Judge-Made Law

By ALBERTO V. CRUZ

Definition and Introduction

Judge-made law is a phrase used to indicate judicial decisions which construe away the meaning of statutes, or find meanings in them which the legislature never intended (1 Bouvier's Law Dictionary, Vol. 1, p. 1716). It carries on its face the notion of judicial usurpation.

The necessity of what is called judge-made law and the possibility of its existence arise from the power of the courts, which admittedly exists, to determine what the law is, if unwritten, or what it means, if written. Of course, in adopting the above definition for our purpose, we are not unaware of the fundamental rule of construction that in the application of statutes courts should make it their main concern to give force and effect to the intention of the legislature. But even where legislative action has been taken, the intention of the legislature is frequently not clear. In such cases, courts are called upon to ascertain this intention, and more often than not fail to "hit the nail on the head."

It seems to be the paradox of the legal profession that upon any given question the solution to which is at issue, jurists as well as commentators are bent to differ. When any such question is brought up for judicial decision, the court in defining its stand naturally aligns itself with either one or the other set of these commentators. Inasmuch as only one or the other of these opposing views can be right, the probabilities are that some of these judicial pronouncements are right and the rest are wrong. In the latter cases, the courts have done either one of two things, i.e., construed away the meaning of the statute or found in it a meaning never intended, and probably not even thought of, by the legislature.

Similarly, there may exist in the statute contradictions which may be reconciled only after a judicial choice is made. Granting, however, that contradictions have been done away with in drafting the statute, still the probability that the legislature has left gaps therein either knowingly or otherwise cannot be overlooked. In both cases, the courts are pressed upon to see to it that these contradictions and gaps are properly reconciled and filled, otherwise the judicial machinery cannot be expected to travel smoothly over an impoverished legal avenue.

We shall carry further our exposition. Let us assume that an 'ideal' law can be attained, i.e., a piece of legislation where the maker's intention is clearly manifested thereby leaving no room for construction; contradictions nicely and subtly reconciled and gaps properly filled. Yet it cannot be gainsaid that future cases, unforeseen at the time when such an 'ideal' legislation was passed, are bound to exist. It is undeniable that the work of man cannot keep pace with the march of time. We change with the change of times as necessarily as we move with the motion of the earth. Progress brings about new conditions and changes which equally demand solution. Inasmuch as he who is

vested with the responsibility of deciding the case cannot refuse to do so on the mere pretext of the silence, obscurity, or insufficiency of the laws, and is, therefore, bound to proceed with the disposition of the case (see Art. 6, Spanish Civil Code; Art. 1, Swiss Civil Code, and Art. 21, Civil Code of Lousiana), he must for this purpose "draw his inspiration from consecrated principles—he is not to yield to spasmodic sentiment, to vague and unregulated benovolence but must exercise a discretion informed by tradition, methodized analogy, disciplined by system, and subordinated to the 'primordial necessity of order in the social life.'" (Cardozo, The Nature of Judicial Process, p. 141.)

The foregoing situations are only few of the many instances which give rise to the birth of judge-made laws. In any of these instances, the resulting creation is clothed with the same authority and receives the same sanction as any statute born of legislative enactment.

The weight of juristic opinion, we believe, recognizes the right of the courts to legislate. The United States Supreme Court, speaking through Justice Holmes timidly admits that "judges do and must legislate, but they can do so only interstitially. They are confined from molar to molecular motions." (Southern Pacific v. Jensen, 244 U. S. 205.) Justice Cardozo agrees with this general thesis and elaborates it when he said: "No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of interstices cannot be staked out for him upon a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art." (The Nature of Judicial Process, p. 114.) In a much bolder language, John C. Gray said: "All the law is judge-made law. The shape in which a statute is imposed upon the commonwealth as a guide of conduct is that statute as interpreted by the courts. The courts put life into the dead words of the statute." (Gray, Nature & Sources of the Law, Sec. 276.)

Schools of Thought

In the preparation of this work, we have come across a number of equally reasonable views on the subject, three of which we believe merit consideration if our discussion were to be complete, if at all.

A group of no less eminent jurists than Coke, Hale and Blackstone maintain that the judges do not "make" the law in any proper sense (see 21 Ky. Law. Journ., 157 Judicial Lawmaking and Stare Decisis by F. R. Aumann). This is the orthodox point of view of an older day. To this group of commentators, law "consists of rules springing from the social standard of justice." It is a "department of sociology," "one of the great facts of society itself." The necessary result of this view is that there is properly no such thing as judge-made law. By considering law as something which is created by and exists in society, it cannot be made by the judge; he is merely an expert appointed to "search for" the law, and to affix to it, when "discovered", his official stamp (see 5 Harvard Law Review, Judicial Legislation by Erza F. Thayer). This theory considers reported decisions as mere evidences of customs and of

the law derived therefrom and not the law itself.

Another set of commentators, led by John Austin and Bentham, assert, on the other hand, that judges, in Anglo-American countries at least, do make laws. We shall call them the Liberals. Law, according to Austin, most distinguished of the so-called "Analytical Jurists", is a general command issued by the sovereign power in any state to political inferiors, and enforced by a sanction. This definition brings to our mind the idea of written law, the express command of the sovereign, although customary rules, such as the common law, are likewise brought within the definition by the maxim that "what the sovereign permits he commands." Of course, this analysis of the law naturally refers to the species and not to the genus, i.e., the municipal law in which the element of force and definite sanction are ever present and most important. In a word, it confines itself to law in the narrower sense. It does not include the rules which the general body of civilized states observe in their mutual dealings. It is to this classification of law that judge-made law belongs. The judge is regarded as the sovereign's agent with a delegated power of oblique legislation.

Still another set of observers, of which Jethro Brown and others were the champions, claims that law is never made by anyone else. We shall call them the Radicals. Like the first group of commentators hereinabove referred to, they look upon law as a "principle of order existing in society," (see 21 Ky. Law Journ., op. cit.) but not a creation thereof. This qualification makes it different from the orthodox or conservative school. It refuses to recognize the right of the legislature to make laws in the strict sense. Its function, according to this school of thought, is merely secondary and auxiliary to that of the judge (who likewise does not make the law) in the sense that it only assists society in getting rid of its old customs and forming new ones. This seemingly extreme view proceeds on the assumption that statutes, unless courts have found their meanings, or customs, until adopted by the courts, are not laws.

It is to be observed, in all of these views, that the participation of the judge in determining what the law is, is conceded. Between the orthodox theory and the liberal theory the conflict arises out of a different approach both in the nature and definition of the law. The former considers law as already existing in society; naturally, the courts cannot create that which is already existing. It recognizes, however, the function of the judge to "search for" this existing principle in society. If, therefore, we can meet half-way the definition of law according to this school, we may succeed in reconciling these two theories. In saying that law is something existing in and created by society, we have no doubt that the orthodox school has in view not only written municipal statute, but also all rules of conduct observed by mankind irrespective of the scope and extent of their applicability. Examples of the latter class of rules would be the Law of the Nations, international law and comity, and the like. In this class of rules, this work is not concerned. The phrase "judge-made law", to our way of thinking, is limited to that class of municipal

laws enforced by municipal tribunals to maintain internal or municipal order and discipline. With that class of laws sought to be included by the orthodox school in which the element of force and definite sanction is absent, judge-made law, as used in this study, is not concerned. This phase of the meaning of law excepted, the orthodox school, we might venture to say, will have no objection to the definition of law given by the Austinian school, which is the corner-stone of the liberal theory.

Let us analyze the third view—that law is not made by anyone else. To say that statutes, unless courts have found their meanings, or customs, until adopted by courts, are not laws, would be to admit, in the last analysis, the proposition that judges make laws. As a matter of fact, under this theory, only the judicial arm is impliedly given the power to make laws to the exclusion of the legislative branch. If statutes, passed by the legislature, or customs existing in society, do not become laws unless acted upon in one way or the other by the courts, what would be a greater law-making power than that given the courts under this proposition? This is not the object of this work. It is objectionable, not to say ridiculous. While we subscribe to the idea that judges do make laws, yet we find it impossible to agree that they excel the legislators in this respect.

The correct view would seem to be the golden mean between the two doctrines, which is to be found in the theory that the power to declare the law carries with it the power to make the law when none exists. "Everywhere," says Justice Cardozo, "there is a growing emphasis on the analogy between the function of the judge and the function of the legislature."

Courts and the Constitution

Let us consider now the office of the judge in the different fields of the law.

In both civil and common-law countries, the constitution of the state, written or unwritten, is looked upon as the supreme expression of sovereignty. It is the fundamental law of the land. It lays down the general structure of the governmental system of the state. The three great branches of the government derive their authority from its broad provisions and are guided by its letter and spirit. It is the measure of the legality of any given act performed by those officials in whose hands the reins of the government have been entrusted. It is indeed the "voice of the people."

And yet the interpretation of the provisions of the constitution is not beyond the province of the judiciary. Just as the constitution is the "voice of the people," so is the court of the land the "voice of the constitution." This exclusive function of the court has given it ample latitude within the range of which it may conveniently legislate. The constitution is the garment the nation wears and must grow with its growth. It cannot be drafted for one and all time. The difficulty confronting the framers of the constitution to adopt one to meet all contingencies, present and future, cannot be obviated. In the very nature of things, it has to exist. The constitution consists of general rules which, though of permanent operation, vary in significance from generation to generation and, therefore, it can only exist as a living

organism by recasting it in the mold of new conditions. In the application of the constitution, the courts must decide what they understand its meaning to be. Accordingly, the growth and temperament of a written constitution is largely in the hands of the courts of the land. It is in this fashion that the constitution adjusts itself to a changing environment. The agency making the change is the judicial office. The process involved in making the adjustment is creative in character; and the result is any living interpretation that attains the end desired. To quote from Dr. Taylor, speaking of American constitutional law: "Without the adjusting, defining and expanding power of judge-made law, it would have been impossible to adapt our complicated and rigid system of written constitutions to the new and varied conditions that have so rapidly arisen out of an unparalleled national development."

Much of the opposition raised against judge-made law finds support upon the constitutional theory of separation of powers. This rule is now recognized as a necessary element of every civilized government. In tune with this time-honored principle, courts of last resort have uniformly held that by the organic law of the state, all powers are vested in the legislative, executive and judicial branches of the government, each branch supreme within its own jurisdiction, whose respective duties are to make the law, to execute the law and to construe the law.

For the purpose of our work, we shall limit ourselves to the legislative and judicial arms of the government. Executive proclamations, rules and regulations are seldom subject of judicial litigations and of the few that have been, little interest and importance, if any, were given. The cases giving rise to judge-made laws involve either constitutional or statutory provisions.

Two simple expressions, each of only two words, define and delimit the respective provinces of the legislature and judicial arms: *jus dare*, to make the law, the sanction for the lawgiver or legislature, and *jus dicere*, to declare what the law is, to interpret its meaning, the basis of judicial authority or right. These respective spheres of action are as far apart as the poles, as characteristically different as day and night and as unalterable as the seasons. To permit the legislature to exercise the judicial function by interpreting and enforcing its own enactments, or, on the other hand, to broaden the judicial power to enable it to make the law, and so to encroach upon, if not to oust, would prove a mischievous experiment. Therefore, not to cross this indivisible barrier and wander in the fields of law-making should seem to be the very essence of judicial duty: the legislative power should owe nothing to the judicial arm nor be subject to it in any manner (Robert E. Ireton, Judicial Control of Legislation, 70 U.S.L.R. 496).

The theory of complete separation of governmental powers is, however, in reality purely superficial. It is unavoidable that, in the distribution of powers, there should be found at times some uncertainty as to the line of demarcation between the legislative and judicial powers as well as between each of them and the executive. To quote from an eminent jurist speaking of the separation of powers: "The great ordinances of the constitution do

not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other." (Mr. Justice Holmes, dissenting opinion in the case of Springer v. P. I., U. S. 189, 72 L. ed. 845, 852.) Terry, in his Anglo-American Law 11, strikes a similar note: "Although it is considered necessary in all free states to keep the legislative, executive and judicial powers for the most part separate, and all our American constitutions provide for this, yet it cannot be completely done. The judges, it is well known, actually make a great deal of law, and this judicial legislation cannot be avoided, and indeed much of the best work that we get in this line is done by them."

The "New Deal" Cases and the United States Supreme Court

The foregoing discussion of the law-making power of the judge in relation to the constitution would seem abstract without a concrete example to further elucidate our point. American and English decisions typical of judge-made laws in connection with cases involving constitutional questions are not wanting, but for the sake of brevity and novelty we have thought it more interesting to cite a series of recent cases which time has not as yet effaced from the memories of man and which has probably elicited more comments from legal, economic and political circles than any other set of cases. We have in mind the "NRA" cases arising out of "new deal" legislations inaugurated by President Franklin Delano Roosevelt in his desire to put the American nation back on its feet.

On May 27, 1935, the National Recovery Administration law, under which a great Administration was set up in an effort to rehabilitate a depressed economic system, was unanimously declared unconstitutional by the United States Supreme Court. Subsequent decisions on other "new deal" legislations were handed down by that august body, several of which upheld the constitutionality thereof, the rest otherwise, but always by a close vote of five to four. The "nine old men" of the United States Supreme Court were divided into the conservative and the liberal groups. Five justices composed the conservative group and always voted against the constitutionality of the "new deal" legislations, guided by the watchwords "back to the constitution", while four justices made up the liberal group who always voted for the constitutionality of such legislations, having as their shining shibbaleth "forward with the constitution." Eventually, however, the order of the day took a turn. Mr. Justice Roberts, openly a conservative, switched over to the liberals, thereby reversing the former ratio of five conservatives to four liberals to that of four conservatives to five liberals. What, therefore, was formerly the majority opinion became the minority opinion and vice versa. Accordingly, what the constitution should be took the same course.

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." 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 (L. W. Lockwood, The American Bar and the Judiciary, Phil. Law Journ., Vol. XVII, p. 269, Dec. 1937).

The "new deal" legislations were passed during the same period, i.e., at a time when the United States was undergoing one of its worst economic crisis beginning in 1932. They were enacted by the same legislature under the same Administration, undoubtedly with the same purpose and intention, and in accordance with the same policy. But it is interesting to note that when brought before the same Tribunal they did not suffer the same fate. This is not because conditions have changed; not because one appears to be better drafted than the other; not because one clearly falls within constitutional limitations while the other transcends them; but rather to a large degree the "nine old men" before whom they were brought found it necessary to legislate by a process of elimination, in accordance with their individual mental disposition at each particular time.

Substantive and Adjective Laws

Let us now enter the fields of substantive and adjective laws. Generally speaking, the statutory laws of a state fall under any of these two divisions. The substantive law imposes duties upon, or invests rights in, the inhabitants of the state. The adjective law prescribes rules of procedure or administration for the discharge of such duties or enforcement of such rights as are provided for by the substantive law. The degree of freedom of the judge to indulge in law-making in these two fields of the law differs.

In the field of substantive law, considerations of policy limit the law-making power of the court, so much so that when a decision of the court might lead to the impairment of vested rights or otherwise cause disturbance in the social order, it becomes its duty to examine very carefully its own acts before it undertakes to lay down a rule distinct from another or others on the same point previously enunciated and adhered to in subsequent cases. This is the more true when prior decisions involve title to land, establish rules of trade, property or contract, support public institutions, or fall under any other of these categories (Hauser v. York Water Co. 278 Pa. 1000; Foster v. Roberts, 142 Tenn. 350, 219 S. W. 729; Harvey v. Missouri Athletic Club, 261 Mo. 576, 170 S. W. 904).

So also do criminal statutes demand strict, if not literal, construction to prevent judicial changes which might operate to prejudice materially the rights of the accused. It would, indeed, be shocking to the conscience for courts to freely indulge in law-making in the field of criminal law, unless in so doing they will resolve doubts in favor of the accused. For to allow a court to impose a penalty upon, or declare criminal, an act which the state declared might be done with impunity would create insecurity and foment suspicion in the social relations of men—a condition which is inconsistent with the avowed aim of every government of promoting peace and order within its jurisdiction. It is for this reason that democratic penal codes have similarly embodied provisions prohibiting the punishment

of an act not otherwise expressly penalized by the state.

As may be gleaned from the preceding pages of this work, we subscribe to the proposition that the courts should be allowed a wider latitude to exercise its sound judicial discretion in defining from time to time the essence and extent of the provisions of the constitution. Of course, we are aware of the fact that the constitution demands as much stability as criminal statutes, although it may well be urged that it should not be interpreted with blinded allegiance if by so doing the right of individuals cannot be protected or enforced, or the wrong done them cannot be prevented or redressed. The constitution, unlike ordinary legislative enactments, is not subject to routinary legislation. Another consideration is the fact that in constitutional cases, the organic law iself is at issue.

When we leave the domain of substantive law and come to that of evidence and procedure, we find a field where changes may be made with greater degree of freedom, for, in the words of Justice Cardozo, "considerations of policy that dictate adherence to existing rules where substantive rights are involved, apply with diminished force when it is a question of the law of remedies." As a matter of fact, courts have been expressly vested with the power to regulate proceedings before it. Rules of court promulgated by virtue of such authorization have the force and effect of law. They supplement the laws enacted by the legislature and render the administration of justice more orderly and effective.

It might be well to consider in this connection what is known as the doctrine of "judicial self-limitation". Judicial self-limitation, briefly defined, is judicial non-interference with cases involving political questions. The exact limits of judicial action in cases of this type have nowhere been laid down; nor is it possible to do so. The notion that seems to be behind such cases is the fear of disastrous consequences that might ensue were courts to interfere in those matters properly belonging to the political department of the state. We, however, venture to predict that this field may yet come within the province of the ever-increasing power of the courts to legislate.

Stare Decisis

Inextricably linked with our subject is the principle of *stare decisis et non quieta movere*, so much so that it has been loosely used to mean judge-made law. We are, however, not inclined to use one phrase when we mean the other as, strictly speaking, it is believed that not only are the two phrases distinctively different but that their relationship is such that an extensive application of one brings about an arrested development of the other.

Stare decisis et non quieta movere is a general maxim of law meaning to abide by, or adhere to, decided cases, where the same points come again in litigation (see Bouvier's Law Dictionary, Vol. II, p. 3118). While the essence of the rule is permanency and stability, judge-made law, on the other hand, connotes change, progress and a deviation from a well-beaten path. *Stare decisis*, like an old man, has seen the march of time; judge-made law, when embodied in a decision, like a newborn babe, sees light for the first time. When a judge follows pre-

cedents, he takes a trodden path; when he enunciates an original principle, he blazes a new trial. When the judge turns to the body of the law as previously laid down by his own court for the solution of a question before him and is guided by such relevant authorities as he may find there, after consulting in vain the constitution or statutes of his jurisdiction, or, failing there, looks for decisions in other jurisdictions which appeal to him as furnishing the proper rule and decides the case before him in accordance therewith, he embarks, so to speak, on "Old Ironsides" *stare decisis.* Should his researches in those fields prove fruitless and nevertheless he proceeds with the disposition of the case, whatever he may call his decision will, in effect, be judge-made law.

These pronouncements embodied in the decisions of the courts are not arbitrary edicts or conclusions reached by individual judges without regard to statutory law, reason and justice, but rather the products of an intensive examination of objective elements, "tempered by the ripened views of the times and molded in the laboratory of judicial experience into rules of action." As such they demand the utmost respect, but the doctrine should not be blindly followed if and when after mature deliberation in a subsequent case, the court finds earlier views inherently wrong, or the rulings relied upon manifestly inapplicable through the vicissitudes of time and conditions. Conversely, in the words of Justice Cardozo, "the needs of successive generations may make restrictions imperative today which were not vain and capricious to the visions of times past." In both eventualities, the court should not hesitate to pursue a different course if the dictates of justice in the controversy before it requires, otherwise the doctrine of *stare decisis,* in its mission to perpetuate that which is traditional, will prevent the law from keeping abreast with the progress of the times and in all likelihood might work injustice to individual rights.

It is gratifying to note, however, that there is a growing tendency of American courts not to pet and pamper the theory of *stare decisis* in determining what the law is (see Hertz v. Woodman, 218 U.S. 205, 212, 30 Sup. Ct. 621; Rosen v. U.S., 245 U.S. 465, 471, 38 Sup. Ct. 148, 150; Thriston v. Fritz, 91 Kan. 625; Adams Express Co. v. Beckwith, 100 Ohio St. 348, 351, 352, 126 N.E. 300, 301; Oppenheim v. Kridel, 236 N.Y. 156, 165, 140 N.E. 227, 230). In other words, the courts are engaged in a process of dovetailing the law with new conditions. So they are creating a new system which will in all probability be more in keeping with the principles of social welfare and justice than the one it seeks to displace. And naturally as the force of precedents declines, the law-making function of the judges becomes wider in scope.

Judge-Made Law in the Philippines

Let us now come to our own. We ask: What place does judge-made law occupy in Philippine jurisprudence? It occupies, in our opinion, as much as important a position, if not more, as it does in Anglo-American jurisdictions.

In a country, like the Philippines, where two great legal systems have existed side by side, the work of the courts in applying

and declaring what the law is requires more than passing care. Our substantive law, greatly derived from the Spanish (Roman) substantive law (Civil and Commercial codes), has to be wooed, as it were, in order that it may be a compatible spouse to our adjective law, the Code of Civil Procedure (Act 190), a purely American enactment. Metaphorically speaking, our judges are called upon to dress a noble Spanish lady, used to wearing a long-laced embroidered gown, elegant in its simplicity, with a smart American blouse and skirt a little above the knees and make her feel at home and at the same time look presentable. This is not a light task and our courts cannot attain this objective without legislating.

Our Statute Law

The Philippine courts are not without authority to legislate. Their power to do so has been recognized in our law. While the recognition is couched in such terms as would necessitate a casual observer to dig deep into the philosophy of the statute before he may realize its real significance, yet the fact remains that there exists such authority.

To be more specific, we are citing the pertinent provisions of the law hinted in the foregoing paragraph.

Article 6 of the Spanish Civil Code, which code forms a major portion of our substantive law, provides:

> "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."

Like the civil codes of other countries, our Civil Code imposes upon the judge a duty to proceed with the disposition of a case before him even where the law is silent on the point. It might be well to consider in this connection what commentators have to say as to the nature and scope of the article under reference.

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." (Jorge Bocobo, The Cult of Legalism, Phil. Law Journ., Vol. XVII, p. 256, Dec. 1937).

According to Sanchez Roman, the "general principles of law" referred to in this provision include natural law, the science of law, and the opinions of jurists. Under the Spanish regime, the phrase "general principles of law" is a rich and abundant source of judicial pronouncement, for, according to Valverde (cited approvingly by Sanchez Roman) these terms signify "principles of justice above the contingency and variableness of facts" as well as axioms which "make up a higher law than legislation." The words "general principles of law" have acquired a still larger meaning in the Philippines since American occupation, because in addition to the scope just mentioned, the phrase has brought in judicial precedents which are given great weight and authority, in accord-

ance with the Anglo-American practice (Jorge Bocobo, Unfettering the Judiciary, Phil. Law Journ., Vol. XVII, pp. 140-141, Oct. 1937).

Section 2 of Act 190, the Code of Civil Procedure, reads:

"The provisions of this Code, and the proceedings under it, shall be liberally construed, in order to promote its object and assist the parties in obtaining speedy justice."

What is that object sought to be promoted in this section? Our Supreme Court in the case of Cuyugan v. Santos, 34 Phil. Rep., 100, in part says: "The authors of the new Code of Civil Procedure (Act 190) were American lawyers, and the avowed purpose and object of its enactment was to introduce in these Islands a system of procedure in civil cases modelled upon precedents in general use in the United States." If this is so, then what has been previously said as to the freedom of the judge in Anglo-American countries to legislate in the fields of evidence and procedure applies with equal force in our jurisdiction.

Our Constitution

Section 5 of Article II (Declaration of Principles) of the Constitution of the Philippines, provides:

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

President Jorge Bocobo of the University of the Philippines, for a long period of time professor of law in the College of Law of that University, on commenting upon this provision of the Constitution said:

"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?" (See Vol. XVII, Phil. Law Journ., p. 262, op. cit.)

We fully concur with him in the interpretation given the provision in question. We might add, in our simple way, that such must be the real intention of the framers of our Constitution and nothing else, otherwise the provision would not only have been meaningless but also an unpardonable surplusage.

In consonance with the constitutional provision aforecited, His Excellency, President Manuel L. Quezon of the Philippines, has enunciated his program of social justice. In so doing, there can be no question but that the Chief Executive only acted in compliance with the express command of our Constitution and as promised by him when he said, "I shall abide by its (Constitution's) provisions." (Acceptance speech delivered on July 20, 1935.) This further strengthens the argument that the provision of the Constitution is likewise addressed to the executive department of the government.

So has the Supreme Court of the Philippines heeded this call. As a matter of fact it had done so even before the warning was sounded. In a very recent case involving a suit for damages brought by the garnishor against the garnishee, that Court, in rendering judgment in favor of the former, said "it were better that procedural laws are not applied regardless of consequences but construed liberally in order to pro-

mote justice and avoid injustice." (Levy & Blum, Inc. v. Jose A. del Prado, et al. O. G. Vol. XXXVI, p. 3739.)

Conclusion

We do not have to be told that others would find it inconvenient to join us in espousing our cause for more judge-made laws, for as carried to its logical conclusion, it would mean complete absorption of legislative functions by the courts. But we ask: Is there a probability that the situation would be carried to such an absurdity? Is the intricate network of legal system without means to be able to guard against such a contingency? To both questions we answer—NO!

To justify the foregoing answer, we shall now pass to what we believe can properly be considered as limitations upon, and safeguards against, what might, if unrestrained, throw a painful uncertainty over the effect that might be given to the most plainly worded statutes, and render courts, in reality, the legislative power of the state.

1. *Stare decisis et non quiete movere.*—As was pointed out hereinabove, an extensive application of the principle of *stare decisis* would arrest the development of judge-made laws. *Stare decisis*, therefore, in this sense, may properly be considered as a limitation upon the power of courts to legislate.

2. *Judicial self-limitation.* — This principle, like the foregoing, has been touched upon previously. While it applies for the most part to judicial non-interference with political questions, yet courts may adopt it, and have done so for that matter, in cases involving questions other than political. As the phrase implies, this limitation is voluntary, i. e., one coming from the doer itself.

3. *Separation of powers.*— While we have sponsored the theory that the principle of separation of powers is in reality purely superficial, yet we do not feel estopped in including it as one of the limitations upon the law-making power of courts.

4. *Oath of Office.*—The office of a judge is one of public trust. As such he must take his oath before he enters upon the performance of the duties of his office, otherwise he may be a *de facto* but never a *de jure* officer. It is submitted that this oath is as much a guaranty as to the subsequent conduct of the judge in keeping faith with the duties, responsibilities and integrity of his office as a pecuniary bond.

5. *Criminal prosecution.*—Most criminal statutes provide for the criminal liability of a judge who knowingly renders an unjust judgment. The threat of criminal prosecution keeps the judge from transcending the bounds of propriety and abusing the powers of his office.

6. *Public censure.*—In a country where the freedom of the press and speech is guaranteed, there is ever present the challenge coming from the people directed against its public officials who deviate from the straight path of duty even but once. The consciousness that their acts and actuations in any given case would, with the least provocation, arouse public criticism against them has, in a way, influenced the conduct of public men. Judges are no exceptions to this rule. Judges whose decisions will be declaratory of the

rights and interests of the parties to the case, or of society in general, will only be too careful not to hand down decisions which would meet public indignation.

The above enumeration is not exclusive, but they are submitted only to show that the day when courts will take over the prerogatives of the legislature, through judicial legislation, is beyond the horizon of possibility.

We have thus seen the office of the judge in the field of law-making. Whatever there still is that remains to be said on the subject will not be something new; it is nothing but the echo of the voice of the past. So consummately has the power of the courts to apply and interpret the law been dealt with by previous writers that every approach thereto (one of which is our present work) seems to have been minutely covered by them. But so long as men think and reason out, so long will the question of the propriety and desirability of judicial legislation be the subject of enlightened discussion.

OBSERVATION

"MEN ARE born with two eyes, but with one tongue, in order that they should see twice as much as they say; but from their conduct one would suppose that they were born with two tongues, and one eye; for those talk the most who observe the least, and obtrude their remarks upon everything, who have seen into nothing."—REVEREND COLTON.