THE SUPREME COURT AND POLITICAL QUESTIONS

In the Talmud, a case is reported about a suit brought against one of the slaves of King Jannaeus. The king was summoned to appear and testify before the high court of seventy-one judges. In accordance with the rules of procedure, the chief justice commanded the king to "rise in order that you (he) may be interrogated with reference to this matter." The king stood up and arrogantly answered: "It is not to thee that I give ear, but only to thy brethren, the judges of this court." The chief justice looked at the other judges of the court and they all bowed their heads. The chief justice was so abashed by the retort of the king that he uttered a mighty oath. "And the Angel Gabriel appeared and smote them all dead." From that day on, it was declared that a king "shall neither judge nor be judged." [1]

Several centuries later, Chief Justice Marshall summoned President Jefferson to appear in person and produce certain papers before a circuit court in connection with the trial of Aaron Burr for treason. Reminiscent of King Jannaeus, President Jefferson addressed a letter to the Court saying that the courts were without power to command "the Executive Government to abandon superior duties and attend on them, at whatever distance." [2]

It is then apparent that courts of justice cannot satisfactorily decide all questions that may be presented to them for decision. Through practice and legal theory, courts in the United States have evolved certain limitations on the exercise of the judicial power.[3] As adopted in the Philippines, these time-honored limitations have the effect of restricting the grant of judicial power to the Supreme Court and such other inferior courts established by law.[4] Thus courts cannot inquire into the wisdom, propriety, and expediency of laws nor can they delve into the motives of the legislature in enacting a particular law.[5] These limitations are properly called

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[1] Tractatus Sanhedrin, 19a, cited in Finkelstein, M., *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1923).

[2] SINCO, V. G., PHILIPPINE POLITICAL LAW 242 (10th ed. 1954).

[3] Dodd, W., *Judicially Unenforced Constitutional Limitations*, U. OF PA. L. REV. 54 (1934).

[4] PHIL. CONST. Art. VII provides:

"§ 1. The judicial power shall be vested in one Supreme Court and in such inferior courts as may be established by law.

"§ 2. The Congress . . . may not deprive the Supreme Court of its original jurisdiction over cases affecting ambassadors, other public ministers, and consuls, nor of its jurisdiction to review, revise, modify, or affirm on appeal, certiorari, or writ of error, as the law or rules of court may provide, final judgments and decrees of inferior courts in—

"(1) All cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order, or regulations is in question."

"self-imposed limitations" because the Constitution does not directly or inferentially provide that they be limitations on the judicial power.

A common illustration of a self-imposed limitation on judicial power is the principle of political questions.[6] Political questions are usually defined as "those questions which, under the constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the Legislature or executive branch of the government."[7] As we shall presently see, this definition is sometimes misleading and has led courts to wrong conclusions.

However, if we keep in mind that a constitution is both a legal document and a political plan,[8] the definition may be of some use in determining what political questions are. But the term is so vague that courts have not consistently acted upon the same general principles in deciding what are and what are not political questions.

To understand more properly the significance and the implications of the principle of political questions, it would be well to recall the cases which our Supreme Court has ruled out of its jurisdiction because they involved political questions.

The first was the case of *Mabanag v. Lopez Vito*.[9] There, the enforcement of a Congressional resolution proposing an amendment of the Constitution was sought to be prevented. The amendment would give American citizens or corporations equal rights with Filipino citizens or corporations in the development of the natural resources of and the operation of public utilities in the Philippines. Petitioner alleged that the proposed amendment did not receive the three-fourths vote of each House of Congress as required by the Constitution.[10] It appeared that three senators did not take part in the passage of the questioned resolution, nor was their membership reckoned in computing the constitutional requirement of three-fourths vote. If these members of Congress had been counted, the affirmative votes in favor of the proposed amendment would have been short of the necessary three-fourths vote in either branch of

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[6] Sumuloong v. Commission, 73 Phil. 288 (1941); People v. Cayat, 68 Phil. 12 (1939).

[7] For an extensive discussion on political questions, see Finkelstein, *supra* note 1, and Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1926); Weston, M. F., *Political Questions*, 38 HARV. L. REV. 296 (1925); Field, O., *The Doctrine of Political Questions in the Federal Courts*, MINN. L. REV. 485 (1924).

[7] 12 C.J. 878.

[8] SINCO, *op. cit. supra* note 2, at 67.

[9] 78 Phil. 1 (1947).

[10] Art. XV, § 1 provides: "The Congress in joint session assembled, by a vote of three-fourths of all Members of the Senate and of the House of Representatives voting separately, may propose amendments to this constitution . . ."

It appeared that there were 16 senators who voted for, and five voted against, the proposed amendment. Senators Jose D. Vera, Ramon Diokno, and Jose C. Romero were previously suspended by the Senate (Vera v. Avelino, 77 Phil. 192 [1946]). In the House of Representatives, 68 voted for, and 18 voted against, the proposed amendment; one abstained; and one was absent. Eight congressmen were not proclaimed elected by the House.

Congress. While these facts were admitted by the Court, none the less it dismissed the petition on two grounds: (1) that the question as to whether a proposal for amendment has been legally passed or not is a political question and hence non-justiceable; and (2) that the resolution which was duly authenticated by the signatures of the presiding officers was conclusive upon the courts.

In discussing the nature of political questions, the Court said:

> "It is a doctrine too well-established to need citation of authorities, that political questions are not within the province of the judiciary, except to the extent that power to deal with such questions has been conferred upon the courts by express constitutional or statutory provision. This doctrine is predicated on the principle of separation of powers a principle also too well-known to require elucidation or citation of authorities. The difficulty lies in determining what matters fall within the meaning of political questions. The term is not susceptible of exact definition, precedents and authorities are not always in full harmony as to the scope of the restrictions, on this ground, on the courts to meddle with the actions of political departments of the government." [11]

The validity of the statement of the Court to the effect that the "doctrine (of political questions) is predicated on the principle of the separation of powers" is doubtful.[12] It is sufficient to note that the principle of separation of powers has been criticized as a misleading guide for the decision of cases. It has no relevance to the determination of what are, and what are not, questons suitable for judicial review.[13] The only interpretation that can be given to this assertion of the Court when read in connection with the question whether the amendment was constitutionally adopted is that certain provisions in the constitution cannot be judicially enforced.[14] The

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[11] See note 9 *supra*, at 4.

[12] The validity of the Court's holding in this *Mabanag* case that a political question was involved has been doubted by some writers. See SINCO, *op. cit. supra* note 2, at 77, 359.

Well-considered decisions in the United States hold that the question as to whether an amendment to the existing constitution has been legally proposed is a question for the courts to determine. See, for example, Georgia v. Pennsylvania, 324 U.S. 439 (1945); Dillon v. Gloss, 256 U.S. 368 (1921); Hawke v. Smith, 253 U.S. 221 (1920); National Prohibition Cases, 253 U.S. 350 (1920); Hollingworth v. Virginia, 3 Dall. 378 (U.S. 1798); MacConnauhhy v. Secretary of State, 119 N.W. 408 (1907); State v. Powell, 27 So. 927 (1900). Some State courts have taken the view that no judicial attack may be made upon a constitutional amendment after its approval by the people. For example, Taylor v. King, 130 Atl. 407 (1925); Armstrong v. King, 126 Atl. 263 (1924); Wright v. Jordan, 221 Pac. 715 (1923).

[13] Weston, M. F., *supra* note 6, maintains that the doctrine of political questions is useless since the purposes which it was expected to accomplish are also comprehended by the principle of separation of powers. Thus he says that when the courts deny their jurisdiction over the cases involving political questions "they unquestionably mean" that "the power was in fact delegated to the other branches of government." But see Finkelstein, *Further Notes on Judicial Self-Limitation*, *supra* note 6.

[14] This interpretation was adverted to in the case of Vera v. Avelino, *supra* note 10, at 205, where the Court said: "Let us not be overly influenced by the plea that

Court seems to imply that there are certain provisions of the Constitution the interpretation of which belong to the political branches of the government.[15]

The Court was perhaps thinking of Justice Malcolm who, in the case of *Alejandrino v. Quezon*,[16] made the statement:

> ". . . that under our system of government, each of the three departments is distinct and not directly subject to the control of another department. The power to control is the power to abrogate and the power to abrogate is the power to usurp. Each department may, nevertheless, indirectly, restrain the others."

However, Justice Malcolm qualified these observations by saying:

> "It is peculiarly the duty of the judiciary to say what the law is, to enforce the Constitution, to decide whether the proper constitutional sphere of a department has been transcended. The courts, must determine the validity of legislative enactments as well as the legality of all private and official acts. To this extent, do the courts restrain the other departments."

It is rather incorrect to say that political questions find their basis on the principle of separation of powers. The principle of separation of powers, when properly understood, means the distribution of the functions of government to the three organs of government,—the executive, the legislature, and the judiciary.[17] This

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for every wrong there is a remedy, and that the judiciary should stand ready to afford relief. There are undoubtedly many wrongs the judicature may not correct, for instance, those *involving political questions* . . .

"Let us likewise disabuse our minds from the notion that the judiciary is the repository or remedies for all political or social ills. We should not forget that the Constitution has judiciously allocated the powers of government to three distinct and separate compartments; and that judicial interpretation has tended to the preservation of the independence of the three, and a zealous regard of the prerogatives of each, knowing full well that one is not the guardian of the others and that, for official wrong-doing, each may be brought to account, either by impeachment, trial or by the ballot box."

[15] An attempt by the Legislature to interpret the Constitution was Republic Act No. 590 by providing that taxing the salary of a judicial officer is not a decrease of compensation, an act prohibited by the Constitution. By this law, Congress tried to define the meaning of the phrase "which shall not be diminished during their continuance in office," as provided in § 9, Article VIII of the Constitution. In declaring the law an invasion of the judicial prerogative of interpreting the Constitution, Justice Montemayor said: "We have already said that the Legislature under our form of government is assigned the task and the power to make and enact laws, but not to interpret them. This is more true with regard to the interpretation of the basic law, the Constitution, which is not the sphere of the Legislative department." Endencia v. David, 49 O.G. 4822, 4825-26 (1953).

[16] 46 Phil. 83, 88 (1924).

[17] SINCO. *op. cit. supra* note 2, at 131. In general discussions of political questions, some writers make a distinction of mandatory and discretionary functions. It is submitted that this paper will not attempt to make such distinction. This is predicated

principle finds its utility only in determining whether one of the departments usurps the function constitutionally assigned to either the other two departments and in cases of unlawful delegation of powers. Even in these cases, the principle has not satisfactorily settled the issues raised. The principle does not prohibit the Supreme Court from interpreting every word, phrase, and sentence of the Constitution. Precisely, by this principle, the Supreme Court has the last word as to the correct interpretation of the Constitution.[18] In the words of Justice Laurel:

> "From the very nature of republican government established in our country in the light of American experience and of our own, upon the judicial department is thrown the solemn and inescapable duty of interpreting the Constitution and defining constitutional boundaries." [19]

A reading of some of the cases where the courts of justice have ruled that they could not take cognizance of political questions shows that they could have been decided just the opposite way without the least infraction of judicial dignity. Neither would the courts be considered as usurping the functions of the other departments of the government.[20]

Judicial avoidance of so-called political questions can best be explained when viewed in the light of the circumstances attending the case. Perhaps the circumstances are such that the political branches of the government are powerless to definitely settle the

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on the assumption that when a court decides that a particular duty is discretionary and hence beyond judicial compulsion, the court is simply applying the principle of separation of powers. A distinction should be made between the act of the court in compelling the political departments to do a particular act and declaring their act as contrary to the fundamental law. When the courts declare an executive or legislative act unconstitutional, it is only declaring that no department of government can prevail over the will of the sovereign people as expressed in their constitution. In short, courts are without power to compel either Congress or the President to do a particular act (Abueva v. Wood, 45 Phil. 612 [1924]; Severino v. Governor-General, 16 Phil. 366 [1910]). But are courts of justice without remedy when Congress or the President has in fact acted? The answer to this question depends on our understanding of political questions. Thus, in cases of constitutional amendments, it is said that as to whether a constitution shall be amended or not is a political question. Whether it has been legally amended is, however, a political question. See MacConaughy v. Secretary, *supra* note 12.

[18] Marbury v. Madison, 1 Cranch. 137 (U.S. 1803); SINCO, *op. cit. supra* note 2, at 315. See also the dissenting opinion of Justice Johnson in Alejandrino v. Quezon, *supra* note 16.

[19] Angara v. Electoral Commission, 63 Phil. 139, 160 (1936).

[20] As Chief Justice Marshall said: "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." Osborn v. Bank of the United States, 9 Wheat. 738 (U.S. 1824).

question that cases of this type are presented before the courts. This is precisely what happened in the case of *Avelino v. Cuenco*.[21] Petitioner was ousted from his position as Senate President and Cuenco was elected in his place. There were twenty-one Senators who attended the session that day; two were absent and one was abroad. When the petitioner was ousted from the senate presidency, he and eight senators staged a walk-out. When respondent was elected Senate President in the same session, there were only twelve senators in the session hall. The petitioner questioned the validity of the election of Cuenco since twelve senators, according to him, did not constitute a quorum. The case hinged on the interpretation of the word "quorum" as provided in the Constitution.[22] At first, six justices held that it was a political question and hence non-justiciable. On motion for reconsideration, seven justices agreed that the Court had jurisdiction.

At the first stage of the case, the Court explained its refusal to take jurisdiction over the case in this wise:

> "We refused to take cognizance of the Vera case even if the rights of the electors of the suspended senators were allegedly affected without *any immediate remedy*. A fortiorari we should abstain in this case because the selection of the presiding officer affects only the Senators themselves who are at liberty at any time to choose their officers, change or reinstate them. Anyway, if, as the petitioner must imply to be acceptable, the majority of the Senators want petitioner to preside, his remedy lies in the Senate Session Hall not in the Supreme Court.
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> "The Court will not sally into the legitimate domain of the Senate on the plea that our refusal to intercede might lead into a crisis, even a revolution. No state of things has been proved that may change the temper of the Filipino people as a peaceful and law-abiding citizens. And we should not allow ourselves to be stampeded into a rush action inconsistent with the calm that should characterize judicial deliberations . . ."[23]

To understand properly the subsequent change of attitude of the Court, it is worth noting that the case was fraught with high political considerations. It was a fight for party leadership within the Liberal Party. Paraphrasing the language of the Court in its first decision, it could be said that the petitioner was able to prove that a state of things existed which could have changed the temper of the Filipinos as a peaceful and law-abiding people.

Chief Justice Moran explained the reversion of the original stand of the Court as follows:

> "The Chief Justice agrees with the result of the majority's pronouncement on the quorum upon the ground that, *under the peculiar circum-*

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[21] G.R. No. L-2821, March 14, 1949.

[22] Art. VI, § 10(2) provides: "A majority of each House shall constitute a *quorum* to do business, but a smaller number may adjourn from day to day and may compel the attendance of absent Members in such manner and under such penalties as such House may provide."

[23] See note 21.

> *stances of the case*, the constitutional requirement in that regard has become a mere formalism, it appearing from the evidence that any new session with a quorum would result in the respondent's election as Senate President, and that the Cuenco group taking cue from the dissenting opinion, has been trying to satisfy such formalities by issuing compulsory process against senators of the Avelino group, but to no avail, because of the latter's persistent efforts to block all avenues to constitutional processes. For this reason, he believes that the Cuenco group has done enough to satisfy the requirements of the Constitution and that the majority's ruling is in conformity with substantial justice and with the requirements of public interest." [24]

Justice Perfecto, writing for the majority said: "The situation has created a veritable national crisis, and it is apparent that solution cannot be expected from any quarter other than the Supreme Court, upon which the hopes of the people for an effective settlement are pinned." He described the situation thus:

> "We can take judicial notice that legislative work has been at standstill, the normal and ordinary functioning of the Senate has been hampered by the non-attendance of session of about one-half of the members, warrants of arrests have been issued, openly defied, and remained unexecuted like mere scraps of paper, notwithstanding the fact that the persons to be arrested are prominent persons with well-known addresses and residences and have been in daily contact with news reporters and photographers. Farce and mockery have been interspersed with actions and movements provoking conflicts which invite bloodshed." [25]

Sometimes, the fear of portentous consequences may enter into the consideration of political questions.[26] The courts fear that by deciding the case, radical changes might occur in the government in which case they deem it wise that the political departments should effectuate the changes themselves. This consideration was taken into account when the United States Supreme Court, in the case of *Luther v. Borden*,[27] refused to determine whether the government of Rhode Island was republican in form or not. The case arose out of the famous Dorr Rebellion. The existing government was sued for trespass. The contention of the plaintiff was that the existing government was not republican in form as guaranteed by the Constitution of the United States. In refusing to decide the question presented, the Court said:

> ". . . if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter had no legal existence during the period of time mentioned, if it had been annulled by the adoption of the opposing government (Dorr's election as governor by popular vote), then the laws passed by its legislature during the time were nullities; its taxes wrongfully collected; its salaries and compensa-

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[24] See note 21.
[25] See note 21.
[26] Finkelstein, *supra* note 1.
[27] 48 U.S. 581 (1849).

> tion to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of the courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals. When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes jurisdiction." [28]

This might have been the determining point in the case of *Mabanag v. Lopez Vito.* It was said that President Roxas had personally promised the American Government parity rights in exchange for financial and economic aid that the Philippines could receive. The Parity Amendment was passed after the Second World War had ceased. The only country that could help the Philippines rehabilitate her war losses and help bring her back to economic normalcy was the United States. In refusing to decide the case on its merits, our Court was well aware of the economic throes of the country.

Whether the Court's refusal to participate in shaping the economic life of our young Republic was a wise step or not can only be judged by present conditions and the future. The hands-off attitude of the Court in that case helped facilitate our becoming economically dependent upon the United States.[29]

Another factor which should be taken into account is the probability that the decision of the court will not be enforced by the executive department of the government. A good example of this circumstance is the celebrated incident between Chief Justice Marshall and President Jackson. The State of Georgia had violated a treaty entered into by the Federal Government and the Cherokee Nation. The case was brought before the Supreme Court and the act of Georgia was declared unconstitutional. Informed of the decision of the Court, President Jackson remarked: "John Marshall has made his decision, now let him enforce it." [30]

There are other cases where the courts have uniformly considered as involving political questions. These cases deal with the rights and duties of the state, such as the conduct of foreign affairs. Courts have consistently agreed that the conduct of the foreign relations of the nation is beyond the scope of judical power.[31] Judicial avoidance of foreign relations questions is predicated on the ground that the foreign power might feel that the decision was unjust and the result of partiality, and, consequently, might attempt counter

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[28] *Id.*, at 597.

[29] See the Bell Trade Agreement and the Laurel-Langley Agreement. The present controversy as to whether or not we were to be independent of the United States could have been settled by the Supreme Court in the *Mabanag v. Lopez* case. One will not fail to see, in this instance, the consequences of a court's refusal to take jurisdiction over so-called political questions.

[30] WORMSER, R., THE LAW 382 (1949).

[31] SINCO, *op. cit. supra* note 2, at 297-308. Youngstown Sheet & Tube, Co. v. Sawyer, 343 U.S. 579 (1951); United States v. Curtiss Wright, 299 U.S. 304 (1936); Doe v. Braden, 16 How. 635 (U.S. 1853).

measures.[32] It is believed that the foreign relations of the nation can best be conducted without judicial interference or obstruction. As one writer puts it: ". . . foreign affairs are conducted by negotiations, not by pleadings and proofs; political integrity is maintained by diplomacy or arms, not by injunction." [33] Thus, it is beyond judicial competence to determine the beginning and ending of war [34] and the necessity of continuing war measures;[35] the territorial limits of the state;[36] the recognition of foreign states, governments, and measures short of war;[37] and the conclusion of treaties.[38]

The principle of political questions has been adopted to forestall radical changes that may be brought about by the decisions of the courts. The fear of vast consequences has likewise dictated judicial avoidance of political questions. Since there are no hard and fast rules defining the scope of political questions and since courts have not always acted upon the same principles, it is apparent that the principle of political questions should be treated as a standard.[39] Like the "due process of law standard," it is to be used in connection with the idea of reasonableness and fairness varying with time, place, and circumstances.[40] The frequency with which the courts may impose upon themselves this limitation depends upon such considerations as the fear of the consequences of the case, the demands of public interest, and the probability that the political departments of the government, especially the executive, may not enforce the decisions of the courts because of strong political considerations.

In the application of the principle of political questions, the courts of justice should, however, be ever vigilant for any infraction of the Constitution especially when there is an apparent collusion between the legislative and executive departments. It is futile to argue that certain provisions of the constitution are judicially unenforceable. Judicial respect and comity for the acts of the other departments cannot legalize "formulas of respect for constitutional safeguards" which are contradicted by the facts of life.

The courts should, therefore, apply the principle of political questions with moderation to the end that they may keep pace with the ever changing political, social and economic conditions of the country and at the same time preserve the Constitution. Judicial power intelligently and wisely exercise is necessary for a government

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[32] Oetjen v. Central Leather Co., 246 U.S. 297 (1918).

[33] Weston, *supra* note 6, at 328.

[34] Ludecke v. Watkins, 335 U.S. 160 (1948); Wodds v. Cloyd Miller Co., 333 U.S. 138 (1948).

[35] Commercial Trust Co. v. Miller 262 U.S. 51 (1923).

[36] Foster v. Neilson 27 U S. 415 (1829).

[37] United States v. Pink, 315 U.S. 203 (1942).

[38] The treaty making power is, in one sense, limited by the power of the Supreme Court to declare a treaty unconstitutional. But the decision of the Court is binding only within the territorial limits of the State. SINCO, *supra* note 2, at 300-301.

[39] Finkelstein, *supra* note 1, at 345.

[40] Pound, R., *Administrative Application of Legal Standard*, 5 A.B.A. REP. 445 (1919).

of laws and not of men. It is the supreme duty of the courts to see to it that no single person or group of persons be above the law. It is a weak court that hides behind the aegis of the principle of political questions when either or both the legislature and executive departments find it expedient to violate the Constitution. Only when the people know that the courts of justice are not afraid of any power may they feel secure with their rights.

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