THE ROLE OF THE JUDICIARY IN POLICY FORMULATION*

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I welcome your invitation to discuss "The Role of the Judiciary in Policy Formulation," as this gives me an opportunity to explore the least charted — but perhaps the most controversial — area in the study of the judicial function. This is an appropriate occasion for me to emphasize that the judiciary as exemplified by the Supreme Court is not a neutral factor in our political system.

In 1954, in the *School Segregation Cases*,[1] the Supreme Court of the United States reversed its 75-year old "separate but equal" doctrine and voided the law of 17 states under which were established segregated public school systems. These led James B. Byrnes, a gentleman from the South and a former associate justice of the Supreme Court to exclaim, "The Court did not interpret the Constitution — the Court amended it."[2]

The statement of Byrnes is not without basis and I shall return to the *School Segregation Cases* a little bit later. But at this juncture, I wish to note that neither the Executive nor the Legislative departments of the Federal government, acting singly or jointly could have done what the Supreme Court did. What made the Supreme Court which Hamilton had described as the last dangerous of the different departments of power, assume the awful task of "amending" the United States Constitution? The answer to this question will be the main thesis of this lecture.

Before answering this question, I ask you to bear with me for a few minutes in examining the structure of our government.

The powers of the state as existing in the people themselves are absolute. In constituting a government through the medium

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1 Brown v. Board of Education and other cases. 347 U.S. 483, 98 L. ed. 873 (1954); 349 U.S. 294, 75 S. Ct. 753 (1955).

2 Westin (ed.), The Supreme Court: Views from Inside, 113 (1961).

3 78 Federalist, "The Judges as Guardians of the Constitution." See Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962).

of a written constitution, they have provided for such limitations upon the exercise of government powers as are deemed to be essential to the preservation of both public and private rights. Among such limitations, and perhaps the most basic, is the division of of those powers among three departments, namely, the legislative, the eyecutive and the judiciary. Such separation of powers broadly confines legislative powers to the legislature, executive powers to the executive department, and those which are judicial in nature to the judiciary. Each department is supreme within its own sphere of functions and all are equal and coordinate. But one cannot exercise any authority belonging to either of the others, without transgressing the limits marked of by the Constitution.

When the Constitution fixes the boundaries of the three departments in terms of their basic functions, it inevitably locates in the judiciary the authority to assert itself as the guardian of the principle of the separation of powers. In appropriate cases, it is the duty of the court to reduce the broad statements of power in the Constitution in concrete terms applicable to particular cases. It must specify the source of power sought to be exercised by the department in question and decide the extent of this power. Its judgment affects the balance between the executive and legislative branches and generally defines the conditions under which they must operate in relation to the Constitution as viewed by the court.

Central to the function of the judiciary as guardian of the Constitution is the power to hold unconstitutional and hence unenforceable any law, or any official action based on it, which it deems to be in conflict with the Constitution. This power is charged upon the court as a duty that cannot be declined in a proper case where the validity of a statute is directly drawn into question. It is here that the judicial function becomes a political problem, because it is in this respect that the judiciary has shown the greater impact of its participation in the policy processes of the government. The more serious implication of this power is that it elevates the court to a position of supremacy over the Congress and the popular will stands the danger of being thwarted as "the gap constantly widens between the Constitution as read by the people and their representative and the Constitution as read by the courts." In such a situation, the court virtually becomes a legislative chamber.

It was Justice Laurel who said that, "courts cannot legislate however much hey have already *judicially* legislated."[4] This simply echoed what Elihu Root said:

> "It is not the duty of our courts to be leaders in reform, or to espouse or to enforce economic social theories, or, except in very narrow limits to readjust our laws to new social conditions. The judge is always confined within the narrow limits of reasonable interpretation. It is not his function or within his power to enlarge or improve the law. His duty is to maintain it, to enforce it, whether it be good or bad, wise or foolish, accordant with sound or unsound economic policy. By virtue of the special duty imposed upon them, our courts are excluded from playing the part of reformer. Their duty is to interpret the law as it is, in sincerity and truth, under the sanction of their oaths and in the spirit of justice." [5]

On the other hand, President Quezon once said: "A judge should be incorruptible. Besides, an ideal judge should combine high technical training with vision and statesmanship. With the advance of commerce and the expansion of industry, the relations of our citizens among themselves and with aliens will become more and more intricate and complicated. New rights and obligations ushered in by social and econocic progress, not foreseen or contemplated by existing laws or constitutional limitations, will undoubtedly arise. And the man called upon to interpret the organic law will have need of a generous gift of an enlightened perspective to be able to make a proper appraisal of the situation and appreciate the needs for proper readjustment in every emergency. The time demands judicial statesmanship of the highest order."[6]

There may be actually be no conflict in the thoughts expressed by these three eminent gentlemen but I would like to think that President Quezon was advocating for a broader interpretation of the judicial function. This is what Justice Holmes had said many, many years ago when he wrote: "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[7]

Indeed, if cases are to be decided on the basis only of axioms and corollaries, we do not need men of vision and statesmanship to fill responsible judicial positions. If we narrow the limits of the

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4 Wee Poco & Co. v. Posadas, 64 Phil. 640, 661 (1937).

5 "The Importance of an Independent Judiciary," 72 The Independent 704 (1912), quoted in Rivera, The Law of Public Administration 514 (1956).

6 IV Lawyers' Journal 268 (April 15, 1936).

7 The Common Law, 1 (1881).

concept of a judge, I daresay that any fresh honor graduate of a reputable law school can discharge the highest judicial function.

It is to the credit of the judiciary that it has realized its place in fulfilling community expectations and values. To be sure, the Supreme Court of the Philippines has not always risen to the task. A number of its decisions have been formally legalistic and in some cases its actions or lack of action has been characterized by timidity.

How does the judiciary perform its function with such far-reaching political and social significance?

The only function of the judiciary is to render a decision in the matters properly brought before it.[8] Such matters must reach the court in the for of a real and justiciable issue brought by a party-in-interest in the form of an adversary proceeding. It cannot proceed upon its work except by the conventional judicial procedure of finding the facts and applying the law in a formal hearing. Thus, the court is a passive institution. Its only link to the policy process stems from the making of decision, which it can do only upon the initiative of a litigant.

From the nature of the court's function proceeds certain limitations to its activism in policy-making.

Judicial process is manifestly inadequate as a fact-finding tool for translating community values into constitutional policies. As Justice Frankfurter pointed out:

> "A court is confined within the bounds of a particular record. Only fragments of a social problem are seen through the narrow windows of a litigation." [9]

The court does not have resources for constructive solution to the varied problems of public management. It is incapable of instituting an integrated program of action. For the execution of its decisions it is completely dependent on the political branches. While it can direct an action, it can neither supervise nor administer its execution.

As it speaks only through the medium of case-law decisions, it is not called upon to decide a question arising out of hypothetical facts, and it must decline to decide a purely abstract question.[10]

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8 Vecki v. Sorensen, 340 P. 2d 1020 (1959).
9 Sherrer v. Sherrer, 334 U.S. .43, 365, 92 L. ed. 1429, 1444 (1947).
10 Helvering v. Stuart, 317 U.S. 154, 87 L. ed., 154, 63 S. Ct. 140 (1942).

The more basic limitation to judicial authority is that the courts cannot decide political questions. They are questions involving policy, "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." They are "concerned with issues dependent upon the wisdom, not legality, of a particular measure."[11] Thus, executive decisions as to foreign policy [12] or the conduct of war by the President as commander-in-chief of the armed forces are beyond judicial function. There is authority, however, for the view that the mere fact that a political question is incidentally involved in a controversy does not make such controversy non-justiciable.[13]

I do not wish to take you too far afield into the intricacies of the doctrine of political questions. It is enough to say that in the light of this doctrine, the role of the judiciary in policy-formulation, as we have discussed, becomes even more controversial. At any rate, a study of Supreme Court decisions involving the doctrine clearly shows its amazing versatility, and perhaps it would not be too much to say that "political questions", to borrow a description, "are no more than trees behind which judges hide when they wish either to throw stones at Congress or the President or to escape from those who are urging them to do so."[14]

Despite these limitations the judiciary has been able to discharge its role in policy formulation. The record of the Supreme Court's performance in the last five years should suffice to show fresh emphasis of its policy role. Its decision in *Macias v. Commission on Elections*,[15] where it struck down the Redistricting Law[16] as unconstitutional, concerns the very method of popular representation in the Congress. In *Aytona v. Castillo*,[17] the Court subjected to judicial control the President's discretion in making *ad interim* appointments, in the process giving him a lesson in prudence in the exercise of his prerogatives. Presidential power came under the judicial axe again in *Gonzales v. Hechanova*[18] where the Court declared illegal importation of rice made by the President as Commander-in-Chief of the armed forces for "military stockpile

11 Tañada v. Cuenco, G.R. No. L-10520, Feb. 28, 1957.
12 Chicago and S. Air Lines v. Waterman S. S. Corp., 333 U. S. 103, 92 L. ed. 568, 68 S. Ct. 531 (1947).
13 Baker v. Carr, 369 U. S. 186, 7 L. ed. 2d 663, 82 S. Ct 691 (1962)
14 Harris, The Judicial Power of the United States, 23 (1940).
15 G. R. No. L-18684, Aug. 23 and Sept. 14, 1961:
16 Rep. Act No. 3040 (1961).
17 G. R. No. L-19313, Jan. 20, 1962.
18 G. R. No. L-21897, Oct. 23, 1963.

purposes." In giving effect to the statutory policy of protecting local rice and corn planters, the Court questioned the President's assessment of national security expressed in response to "worsening situation in Laos and Vietnam" and "the tension created by the Malaysian problem." By nullifying Republic Act No. 3836 in *PHILCONSA v. Gimenez*,[19] the Court swept away the retirement benefits of Senators and Representatives provided by that law. On the same week that the Court wrought havoc upon the policy of Congress to provide for the future of its members, it went on to declare null and void 33 Executive Orders of the President, each creating a municipality, as it asserted in *Pelaez v. Auditor General*[20] the doctrine that creation of municipal corporation is a legislative function and therefore outside the orbit of Presidential powers.

Although these cases bore the stamp of partisan politics as they went up the Supreme Court, their significance as drawn by the 11 "old men on the bench" goes beyond the fixing of temporary alignment of politicians and parties. More than that, they indicate the political dimension of judicial function as embracing issues decisive to the whole political system. We should concede that this system is nothing more than a consensus as to how the powers of the governed should be exercised by the main repositories of such powers, namely the Congress and the Presidency.

Under our theory of government, this consensus is written upon the Constitution, and so far as we are willing to go along with the truth that the Constitution is what the Supreme Court says it is, to the same extent must it be settled that judicial review hangs either as a threat or grace on the constitutional competence of our political system to meet the basic expectations of the people. What Justice Jackson wrote of the United States Supreme Court is as much true of our own Court. He said: "Nearly every significant decision of the Supreme Court has to do with power — power of government, power of officials — and hence it is always concerned with the social and economic interests involved in the allocation, denial, or recognition of power."[21] Where the Court sees the locus of power within the political structure, there it must reside. How it relates the government to the traditional economic rights of the individual must be observed *vis-a-vis* the demand for reform legislation. At any rate, the Court's attitude to power determines in a

[19] G. R. No. L-23326, Dec. 18, 1965.
[20] G. R. No. L-23825, Dec. 24, 1965.
[21] The Struggle for Judiciary Supremacy, xii (1941).

crucial manner the vigor and direction of the political branches of the government.

Such political implication of the judicial function immediately suggests the magnitude of its social impact. In this respect, American experience with the institution of judicial review of legislation, after which our own was closely patterned, presents a clear lesson. To lift the country from the ravages of the 1930s depression, President Roosevelt, supported by the majority in both the Senate and the House of Representatives, obtained passage of New Deal enactment expressing urgent social and economic policies called for by the rehabilitation period. But a conservative Supreme Court, on the whole a die-hard adherent to the laissez-faire ideology and friendly to big business interest,[22] struck a serious blow to the general program of reform legislation as it voided the power of Congress in 12 cases in three years, 5 of which were decided in a single year.[23] By 1933, Justice Jackson observed, the Supreme Court was no longer regarded as co-equal of the other department; it had become an "acknowledged and supreme authority."[24] This orientation of the Supreme Court was the subject of a long-drawn political storm and it was only after a conflict with President Roosevelt that it eventually modified its persuasion after 1937. Thus, as the American economy sunk into its gravest slump, the hostility of the Court toward social welfare legislation pushed the Federal Constitution into a crisis. "This constitutional crisis," one writer perceptively observed, "was in the main a conflict between the legislative response to the development of our industrial society and the judicial vetoing of important aspects of that response."[25] By the 1940s it became clear that the Federal Supreme Court shifted its course, and after World War II its evolution from negative aggressiveness to positive boldness in enlarging its role in the political process seemed to have been an accomplished thing. The early 1950s already saw an upsurge of judicial activism, this time however in a different direction. Starting with the *Steel Seizure* case,[26] where it held unconstitutional President Truman's seizure of the steel industry, it went on to include movies as within the free speech guarantee of the Constitution in the *Burstyn* case,[27] and then struck down the state loyalty oath for teachers, for the

22 Torgersen, The Role of the Supreme Court in the Norwegian Political System: Judicial Decision-Making, 222 (1963).

23 **Op. cit.**, note 21, 41.

24 **Id.**, 72.

25 Cohill, Judicial Legislation, 48 (1952).

26 Youngstown Sheet & Tube Co. v. Sawyer, 343 U S 579, 96 L. ed., 1153, 72 S. Ct. 863 (1952).

27 343 U. S. 495, 96 L. ed. 1098, 72 S. Ct. 777 (1952):

first time, in *Wieman v. Updegraff*.[28] This period culminated in the landmark decision in the *School Segregation Cases*.

And now to answer the question earlier propounded — what impels the judiciary to "amend" the Constitution?

For this purpose let us take just two cases: one American and another Philippine.

It was in *Plessy v. Ferguson*[29] decided by the United States Supreme Court in 1896 that the "separate but equal" doctrine was announced. Under that doctrine, equality of treatment in traveling accomodations is accorded when the races are provided substantially equal facilities, even though these facilities be separate. This doctrine was extended to the field of public education. But in 1954 the "separate but equal" doctrine was completely discarded. In the *School Segregation Cases*, the Court took note of the psychological trauma for being separated from so-called co-equals and Chief Justice Warren quoted approvingly from a finding in one of the appealed cases which said:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

Byrnes asserts that this decision "demonstrated the willingness of the Supreme Court to disregard our written Consitution and its own decisions, invalidate the laws of States, and substitute for this a policy of its own, supported not by legal precedents but by the writings of sociologists.[30] He could be right for long established doctrine form part of the legal fabric of any society. To upset precedents deprives law of its stability and causes confusion. For people will be asking, What will the court do next." And nobody can say for sure.

In *Lagumbay v. Commission on Elections*,[31] the Supreme Court ruled that the election returns from 50 precincts in Lanao del Sur, Lanao del Norte and Cotabato should be classified as "obviously manufactured returns" because it appeared "that contrary to all

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28 344 U. S. 183, 97 L. ed. 217, 73 S. Ct. 215 (1952).
29 163 U. S. 537, 41 L. ed. 256, 16 S. Ct. 1138 (1896).
30 **Op. cit.**, note 2, 113.
31 62 O. G. 992 (Feb. 14, 1966).

statistical probabilities — in the first set, in each precinct the number of registered voters equalled the number of ballots and the number of voters reportedly cast and tallied for each and every candidate of the Liberal Party, the party in power; whereas, all the candidates of the Nacionalista Party got exactly zero. And in the second set — again contrary to all statistical probabilities — all the reported votes were for candidates of the Liberal Party, all of whom were credited with exactly the same number of votes in each precinct, ranging from 240 in one precinct to 650 in another precinct; whereas, all the candidates of the Nacionalista Party were given exactly zero in all said precincts."

Although the *Lagumbay Case* relied on the previous case of *Nacionalista Party v. Commission on Elections*,[32] in applying the doctrine of "statistical probabilities," the Supreme Court in the earlier case refused to compel the Commission on Elections to exclude the votes cast for senators in Negros Occidental and Lanao during the elections in 1949 on the ground that:

> "At bottom this case involves a senatorial election contest insofar as the petitioners who are candidates for senators of the Nacionalista Party seek to exclude or annul the votes cast for senators during the last elections in Negros Occidental and Lanao, with the notorious defect that the opposing candidates have not been impleaded. At this stage, the obvious intent of the petitioners is to avoid, if possible, the necessity on their part of filing an election protest before the Electoral Tribunal of the Senate. But as we construe the pertinent provisions of the Constitution and of the Election Law, neither the Commission on Election nor this court is empowered to forestall and much less decide the impending contest. The jurisdiction over such case is expressly and exclusively vested by the Constitution in the Electoral Tribunal of the Senate."

How do we explain the decisions in the *School Segregation* and *Lagumbay* cases. The answer, it is suggested, is a simple one. Freund tells us, "Alfred North Whitehead, suggesting that the key to the science of values will be found in aesthetics, remarked that the Supreme Court is seeking the aesthetic satisfaction of bringing the Constitution into harmony with the activities of modern America."[33] To put it differently, what the judiciary has done is simply to give effect to current expectations and values.

In America, despite pious assertions that all men are created free and equal, the Negro up to now is still a second class citizen in many respects and his condition was worse until a little over a decade ago. And the tragedy of it is that the Negro did not go

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32 85 Phil. 149 (1949).

33 On Understanding the Supreme Court, 1 (1949).

to America voluntarily. He was forcibly taken from Africa, separated from his family and friends, and made a slave in southern plantations. It took a decision of the United States Supreme Court[34] and a Civil War to emancipate him but that was in name only. For he continued to be the object of racist discrimination which many times took violent turns. He was discriminated in housing, in travel, in education, in the exercise of political rights and even in the basic function of taking food and drink and afterwards evacuating them. In this year 1966, justice for the Negro is not the same as justice for the white pigmented.[35]

But the social conscience of America has been awakening during the past few years. Besides racial discrimination is something that democratic America cannot afford in its ideological conflict with the Communists. Unfortunately, however, the prime maker of policy — the Congress — either failed to perceive the changed attitude or, ostrich-like, refused to look at it. Thus, the activism of the Supreme Court.

In the Philippines, it is of public knowledge that electoral protests involving seats in the Senate and in the House of Representatives generally wither on the vine. Artemio Lobrin won an electoral protest for one of the House seats from Batangas but the decision in his favor came so late that he assumed office for about a month only and never had a chance to participate in the deliberations. The case of Fernando Campos is another. I do not suggest that Campos would have won the contest but it became moot when the contested seat in Cavite came up for new election in 1965. The people as a whole care not so much in how electoral contests are decided, whether for or against the protestant, but that they be disposed of expeditiously and inexpensively. But the frustration of their expectation in this respect is one mark against democracy in this country.

The Supreme Court did not say so but I would say that the delays and frustrations attending an electoral protest in the Philippines must have counted heavily in its decision in the *Lagumbay case.*

When Jose Abad Santos was Secretary of Justice, he had occasion to say that "as the agency of the government in the administration of justice, it would be well for the courts to understand the trends and the people's thinking and to adjust their own prejudices to the changing ideologies of the people."[36] I suggest that the judiciary is precisely following that advice right now.

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[34] Scott v. Sanford, 19 How. 393, 15 L. ed. 691 (1857):
[35] Breaching the Wall of Southern Justice, Time, 16 (April 15, 1966).
[36] IX Lawyers' Journal 260 (May, 1941).