining supplied)

The Supreme Court in its case law has given robust effect to the above-quoted provision. Presidential decrees found to be in collision with applicable provisions of the 1987 Constitution, are held to be bereft of the legal effect,[19] at least after the cessation of martial law.

There is a second basis for the submission above made. Sections 401 and 402 as revised by former President Marcos are inconsistent with the fundamental principles of separation of powers and its companion principle of checks and balances. As noted earlier, Sections 401 and 402, in their martial law reinvented form, were bereft of all the substantive limitations and restrictions that the pre-martial law Congress of the Philippines, complying with Article VI, Section 22(2) of the 1935 Constitution, had built into them. Further, those limitations and restrictions had been carried over in the 1973 Marcos Constitution and into the present day 1987 Constitution – compelling if silent evidence of the fundamental nature of the principles involved. Nevertheless, and this is a matter for regret, the Supreme Court of the Philippines has to date had no opportunity to pass upon the constitutional issues here canvassed.

Post-1987 Practice of the Legislative and Executive Departments of the Government of the Philippines: Utilization of Martial Law Issuances Beyond the Termination of Martial Law: Deconstruction of the Tariff Regime of the Philippines

The treatment by the Post-Marcos Governments of the executive issuances of Mr. Marcos under Section 401 of 1978 Code has differed from the treatment of non-tariff decrees and other martial law issuances of Mr. Marcos. The latter, as already noted, were in principle tested under the applicable provisions of the 1987 Constitution and if consistent therewith, were left standing and in effect. If found to be inconsistent therewith, such

[19] For instance, Pres. Dec. No. 1177 (1977), § 44 ¶ 1 *in* Demetria v. Alba, G.R. No. 71977, 148 SCRA 208, Feb. 27, 1987; Pres. Dec. No. 76 (1972), § 1 ¶ 3, Pres. Dec. No. 464 (1974), § 92, Pres. Dec. No. 794 (1975), § 92, and Pres. Dec. No.1533 (1978), § 1 *in* Export Processing Zone Authority v. Dulay, G.R. No. 59603, 149 SCRA 305, Apr. 29, 1978; Pres. Decree Nos. 1669 and 1670 (1980) *in* Manotok v. National Housing Authority, G.R. No. 55166, 150 SCRA 89, May 21, 1987; Pres. Dec. No. 293 (1973) *in* Tuason v. Register of Deeds, G.R. No. 70484, 157 SCRA 613, Jan. 29, 1988, among others.

issuances were generally struck down as unconstitutional and devoid of prospective effect. In contrast, the tariff issuances of Mr. Marcos were generally left standing and effective unless prospectively modified by subsequent exercises of tariff-setting power.

More portentous, perhaps, was the continuation by each of the four Presidents elected to office after the withdrawal of Mr. Marcos from Philippine affairs, of recourse to tariff-setting by executive orders initiated by Mr. Marcos. Thus, former Presidents Corazon C. Aquino, Fidel V. Ramos, Joseph E. Estrada, as well as incumbent President Gloria M. Arroyo, all issued executive orders unilaterally setting or revising tariff rates for numerous products. In these executive orders, the former Presidents and the incumbent President consistently referred either to Section 401 or Section 402 of the 1978 Code.[20]

On January 28, 1992, the Philippines entered into the *Framework Agreement on Enhancing ASEAN Economic Cooperation* with Brunei, Indonesia, Malaysia, Singapore, and Thailand. Represented by then President Aquino, the Philippines undertook to establish and participate in the ASEAN Free Trade Area (AFTA) for the reduction of tariffs among ASEAN Member States within 15 years. Article 1(2) of the Framework Agreement required all ASEAN Member States to participate in intra-ASEAN economic arrangements, i.e. AFTA, but allowed two or more ASEAN Member States "to proceed first if the others were not ready to implement such economic arrangements." The Philippines was among the very first of the ASEAN Member States to proceed with the implementation of the AFTA. Executive Order No. 145, which was issued by former President Ramos pursuant to Section 402 of the 1978 Code, took effect on January 1, 1994 and

[20] President Corazon C. Aquino – *e.g.* (1) Exec. Order No. 364 (1989), which imposed alternative rates on certain articles; (2) Exec. Order No. 387 (1989), which suspended certain import duties during the period of national emergency; and (3) Exec. Order No. 438 (1990), which imposed an additional 5% *ad valorem* duty on all imported articles.

President Fidel V. Ramos – *e.g.* (1) Exec. Order No. 43 (1992), which reduced import duties of certain articles to a minimum level of 25%; (2) Exec. Order No. 145 (1993), which reduced certain tariff rates pursuant to the 1994 Philippine schedule of tariff reductions in the Accelerated and Normal Programs of the AFTA-CEPT Scheme; and (3) Exec. Order No. 461 (1997), which generally modified the nomenclature of and reduced tariff rates on certain imported articles.

President Joseph E. Estrada – *e.g.* (1) Exec. Order No.63 (1999), which modified the nomenclature and import duty rates on certain articles; (2) Exec. Order No. 71 (1999), which reduced certain tariff rates pursuant to the 1999-2003 Philippine schedule of tariff reduction under the new time frame of the accelerated AFTA-CEPT scheme; and (3) Exec. Order No. 234 (2000), which reduced certain tariff rates pursuant to the 2000-2003 Philippine schedule of tariff reduction of products transferred from the Temporary Exclusion List and the Sensitive List to the Inclusion List of the accelerated AFTA-CEPT scheme.

President Gloria Macapagal-Arroyo – *e.g.* (1) Exec. Order No. 84 (2002), which generally modified the nomenclature and MFN rates on various agricultural products; (2) Exec. Order No. 262 (2003), which modified the nomenclature and tariff rates on motor vehicles; and (3) Exec. Order No. 703 (2008), which reduced the tariff rates on 80% of the products in the Inclusion List to 0% under the AFTA-CEPT scheme.

implemented the Philippine commitment in AFTA and the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme and its obligation to reduce tariff rates on specified products at either an "accelerated" or "normal" pace.

Executive Order No. 145 identified products with tariff rates of 20% or below for accelerated rate reduction: rates were to be reduced to 5% and 0% by January 1, 2000. Products with (MFN/PTA) tariff rates of 20% or below identified for normal rate reduction were to be reduced to 5% and 0% over the period from January 1, 1996 to January 1, 2003; products whose normal tariff rates were above 20% were to be reduced by 5 percentage points every two years from January 1, 2004 to January 1, 2008.

A general policy of further tariff reductions was adopted and formalized in a series of presidential issuances starting with Executive Order No. 264, issued by then President Ramos on July 22, 1995. This Executive Order adopted a general two-tiered tariff structure of 3% for raw materials and 10% for finished goods to be fully implemented by January 1, 2003. A subsequent uniform rate of 5% *ad valorem* was to be imposed on the same articles staring January 1, 2004. Executive Order No. 439 (September 15, 1997), also issued by then President Ramos, likewise brought down the MFN rates of specific product lines to 0% and 10%.[21]

Since the departure of former President Marcos in 1986, Congress has enacted only one statute that amended the 1978 Code. Republic Act No.6647 (hereinafter R.A. 6647), which went into effect on 29 January 1988, amended Section 104 of the 1978 Code and prescribed new tariff rates for 31 categories of imported goods and expressly prohibited the President from increasing or decreasing those rates while Congress was in session. Congress apparently reserved for itself the power to revise the tariff rates for the 31 categories of goods specified in R.A. No. 6647, but did not address the matter of revision of the tariff rates of many hundreds of other classes of goods. Thus, to date Congress has not undertaken any effort systematically to re-examine Sections 401 and 402 of the Martial Law Code, in the light of the 1987 Constitution.

Neither has Congress enacted a new post-martial law Tariff and Custom Code. *De facto,* the task of revision of pre-existing tariff rates and the setting of rates for new categories of imported goods has effectively been

[21] Figures from the Tariff Commission show that the average nominal tariff dropped from 7.96% in 2000 to 6.95% in 2008. As of 2007, majority of tariff lines had an MFN rate ranging from 0% to 15%, while majority had a CEPT rate of 0% to 5%. The highest MFN rate was 65% for four tariff lines, while the highest CEPT rate was at 40% for one tariff line.

taken over by the President of the Philippines since the end of the martial law period of Philippine history. That task has in practice been lodged with the President since 1986 and remains there to date.

The changes effected by former President Marcos in respect to the tariff regime of the Philippines are structural in nature and have outlived for almost a quarter of a century the end of his martial law regime. The Congress has not retrieved for itself the tariff-setting power which it had delegated to the President 52 years ago (in 1957). What originally was a limited delegated power has effectively been converted into the plenary legislative power to set and revise tariff rates for any and all kinds of imported goods. The distribution of powers and functions among the three principal departments of government has thus effectively been altered in respect of the imposition and revision of tariff rates, subject only to the general injunction that the system remains within the "framework of the national development program of the Government."[22]

The structural relocation of the tariff-setting power from the Legislature to the President translates into a reduction of power on the part of the Legislature to set the course and direction of economic development of the nation. Yet, as has been earlier noted, the formulation and promulgation of national development programs of the nation is vested under the 1987 Constitution in the Legislature, not in the President. The officials that those in the private sector need to persuade as to the need for and the merits of any proposed change in the tariff structure and lists of import quotas have changed: those officials are no longer the members of the House of Representatives and the Senate. They are now instead the President and other officials of the Executive Department.

In operational terms, it may be said that the lobbying arena has been shifted from the committees and halls of Congress to the relevant offices of the Executive Department. There is no necessity to prove the existence or scope of a national emergency, nor the intervention of extraordinary circumstances before tariffs can be revised. Hearings at the Tariff Commission are still necessary, but those seem less demanding than hearings before Congressional or Senate committees.

These changes in operating procedures have probably made possible certain efficiencies and economies, if only because there are in the nature of things fewer participants in the decision-making processes in the Office of the President than in Congress. Issues of good governance of course remain,

[22] CONST. art. VI, § 28(2).

and longer-term perspectives require that the participants consider giving up such efficiencies and economies.

In the restructured, constitutionally flawed, process that persists, it may be more difficult to ensure that long term perspectives and more inclusive and broader interests are, as they should be, in fact taken into effective account rather than exclusive and narrower economic interests. The primacy of those perspectives and interests is at the center of the theory of the pluralistic and just, open and caring, society that the Constitution seeks to project for the people of the Philippines.

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