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[G.R. No. 124360, December 03, 1997]

FRANCISCO S. TATAD, PETITIONER, VS. THE SECRETARY OF THE DEPARTMENT OF ENERGY AND THE SECRETARY OF THE DEPARTMENT OF FINANCE, RESPONDENTS.

[G.R. No. 127867]

EDCEL C. LAGMAN, JOKER P. ARROYO, ENRIQUE GARCIA, WIGBERTO TAÑADA, FLAG HUMAN RIGHTS FOUNDATION, INC., FREEDOM FROM DEBT COALITION (FDC), SANLAKAS, PETITIONERS, VS. HON. RUBEN TORRES IN HIS CAPACITY AS THE EXECUTIVE SECRETARY, HON. FRANCISCO VIRAY, IN HIS CAPACITY AS THE SECRETARY OF ENERGY, CALTEX PHILIPPINES, INC., PETRON CORPORATION, AND PILIPINAS SHELL CORPORATION, RESPONDENTS.

EASTERN PETROLEUM CORP., SEAOIL PETROLEUM CORP., SUBIC BAY DISTRIBUTION, INC., TWA, INC., AND DUBPHIL GAS, MOVANTS-IN-INTERVENTION.

R E S O L U T I O N

PUNO, J.:

For resolution are: (1) the motion for reconsideration filed by the public respondents; and (2) the partial motions for reconsideration filed by petitioner Enrique T. Garcia and the intervenors.[1]

In their Motion for Reconsideration, the public respondents contend:

I

> "Executive Order No. 392 is not a misapplication of Republic Act No. 8180;

II

> Sections 5(b), 6 and 9(b) of Republic Act No. 8180 do not contravene Section 19, Article XII of the Constitution; and

III

> Sections 5(b), 6 and 9(b) of R.A. No. 8180 do not permeate the essence of the said law; hence their nullity will not vitiate the other parts thereof."

In their motion for Reconsideration, the intervenors argue:

"2.1.1 The total nullification of Republic Act No. 8180 restores the disproportionate advantage of the three big oil firms — Caltex, Shell and Petron — over the small oil firms;

2.1.2 The total nullification of Republic Act. No. 8180 "disarms" the new entrants and seriously cripples their capacity to compete and grow; and

2.1.3 Ultimately the total nullification of Republic Act No. 8180 removes substantial, albeit imperfect, barriers to monopolistic practices and unfair competition and trade practices harmful not only to movant-intervernors but also to the public in general."

In his Partial Motion for Reconsideration,[2] petitioner Garcia prays that only the provisions of R.A. No. 8180 on the 4% tariff differential, predatory pricing and minimum inventory be declared unconstitutional. He cites the "pernicious effects" of a total declaration of unconstitutionality of R.A. No. 8180. He avers that "it is very problematic xxx if Congress can fasttrack an entirely new law."

We find no merit in the motions for reconsideration and partial motion for reconsideration.

We shall first resolve public respondents' motion for reconsideration. They insist that there was no misapplication of Republic Act. No. 8180 when the Executive considered the depletion of the OPSF in advancing the date of full deregulation of the downstream oil industry. They urge that the consideration of this factor did not violate the rule that exercise of delegated power must be done strictly in accord with the standard provided in the law. They contend that the rule prohibits the Executive from subtracting but not from adding to the standard set by Congress. This hair splitting is a sterile attempt to make a distinction when there is no difference. The choice and crafting of the standard to guide the exercise of delegated power is part of the lawmaking process and lies within the exclusive jurisdiction of Congress. The standard cannot be altered in any way by the Executive for the Executive cannot modify the will of the Legislature. To be sure, public respondents do not cite any authority to support its strange thesis for there is none in our jurisprudence.

The public respondents next recycle their arguments that Sections 5(b), 6 and 9(b) of R.A. No. 8180 do not contravene Section 19, Article XII of the Constitution.[3] They reiterate that the 4% tariff differential would encourage the construction of new refineries which will benefit the country for they use Filipino labor and goods. We have rejected this submission for a reality check will reveal that this 4% tariff differential gives a decisive edge to the existing oil companies even as it constitutes a substantial barrier to the entry of prospective players. We do not agree with the public respondents that there is no empirical evidence to support this ruling. In the recent hearing of the Senate Committee on Energy chaired by Senator Freddie Webb, it was established that the 4% tariff differential on crude oil and refined petroleum importation gives a 20-centavo per liter advantage to three big oil companies over the new players. It was also found that said tariff differential serves as a protective shield for the big oil companies.[4] Nor do we approve public respondents' submission that the entry of new players after deregulation is proof that the 4% tariff differential is not a heavy disincentive. Acting as the mouthpiece

of the new players, public respondents even lament that "unfortunately, the opportunity to get the answer right from the 'horses' mouth' eluded this Honorable Court since none of the new players supposedly adversely affected by the assailed provisions came forward to voice their position."[5] They need not continue their lamentation. The new players represented by Eastern Petroleum, Seaoil Petroleum Corporation, Subic Bay Distribution, Inc., TWA Inc., and DubPhil Gas have intervened in the cases at bar and have spoken for themselves. In their motion for intervention, they made it crystal clear that it is not their intention "xxx to seek the reversal of the Court's nullification of the 4% differential in Section 5(b) nor of the inventory requirement of Section 6, nor of the prohibition of predatory pricing in Section 9(b)."[6] They stressed that they only protest the restoration of the 10% oil tariff differential under the Tariff Code.[7] The horse's mouth therefore authoritatively tells us that the new players themselves consider the 4% tariff differential in R.A. No. 8180 as oppressive and should be nullified.

To give their argument a new spin, public respondents try to justify the 4% tariff differential on the ground that there is a substantial difference between a refiner and an importer just as there is difference between raw material and finished product. Obviously, the effort is made to demonstrate that the unequal tariff does not violate the equal protection clause of the Constitution. The effort only proves that the public respondents are still looking at the issue of tariff differential from wrong end of the telescope. Our Decision did not hold that the 4% tariff differential infringed the equal protection clause of the Constitution even as this was contended by petitioner Tatad.[8] Rather, we held that said tariff differential substantially occluded the entry point of prospective players in the downstream oil industry. We further held that its inevitable result is to exclude fair and effective competition and to enhance the monopolists' ability to tamper with the mechanism of a free market. This consideration is basic in anti-trust suits and cannot be eroded by belaboring the inapplicable principle in taxation that different things can be taxed differently.

The public respondents tenaciously defend the validity of the minimum inventory requirement. They aver that the requirement will not prejudice new players "xxx during their first year of operation because they do not have yet annual sales from which the required minimum inventory may be determined. Compliance with such requirement on their second and succeeding years of operation will not be difficult because the putting up of storage facilities in proportion to the volume of their business becomes an ordinary and necessary business undertaking just as the case of importers of finished products in other industries."[9] The contention is an old one although it is purveyed with a new lipstick. The contention cannot convince for as well articulated by petitioner Garcia, "the prohibitive cost of the required minimum inventory will not be any less burdensome on the second, third, fourth, etc. years of operations. Unlike most products which can be imported and stored with facility, oil imports require ocean receiving, storage facilities. Ocean receiving terminals are already very expensive, and to require new players to put up more than they need is to compound and aggravate their costs, and consequently their great disadvantage vis-a-vis the Big 3."[10] Again, the argument on whether the minimum inventory requirement seriously hurts the new players is best settled by hearing the new players themselves. In their motion for intervention, they implicitly confirmed that the high cost of meeting the inventory requirement has an inhibiting effect in their operation and hence, they support the ruling of this Court striking it down as unconstitutional.

Public respondents still maintain that the provision on predatory pricing does not offend the Constitution. Again, their argument is not fresh though embellished with citations of cases in the United States sustaining the validity of sales-below-costs statutes.[11] A quick look at these American cases will show that they are inapplicable. R.A. No. 8180 has a different cast. As discussed, its provisions on tariff differential and minimum inventory erected high barriers to the entry of prospective players even as they raised their new rivals' costs, thus creating the clear danger that the deregulated market in the downstream oil industry will not operate under an atmosphere of free and fair competition. It is certain that lack of real competition will allow the present oil oligopolists to dictate prices,[12] and can entice them to engage in predatory pricing to eliminate rivals. The fact that R.A. No. 8180 prohibits predatory pricing will not dissolve this clear danger. In truth, its definition of predatory pricing is too loose to be real deterrent. Thus, one of the law's principal authors, Congressman Dante O. Tinga filed H.B. No. 10057 where he acknowledged in its explanatory note that "the definition of predatory pricing xxx needs to be tightened up particularly with respect to the definitive benchmark price and the specific anti-competitive intent. The definition in the bill at hand which was taken from the Areeda-Turner test in the United States on predatory pricing resolves the questions." Following the more effective Areeda-Turner test, Congressman Tinga has proposed to redefine predatory pricing, *viz.:* "Predatory pricing means selling or offering to sell any oil product at a price below the average variable cost for the purpose of destroying competition, eliminating a competitor or discouraging a competitor from entering the market."[13] In light of its loose characterization in R.A. 8180 and the law's anti-competitive provisions, we held that the provision on predatory pricing is constitutionally infirmed for it can be wielded more successfully by the oil oligopolists. Its cumulative effect is to add to the arsenal of power of the dominant oil companies. For as structured, it has no more than the strength of a spider web — it can catch the weak but cannot catch the strong; it can stop the small oil players but cannot stop the big oil players from engaging in predatory pricing.

Public respondents insist on their thesis that the cases at bar actually assail the wisdom of R.A. No. 8180 and that this Court should refrain from examining the wisdom of legislations. They contend that R.A. No. 8180 involves an economic policy which this Court cannot review for lack of power and competence. To start with, no school of scholars can claim any infallibility. Historians with undefiled learning have chronicled[14] over the years the disgrace of many economists and the fall of one economic dogma after another. Be that as it may, the Court is aware that the principle of separation of powers prohibits the judiciary from interferring with the policy setting function of the legislature.[15] For this reason we italicized in our Decision that the Court did not review the wisdom of R.A. No. 8180 but its compatibility with the Constitution; the Court did not annul the Economic policy of deregulation but vitiated its aspects which offended the constitutional mandate on fair competition. It is beyond debate that the power of Congress to enact laws does not include the right to pass unconstitutional laws. In fine, the Court did not usurp the power of Congress to enact laws but merely discharged its bounden duty to check the constitutionality of laws when challenged in appropriate cases. Our Decision annulling R.A. No. 8180 is justified by the principle of check and balance.

We hold that the power and obligation of this Court to pass upon the constitutionality of laws cannot be defeated by the fact that the challenged law

carries serious economic implications. This Court has struck down laws abridging the political and civil rights of our people even if it has to offend the other more powerful branches of government. There is no reason why the Court cannot strike down R.A. No. 8180 that violates the economic rights of our people even if it has to bridle the liberty of big business within reasonable bounds. In *Alalayan vs. National Power Corporation*[16] the Court, speaking thru Mr. Chief Justice Enrique M. Fernando, held:

> "2. Nor is petitioner anymore successful in his plea for the nullification of the challenged provision on the ground of his being deprived of the liberty to contract without due process of law.
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> It is to be admitted of course that property rights find shelter in specific constitutional provisions, one of which is the due process clause. It is equally certain that our fundamental law framed at a time of "surging unrest and dissatisfaction," when there was a fear expressed in many quarters that a constitutional democracy, in view of its commitment to the claims of property, would not be able to cope effectively with the problems of poverty and misery that unfortunately afflict so many of our people, is not susceptible to the indictment that the government therein established is impotent to take the necessary remedial measures. The framers saw to that. The welfare state concept is not alien to the philosophy of our Constitution. It is implicit in quite a few of its provisions. It suffices to mention two.
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> There is the clause on the promotion of social justice to ensure the well-being and economic security of all the people, as well as the pledge of protection to labor with the specific authority to regulate the relations between landowners and tenants and between labor and capital. This particularized reference to the rights of working men whether in industry and agriculture certainly cannot preclude attention to and concern for the rights of consumers, who are the objects of solicitude in the legislation now complained of. The police power as an attribute to promote the common weal would be diluted considerably of its reach and effectiveness if on the mere plea that the liberty to contract would be restricted, the statute complained of may be characterized as a denial of due process. The right to property cannot be pressed to such an unreasonable extreme.
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> It is understandable though why business enterprises, not unnaturally evincing lack of enthusiasm for police power legislation that affect them adversely and restrict their profits could predicate alleged violation of their rights on the due process clause, which as interpreted by them is a bar to regulatory measures. Invariably, the response from this Court, from the time the Constitution was enacted, has been far from sympathetic. Thus, during the Commonwealth, we sustained legislations providing for collective bargaining, security of tenure, minimum wages, compulsory arbitration, and tenancy regulation. Neither did the objections as to the validity of measures regulating the issuance of securities and public services prevail."

The Constitution gave this Court the authority to strike down *all* laws that violate the Constitution.[17] It did not exempt from the reach of this authority laws with