NOTE

THE SUPREME COURT AND THE POLITICAL DEPARTMENTS: 1905-1960

Joaquin G. Bernas *

The problem of delineating where the powers of each of the three departments of our government begin and where they end has been depicted by Justice Holmes, in a case of Philippine origin, as something well nigh insoluble. The dividing lines between the three powers are not clear-cut geometric lines but penumbrae "shading gradually from one extreme to the other."[1] Justice Laurel, in one of the earliest cases decided after the enactment of the Philippine Constitution, re-echoes Holmes when he says: "The overlapping and interlacing of functions and duties between the several departments... sometimes make it hard to say just where the one leaves off and the other begins."[2] Yet, separation of powers, a device intended as a shield against the dangers of tyranny inherent in the concentration of power in one man or group of men, is a fundamental principle of our system of government. Hence, it is easily seen that the resolution of problems involving conflict of powers is of paramount importance.

There is no express provision in the Philippine Constitution affirming the principle of separation of powers. Separation is achieved by actual division. The key provisions are Article VI, Section 1 ("The Legislative power shall be vested in a Congress of the Philippines..."); Article VII, Section 1 ("The Executive power shall be vested in a President of the Philippines."); and Article VIII, Section 1 ("The Judicial power shall be vested in one Supreme Court and in such inferior courts as may be established by law."). By these provisions each department is given exclusive cognizance of matters within its jurisdiction. Each department is made supreme within its own sphere. But the separation effected is not absolute. The Constitution does not create three autonomous bodies effectively insulated against all contact with each other and absolutely free to exercise its own sweet will. "The

* LL.B. '62, Ateneo de Manila.

[1] Dissenting opinion in *Springer v. Philippine Islands* 277 U.S. 189; 72 L. Ed. 845, 852. (1928).

[2] *Angara v. Electoral Commission*, 63 Phil. 139, 157 (1936).

Constitution has provided for an elaborate system of checks and balances to secure the coordination in the workings of the various departments of the government."[3]

Under this system of checks and balances, the instrument which the Judicial Department wields is the power of judicial review, the power to decide whether the Constitution has been transgressed. Thus it is that especially in times of social crisis and political disquietude, when "the great landmarks of the Constitution are apt to be forgotten or marred," the judicial department is frequently called upon to intervene in conflicts where acts of the legislative or executive department are challenged or called in question. The judiciary is asked to remedy alleged legislative or executive violation of rights. It is then that the issue of separation of powers is raised against the courts. Thus the problem arises: where does the power of judicial review begin and where does it end? Can the judiciary intervene? If it does, can it answer the accusation of arrogation of legislative or executive power, or of asserting supremacy over co-equal departments. If it does not, would it not be shirking a constitutional obligation? And who would resolve the conflict? The Supreme Court has frequently come to grips with this perennial problem and the major cases on the subject are characterized by vigorous and lengthy decisions and concurring opinions and equally vigorous and lengthy dissents. The subsequent pages will be a survey of these cases with a view to determining whether there is a definitely discernible pattern in the decisions which can serve as a guide for predicting the outcome of future cases.

I. THE CASES

"Barcelon" To "Abueva"

Barcelon v. Baker.[4]

The first major case on separation of powers was a petition for the issuance of a writ of *habeas corpus* in favor of Felix Barcelon and against two Constabulary officers. The former was being detained in Batangas where the privilege of the writ of *habeas corpus* had been suspended by the Governor-General by authority of the Philippine Com-

[3] *Id.* at 156. Thus, the President may veto the acts of Congress and Congress may override the veto of the President. Courts may declare legislative measures or executive acts unconstitutional. Courts in turn are checked by the pardoning power of the President. Congress may likewise check the courts by repealing or amending what has been the object of a court decision, again Congress may check the appointing power of the President through the Commission on Appointments. Congress and the Court may check the President by impeachment.

[4] 5 Phil. 87 (1905).

mission. The suspension was predicated on the existence of open insurrection in Cavite and Batangas. The existence of such disorder, however, was denied by the petitioner. The Supreme Court, in denying the petition, declared that "the conclusion set forth in the said resolution and the said executive order, as to the fact that there existed in the Province of Cavite and Batangas open insurrection against the constituted authorities, was a conclusion entirely within the discretion of the legislative and executive branches of the Government, after an investigation of the facts" and that "one branch of the United States Government in the Philippine Islands has no right to interfere or inquire into, for the purpose of nullifying the same, the discretionary acts of another independent department of the Government."[5]

The suit, it will be noted, involved the validity of a joint act of the legislature and the executive. But the question was not one of law. That the Governor-General, given a specified set of facts, could suspend the privilege of the writ of *habeas corpus*, was not in dispute. The only question was whether such a specified set of facts did exist, viz., did a state of insurrection exist or not? Who is to answer that question? The Court said — the legislature and the executive. Their decision on the subject is conclusive upon the courts. The reason is simple:

> . . . The executive branch of the Government, through its numerous branches of the civil and military, ramifies every portion of the Archipelago, and is enabled thereby to obtain information from every quarter and corner of the State. Can the judicial department of the Government, with its very limited machinery for the purpose of investigating general conditions, be any more sure of ascertaining the true conditions throughout the Archipelago, or in any particular district, than the other branches of the Government? We think not.[6]

This same reason was reiterated almost fifty years later when the Supreme Court was faced with an identical problem.[7]

Severino v. Governor-General[8]

The next major case arose out of the general elections of 1909. The elections in Silay, Occidental Negros, resulted in a "failure to elect" a mayor. Instead of calling a special election, the Governor-General directed the Municipal Board to fill the vacancy by appointment, submitting to him, for his approval, the name of the person to be appointed. Jose Lope Severino, the local chief of the Nacionalista party, contested this move of the Governor-General and petitioned the Supreme Court to compel him to call a special election. The Court denied the petition on

[5] *Id.* at 98.
[6] *Id.* at 96. The burden of Justice Willard's dissent was to the effect that courts have power to review such questions of fact in order to effectively protect the people against arbitrary and illegal acts. *Ibid.* 120.
[7] *Montenegro v. Castaneda* 48 O.G. 3392, 3395 (1952).
[8] 16 Phil. 366 (1910).

the basis of separation of powers declaring that the duties of the Governor-General are conferred upon him with the knowledge that "he is in a better position to know the needs of the country . . . and with full confidence that he will perform such duties . . . as his best judgment dictates."[9]

It should be noted that the Governor-General had a statutory duty to call a special election. Was such a duty discretionary or purely ministerial? The petitioners conceded that, if the duty was discretionary, the court would have no jurisdiction to compel performance. But the petitioners contended that the duty was purely ministerial and that, therefore, the right of a citizen to have it performed was absolute. The Court refused to say what kind of duty the Governor-General had. "Should this court attempt to distinguish between purely ministerial and discretionary duties, conferred upon him by law, and attempt to determine in each case which are purely ministerial, which are political, or which are discretionary, the Governor-General, to that extent, would become subservient to the judiciary."[10]

Forbes v. Chuoco Tiaco

Within the year of the *Severino* case, the Supreme Court had to face another separation of powers suit in *Forbes v. Chuoco Tiaco*.[11] It arose from a preliminary injunction issued by a CFI judge enjoining the Governor-General against re-deporting a Chinaman who had come back to the Philippines. The Governor-General petitioned the Supreme Court to prohibit the judge from continuing jurisdiction and to lift the preliminary injunction. The petition was granted. The Court upheld the supremacy of the executive in the exercise of his political duties.

The Court said:

> . . . In the exercise of those duties the chief executive is alone accountable to his country in his political character and to his own conscience . . . . Each department should be left to interpret and apply, without interference, the rules and regulations governing it in the performance of what may be termed political duties. Then for one department to assume to interpret or to apply or to attempt to indicate how such political duties shall be performed would be unwarranted, gross, and palpable violation of the duties which were intended by the creation of the separate and distinct departments of government.[12]

Abueva v. Wood

More than a decade later, the Supreme Court was called upon to issue a compulsive order against the political departments. In *Abueva*

[9] *Id.* at 401.
[10] *Ibid.*
[11] 16 Phil. 534 (1910).
[12] *Id.* at 574.

v. Wood,[13] the petitioners asked the Supreme Court to direct some of the officials of the executive and legislative departments to permit petitioners to see and examine the vouchers showing the various expenditures of the Independence Commission out of the appropriation authorized by Act No. 2933. Could the Supreme Court grant the petition?

The Supreme Court said:

> ... one department of the government has no power or authority to inquire into the acts of another, which acts are performed within the discretion of the other department .... The judicial and executive departments of the government are distinct and independent, and neither is responsible to the other for the performance of its duties and neither can enforce the performance of the duties of the other ....[14]

Furthermore, with reference to the legislative officers, the Court said:

> ... It may be asserted as a principle founded upon the clearest legal reasoning that the legislature or legislative officers, in so far as concerns their purely legislative functions, are beyond the control of the courts by the writ of mandamus. The legislative department, being a coordinate and independent branch of the government, its action within its own sphere cannot be revised or controlled by mandamus by the judicial department, without gross usurpation of power upon the part of the latter. When the legislative department of the government imposes upon its officers the performance of certain duties which are not prohibited by the organic law of the land, the performance, the non-performance, or the manner of the performance is under the direct control of the legislature, and such officers are not subject to the direction of the courts.[15]

From the *Barcelon* case to the *Abueva* case, the objection may be and has often been raised that judicial hands-off can result in the toleration of injustice; that, if courts can not compel performance of ministerial duties, many parties will be without remedy and the government can become one of men and not of laws; that in a government of laws there must be an adequate remedy for every wrong, and where a clear right exists, there must be some mode of enforcing that right.

Our Supreme Court has not been unaware of these objections and its answer has always been that in the Philippine scheme of government "All wrongs, certainly, are not redressed by the judicial department."[16] In the *Severino* case the Court gave some sample illustrations of wrongs without remedy. A wrong court verdict that has become final is without redress. A lawfully elected legislator whose seat is given to another by the legislature is without remedy. An innocent person erroneously convicted may be denied pardon by the executive. In all these cases, one department will not interfere to right the wrong

[13] 45 Phil. 612 (1924).
[14] *Id.* at 629-30.
[15] *Id.* at 634-5.
[16] *Severino v. Governor-General* 16 Phil. 366, 397 (1910).

committed by the other. "The law must leave the final decision upon every claim and every controversy somewhere, and when that decision has been made, it must be accepted as correct...."[17] Would this not amount to a government of men and not of laws? The Court answers: "... is it not also true that if the judiciary, which is composed of men, can enter the field assigned to the Chief Executive and determine what are his political, ministerial and discretionary duties, the Government, to that extent, would become one of men and not of laws?"[18]

The Court was even more emphatic in the *Abueva* case:

> ... No one department of the government can or even has claimed, within its discretionary power, a greater zeal than the others in its desire to promote the welfare of the individual citizen and to protect his rights. They are all joined together in their respective spheres, harmoniously working to maintain good government, peace, and order, to the end that the rights of each citizen be equally protected. *No one department can claim that it has monopoly of these benign purposes of the government* ....[19]

In answer to the objection that in a government of laws there must be a remedy for every wrong, the Court said:

> While human society is governed by so imperfect a being as man, this can be true only in theory. If we are to compel the governor or the legislature to right every wrong which may arise from their omissions of duty, then surely they (the executive and legislative departments) must, in order to make this Utopian system perfect, have the power to compel us (the courts) to do right in every case. May it not be as well supposed that we (the courts) will act perversely, and refuse to perform a duty imposed upon us, to the injury of the citizen, as that the governor will do so? ...[20]

ALEJANDRINO V. QUEZON

There are wrongs which courts cannot remedy. From the *Barcelon* case to the *Abueva* case, this was just a theoretical possibility. The theory found application in the case of *Alejandrino v. Quezon*.[21]

Senator Jose Alejandrino had assaulted a fellow senator, Vicente de Vera. Alejandrino was an appointive senator. The Senate suspended him for one year. The suspension was unconstitutional. The Senate did not have the power to suspend an appointive senator for a period of one year. Alejandrino sought redress from the Supreme Court. Although the Court agreed with the senator that his suspension was unconstitu-

[17] *Ibid.* citing Cooley in 29 Mich. 320.
[18] *Id.* at 402.
[19] 45 Phil. 630. Emphasis in original.
[20] *Id.* at 632.
[21] 46 Phil. 83 (1924).

tional, by a majority vote, the Court refused to assume jurisdiction. Justice Malcolm, writing for the majority, said:

> .... the writ [mandamus] will not lie from one branch of the government to a coordinate branch, for the very obvious reason that neither is inferior to the other. Mandamus will not lie against the legislative body, its members, or its officers, to compel the performance of duties purely legislative in their character which therefore pertain to their legislative functions and over which they have exclusive control ....[22]

For this reason the Court believed that no good could come from the issuance of a mandamus:

> ... mandamus should never issue from the court where it will not prove to be effectual and beneficial. It should not be awarded where mischievous consequences are likely to follow. Judgment should not be pronounced which might possibly lead to unseemly conflict or which might the disregarded with impunity. This court should offer no means by a decision for any possible collision between it as the highest court in the Philippines and the Philippine Senate as a branch of a coordinate department, or between the Court and the Chief Executive or the Chief Executive and the Legislature.[23]

A decision like that of the *Alejandrino* case could hardly be expected to meet with approval among all the justices. We here report the positions taken by the dissenters because they are representative of the reasoning that runs through the dissenting opinions in similar cases.

Justice Johnson summarizes the powers of the Court thus:

> ... the courts have jurisdiction to examine acts 'actually' taken by the executive or legislative departments of the government when such acts affect the rights, privileges, property, or lives of individuals.
>
> ... the courts will not take jurisdiction to order, coerce, or enjoin an act or acts of either the executive or legislative departments of the government upon any question or questions, the performance of which is confided by law to said departments. The courts will not take jurisdiction until some positive 'action' is taken by the other coordinate departments of the government.[24]

When such positive action has been taken and the court finds that an individual has been unlawfully deprived of his life, liberty, or property by any of the political departments,[25] or that there has been a transgression of the constitution,[26] or that the executive or the legislature has acted in excess of its authority,[27] what remedy may the Court give?

> A pronouncement by the highest tribunal of justice in the Philippine Islands, that the resolution is *ultra vires*, illegal, and void, we confidently believe, will be sufficient to cause an immediate revocation of the same, and the adoption of a further order to the effect that all persons affected by it will be restored to their rights .... We are sure that the respondents will be among the very first to criticise and vigorously denounce any person, entity, or department within the Philippine Islands, who should be guilty of the slightest disregard or disobedience to the mandates of the constitution — the law of the people.
>
> The nightmare which runs through the majority opinion concerning the impossibility of the execution of a judgment, is hardly justified in a stable and well-organized government, among a people who love peace and good order, who despise disobedience to law and disloyalty to the constituted authorities ....[29]

Justice Ostrand chides the majority for failing to make a distinction between "entire absence of power" and "improper exercise of legitimate powers." The Court, he says, may not attempt to direct the exercise of discretional powers of the executive and the legislature within their legitimate spheres, because within these spheres they are supreme. But, he continues, when they step out of their proper spheres they are no longer supreme.[29]

Briefly, then, the *Alejandrino* case presents the following views on the powers of the courts:

1. Courts have no jurisdiction to pass judgment over the political acts of the executive or of the legislature; but courts may render an "opinion" for the guidance of future actions of the political departments (Majority view *per* J. Malcolm).

2. In any case where it is alleged that a person is deprived of his life, liberty, or property by the political departments, courts are *without discretion* but to take cognizance of the case and to make pronouncement as to legality or illegality. Such pronouncement is sufficient; no further order need be issued. The political departments will, on their own, remedy the wrong done (Justice Johnson's).

3. When the political departments step out of their legitimate spheres of action and act without authority, they are subject to the coercive writs of courts (Justice Ostrand's).[30]

Such was the state of things when the Philippine Constitution took effect in 1935. Shortly thereafter the Supreme Court of the newly inau-

[22] *Id.* at 88.
[23] *Id.* at 95.
[24] *Id.* at 105.
[25] *Id.* at 106.
[26] *Id.* at 110.
[27] *Id.* at 111.
[28] *Id.* at 123-4.
[29] *Id.* at 126-7. Justice Ostrand likewise pointed out that when the court entertains an action against one of the political departments, it does not thereby assume superiority over such departments. It merely asserts the superiority of the law. Finally, he said that the enforcement of the writ prayed for would cause strife and disturbance was "almost an insult to the intelligence and patriotism of the defendants." *Ibid.* 142-3.
[30] *Id.* at 98.

gurated Philippine Commonwealth had its first separation of powers case in *Angara v. Electoral Commission.*[31]

Angara v. Electoral Commission

Jose Angara was declared elected to the National Assembly by the National Assembly. Pedro Ynsua filed an election protest with the Electoral Commission. Angara countered with a motion to dismiss but was met with a denial by the Electoral Commission. Angara then asked the Supreme Court to prohibit the Electoral Commission from taking cognizance of the protest on the ground that the dispute had already been decided by the National Assembly. The Supreme Court assumed jurisdiction over the case, denied Angara's petition, and ruled that it was the Electoral Commission, and not the National Assembly, which had jurisdiction to decide the electoral contest.

Justice Laurel, writing for the majority, justified the Court's action thus: "... the judicial department is the only constitutional organ which can be called upon to determine the proper allocation of powers between the several departments and among the integral or constituent units thereof."[32] He continues:

> ...The Constitution sets forth in no uncertain language the restrictions and limitations upon governmental powers and agencies. If these restrictions and limitations are transcended it would be inconceivable if the Constitution had not provided for a mechanism by which to direct the course of government along Constitutional channels, for then the distribution of powers would be mere verbiage, the bill of rights mere expressions of sentiment, and the principles of good government mere political apothegms. Certainly, the limitations and restrictions embodied in our Constitution are real as they should be in any living constitution.[33]

Does the Supreme Court thereby assert superiority over the other departments? Justice Laurel answers:

> ... when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them. This is in truth all that is involved in what is termed 'judicial supremacy' which properly is the power of judicial review under the Constitution ....[34]

It should be noted, however, that in this case the action was not against the National Assembly but against the Electoral Commission. This distinction is extremely important in separation of powers cases.[34a]

[31] 63 Phil. 139 (1936).
[32] *Id.* at 157.
[33] *Ibid.*
[34] *Id.* at 158.

Vera v. Avelino

Ten years after the *Angara* case, the Supreme Court was once more faced with a controversy involving separation of powers. In the case of *Vera v. Avelino,*[35] Jose O. Vera, Ramon Diokno, and Jose Romero, by a resolution of the Senate, were not sworn in as members of the Senate pending the termination of the election protest lodged against them. An action was filed to annul the Senate resolution and to compel the Senate to permit them to occupy their seats in the Senate.

In refusing to assume jurisdiction over the case, Justice Bengzon, writing for the majority, simply fell back on the *Alejandrino* case. He recalled that while the Supreme Court had declared Alejandrino's suspension unconstitutional, it refused, because of the separation of powers, to grant the relief sought by Alejandrino.[36] Bengzon argued that when, years after the *Alejandrino* case, the Philippine Constitution was framed, the framers, most of whom were lawyers who knew their constitutional law and the *Alejandrino* case, did not choose to modify the *Alejandrino* doctrine, even as they "altered some fundamental tenets theretofore well established."[37]

Does this doctrine not amount to a toleration of wrong doing? Justice Bengzon repeats the answer already given by justices before him:

> Let us not be overly influenced by the plea that 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 ....
>
> Let us likewise disabuse our minds from the notion that the judiciary is the repository of 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,

[34a] Suppose, however, that the National Assembly had disregarded the Court's decision and the Electoral Commission's decision and had insisted on implementing its own decision. Could the Supreme Court intervene? It is submitted that in such an event the *Alejandrino* case would apply. The wrong, if any, would go unremedied judicially.
[35] 77 Phil. 192 (1946).
[36] *Id.* at 200.
[37] *Id.* at 202. Perfecto, however, a delegate to the Constitutional Convention, offers in his dissent his own explanation of the silence of the framers. He says: "Fully knowing the prevailing misconception regarding said principle [of separation of powers], although there was an implicit agreement that it is one of those underlying principles of government ordered by the Constitution to be established, the delegates to the constitutional convention purposely avoided its inclusion in the Declaration of Principles inserted as Article II of the fundamental law. They went to the extent of avoiding to mention it by the phrase it is designated." *Ibid.* 265.

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.[38]

Mabanag v. Lopez Vito

The case of *Mabanag v. Lopez Vito*[39] came shortly after *Vera v. Avelino*. A resolution had been passed proposing the so-called Parity Amendment to the Constitution. In the computation of the required three-fourths affirmative votes, three Senators and eight Representatives, who had not been allowed to sit on account of alleged irregularities in their election, were not included. The validity therefore of the resolution was challenged. Would the Supreme Court assume jurisdiction?

The Court did not. "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 the power to deal with such questions has been conferred upon the courts by express constitutional or statutory provisions."[40] The proposal of amendments to the Constitution is a political question beyond the jurisdiction of courts. Justice Tuason writing for the majority said:

> If ratification of an amendment is a political question, a proposal which leads to ratification has to be a political question. The two steps complement each other in a scheme intended to achieve a single objective. It is to be noted that the amendatory process as provided in section 1 of Article XV of the Philippine Constitution 'consists of (only) two distinct parts: proposal and ratification.' There is no logic in attaching political character to one and withholding that character from the other. Proposal to amend the Constitution is a highly political function performed by Congress in its sovereign legislative capacity and committed to its charge by the Constitution itself. . . .[41]

Important as the concept of political questions is for the proper understanding of this case, the Court does not define it. In Justice Tuason's words: "The term is not susceptible of exact definition, and 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 the political departments of the government."[42] This draws Justice Perfecto's dissenting rejoinder that "A doctrine in which one of the elemental or nuclear terms is the subject of an endless debate is a misnomer and paradox."[43] But Justice Concepcion, in a later case, comes to the rescue:

[38] *Id.* at 205-6.
[39] 78 Phil. 1 (1947).
[40] Justice Tuason, writing for the majority. *Id.* at 4.
[41] *Id.* at 5-6.
[42] *Id.* at 4.
[43] *Id.* at 41.

> . . . the term 'political questions' connotes, in legal parlance, what it means in ordinary parlance, namely, a question of policy. In other words, in the language of the *Corpus Juris Secundum* (16/413), it refers to '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 Legislative or Executive branch of the Government.' It is concerned with issues dependent on the *wisdom*, not legality, of a particular measure.[44]

It is clear from this description of political questions that the question of what to propose as an amendment to the Constitution and the decision as to whether to propose it or not are political questions. They are questions of policy. But it is not so clear that the manner of proposing the amendment, particularly, the requisite three-fourths majority vote, is a political question. In this regard, the Constitution has not given the legislature "full discretionary authority." Justice Bengzon himself, one of those who voted with the majority against the petitioners, maintained that the question was judicial. He argued that an overwhelming majority of the state courts in the United States hold that the question as to whether an amendment has been properly proposed is judicial; and that, since the Philippine Constitution is more analogous to American state systems than to the Federal theory of grant of powers, "it is proper to assume that the members of our Constitutional convention, composed mostly of lawyers, and even the members of the American Congress that approved the Tydings-McDuffie enabling legislation, contemplated the adoption of such constitutional practice in this portion of the world."[45]

What then made Justice Bengzon vote against the petitioners? The "enrolled bill theory",[46] which Justice Perfecto promptly branded as an "uncourageous example which is given under the intellectual tutelage of Wigmore."[47] But whether uncourageous or just another instance of the proverbial discretion which is the better part of valor, the enrolled bill theory, in the hands of an unscrupulous Congress, can present some serious problems. It can render nugatory some of the numerical provisions in the Constitution, e.g., the requisite number of votes for the expulsion of a member of Congress (Art. VI, Sec. 10(3)), for overriding a Presidential veto (Art. VI, Sec. 20(1)), for proposing an amendment to the Constitution (Art. VI, Sec. 20 (2)), for declaring war (Art VI, Sec. 25), for impeachment (Art. IX, Sec. 2, 3).[48] It is perhaps for this reason that in a later case[49] the Court said that the weight of this case as a precedent has been weakened by the case of *Avelino v. Cuenco*.

[44] *Tañada v. Cuenco*, G.R. No. L-10520, Feb. 28, 1957.
[45] *Mabanag v. Lopez Vito*, 78 Phil. 19-20. (1947).
[46] *Ibid.*
[47] *Id.* at 52.
[48] See Perfecto's dissent, *id*, at 53-4.
[49] *Tañada v. Cuenco*, G.R. No. L-10520, Feb. 28, 1957.

AVELINO V. CUENCO[50]

The case of *Avelino v. Cuenco* also involved the problem of numerics. This time the question was one of *quorum*.

During the Senate session of February 21, 1949, Senate President Avelino walked out of the session hall followed by nine other senators. This left only twelve senators in the session hall, (Of the twenty-four senators, one was in the United States and another in a local hospital.) The Senate President Pro-Tempore then took over and, by a resolution approved by the twelve remaining senators, the position of Senate President was declared vacant and Senator Cuenco was designated Acting Senate President. Avelino brought the case to court asking whether the twelve senators who had designated Cuenco Senate President constituted a *quorum*.

By a vote of 6-4, the Court refused to assume jurisdiction. It declared that the controversy was political in nature and that the constitutional grant to the senate of the power to elect its own president should not be taken over by the judiciary. The choice of a Senate President "affects only the Senators themselves who are at liberty *at any time* to choose their officers, change or reinstate them."[51] Furthermore, the Court said:

> 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 might change the temper of the Filipino people as a [sic] peaceful and law-abiding citizens. And we should not allow ourselves to be stampeded into a rash action inconsistent with the calm that should characterize judicial deliberations.[52]

Chief Justice Moran, Justices Tuason, Perfecto and Briones argued for assuming jurisdiction.

Moran argued that the question of *quorum* was a constitutional issue which could be decided by neither of the two conflicting senate factions. With the conflict remaining unsettled, the laws passed by the Senate would be open to doubt. He warned against the "general situation of uncertainty, pregnant with grave dangers" which was "developing into confusion and chaos with severe harm to the nation." He therefore advocated intervention by the Court, the guardian of the Constitution, through the exercise of "the utmost judicial temper and judicial statesmanship."[53]

[50] 83 Phil. 17 (1949).
of *quorum*.
[51] *Id.* at 21-2. But, jurisdiction or not, eight Justices voted 4-4 on the question
[52] *Ibid.*
[53] *Id.* at 25-6.

Justice Tuason's reasoning ran thus:

> ... Here the process sought is to be issued against an appointee of a senate, that, it is alleged, was not validly constituted to do business because ... there was no *quorum*. The Court is not asked to interfere with an action of a coordinate branch of the government so much as to test the legality of the appointment of the respondent.
>
> ... Although this Court has no control over either branch of the Congress, it does have the power to ascertain whether or not one who pretends to be its officer is holding his office according to law or the Constitution. Political questions as a bar to jurisdiction can only be raised by the supreme power, by the legislature, and not by one of its creatures. (Luther v. Borden, 48 U.S. 7 How. 1, 12 Law ed., 581).[54]

Justice Perfecto conceded that the senate was the only body that could determine from time to time "who is and shall be its President."[55] But, he added:

> ... in making such changes of leadership, the Senate and the Senators are bound to follow the orderly processes set and outlined by the Constitution and the rules adopted by the Senate as authorized by the fundamental law. Any step beyond said legal bounds may create a legal hiatus which, once submitted to the proper courts of justice, the latter cannot simply wash their hands and ignore the issue upon the pretext of lack of jurisdiction ....[56]

Justice Briones was for assuming jurisdiction because the heart of the controversy was the business of legislation, one of the essentials of a republic. Moreover, "el conflicto surgido ... ha cobrado las proporciones de una tremenda crisis nacional, preñada de graves peligros para la estabilidad de nuestras instituciones politicas, para el orden publico y para la integridad de la existencia de la nacion."[57] Finally, he agreed with *Werts v. Rogers* that, besides justiciability, another ground for courts to take cognizance of a case is "extrema necesidad".[58]

But six Justices remained unconvinced.

In the case of *Alejandrino v. Quezon* Justice Ostrand had said: "It is usually when courts fail in these respects [performance of duties], and thus prove unfaithful to their trust, that their orders are disregarded and trouble ensues."[59] Whether or not the 6-4 vote in the original resolution of the Court in *Avelino v. Cuenco* meant a failure in judicial duties will forever be a subject of debate. But trouble did ensue.

Following the constitutional provision that in the absence of a *quorum* "a number may adjourn from day to day and may compel the atten-

[54] *Id.* at 66-7.
[55] *Id.* at 38.
[56] *Id.* at 52.
[57] *Id.* at 58.
[58] *Id.* at 69.
[59] 16 Phil. 142-3.

dance of absent Members," the Cuenco group issued orders for the arrest of absenting Senators. But the orders were ignored.

Originally the Court had said that no circumstances had been proved which could change the pacific and law-abiding temper of Filipinos. Now there were indications that the Filipino temper was being taxed severely. Chief Justice Moran and Justice Briones had already spoken of a situation pregnant with grave dangers. Thus it was that, in the reconsideration of the case, the Court, by a vote of 7-4, decided to assume jurisdiction "in the light of subsequent events which justify its intervention."[60]

The language of Justice Pablo was solemn and sacrificial:

> Es un sano estadismo judicial evitarlo [fatales consecuencias] y, si es necesario, impedirlo.
>
> ... Como magistrado, no deben importarme las consecuencias de mi opinion, emitida despues de un estudio concienzudo; pero como ciudadano, me duele ver una lucha enconada entre dos grupos en el senado sin fin practico ... Si insisto en mi opinion anterior, fracasará todo esfuerzo de reajuste de nuestros opiniones para dar fin a la crisis en el Senado.[61]

Justice Feria, however, was more radical. He was for establishing "in this country judicial supremacy, with the Supreme Court as the final arbiter, to see that no one branch or agency of the government transcends the Constitution, *not only in justiciable but political questions as well.*"[62]

If Justice Feria's reasoning were the decisive factor in the reconsideration, this case would constitute a radical change in the Court's attitude to political questions. But what caused the reversal of the Courts original resolution were the peculiar circumstances that had developed in the political scene. The Court Resolution on reconsideration spoke of "subsequent events" which justified its intervention.[63] Justice Pablo, in reversing his stand, admittedly yielded only to a

[60] 83 Phil. 68.
[61] *Id.* at 74-5.
[62] *Id.* at 71. Emphasis ours.
[63] *Id.* at 68.
[64] G.R. No. L-4638, May 8, 1951. 16 L.J. 302, 303. The facts of the case were as follows: As a result of a new party alignment that divided the Senate into two factions, the Little Senate and the Democratic Group, the latter commanding a majority, a reshuffle was made of the membership in the Commission on Appointments. The Senators composing the so-called Little Senate filed a petition with the Supreme Court seeking to annul the reorganization of the Commission on Appointments.

While not assuming jurisdiction over the case, the Court discussed the legality of the reshuffle. Four Justices held that membership in the Commission on Appointments should at all times reflect party alignment. Four others held that the Constitution contemplated stability of tenure for the members, irrespective of subsequent change in party alignment.

citizen's desire for the settlement of the Senate crisis. Thus, when two years later, in 1951, the case of *Avelino v. Cuenco* was invoked in the case of *Cabili v. Francisco* as authority for the Supreme Court to intervene in the allegedly unconstitutional reorganization of the Committee on Appointments, the Court ruled that the conditions which impelled the Court to assume jurisdiction in the *Avelino* case did not presently obtain.[64]

ARNAULT V. BALAGTAS

The case of *Arnault v. Balagtas*,[65] a 1955 case, arose out of the imprisonment of Jean Arnault by the Senate for legislative contempt. Arnault filed a petition for a writ of *habeas corpus* alleging that the legislative purpose for which he was being confined had already been accomplished and that he had already purged himself of legislative contempt by his disclosure of the name of the person whose identity the Senate had asked him to reveal. The Supreme Court ruled that it had no authority to review the findings of legislative bodies

> ... much in the same manner that the legislative department may not invade the judicial realm in the ascertainment of truth and in the application and interpretation of the law, in what is known as the judicial process, because that would be in direct conflict with the fundamental principle of separation of powers established by the Constitution.

The Court, however, added the following: "The only instances when judicial intervention may lawfully be invoked are when there has been a violation of a constitutional inhibition, or when there has been an arbitrary exercise of the legislative discretion."[67] But this statement is not a reassertion of Feria's position in the reconsideration of the *Avelino* case. The *Arnault* case was a petition for a writ of *habeas corpus* against the Director of Prisons. The case was not against a legislative body. This statement therefore does not warrant the conclusion that the Court would assume jurisdiction of a case against a legislative body which has violated a constitutional inhibition or has arbitrarily exercised legislative discretion. The Court was merely reiterating Justice Bengzon's answer to the argument that, under the theory of judicial non-intervention, a citizen arbitrarily imprisoned for years by the Senate would be without remedy. His remedy, according to Bengzon, would be a petition for a writ of *habeas corpus*. "But then the *defendant shall be* the officer or person holding him in custody, and the question will be the validity or invalidity of the

[65] 51 O.G. 4017 (1955).
[66] *Id.* at 4022.
[67] *Ibid.*

resolution."[68] But if relief should be sought against a legislative body, the Court will fall back on *Alejandrino v. Quezon, Vera v. Avelino,* and *Mabanag v. Lopez Vito.* This the Court recently did in the case of *Osmena, Jr. v. Pendatun.*

OSMENA, JR. v. PENDATUN

A resolution was passed by the House of Representatives suspending Congressman Osmeña, Jr. for fifteen months on the ground of "disorderly behaviour." The suspended Congressman sought court intervention. The Supreme Court ruled: "Under our form of government, the judicial department has no power to revise *even the most arbitrary and unfair action* of the legislative department, or of either house thereof, taken in pursuance of the power committed exclusively to that department by the Constitution .... And attempt by this court to direct or control the legislature, or either house thereof, in the exercise of the power, would be an attempt to exercise legislative functions, which it is expressly forbidden to do."[70]

There is room for speculation here as to whether the Supreme Court, given circumstances similar to those accompanying the *Avelino* case, would have assumed jurisdiction over the *Osmena* case. We are inclined to believe that, even under circumstances of "grave dangers", the most that the Court could have done would have been to make an abstract definition of what constitutes disorderly behaviour and then hope for Congress to review its resolution in the light of such definition. The Avelino case was different in that the question of *quorum* could be decided on the basis of numerical data ascertainable by the Courts and not disputed by the litigants. Likewise, in the case of *Cabili v. Francisco,* where it was suggested that the Court would intervene should the conditions of the *Avelino* case obtain, the problem presented to the Court could have been decided on the basis of ascertainable data; for, the political alignment of the Senate could be ascertained and, once done, proportional party representation in the Commission on Appointments would have been a matter of numerical computation.[71]

In the Osmeña case, the Court's refusal to assume jurisdiction was based not solely on the non-justiciable character of the controversy, but also on the inavailability of facts upon which to predicate judgment. "We believe ... that the House is the judge of what constitutes disorderly behaviour, not only because the Constitution has conferred jurisdiction upon it, but also because the matter depends mainly on

[68] *Vera v. Avelino,* 77 Phil. 192, 206 (1946).
[69] G.R. No. L-17144, Oct. 28, 1960.
[70] Emphasis ours.
[71] Likewise, in the *Mabanag* case, the facts were ascertainable by the Court.

factual circumstances which the House knows best but which cannot be depicted in black and white for presentation to and adjudication by the Courts." It is hardly to be supposed that "judicial statesmanship" will lead the Court to venture into what it confessedly considers the unknown.

It is noteworthy, moreover, that, although this decision was not unanimous, the dissenting Justices, Mr. Justice J.B.L. Reyes and Mr. Justice Labrador, disagreed with the majority only on the point of the validity of Congress' disregard of Rule XVII, section 7 of the House. The House resolution, according to Mr. Justice Reyes, insofar as it attempted to divest Mr. Osmeña of the immunity acquired under Rule XVII, section 7 and to subject him to discipline and punishment, when he was previously not so subject, violated the constitutional inhibition against *ex post facto* legislation. The majority's answer to this objection is significant: "Parliamentary rules are merely procedural, and with their observance, the courts have no concern. They may be waived or disregarded by the legislative body."

TANADA v. CUENCO[72]

Another noteworthy decision, one which came before the *Osmena* case and to which reference has already been made, is the case of *Tanada v. Cuenco.* The controversy centered around Article VI, Section 11 of the Constitution which fixes membership in the Senate Electoral Tribunal at nine members distributed thus: three Justices of the Supreme Court, three Senators chosen "upon nomination of the party having the largest number of votes," and three "upon nomination of the party having the second largest number of votes." At the time of the controversy, the Senate consisted of twenty-three *Nacionalistas* and one *Citizens Party* member, Lorenzo Tañada. The latter, making use of his party's right as " the party having the second largest number of votes," nominated himself to the Electoral Tribunal and refused to nominate a second and a third. The Senate, believing that the Constitution called for a mandatory nine man Electoral Tribunal, nominated two more *Nacionalistas,* Cuenco and Delgado, to the Tribunal. Tañada then challenged the right of Cuenco and Delgado to sit as Tribunal members. The Supreme Court took cognizance of the case and decided it in favor of Tañada.

On the question of jurisdiction, Justice Concepcion, writing for the majority, began by distinguishing the present case from *Alejandrino v. Quezon* and *Vera v. Avelino* saying that this was not an action against the Senate and this did not seek to compel the Senate, either

[72] G.R. No. L-10520, Feb. 28, 1957.

directly or indirectly, to allow the members to perform their duties as members of the Senate. This was an action against the Electoral Tribunal, a part neither of Congress nor of the Senate. He likewise explained away the *Mabanag* case by saying that the weight of that case as a precedent had been weakened by the resolution in *Avelino v. Cuenco*. He then reinforced this argument with the following distinction:

> ... the case at bar does not hinge on the number of votes needed for a particular act of said body. The issue before us is whether the Senate *after acknowledging that the Citizens Party is the party having the second largest number of* votes in the Senate ... could validly choose therefor two (2) *Nacionalista* Senators, upon nomination by the floor leader of the Nacionalista Party in the Senate ....

On the matter of political questions, Justice Concepcion was most enlightening. His definition of this concept has already been cited: "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 legislative or executive branch of the government." The case presently at bar is not a political question. There can therefore be no talk of judicial arrogation of political powers.

II. CONCLUSIONS

These, then, are the leading separation of powers decisions of the Philippine Supreme Court in the context in which they were decided. They can also very aptly be called the political questions decisions, for an all-embracing and almost unanimously accepted way of expressing the limitation on the power of judicial review is that courts have no jurisdiction over political questions. It can even be said that there is near unanimity in the understanding of political questions as an abstract concept; for, although a strict definition of the concept by genus-species classification may not be arrived at, a generally satisfactory description, at least, has been formulated: they are "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 legislative or executive branch of the government."[73] The lengthily argued majority opinions, concurrences and dissents which characterize separation of powers decisions arise not from disagreement on what political questions mean in the abstract, but from disagreement as to whether the concept is applicable to this or that problem presented before the courts. Is the matter one regarding which full discretionary authority has been delegated by the Constitution to the legislature or the executive? Is the problem a question of policy? Is the question one of wisdom or of legality?

[73] *Ibid.*

When the question is the legality of a political act, the Court derives its power to adjudicate from Article VIII, Section 2(1) of the Constitution which empowers the Court to review "All cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in question." But this provision is at once the *source* and the *limit* of the Court's power. It does not cover all legal questions. It is not entirely correct to say that, if a question involves the legality of an act of Congress or of the Executive, the Court will assume jurisdiction. Certainly, for instance, when the Executive suspends the privilege of the writ of *habeas corpus* or when Congress suspends or expels a member or imprisons a private citizen, one can legitimately ask whether the executive or legislative act is legal or not. It has been seen, however, that in these and similar instances the Court has refused to assume jurisdiction. These are matters regarding which full discretionary authority has been delegated by the Constitution to the executive or to the legislature because they are questions which cannot be decided without the assessment of facts easily available to the political departments but not to the judicial. It has been seen, moreover, that in instances where the Court is confronted with the inavailability of facts, the Court will refuse to assume jurisdiction even when relief is sought not against the legislature but against some subordinate officer.[74]

There are questions of legality, however, over which, even with facts available to the Court, the Court has refused to assume jurisdiction. Thus, when a constitutional amendment is proposed, it is legitimate to ask whether the constitutional requirement of three-fourths vote has been followed. When a Senate President is ousted and a new one elected, it is legitimate to ask whether there was a *quorum* when all these took place. When the Commission on Appointments is reorganized, it is legitimate to ask whether the constitutional requirement of proportional party representation has been followed. These are questions of legality, of constitutionality. But in all these cases, even with facts at hand, the Court has declined to assume jurisdiction. The reasons: (1) the proposal of an amendment, the choice of a Senate President, the composition of the Commission on Appointments are matters to be decided solely by the legislature; (2) the Court cannot issue a compulsive order against a department which constitutionally is its equal.

[74] See *Barcelon v. Baker*, 5 Phil. 87 (1905) and *Montenegro v. Castaneda*, 48 O.G. 3392 (1952).

The case of *Avelino v. Cuenco,* however, has limited the scope and put in doubt the decisiveness of the first reason. In this case, the Court, on reconsideration, decided the question of *quorum* because of "subsequent events." And in the case of *Cabili v. Francisco,* the Court hinted that, given the circumstances of the *Avelino* case, it would intervene on the question of the reorganization of the Commission on Appointments. Finally, in *Tanada v. Cuenco* the Court said that the weight of the *Mabanag* case (regarding the justiciability of a proposal of an amendment to the Constitution) as a precedent had been weakened by the resolution in the *Avelino* case. Thus, what chiefly keeps the Court from assuming jurisdiction over cases in which the constitutional issue can readily be decided but which call for a compulsive order against a political department is the second reason—co-equality of the political departments. For from the fact of co-equality rises a question of which the Court is always conscious: Will an equal obey the order of an equal?[75] It is only in extraordinary circumstances that the Court will take a chance — after it has felt the pulse of the nation and weighed the possibility of its order being obeyed. This is judicial statesmanship — to tolerate wrong when intervention will only create a greater wrong, to intervene when intervention can avert a serious wrong. This the Court did in *Avelino v. Cuenco.*

Thus it is seen that when the Court distinguishes cases wherein a political department is a direct party from cases where a political department is not a direct party, the distinction is not mere judicial hair-splitting used as a subterfuge for judicial indecision. The distinction is substantial. It flows right out of the tri-departmental structure of our government. The three departments are co-equal and one department can lord it over the others only in those instances where the Constitution makes it lord. In the words of Justice Bengzon: "... Judicial interpretation has tended to the preservation of the independence of the three, and a zealous regard of the prerogative of each, knowing full well that one is not the guardian of the others."[76]

It is true that this arrangement can create a situation where a violation of the law must go unpunished. We are not satisfied with the suggestion that official wrong-doing can always have its remedy in impeachment or in the ballot.[77] The practicability of the impeachment process, vested as it is in a purely political and partisan body, is

[75] "Judgment should not be pronounced which might be *disregarded with impunity.*" *Alejandrino v. Quezon,* 46 Phil. 95; *Vera v. Avelino,* 77 Phil. 228. In *Severino v. Governor-General,* 16 Phil. 366 (1910), it will be remembered that the Court refused to determine whether the executive duty was *discretionary* or *ministerial.* The refusal was born of the realization that even if the duty were ministerial, the Court would have been powerless to order executive action.

[76] *Vera v. Avelino,* 77 Phil. 192, 206-7 (1946).

[77] *Id.* at 207.

minimal.[78] As for the ballot, Justice Briones' observation in *Vera v. Avelino* is not without merit:

> ... en una eleccion politica entran muchos factores, y es posible que la cuestion que se discute hoy, con ser tan fervida y an palpitante, quede, cuando llegue el caso, obscurecida por otros 'issues' mas presionantes y decisivos. Tambien se podra decir que, independiente de la justicia de su causa, un partido minoritario siempre lucha con desventaja contra el partido mayoritario.
>
> ... En Inglaterra y en los paises que siguen su sistema hay una magnifica valvula de seguridad politica; cuando surge una grave crisis, de esas que sacuden los cimientos de la nacion, el parlamento se disuelve y se convocan elecciones generales para que el pueblo decida los grandes 'issues' del dia. Asi se consuman verdaderas revoluciones, sin sangre, sin violencia. El sistema presidencial no tiene esa valvula.....[79]

Thus, the hard fact is that in a system of separation of powers there can be wrongs without remedy. It is a system which, as Justice Laurel observed, like any human production, lacks perfection and perfectibility.[80] The danger of tyranny by one department, however, is effectively minimized by a system of "checks and balances."[81] And American and Philippine experiences have shown that the system works. One may therefore apply to this system, without subscribing to pure pragmatism as a philosophy, the Holmesian dictum regarding the religion clause of the First Amendment to the effect that "The life of the law is not logic but experience."

[78] See SINCO, PHILIPPINE POLITICAL LAW 387-8 (1954).

[79] Dissent, *Vera v. Avelino,* 77 Phil. 364 (1946).

[80] *Angara v. Electoral Commission,* 63 Phil. 139, 157 (1936).

[81] There is no danger from the tyranny of a subordinate officer hiding behind the relative immunity of Congress or the Chief Executive. "... A mere plea that a subordinate officer of the government is acting under orders from the Chief Executive may be an important averment, but it is neither decisive nor conclusive upon this court. Like the dignity of his high office, the relative immunity of the Chief Executive from judicial interference is not in the nature of a sovereign passport for all subordinate officials and employees of the Executive Department to the extent that at the mere invocation of the authority that it purports the jurisdiction of this court to inquire into the validity or legality of executive order is necessarily abated or suspended ...." *Planas v. Gil,* 67 Phil. 62, 74-5 (1939).

But there are instances when a subordinate official may enjoy immunity. "When the head of a department acts as the mere assistant or agent of the executive in the performance of a political or discretionary act, he is not more subject to the control of the courts than the executive himself ..." *Severino v. Governor-General,* 16 Phil. 397 citing *Sutherland v. Governor,* 29 Mich. 320.