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THE CULT OF LEGALISM

By JORGE BOCOBO
President, University of the Philippines

The votaries of formalism worship the letter of the law with undiminished unction. They have raised their fetish on the pedestal of strict interpretation. Denying the right and the duty of the judge to declare new principles, or to adapt old rules to the changing needs of modern life, many lawyers in the Philippines put their absolute faith in legislative formulation as more than sufficient to unfold any policy of the State. Therefore, they say, the courts should never usurp legislative functions by transcending the words of the statutes.

Reasonableness

Referring to the present controversy, they maintain that social justice can be attained only by an adequate legislation to be passed by the National Assembly. But judging from universal experience, it may well be doubted whether any adequate set of laws can be promulgated that will truly relieve all or most of the unjust hardships which the poor have to undergo. However, granting the improbable—that such legislation can be drafted—there is no assurance that this tree thus planted will flower into the consummation so full-heartedly desired, unless the roots are nourished in the judicial field by that philosophic spirit and that reasonableness to which Bryce[1] ascribes the excellence of the Roman legal system, and by that process of enlargement which, according to Judge Baldwin, justifies the American courts to do violence to the words of the statute to carry out "the judge-discovered intent."[2]

What has just been said about any possible legislation on social justice may be said of any other statute. It is the purpose of this article to show that the courts do, as they should, enjoy the prerogative of vitalizing statutory law in order that

[1] Lectures on Jurisprudence, Vol. II, p. 637.
[2] The American Judiciary, p. 84.

the dead hand of legalism may not rule society from the grave of outworn formulas. The judge should always be, in the words of the great Blackstone, the "living oracle of the law."

Three lines of approach to our thesis will be followed: (1) What do Civil Codes provide? (2) What have the courts done? (3) What have writers on legal science said? Then, our own general observations will be offered.

Various Civil Codes

The Civil Codes of various countries have fully and unequivocally recognized the right and declared the duty of judges to interpret laws according to their spirit, and in furtherance of justice and natural equity.

Arts. 18 and 21 of the Louisiana Civil Code state:

> "Art. 18. *Reason and Spirit.* The universal and most effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the Legislature to enact it."
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> "Art. 21. *Equity in Absence of Law.* In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to *natural law and reason,* or received usages, where positive law is silent."

It should be noted that the State of Louisiana has had the same legal development as the Philippines: the blending of the Roman law and the English law.

The California Civil Code, which in part is of Spanish origin, provides in art. 4:

> "4. *Rules of construction.* The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be *liberally construed* with a view to effect its objects and to *promote justice.*"

The Civil Code of Chile, based on Roman law and greatly influenced by old Spanish legislation, declares in arts. 19 and 24 that the intention or *spirit* of the law may be sought in case of doubt, and that obscure or contradictory provisions should be understood according "to the *general spirit* of legislation and to *natural equity.*" To the same effect is the Civil Code of Colombia (Ley 153 de 1887).

The Argentine Civil Code, perhaps the most extensive Civil Code in the world, as it attempts to foresee the largest possible

number of situations, and contains 4085 articles, orders courts to decide questions in conformity with "the words or the *spirit* of the law."

The Austrian Civil Code (art. 7), provides that in case of doubt, "the fundamental, natural principles of the philosophy of law" shall be the bases of judgment.

The Spanish Civil Code

Coming now to the Spanish Civil Code, art. 6 reads:

> "The court that refuses to render judgment on the pretext of the silence, obscurity or insufficiency of the laws, shall be held liable.
>
> "When there is no law *exactly* applicable to the point at issue, the custom of the place shall be applied, and in default thereof, the *general principles of the law.*"

Manresa, the chief commentator of the Spanish Civil Code, says that this article confers on the judiciary "attributes of truly legislative character." According to this article, he adds, the courts should interpret, complete and supplement the law. He is also of the opinion that the application of natural law, though ample and indefinite, is nevertheless "in conformity with modern tendencies of extending the discretion of the courts."

It will be seen that the drafters of Civil Codes, including the Spanish, have confessed to the shortcomings of their own creations by granting to the courts the power to develop, evolve and expand legislation in order to make these written codes keep pace with the march of the times. This judicial duty is particularly emphasized by the Spanish Civil Code by making the judge liable if he refuses to render judgment on the pretext of the silence, obscurity or insufficiency of the laws. The framers of these Civil Codes know full well that as no man has yet charted the "high seas of thought," no legislator is able to encompass all human problems; so he invokes the aid of the courts. Those members of the Philippine bar who deny the judiciary such a faculty would do well to study this trend of legislative attitude toward the courts.

What Courts Have Done

Although the courts have usually disclaimed any right to legislate, they have, however, in fact made law. This is especially true in England, the United States, the Philippines and

other English-speaking countries. In continental Europe the same process has been going on, though not to such a great extent.

This judicial law-making has taken place in many types of situations, among which the following may be mentioned:

1. Any lawyer who has read the various commentators on the Spanish Codes, the Civil and the Penal for example, knows that there are innumerable articles upon whose interpretation the authors are divided. Inasmuch as only one or the other set of writers is right in ascertaining the legislative intent, when the courts settle the difference of opinion between the commentators for the first time, the chances are that about one-half of these judicial decisions are right, and the other half are wrong. As to the latter class of cases, the courts have actually though unconsciously adopted their own view of the law rather than the real intention of the legislator. Is it not true, then, that in these numerous debatable provisions, the courts have, as often as not, been engaged in law-making?

2. In every code, there is an incalculable number of gaps which the law-maker has left, intentionally or otherwise. For instance, the extensive works of such commentators as Manresa and Scaevola illustrate the tremendous number of cases not foreseen by the drafters of the Spanish Civil Code—these cases being much more numerous than those expressly provided for. It is the task of the courts to fill these gaps, because in such cases, the judge must decide according to custom, or "the general principles of law." (Art. 6, Spanish Civil Code).

Gordian Knots To Cut

3. There are numerous provsions of each and every code which conflict with one another. The courts must somehow reconcile or adjust these contradictions. This unifying process is essentially legislative, which has been going on in the courts for generations.

4. The drafting of codes and statutes is often very faulty. Thus, the Spanish Civil Code, according to Prof. Valverde,[3] lacks juridical technique, uses incorrect language, and many articles are obscure, so that "it is one of the most defective codes in the world." The courts have had to undertake the

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[3] Derecho Civil Español, Vol. I, p. 3.

hard task of expounding and clarifying the provisions of this code. In this process, law-making has been necessary and inevitable.

5. Progress brings about conditions not foreseen by the legislator. For example, the Spanish Civil Code does not provide for contracts by telephone. The courts must apply general principles of the law to such contracts.

6. When two systems of law meet in the same country, there are many Gordian knots to cut. This is the situation in the Philippines. Among our problems are these: (a) reconciliation and adjustment between the Spanish substantive law (Civil and Commercial Codes) and the American adjective law (Code of Civil Procedure); and (b) adaptation of the Civil and Commercial Codes to new special laws, like those on divorce, chattel mortgage, insurance, insolvency and corporations. These tasks can not be undertaken by courts without legislating.

7. Application of the definitions of felonies and misdemeanors has always been a function of the courts. A great body of principles unfolded by the judiciary has grown out of these definitions in Spain, in the Philippines and elsewhere. Any standard compilation of such principles is vastly more voluminous than the Penal Code itself.

8. The superstructure of every constitutional system, where the Constitution is written, is built by the courts upon the broad foundations laid down by the Constitution. This is true in the United States, Canada, Australia, and the Philippines. Every student of the American government knows that it is mainly due to the decisions of the United States Supreme Court that the Federal government has grown in power and authority, as against the rights of the various States.

Absurd, Unjust Result

9. The courts have openly and deliberately disregarded clear and precise words of the statute, in order to avoid an absurd and unjust result. The best known instance is the case of The Church of the Holy Trinity vs. U. S.[4] In that case, an Act of Congress prohibited the importation of aliens "to perform labor or *service of any kind*" in the United States. The question was whether an English rector and pastor could be

[4] 36 Law Ed. (U. S.), 232.

contracted to serve as such in New York City. The Supreme Court of the United States held the affirmative, citing decisions which declared that construction must avoid absurdity, and that general terms must not lead "to injustice, oppression, or an absurd consequence," because, "the reason of the law in such cases should prevail over its letter." The court reasoned out that Congress merely wanted to stay the influx of cheap unskilled labor, and that the American nation was religious. The court concluded:

> "The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the Legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that however broad the language of the statute may be, the act, although within the letter, is not within the intention of the Legislature, and therefore cannot be within the statute."

American Case Law Here

Enough has been said to show that courts have made and are making law. But in order to leave no doubt on this point, the reader is asked to bear in mind that since American occupation, lawyers and judges in the Philippines have attached great importance to American case law. Therefore, so far as the role of the judiciary is concerned, this practice has transferred our country from the side of Spain and other European countries where the courts do not speak with such authority, to the side of England, America and other English-speaking countries, where judge-made law has attained the fullest development. The vast significance of judge-made law is recognized by the Philippine Supreme Court in the case of In Re Shoop [5] decided in 1920, where our highest tribunal declared:

> "Anglo-American case law has entered practically every one of the leading subjects in the field of law, and in the large majority of such subjects has formed the sole basis for the guidance of this court *in developing the local jurisprudence.* The practical result is that the past twenty years have developed a Philippine Common Law or case law

[5] 41 Phil. 231, 245-7.

based almost exclusively, except where conflicting with local customs and institutions, upon Anglo-American Common Law. The Philippine Common Law *supplements and amplifies our statute law.*"

Although the writer does not quite subscribe to the conclusion of the court in that case—that Philippine jurisprudence has become Anglo-American—because Philippine private law is still essentially of Roman origin, however, that decision is cited to bring home the idea that lawyers who deny the power of courts to legislate in the Philippines are sadly mistaken. Incidentally, these very same lawyers in their briefs and oral arguments have for years been copiously citing American judge-made law.

Legal Science

Let us see now what legal science has to say on this subject.

The eminent French professor, Francois Geny, is one of the pioneers of the movement for the scientific and sociological interpretation of codes and other legislation. He says, among other things,[6] that "the judge should form his legal decision in view of the same reasons which the legislator would have if the latter proposed to regulate the question," and that the task of the judge is "free scientific investigation." One of the reasons he gives is that judicial interpretation of written law "cannot find a broad field for its own development except in the moral, social and economic life which constitutes the atmosphere of the juridical world." He rejects as being unreasonable "any provision which tries to confine the interpreter of the law in a purely legal horizon if at the same time it does not furnish a prompt method of widening that horizon in proportion to the manifest needs and the new social demands."

Laboratories of the Law

The eminent jurist, Mr. Justice Cardozo,[7] following this broad tendency of modern legal thinkers, has called the courts "the great laboratories of the law." The following words of his commend themselves to sober reflection: "I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its

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[6] Method of Interpretation and Sources of Private Positive Law.

[7] The Nature of the Judicial Process.

direction and its distance." He also observes that, "Everywhere there is growing emphasis on the analogy between the function of the judge and the function of the legislator."

Justice Cardozo also quotes the President of the highest French Court, M. Ballot-Beaupré, to the effect that the provisions of the Code Napoleon have been adapted to modern conditions by a judicial interpretation in "le sens évolutif," and that we do not inquire what the legislator willed a century ago, but what he would have willed if he had known what our present conditions would be.

In answer to the objection that this wide discretion of the court is fraught with danger, Justice Cardozo says that judges are to draw their inspiration from consecrated principles.

No Real Intention

Professor Gray of Harvard University expresses himself thus:[8] "The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present. If there are any lawyers among those who honor me with their attention, let them consider any dozen cases of the interpretation of statutes, as they have occurred consecutively in their reading or practice, and they will, I venture to say, find that in almost all of them it is probable, and that in most of them it is perfectly evident, that the makers of the statutes had no real intention, one way or another, on the point in question; that if they had, they would have made their meaning clear; and that when the judges are professing to declare what the Legislature meant, they are in truth, themselves legislating to fill up *casus omissi.*"

He quotes Mr. Justice Hughes as saying "the intent of the Legislature is sometimes little more than a useful legal fiction, save as it describes in a general way certain outstanding purposes which no one disputes, but which are frequently of little aid in dealing with the precise points presented in litigation."

[8] The Nature and Sources of the Law, p. 173.

Holland says:[9]

> "The State has in general two, and only two, articulate organs for law-making purposes—the Legislature and the Tribunals. The first organ makes new law, the second attests and confirms old law, though under cover of so doing it introduces many new principles."

Common Roots

The foregoing brief survey of codification, of judicial process, and of legal science should carry the persuasion that judges have a more dignified and more transcendent mission that being mere parrots or phonographs of the legislature. Codifiers and statute-makers have recognized the function of the judiciary to declare new principles. The courts themselves have in fact exercised this function for centuries. The science of law, as cultivated by profound jurists and legal thinkers, asserts that this task is the only method for the natural and orderly development of a sound legal system.

All this is as it should be. For statutes and judicial decisions alike come into being and grow out of the same common roots, the supreme good of society. It is a consecrated legal axiom that the reason of the law is the life of the law. That reason lies in the soil of the common welfare. Statutory law is thus but the expression of an inspiration for that common interest, as the latter is seen and voiced by the legislator. The judge must, therefore, find out for himself what this cherished public policy is, and that task is in vain if he does not try to meet the law-maker on this common ground: the demands of social well-being. Consequently, if the judge limits himself to the printed page of the statute, and does not go out into the open spaces of actuality and dig down deep into this common soil, he fails in his noble calling, and becomes subservient to formalism. In other words, he should adopt the same process of the legislator, which is an earnest search for the public good.

Divine Right of Kings

This is especially true in every democracy, where law-makers chosen by the electorate are solemnly committed to reflect the desires and strive for the best interests of the people. Hence, judges have a right to assume that the legislative body never intended the public good to be sacrificed to the technical-

[9] The Elements of Jurisprudence.

ities of statutes. *"Dura lex sed lex"* has no place in a democracy. This maxim is of a piece with the doctrine of the divine right of kings and with the obsolete idea that the Prince can do no wrong. To cling to these antiquated propositions is to place the modern legislator, chosen by the people, on the throne of the old absolute monarch.

But aside from this last consideration, applicable in all democracies, there is a peculiar reason in the Philippines for insisting on the principle of broad interpretation, based on the paramount social welfare, by our courts. We refer to the following provision of the Constitution of the Philippines, which appears under the heading, "Declaration of Principles":

> "The promotion of social justice to insure the well-being and economic security of all the people should be the concern of the State."

Is this mandate addressed only to the legislative department? No; it is meant for the three departments: legislative, executive, and judicial, because the latter two are no less the agencies of the State than the first. For of what use would it be for the National Assembly to pass laws calculated to enhance social justice if the executive officials should enforce them in such a way, and the courts should give them such an interpretation as to defeat social justice?

Chastened Body Politic

Certainly, this principle of social justice in our Constitution so generously conceived and so tersely phrased, was not included in the fundamental law as a mere popular gesture. It was meant to be a vital, articulate, compelling principle of public policy. It should be observed in the interpretation not only of future legislation, but also of all laws already existing on November 15, 1935. It was intended to change the spirit of our laws, present and future. Thus, all the laws which on the great historic event when the Commonwealth of the Philippines was born, were susceptible of two interpretations—strict or liberal, against or in favor of social justice,—now have to be construed broadly in order to promote and achieve social justice. This may seem novel to our friends, the advocates of legalism, but it is the only way to give life and significance to the above-quoted principle in the Constitution. If it was not designed to apply to these existing laws, then it would be necessary to wait for generations until all our codes and all our statutes shall

have been completely changed by removing every provision inimical to social justice, before the policy of social justice can become really effective. That would be an absurd conclusion. It is more reasonable to hold that this constitutional principle applies to all legislation in force on November 15, 1935, and all laws thereafter passed.

Our people are indeed fortunate that this guiding principle should be found in our Constitution. For it dispels all doubt as to the proper interpretaton of all our laws, many of which are at variance with the spirit of present-day society. For instance, the Spanish Civil Code, which is the basic law governing property, contractual and family relations in the Philippines, is at least one-hundred years behind, because when it was passed by the Spanish Cortes half a century ago, it was already, according to Sanchez Roman, backward by fifty years, especially as to property and contracts. But thanks to this supreme mandate of the Philippine Constitution, the Civil Code and all other codes and statutes are brought up to date in regard to their doubtful provisions or the countless gaps which the courts may find in them. Every judicial construction must therefore be for social justice, in spite of any technicality or silence in any statute. This all-pervading force which emanates from our Constitution is meant to chasten and regenerate the body politic.

Storm the Fortress!

In conclusion, it is the duty of the judiciary to unfold and develop the law by liberal interpretation. It is imperative that this far-reaching task of the judge should ever be upheld because no matter how well drawn up our statutory laws might be, lawyers usually demand that the letter of the law be adhered to, if it suits the interests of their clients, and the courts must choose which pathway to take—the formal or the substantial, the strict or the liberal. The noble purposes of the law have been lost in narrow and labyrinthical technicalities, whereas a broad and humane interpretation has opened the wide highways that lead to the common welfare. The experience of mankind shows that legalism has ever been the forbidding bulwark of the dominant caste, whether social or economic. A reflective contemplation of what the poet has called "the eternal landscape of the past" would make this sinister fact of history loom large in our minds, and impel us boldly to storm this fortress of special privilege.

THE AMERICAN BAR AND THE JUDICIARY

Dean Espiritu, Professor Florendo and Students:

It is a pleasure for me to again have the opportunity to address you. I like to keep in contact with the young men and ladies who will in the years to come be the members of my profession and, if at any time I can be of any service or assistance to them, I shall always be happy to render it.

When Professor Florendo invited me to speak here today he suggested that as I had just come from the Convention of the American Bar Association, which might be considered the heart of the American legal fraternity, I might speak on a subject of current interest to lawyers. Following that indication it is clear that I should speak on the subject which, above all things else, has interested the American Bar during the past year, or rather the current year—1937—and that is what is usually referred to as the "Supreme Court Controversy."

Before beginning my talk on that subject, however, I should like to tell you something about the American Bar Association. As its name indicates, it is an association of lawyers. It is almost sixty years old, having been organized on August 21, 1878. Its purposes and objects are set forth in its constitution as follows:

> "Its object shall be to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation and of judicial decision throughout the nation, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American Bar."

It has 30,000 members, composed of lawyers from every state and from every territory under the jurisdiction of the United States. We have 50 members here in the Philippines, including leading American and Filipino lawyers, Chief Justice Avanceña and other members of the Supreme Court. It is, therefore, looked upon as the representative organization of the American Bar. It was recently reorganized so as to make it more representative. The governing body of the Association is the House of Delegates composed of a delegate from each state, Hawaii and District Columbia and one member from the "Territorial Group" composed of Philippines, Alaska, Porto Rico and Canal Zone and certain other delegates, 171 in all. Dele-

gates are elected by ballots sent out to all members in the respective jurisdictions. I had the honor to be elected Delegate from the "Territorial Group" and was therefore particularly interested in attending the recent Convention held at Kansas City, the first since the creation of the House of Delegates. The Convention, of course, is open to all members. There were 4,000 in attendance at Kansas City. Filipino lawyers in good standing are eligible for membership in this Association and I suggest to you that, when you become members of the Bar, you consider the advisability of identifying yourself with this great organization.

Now let us come to the subject of the day.

On February 5th of this year the people of the United States, and especially the American Bar, were startled, I might say shocked, when President Roosevelt sent a special message to Congress recommending the passage of a certain bill, a draft of which he sent with the message.

This bill has been referred to in various ways, by its friends as a "Plan to Reform the Judiciary", and by its opponents as a "Bill to Pack the Supreme Court". In general parlance, it has been called briefly the "Court Bill."

Briefly speaking, the bill provided, among some other things, that, whenever a justice of the Supreme Court reached the age of 70 years and did not resign or retire, the President might appoint another member of the Court until the total number of the members of the Court reaches fifteen.

And immediately a great controversy, perhaps one of the greatest in American history, began.

The American Bar Association felt that this was a controversy in which it was peculiarly called upon to take part. Before taking action, however, the officials of the Association felt that they should be sure of their ground and know exactly how the individual members of the Association felt about this controversy. A poll was, therefore, taken of the members. A ballot was sent to each member of the Association and he was asked to vote as to whether he was in favor or opposed to the plan or proposed bill. The result of the poll showed that the members of the Association were opposed to the bill in a proportion of six to one. The officials of the Association then decided to go farther and take a poll of all the lawyers of the United States, or that is, of the lawyers who were not members of the Association. Ballots were, therefore, sent out to all these lawyers.

All did not vote, but 52,000 of them did and the result was that these lawyers, non-members of the Association, were opposed to the bill at the rate of four to one. The Association then decided that it should actively oppose the adoption of the bill by Congress and a committee was appointed to take charge of the fight. This committee established its headquarters in Washington. It appeared before the Committee of the Judiciary of the United States Senate, to which the bill had been referred, and presented a mass of evidence and argument against the same and did every legitimate thing in its power to oppose its adoption.

For a thorough understanding of this controversy it is now necessary to go back to the beginning of the Roosevelt Administration.

At the time of the national election in 1932, when Mr. Roosevelt was a candidate of the Democratic Party, the country was in the midst of a terrible economic depression, the worst in the history of the country. Millions of men, some ten or twelve millions, were out of employment. Millions of people were hungry, and while the farmers had abundant crops, the prices of their products were so low that it did not pay to harvest them. Banks all over the country were closing their doors. Business firms were everywhere becoming insolvent. In this campaign Roosevelt promised the people a "new deal." I do not think anyone knew exactly what this "new deal" was to be, but the people were naturally dissatisfied with the prevailing conditions and wanted a new deal, so Mr. Roosevelt was elected President of the United States by a large majority and took office on March 4, 1933.

He immediately began recommending to Congress the adoption of various laws, intended to bring about the greatly desired economic recovery. These laws were nearly all drafted in the White House, either by the President himself or by his advisers with whom he had surrounded himself and who were referred to as "brain trusters."

These laws were new and strange, something entirely different from anything ever put upon the books of the United States statutes. Time does not permit me to explain what these laws were. They are generally referred to as the "New Deal Legislation". It is probable that many members of Congress had some doubts and misgivings regarding this legislation, but, on the other hand, all felt that the President should have a

free hand to work out his plans for the economic recovery; and, therefore, practically all of these bills proposed by the President were enacted into laws by Congress and were actually put into force and effect.

Not long after these laws had been put into force and effect and people had begun to feel their consequences, questions began to arise regarding their constitutionality; and before very long, actions had been begun in different federal courts, questioning the constitutionality of practically all of this "New Deal Legislation".

Now, in order to understand questions of constitutionality of laws in the United States, it is necessary to again go back in history, not only to the beginning of the Roosevelt Administration, but to the very beginning of the United States Government itself.

As you know, the American colonies rebelled against England because of many long continued abuses suffered from a tyrannical king of England, King George III, and his representatives. These abuses are enumerated in the American Declaration of Independence and it is not necessary to mention them here. You must also take into consideration that the rebellion was by thirteen separate and distinct colonies which had banded together during the revolution for military purposes only. But after the revolution was won and independence obtained, it was obvious that these colonies, now called states, should form some kind of a union and national government and, in so doing, as a basis for their union and national government, a constitution was adopted. In framing this constitution, the founders had two purposes in mind. First, the prevention of tyranny like that which they had suffered under England, or, in other words, the protection of human rights; and secondly, the maintenance of certain rights and powers of the individual states forming the union. The idea being to grant to the central or national government only those powers which were necessary for a national government, all other governmental powers to remain in the states.

Therefore, to accomplish the first purpose, a government of checks and balances consisting of three departments, executive, legislative and judicial, and in which no one man should be all powerful, was created. For, as George Washington said at the time, "arbitrary, irresponsible power can never be trusted in human hands." And as a commentator has said, "that is the

verdict of all history." To accomplish the second purpose, certain specific legislative powers, and no more, were granted to the Congress in which is vested the legislative power of the national government. These powers are found specified in eighteen subsections of Section 8 of Article I of the Constitution. It is, therefore, self-evident that when Congress enacts a law which is not within its specified power, as set forth in the Constitution that law is *ultra vires* and unconstitutional.

Now let us come back to our controversy. The first of the "new deal" legislation to come before the Supreme Court on a question of constitutionality, was what is known as the NRA law, or, the National Recovery Administration law. By unanimous decision handed down by the Supreme Court on May 27, 1935, that law was declared unconstitutional. I remember this very well for just one week before, or on May 20, 1935, I had the honor to be admitted to the Bar of the United States Supreme Court. After all cases are argued the Court sits but once a week on Mondays. On the day I was admitted the historic old courtroom in the Capitol was crowded with Senators and other high dignitaries of the Government who were expecting the NRA decision to be handed down that day. It was not rendered that day, but the next Monday, which, by the way, was the last session of the Court in the old courtroom in the Capitol because the construction of the grand new building, which may properly be called the "Temple of Justice", located near the Capitol and built for the exclusive use of the Court had been finished and the next session of the Court was opened in this new building.

A great administration had been set up under that law, some twelve hundred clerks and employees having been employed in the central office in Washington alone and, as a result of the decision, this administration had to cease its activities, dissolve and close its doors. One after another, other pieces of "new deal" legislation came before the Supreme Court and fell under the Constitutional ax. I do not have the exact figures, but as I remember it, about twelve of these laws were questioned and eight or nine of them were declared unconstitutional by the Supreme Court.

Unfortunately, all of them were not declared unconstitutional by a unanimous decision, as in the case of the NRA, which was very clearly unconstitutional, but many of the decisions were by a five to four vote; and the Court came to be known as di-

vided between conservatives and liberals, five members known as the conservatives, always voting against the constitutionality of these laws, while the four liberals always considered them constitutional.

During the heat of the controversy, decisions were handed down by the Supreme Court on four more of the "new deal" laws, all of which were held to be constitutional by a vote of five to four and this was because Mr. Justice Roberts swung over from the conservatives to the liberals.

Chief Justice Hughes is credited with the remark "the Constitution is what the Court says it is." Paraphrasing this remark, critics of the Court have said "the Constitution is what five justices say it is, and four justices say it is not"; and still a later critic has said, "the Constitution is what Justice Roberts says it is", because he is the one member who sometimes has voted on one side and sometimes on the other.

The nullifying of so many of these laws by the Supreme Court naturally frustrated the plans of President Roosevelt to bring about the economic recovery of the country and, undoubtedly, he was much vexed. Nevertheless, he has never attacked the Court; and with the possible exception of one remark made that one of these decisions took us back to the "horse and buggy" days, he has never criticized the Court. In his message recommending the adoption of the Court Bill he did not attack it. There was a veiled insinuation that because of the age of the members of the Court, they were not able to keep up with their work. The average age of the members of the Court is, or was at that time, 72 years. This insinuation was amply refuted during the controversy by showing that the Court was up to date in its work. While, as I say, the President did not attack the Court, yet the American Bar felt, and I think that the American public felt, that the proposed Court Bill was a deliberate attempt to bring the Judiciary more or less under the control of the Chief Executive; believing, as we do, that the independence of the Judiciary is the safeguard of human liberty in a free country, the American Bar fought the proposed bill to the finish.

Now let us see what happened to the bill. It was referred, as I have said before, to the Judiciary Committee of the Senate. Lengthy hearings were held at which much evidence and many arguments were presented both for and against the bill.

Now it is necessary to take a look, for the moment, at the political situation. Here was a bill, sponsored and proposed by the President of the United States, who was not only the Chief Executive of the nation but also the recognized Leader of the party overwhelmingly in power in both Houses of Congress, a leader who had just been returned to power by a tremendous popular vote carrying 46 of the 48 states. Of the 96 Senators, all but 17 were of his party and of the Judiciary Committee all but three were of his party. The natural and ordinary thing for the Committee to do would have been to report the bill favorably.

Be it said to the everlasting honor of the Senators, members of the Judiciary Committee, that they arose above all influences and questions of partisanship and of leadership and acted for the good of their nation in accordance with the dictates of their consciences. I have here a facsimile copy of the summary of the majority report with the facsimile signatures of the Senators making it. It is a most remarkable, even astounding, report. Some have said that it will go down in history as a great historical document. I shall read it to you:

"SUMMARY

We recommend the rejection of this bill as a needless, futile, and utterly dangerous abandonment of constitutional principle.

It was presented to the Congress in a most intricate form and for reasons that obscured its real purpose.

It would not banish age from the bench nor abolish divided decisions.

It would not affect the power of any court to hold laws unconstitutional now withdraw from any judge the authority to issue injunctions.

It would not reduce the expense of litigation nor speed the decision of cases.

It is a proposal without precedent and without justification.

It would subjugate the courts to the will of Congress, and the President, and thereby destroy the independence of the judiciary, the only certain shield of individual rights.

It contains the germ of a system of centralized administration of law that would enable an executive so minded to send his judges into every judicial district in the land to sit in judgment on controversies between the Government and the citizen.

It points the way to the evasion of the Constitution and establishes the method whereby the people may be deprived of their right to pass upon all amendments of the fundamental law.

It stands now before the country, acknowledged by its proponents as a plan to force judicial interpretation of the Constitution, a proposal that violates every sacred tradition of American democracy.

Under the form of the Constitution it seeks to do that which is unconstitutional.

Its ultimate operation would be to make this Government one of men rather than one of law, and its practical operation would be to make the Constitution what the executive or legislative branches of the Government choose to say it is—an interpretation to be changed with each change of administration.

It is a measure which should be so emphatically rejected that its parallel will never be presented to the free representatives of the free people of America.

WILLIAM H. KING
FREDERICK VAN NUYS
PATRICK McCARRAN
CARL A. HATCH
EDWARD R. BURKE
TOM CONNALLY
JOSEPH C. O'MAHONEY
WILLIAM E. BORAH
WARREN R. AUSTIN
FREDERICK STEIWER"

That is the *official verdict.* It is not necessary for me to add anything. It must be considered a rebuke to the President.

Ordinarily an unfavorable committee report kills a bill, but not so in this case. Notwithstanding the unfavorable report, the President insisted that the bill pass. He summoned his leaders to the White House and told them in no uncertain terms that "the bill must pass". Senator Joseph Robinson of Arkansas, Democratic Floor Leader of the Senate, able parliamentarian leader and tactician, was put in charge of the fight to pass the bill in the Senate.

Robinson did everything in his power to swing the necessary votes and win the fight. He believed, but was not sure, that he could swing 51 votes in favor of the bill or 2 more than the necessary majority. When the time came he opened the debate, speaking eight hours in favor of the bill, standing his ground hour after hour, answering questions of opposing Senators. He left the Senate Chamber greatly fatigued. Two days later he was found dead in his room with a copy of the Congressional Record in his hands.

With this tragic loss of the leader, the fight was surely lost, if it had not been lost before. A bloc of eight of the younger Senators, whom Robinson had hoped to hold in line, notified the leaders that they could not support the bill. This left the supporters only about 43 votes and 49 were required to pass the bill. They knew the fight was lost and so advised the President. The bill was recommitted to the Committee with instructions to prepare a new bill regarding certain reforms in the lower federal courts only, regarding which there was no question. This was done and the new bill was promptly passed by both Houses of Congress and signed by the President who remarked at the time that it was "a step in the right direction".

Thus ended the great controversy. It was comparatively short. It began in February and ended in July, but it aroused the nation.

At least it was believed to be ended, but in his Constitution Day speech made just prior to the Bar Convention, the President indicated an intention of renewing the fight and, for that reason, the Committee of the Bar Association, which had charge of the opposition on the part of the Association, was kept active; but there has been no further indication upon the part of the President to reopen the question.

The American courts have always been held in the highest respect by American citizen. They are considered the safeguard and protector of their rights. When an American citizen feels aggrieved, he says "I will go to court". And he says it with perfect confidence that in court he will receive exact justice and his full rights. So it is that the courts have always been held apart from the rest of the Government system, enjoying the confidence, respect and, we might say, even veneration of the people. And at the very top of our system of courts, the apex of the Judiciary, stands the Supreme Court, enjoying the confidence, respect and veneration almost sacred of the citizenry. And so far as the Bar is concerned, President Stinchfield of the Bar Association, properly expressed our thoughts when he said: "Of all the things we most love, admire and respect, the Supreme Court stands first in our estimation."

So it is no wonder that when the integrity of the Supreme Court was attacked, the nation was aroused and the attempt failed.

I hope that as the years go on the citizens of the Philippines will have cause to have the same confidence and respect for

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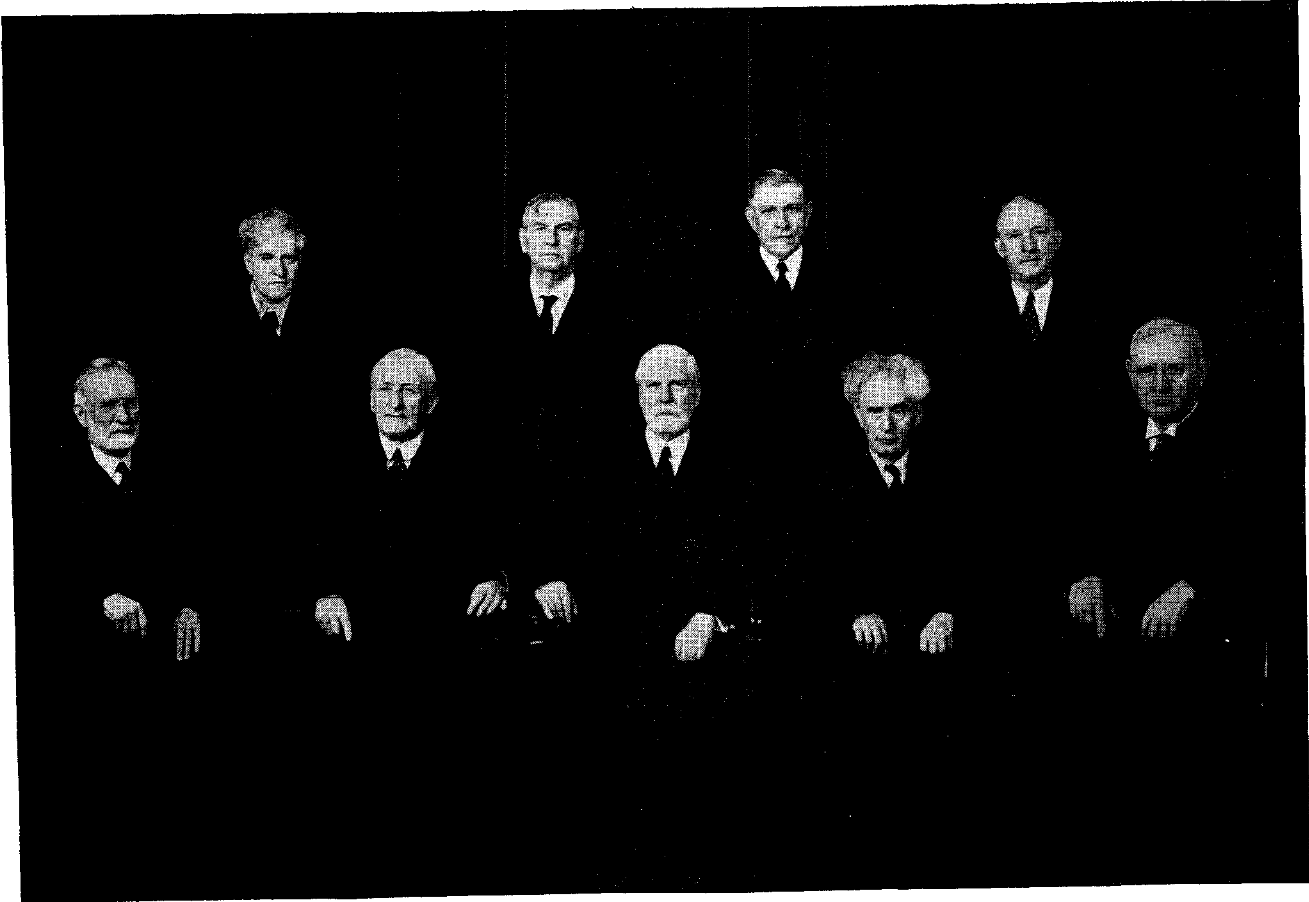

The first group photograph to be made of the United States Supreme Court since the appointment of Associate Justice Hugo L. Black. It was made in the studios of Harris and Ewing, left to right: (Front row) Associate Justices George Sutherland, James Clark McReynolds, Chief Justice Charles Evans Hughes, Associate Justices Louis Dembitz Brandeis and Pierce Butler. Back row, left to right: Associate Justices Benjamin N. Cardozo, Harlan Fiske Stone, Owen J. Roberts and Hugo L. Black.

their courts and that they will be ever ready to come to their defense if their integrity is attacked.

By this I do not mean to say that a court or a judge should never be criticized. Honest criticism is usually a good thing. Sometimes when I lose a case, I myself say, "that fool judge has no sense", or something similar; and many other lawyers give vent to similar expressions. But that is nothing. We are just blowing off a little steam.

The courts have a sacred trust. It is their duty to safeguard and protect human liberties, something much more precious than gold or property. And so long as they are faithful to that trust, so long as they protect the rights of the citizens, it is the duty of all good citizens to protect and defend the courts.