of recovering ill-gotten wealth. The court requires assistance to arrive at a final determination of the issue of ownership as expeditiously as possible. Not only will the owners benefit. So, too, will Government. And justice is thereby served.

THE SUPREME COURT AND JUDICIAL POLICY-MAKING

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INTRODUCTION

There is a dearth of scholarship on the Supreme Court's policy-making function in our constitutional system of government. Except for occasional outbursts over politically controversial decisions, the Supreme Court is often left undisturbed, quietly doing its task of hearing cases while everybody focuses on the Presidency and the Congress. According to one author this area of study is the "least explored and the most controversial".[1] This condition stems mainly from a fixed view of the nature of the Supreme Court as an institution and its role in the constitutional order. Unfortunately, a perception of this nature has been in existence over several decades in Philippine constitutional history. The result is an apparent lack of understanding of the nature of the Supreme Court as an institution operating within a democratic system of government. This, in turn, led to a failure to appreciate the process of national policy-making in our governmental system, specifically how the Supreme Court in its own way shapes national policies that address social, economic and political problems in our society.

Neglecting the Court's role in national policy-making is to underestimate its power to influence pivotal moments in history. A reassessment, therefore, of the conventional belief on the role of the Supreme Court in our structure of government is necessary at this stage of our political and constitutional evolution.

Viewed in the light of recent constitutional developments, this study aims to determine the nature of the Supreme Court as an institution in the constitutional government of the Filipino people. The paramount question to be addressed is this: what makes the Court an institution involved in national policy-making? Second, this thesis seeks to find out how the Supreme Court exercises its policy-making function. A third objective is to inquire into the existence of a discernable pattern in the Court's exercise of its policy-making function indicative of a manner or mode by which the Court participates in national policy-making. And finally, the writer proposes to examine what can be expected of the Supreme Court as a participant in national policy-making in the near future.

The study of how the Supreme Court participates in policy-making is important because as the final interpreter of the Constitution and the law the

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Abad Santos, *The Role of the Judiciary in Policy Formulation*, 4 PHIL. L.J. 567 (1966)

Court holds a strategic position in the scheme of our democratic system. Through its power of judicial review the Supreme Court can "legitimize" certain policy choices made by either of the two departments of government or reject such policy choices. In settling constitutional adjudications, the Supreme Court necessarily addresses certain values that citizens adhere to and is called upon to determine the hierarchy of these values at times. In controversies over policy options challenged in constitutional adjudication, the Supreme Court can tip the balance in favor of either preference.

Without a clear understanding of the Supreme Court's policy-making function in our democratic system of government we will not be able to realize fully the policy-making process. Only by understanding and utilizing effectively the policy-making process can our institutions adapt to the changing needs and demands of our society.

The study begins with a look at the Supreme Court as an institution of government, supported by some historical and theoretical observations made by authorities on political theory and constitutional law and an analysis of the Court's role under the Constitution. Chapter One concludes that the Supreme Court is a "hybrid" institution. While it is a "legal institution" just like any other court, its power under the Constitution assumes a political dimension. Through constitutional adjudication, the Court necessarily faces cases of a political nature or those involving questions of public policy.

Chapter Two describes the policy-making function of the Supreme Court, and how the power of judicial review inevitably draws the Court into the political arena. There are, however limitations to the Court's policy-making function. The more obvious ones are the "external limitations" and "institutional limitations". There are also the "self-imposed limitations": a series of procedural "rules" meant to restrict the Court's entanglement with policy questions. Analysis of selected cases, however, reveal that the Supreme Court has shown a tendency to be flexible with those rules when it is faced with nationally significant policy issues. As a result, there is a trend towards increased Supreme Court participation in national policy-making.

Chapter Three deals with the manner by which the Supreme Court participates in policy-making. Using some historical and theoretical concepts developed by authorities on the Supreme Court, including analysis of selected cases, the writer is able to discern three modes of participation in policy-making, namely: (a) the legitimating mode, (b) the advisory mode, and (c) the direct policy-making mode.

Chapter Four applies these four modes of participation in analyzing several Supreme Court decisions on politically controversial cases.Some recent decisions analyzed offer us a glimpse of how the present Supreme Court has exercised its policy-making function under the 1987 Constitution.

Chapter Five summarizes the findings made and concludes that the

Supreme Court does have a significant role in the policy-making process. The Court is seen as manifesting a tendency to exercise its policy-making function actively. Thus, it is reasonable to expect a more active Supreme Court in national policy-making because of the following reasons: (1) the diminished importance of the "self-imposed" procedural limitations; (2) the broad powers of judicial review now made a duty by explicit grant in the Constitution; and, (3) the ambiguous language of general policy guidelines in the 1987 Constitution the ultimate interpretation of which is the responsibility of the Supreme Court.

I. THE SUPREME COURT AS A POLITICAL INSTITUTION

Among the three branches of government the Supreme Court is generally perceived to be the apolitical branch. It is considered as a strictly "legal institution ," concerned with the impartial application of the law as it is written. Questions regarding public policy or of a political nature fall within the domain of the legislative and executive departments of government. The legislative and executive are called "the political departments of government because in very many cases their action is necessarily dictated by considerations of public or political policy".[2] Thus, when the Court is faced with constitutional issues it simply must, according to Justice Owen Roberts, "lay the article of the constitution which is invoked beside the statute which is challenged and decide whether the latter squares with the former."[3] Under this view, the task of a justice is to "find" the law and apply it in a detached and impartial manner.

But to consider the Supreme Court strictly as a legal institution is to underestimate its significance in the political system. The Supreme Court's power of judicial review, that is, to nullify acts of the other branches of government as unconstitutional, clothes the Court's role with a definitely political character. As early as 1835, De Tocqueville observed that "an American judge, armed with the right to declare laws unconstitutional is constantly in political affairs."[4] The Court is a political institution -- "an institution, that is to say, for arriving at decisions on controversial questions

[2] 3 WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES 1326, cited in Tañada v. Cuenco 103 Phil. 1065 (1957) (Justice Concepcion, ponente).

[3] United States v. Butler, 297 U.S. 1 (1936).

[4] De Tocqueville, Democracy in America 90 J.P. Mayer & M. Lerner (eds. 1964) (a new translation by George Lawrence. Original published in Paris, 1835).

of national policy."[5] Certain features of the Supreme Court distinguish it from ordinary courts. Justice Cardozo, after being appointed to the Supreme Court from the New York Court of Appeals, made an observation that shows the nature of the Supreme Court's position in the constitutional order. Comparing the New York Court of Appeals to the U.S. Supreme Court, he said that in the former the court's problems are "lawyers' problems;" but, in the latter, "the preoccupation is chiefly with statutory construction ... and with politics." He used the term "politics" not in the partisan sense, but in the "sense of policy-making."[6]

The term "politics" is used because the Court is called upon to make "a choice among competing values or desires, a choice reflected in the legislative or executive action in question, which the Court must either condemn or condone."[7] Conscious choices are made between competing claims "about the validity of a particular governmental or private action, the legal, political, or economic status of an individual, or group, or the validity of a particular pattern of behavior."[8] Judges and justices do not "mechanically" apply the law, especially in constitutional adjudication. They consciously or unconsciously make value judgments and policy choices. In this regard, Chief Justice Roberto Concepcion states that:

> The lack of a reasonable degree of realism would make the judiciary miss the full impact of values of economic progress, social justice, independence and sovereignty, democracy and freedom, and peaceful political, economic and social reform. The Bench would then lack the perspective and awareness necessary to inspire and generate active and vigorous support for laws and measures intended to propel the government and the people forward and upward, to maximize the democratic participation of the people, to forestall

[5] R. Dahl, *The Supreme Court as National Policy- Maker*, 6 J. OF PUB. LAW 279-86 (1957) in H. KARIEL (ed.) THE POLITICAL ORDER (1970).

[6] R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 54-55 (1955).

[7] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 15 (1959).

[8] GROSSMAN & WELLS, CONSTITUTIONAL LAW AND JUDICIAL POLICY-MAKING 44 (1980).

future social disintegration.[9]

To insist therefore on the exclusive function of the Supreme Court as a "legal institution" is to ignore the human biases of the judges and to disregard the Court's power to annul laws or acts of the executive department as unconstitutional.

Thus, it is more realistic to view the Supreme Court also as a political institution that makes up the constitutional order. It is as much a unit of government as the other "political departments." In the United States, debates on the role of the Supreme Court in policy-making have been ongoing since the turn of the century. It has been observed that the function of the Supreme Court was to "lay down the lines of economic orthodoxy" of capitalism during the industrial revolution.[10] In the 1950s Justice Robert Jackson wrote that "in living history this institution (the United States Supreme Court) has profoundly influenced, for better or for worse, the course of the nation. Not only has it been the center of bitter debate itself, but its decisions have played some part in nearly every great political issue that has vexed our people."[11] In the 1960s, one of the Warren Court's severest critics declared that during the Chief Justice's tenure, the "Supreme Court has wrought more fundamental changes in the political and legal structure of the United States than during any similar span of time since the Marshall Court had the unique opportunity to express itself on a clean slate."[12] Another critic of the Warren Court, after concluding that the Court's pronouncements have "decreed changes in the status quo" and ordered alterations of widespread long accepted practices, including many which have not been legislatively sanctioned," accused the Court as functioning as a "revolutionary

[9] Roberto Concepcion, *The Supreme Court and the Rule of Law*, in Cancio, Alberto, & Guillermo Pablo Jr. (eds.), Chief Justice Concepcion 10 (1966).

[10] *See* M. Lerner, *The Supreme Court and American Capitalism*, 42 YALE L. J. 668 (1933) in R. McCloskey. Essays in Constitutional Law (1947).

[11] R. JACKSON, *supra* note 6, at 22.

[12] *See* Kurkland, *The Court 1963 Term, Forward: Equal in Origins and Equal in Title to the Legislative and Executive Branches of Government*, 78 HARV. L. REV. 143 (1964).

committee."[13]

But when we speak of the Court's role as a political institution what is meant is the position of the Court in the constitutional order, and its function in the national policy-making process. As a political institution, the Court should not be viewed as a "trafficker in party votes and electoral stratagems, but as one of the principal holders of public power." In the constitutional scheme the Court is strategically located to hamper, divert, or accelerate those "great pivotal movements" in society where political power or social forces shift from one point to another.[14] Although able to function only interstitially, as Holmes remarked, nevertheless it has been in a strategic position to exercise significant political power in national policy-making. It is in the exercise of its power of judicial review in constitutional adjudication that the Supreme Court has the most impact in the policy-making process of the government.[15]

Neither exclusively a "legal institution" nor a political one, the Supreme Court is a "hybrid institution combining in an often uneasy alliance the cultures of law and politics. The demands that are made on the Supreme Court often require it to reconcile the needs of the law with the wisdom and pragmatism of politics."[16] As a "court of law," the Supreme Court participates in the policy-making process as a passive institution. It can do nothing until a case is brought before it by a party-litigant. But hardly a political issue arose in the United States that was not converted into a legal question and taken to the courts for a decision.[17] This observation applies particularly to the Supreme Court.[18] It is also applicable to the Philippine experience where many cases of a political nature are brought to the Supreme Court in the

[13] J. Wright, *The Role of the Supreme Court in a Democratic Society: Judicial Activism or Restraint?* 54 CORNELL L. REV. 1 (1968). The criticism is Professor Berle's as quoted from his book, The Three Faces of Power (1967).

[14] J. GROSSMAN & R. WELLS, *supra* note 8, at 45-46.

[15] Abad Santos, *supra* note 1, at 568.

[16] J. GROSSMAN AND R. WELLS, *supra* note 8, at 50.

[17] De Tocqueville, supra note 4, at 89.

[18] A. COX, THE WARREN COURT 1 (1968).

"semblance of a legal question."[19] The only link of the Supreme Court to the policy-making process stems from deciding cases, which it can only do upon initiative of a litigant.[20]

II. The Supreme Court and Policy-making

A. Nature of The Supreme Court's Policy-making Function

Generally, courts function in two ways: norm enforcement and policy-making. In the former a court hears and decides a case wherein a party brings an action against another party to protect his right or to obtain relief for a violation of a right. The court's decision in these kinds of cases is binding on the party-litigants. In its policy-making function, the validity, applicability, or enforceability of the norm itself is questioned. On these occasions the courts may interpret statutes or constitutional provisions.[21] A decision on the issue involved affects not only the party-litigants but a host of other parties, probably a particular group, sector, or class of people, or even an entire population. The decisions of trial courts are often involved in the norm enforcement function, while the appellate courts more often deal with the policy-making function. Our concern is with the latter function, specifically the

[19] F. Feliciano, *On the Functions of Judicial Review and the Doctrine of Political Questions*, 3 PHIL. L.J. 457 (1964). (In Advincula and Avelino v. Commission on Appointments; G.R. No. L-19823, August 31, 1962. Feliciano observed :

> ...There the petitioners asked the Court in effect to control the discretion of the Commission on Appointments to confirm or not to confirm the petitioners' ad interim appointments. The petitioners sought mandamus with preliminary injunction to compel the Secretary of the Commission on Appointments to issue the corresponding certification of confirmation. They did not of course urge the Supreme Court simply and nakedly to supersede the judgment of the Commission on Appointments; the petitioners raised the semblance of a legal question by asking the Court to pass upon the correctness of an interpretation placed by the Commission on Section 21 of the Rules of Procedure, relating to those within which reconsideration of a resolution of the Commission confirming any appointment may be had.)

[20] Abad Santos, *supra* note 1, at 570.

[21] GROSSMAN, *supra* note 8, at 38.

Supreme Court as the highest appellate tribunal with the final say on constitutional issues through the exercise of its power of judicial review.

Through the power of judicial review the Court plays its role as the "guardian of the Constitution." In a series of cases starting with Angara v. Electoral Commission, Justice Laurel elaborated on the "peculiarly American doctrine of imposing upon the judiciary the duty of enforcing the Constitution in the determination of actual cases and controversies before it."[22] Borrowing the reasoning of Chief Justice Marshall in *Marbury v. Madison*,[23] Justice Laurel set the pace for judicial review in Philippine jurisprudence:

> The Constitution is a definition of the powers of government. Who is to determine the nature, scope, and extent of powers? The Constitution itself has provided for the instrumentality of the judiciary as the rational way. And 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 actual controversy the rights which that instrument secures and guarantees to them.[24]

The Supreme Court's power to nullify a legislative or executive act was explicitly provided in the 1935 Constitution, thus sparing us from the debate over the legitimacy of judicial review in a democracy.[25] The power of judicial review was retained in the 1973 and 1987 Constitutions. Simply stated, the Supreme Court has the power to decide "all cases involving the

[22] E. FERNANDO, THE POWER OF JUDICIAL REVIEW 6 (1967).

[23] 1 Cranch 137 (1803). The case where the doctrine of judicial review first had explicit statement and application by the Supreme Court of the United States.

[24] 63 Phil. 139, 157-58 (1936).

[25] Unlike in the United States, our Constitution expressly vests in the Supreme Court the power of judicial review. The legitimacy of the power of judicial review in a democracy is still a subject of debate in the U.S. *See* LEARNED HAND, THE BILL OF RIGHTS (1958); Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); W.R. Bishin, *Judicial Review in a Democracy*, 50 S. CAL. L. REV. 1099 (1977).

constitutionality of a treaty, international or executive agreement, or law."[26]

B. Definition of Policy

"Policy" is defined as "an authoritative and prospective standard of action that is applied to the solution of a perceived problem."[27] Policy decisions are intended to be "guideposts for future actions," and involves a wider group of participants and not just the immediate litigants. Furthermore, by policy decisions, we are talking about "broad changes in the social, economic, or political behavior of groups of individuals."[28]

C. Characteristics of Judicial Policy-making

One characteristic of judicial policy-making is that it is usually directed at government agencies, entities, or instrumentalities. Often, the issue involved is the regulatory activities of government.[29] Some common grounds for calling the Court to enter the policy arena are: the lack or denial of due process, the equal protection clause, and the constitutional guarantees of individual freedom. Under the 1987 Constitution, an additional ground is "grave abuse of discretion amounting to lack of or excess jurisdiction on the part of any branch or instrumentality of government."[30]

Another characteristic is the form Supreme Court decisions take. They tend to be incremental, marginal adjustments to existing rules of law rather than broad or comprehensive statements of means and ends. The adversary process is not conducive to concrete and coherent policy statements. Instead, Supreme Court policies are often stated in negative terms--"thou shall not"--

[26] PHILIPPINE CONST. OF 1987, Art. VIII, Sec. 4, para. 2.

[27] GROSSMAN, supra note 8, at 36.

[28] *Id.* at 50.

[29] *Id.* at 40-41.

[30] PHIL. CONST. OF 1987, Art. VIII, Sec. 1, par. 2.

rather than expected specific performance.[31]

Supreme Court policy very rarely come out "full blown" in a particular case. It is more likely to evolve out of a series of cases, which consider various aspects of a problem.

Finally, rarely does the Supreme Court have the first or last word on a major issue of public policy. Its decisions, like many other in the political process, vary in its political impact.

D. POLICY LIMITATIONS

The Supreme Court's power to decide on policy issues are subject to various limitations. There are external, institutional, and internal limitations.

1. EXTERNAL LIMITATIONS

External limitations are political considerations stemming from the presidential powers of appointment,[32] from the power of Congress to override an unpopular decision through corrective legislation, and generally from the political climate in which the Court must operate.[33]

2. INSTITUTIONAL LIMITATIONS

As a "legal institution", the Supreme Court has inherent limitations. By its nature, it cannot initiate policy-making; it must wait for a case to be brought before it. As a court, it does not have the capacity nor the resources to enforce its decisions. For this, the Court must rely on the legislative and executive branches of government.

3. INTERNAL LIMITATIONS

[31] GROSSMAN, *supra* note 8, at 52.

[32] PHIL. CONST. OF 1987, Art. VIII, Sec. 9: The Members of the Supreme Court and judges of lower courts shall be appointed by the President from a list of at least three nominees prepared by a Judicial and Bar Council for every vacancy. Such appointments need no confirmation.

[33] *See* GROSSMAN, *supra* note 8, at 130.

The Supreme Court of the United States through Justice Brandeis, formulated a series of rules by which the Court would limit the exercise of its constitutional powers "to conform to the necessities of democratic politics":

> The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding...will not anticipate a question of constitutional law in advance of the necessity of deciding it...will not formulate a rule of constitutional law broader than the precise facts to which it is to be applied...will not pass upon a constitutional question...if there is also some other ground upon which the case may be disposed of...will not pass upon the validity of a statute upon complaint of one who fails to show that he is inspired by its operation...will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits...[when the constitutionality of an act is challenged] this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[34]

In *People v. Vera*[35] Justice Laurel laid down the requisites before judicial review can be exercised, supported by a wealth of Filipino and American decisions. In sum, the requisites are: (1) there must exist an appropriate case or an actual controversy; (2) the party raising the constitutional question must have a substantial interest; (3) the question of constitutionality must be raised at the earliest possible opportunity; and (4) that the question of constitutionality must be passed upon in order to settle the case.

a. Actual case or controversy

The Constitution confers upon the Supreme Court the power of judicial review. The Court has the power to "review, revise, reverse, modify, or affirm in appeal or certiorari...final judgments and orders of lower courts in all cases in which the constitutionality or validity of any treaty, executive agreement, law, presidential decree, proclamation, order, instruction, ordinance or regulation is in question."[36] There must therefore be an actual

[34] Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936).

[35] 65 Phil. 56 (1937).

[36] PHIL. CONST. OF 1987, Art. VIII, Sec. 5, para. 2(a).

case before the Court. The Court does not render formal advisory opinions[37] nor will it entertain hypothetical constitutional problems[38] or "friendly suits."[39].

The case must also be "ripe" for adjudication, which means that the act being challenged has had a direct adverse effect on the individual challenging it.[40] A clear illustration of lack of "ripeness" is the case of *Tan v. Macapagal*,[41] where the petitioners sought to have the Supreme Court declare that the 1971 Constitutional Convention had no power under the Constitution to adopt a form of government other than the one outlined in the 1935 Constitution. Since the Convention had no final resolution yet on the subject matter at that time the action was brought,the Court declined to take action. According to the Court, the "doctrine of separation of powers calls for the other department being left alone to discharge their duties as they see fit...it is a pre-requisite that something had by then been accomplished or performed by either branch before a court may come into the picture."[42]

b. Standing to sue

A person has "standing" if he "has a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result

[37] *In re* Workmen's Compensation Fund, 119 NE 1027 (1918) *cited in* Director of Prisons v. Ang Cho Kio, 33 SCRA 494, 509 (1970). (Fernando J. concurring).

[38] Museral v. United States, 219 U.S. 346, 362 (1911).

[39] Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 246 (1936).

[40] *See* PACU v. Secretary of Education, 97 Phil. 806 (1955). The Supreme Court declined to pass judgment on the validity of Section 3 of Republic Act No. 2706 that required a private school to obtain a permit from the Secretary of Education before operating because all the petitioning schools had permits to operate, were actually operating and none were threatened with revocation of their permits.

[41] 43 SCRA 677 (1922).

[42] Id. at 681.

of its enforcement."[43] The rule on standing, however, has been liberalized. Associations have been recognized as possessing standing to assert the right of its rank and file members to challenge the constitutionality of a statute requiring the revelation of its members.[44] "Revelation of names of members would have defeated the very purpose of their joining the association whose main aim was to protect them against racial discrimination."[45] An ordinary taxpayer is also allowed to challenge the constitutionality and legality of disbursement of public funds.[46] Furthermore, members of the legislature have a right to challenge the validity of a statute.[47]

c. Other self-imposed limitations

The Court has also imposed upon itself the following limitations: the principle of *stare decisis*; the presumption of constitutionality; the question of constitutionality as the very *lis mota* of the case; that the constitutional issue must be raised at the earliest opportunity; and that the issue in not moot and academic or rendered such by a supervening event.

Stare decisis is an important contribution of common law. Commonly known as the rule of precedent, it obliges the court to apply a settled rule of law to subsequent similar cases. Accordingly, "this infuses the law with an element of predictability and limits the discretion of any individual judge."[48]

The principle of *stare decisis*, however, has never been perceived as an absolute limitation on the Supreme Court discretion in matters of constitutional law. Its force comes from tradition, from respect for the rule of

[43] People v. Vera, 65 Phil. 56, 89 (1937). A party's interest must be personal. (A physician, therefore, cannot challenge a statute prohibiting the use of contraceptives on the ground that it violates the constitutional rights of his patients, Tileston v. Ullman, 318 U.S. 44 (1943).

[44] NAACP v. Alabama, 357 U.S. 449 (1956).

[45] 2 BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES 278 (1987).

[46] Pascual v. Secretary of Public Works, 110 Phil. 331 (1960); Gonzales v. Hechanova, 9 SCRA 230 (1963); PHILCONSA v. Gimenez, 15 SCRA 479 (1965).

[47] Mabanag v. Lopez-Vito, 78 Phil. 1 (1947); Tolentino v. Comelec, 41 SCRA 702 (1971); Garcia v. Board of Investments, 177 SCRA 374 (1989).

[48] GROSSMAN, *supra* note 8, at 130.

law, and from the recognition that its use may accord Supreme Court decisions with an extra measure of legitimacy.[49] While the doctrine of *stare decisis* is a standard for choice and a limitation on judicial discretion, it can also operate in a way that controls choice and facilitates discretion.

The presumption of constitutionality of a legislative or executive act is founded on the principle of separation of powers. Within its separate domains, the other departments of government reign supreme. The burden of proving the unconstitutionality of an act is on the party challenging it and "all reasonable doubts should be resolved in favor of constitutionality."[50]

In addition, the constitutionality of a statute or act must be raised at the earliest opportunity.[51] As noted in *People v. Vera*, the rule admits of exceptions and is subject to the sound discretion of the courts, which "may determine the time when a question affecting the constitutionality of a statute should be presented."[52]

However, the constitutional question must also be unavoidable for the resolution of the case. If the court can decide the case without addressing the question of constitutionality, it must do so, and leave the constitutional question "for consideration until such question will be unavoidable."[53] In other words, the issue of constitutionality must be the very *lis mota*;[54] it must be pressing and inescapable on the court.[55] The court will not anticipate a question of constitutional law in advance of the necessity of deciding it."[56]

Finally, the question must not be moot and academic. If a court

[49] *Id.* at 130-31.

[50] People v. Vera 65 Phil. 56 (1937).

[51] *Id.* at 88. "It is true, as a general rule, the question of constitutionality must be raised at the earliest opportunity, so that if not raised in the pleadings, ordinarily it may not be raised at the trial and if not raised in the trial court, it will not be considered on appeal."

[52] *Id.*

[53] Sotto v. Commission on Elections, 76 Phil. 516 (1946).

[54] *Id.* at 522.

[55] McGirr v. Hamilton and Abreu, 30 Phil. 563 (1947), as cited in FERNANDO, *supra* note 22, at 91.

[56] *Id.*

decision would not affect the parties to the case or change its outcome, then the court should avoid the constitutional questions raised.

The limitations just enumerated including the doctrine of "political questions," which deserves a separate discussion, are the "tools" that the Supreme Court avails of in order to avoid, evade, or hinder its entering the arena of policy-making in constitutional adjudication. These limitations are "self-imposed" due to an awareness of the potentially powerful and strategic position of the Court. These self-imposed limitations serve a "gatekeeping" function to control the flow of constitutional adjudication that could entangle the Court in questions of politics and public policy. Yet, if there is anything certain about these limitations, it is that none of them are absolute. They merely serve as guides that the Court can refer to in cases involving constitutionality. The Court, however, has shown such flexibility in applying these rules that it has, to a significant extent, lessened their usefulness.

Consider the rule of "actual controversy" or of "standing" in the light of *Dumlao v. COMELEC*.[57] The petitioners, whose qualifications had not been questioned or challenged, claimed that they were suing as taxpayers. The Court held that there was no actual controversy and that the suit presented merely a hypothetical case. Neither was the action a taxpayer's suit because there was no challenge to the expenditure of public funds for the holding of election. Nevertheless, the Court swept aside these rules, and ruled on the substantive issues raised because of "paramount public interest" due to the proximity of the election date and the need to clear the air of confusing doubts.[58]

In addition, the relaxation of the rule on standing has enabled the ordinary taxpayer, associations and other interest groups to bring before the Supreme Court constitutional issues which affect its members' interests.[59]

The other technical rules of limitation were also disregarded because of what the Court perceived as reasons of national importance. In *Hebron v.*

[57] 95 SCRA 392 (January 22, 1980). At issue is the constitutionality of provisions of Batas Pambansa Bilang 52 disqualifying from political candidacy certain types of public officials and those who have been charged with subversion.

[58] Id. at 404. See also 2 BERNAS, *supra* note 45, at 279.

[59] PHILCONSA v. Gimenez, 15 SCRA 479 (1965); Association of Small Landowners in the Philippines, Inc. v. Secretary of Agrarian Reform G.R. No. 78742 (July 14, 1989).

Reyes,[60] for instance, the Supreme Court not only assumed jurisdiction over vital constitutional questions, but also decided the matter, "even if on technical grounds, the suit could have been dismissed for being moot and academic."[61] In that case, the controversy was over the legality of the President's order suspending the petitioner, Mayor of Carmona, Cavite. The Court could not reach an agreement within the unexpired portion of the petitioner's term as mayor. However, the Court held that the case had not become entirely moot although the petitioner's term had already expired because:

> the question on law posed in the pleadings concerns a vital feature of the relations between the national government and the local governments, and the Court has been led to believe that the parties, specially the executive department, are earnestly interested in a clear-cut settlement of said question, for the same will, otherwise, continue to be a constant source of friction, disputes and litigations to the detriment of the smooth operation of the government and of the welfare of the people, the members of this Court deem it necessary to express their view thereon, after taking ample time to consider and discuss fully every conceivable aspect thereof.[62]

In the leading case of *Krivenko v. Register of Deeds*, the Supreme Court ruled on a vital constitutional issue, notwithstanding an opportunity to decline to do so based on the settled principle that a Court need not rule on the question of constitutionality unless absolutely necessary for the resolution of the case.

The issue in *Krivenko* was whether or not residential and commercial lands were included in the constitutional prohibition on alien ownership of "agricultural lands." After the briefs had been presented and while the majority opinion was being prepared, the Department of Justice issued a circular "instructing all registers of deeds to accept for registration all transfers of residential lots to aliens." Thereafter, Krivenko filed a motion to withdraw his appeal. The Solicitor General expressed his conformity to the withdrawal. Instead of avoiding the constitutional issue, the Supreme Court denied the motion to withdraw the appeal and decided on the case. The Court justified its decision to refuse the withdrawal because of the "harmful consequences

[60] 104 Phil. 68 (1958).

[61] FERNANDO, *supra* note 22, at 64.

[62] Hebron v. Reyes, 104 Phil. 68 (1958).

that might be brought on the national patrimony." The Court could have resolved the issue on grounds other than constitutionality, that is, the case had become moot and academic or the appellant wanted to withdraw his appeal. But the Court was concerned that "the possibility of this Court to voice its conviction in a future case may be remote, with the result that our indifference of today might signify a permanent offense to the constitution."[63]

From the foregoing examples, it can be seen that the various rules on self-limitation have been conveniently set aside by the Supreme Court for reasons of "paramount public interest," or "the welfare of the people," or "harmful consequences to the national patrimony." When a constitutional question involving public policy as laid down by the executive or legislative branches of the government arises, the Court is drawn into the policy arena. And the Supreme Court, exercising its discretion, has shown a tendency to set aside its self-imposed limitations when it perceives that the problem before it is of national importance. As Justice Tuason stated in the first of the Emergency Power cases, *Araneta v. Dinglasan*:

> No political benefit can be gained from a discussion of these procedural matters.... Above all, the transcendental importance to the public of these cases demands that they be settled promptly and definitely, brushing aside, if we must, technicalities of procedure.[64]

From this approach to judicial decision-making, these self-imposed limitations are not always effective restraints on the Supreme Court's exercise of its policy-making function.

4. POLITICAL QUESTIONS

The most important and controversial limitation to the Supreme Court's policy-making function is the doctrine of political questions. This doctrine stems from Chief Justice Marshall's opinion in *Marbury v. Madison*.[65] Even as he claimed the power to decide questions of law authoritatively for all three branches of government, Chief Justice Marshall recognized limitations on that power:

> The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties on which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[66]

[63] Krivenko v. Register, 19 Phil 461 at 465-67.

[64] 84 Phil. 368, 373 (1949).

[65] 1 Cranch 137, 168 (1803).

Since Marbury, what exactly is a political question has been the subject of extensive debate. In *Baker v. Carr*, the U.S. Supreme Court tried to clarify the doctrine in this manner:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a Court's undertaking independent resolution without expressing lack for the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made, or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[67]

Justice Concepcion in this often quoted passage from *Tañada v. Cuenco*[68] said that political questions are "those which, under the Constitution, are to be decided by the people in the sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of government." They are concerned with issues "dependent upon the wisdom, not the legality of a particular measure."[69]

Although the doctrine of political question is the most substantial limitation on the policy-making function of the Supreme Court, it has yet to be defined. The ambiguity of the doctrine allows the Court a "very substantial area of discretion in accepting or declining jurisdiction to review the

[66] *Id.* at 70.

[67] *Id.* at 217. [For a thorough discussion on the different approaches to the "political question" doctrine, see 1 Bernas, The Constitution of the Republic of the Philippines 401-408 (1987). See also J.P. Mulhern, In Defense of the Political Question Doctrine, 137 U. Pa. L. Rev. 97 (1988).]

[68] 103 Phil. 1051 (1965).

[69] *Id.* at 1067.

constitutionality of a particular challenged congressional or executive measure, and in deferring and controlling the timing of constitutional adjudication."[70]

The evolution of the political question doctrine in our jurisdiction has also diminished its significance as a limitation on the policy-making function of the Supreme Court. This is due partly to the doctrine's inherent ambiguity, which prompts many scholars to ask whether there is such a thing as a political question or is it just "whatever a court says it is."[71] Another major factor that contributed to the doctrine's decline is the Court's history of "amazing versatility"[72] in the use of "political questions" when faced with controversial cases. An illustration of how the Court can raise the political question doctrine in one moment and disregard it in the next is *Avelino v. Cuenco*.[73]

In this case a serious political impasse occurred in the Senate. Former Senate President Avelino and his supporters refused to attend a session headed by the new President-elect Cuenco, on the ground that the unseating of the former and the election of the latter was done without a quorum being present. By a vote of six to four, Avelino's petition for quo warranto was denied on the ground of lack of jurisdiction. Relying on its previous rulings in *Alejandrino v. Quezon*,[74] *Vera v. Avelino*,[75] and *Mabanag v. Lopez Vito*,[76] the Supreme Court denied the petition:

> in view of the separation of powers and the political nature of the controversy and the constitutional grant to the Senate of the power to elect its own President, which power should not be interfered with, not taken over, by the judiciary. 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 *fortiori* 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 petition must imply to be acceptable, the majority of the Senators want the petitioner to preside, his remedy lies in the Senate Session Hall -- not in the Supreme Court.[77]

[70] FELICIANO, *supra* note 19, at 452.

[71] D. ROHDE & H. SPAETH, SUPREME COURT DECISION MAKING 19 (1976).

[72] Abad Santos, *supra* note 1, at 571.

[73] 83 Phil. 17 (1949).

[74] 46 Phil. 83 (1924).

[75] 77 Phil. 192 (1946).

[76] 78 Phil. 1 (1947).

Then Chief Justice Moran, concurring and dissenting in part, warned that "a general situation of uncertainty, pregnant with grave dangers, is developing into confusion and chaos with severe harm to the nation."[78]

The resolution expressly noted that the Supreme Court would not trespass on the "domain of the Senate" even on the plea that its "refusal to intercede might lead into a crisis, even a revolution."[79] Yet, after holding that it had no jurisdiction, the majority proceeded to make findings of fact on the basis of evidence which it had no authority to receive and evaluate if it really had no jurisdiction.[80] The Court gave its own opinion that, indeed, there was a quorum.

The Court's decision attracted much public criticism and controversy. The Senators supporting Avelino still refused to attend the session. Prominent Filipinos like Claro M. Recto, the President of the 1934 Constitutional Convention, and former President Jose P. Laurel, criticized the Court's decision. According to Laurel, "for the Supreme Court to hide behind the cloak of the separation of powers among the three branches of government is a senile excuse that has been over-abused by those who refuse to take responsibility on their shoulders."[81]

Thereafter, on a motion for reconsideration, the Court resolved by a majority of seven, "to assume jurisdiction over the case in the light of subsequent events which justify its intervention; and ... to declare that there was a quorum at the session where respondent Marciano Cuenco was elected

[77] Avelino v. Cuenco, 88 Phil. 17, 21-22 (1949).

[78] *Id.* at 25 (1949).

[79] *Id.* at 22.

[80] C.M. Recto, *High Court's Refusal to Act on Avelino's Petition is Deplored*, LAWYER'S JOURNAL (March,1949) in D. BATACAN, THE SUPREME COURT IN PHILIPPINE HISTORY 215 (1972).

[81] *Id.* at 217.

acting Senate President."[82]

III. The Supreme Court as National Policy Maker

A. The Modes of Participation in Policy-making

When the Supreme Court exercises its policy-making function, it shapes national policy in three discernible levels.

1. LEGITIMATING MODE

First is the "legitimating mode" of policy-making. When the Court refuses to take cognizance of a case because of its political nature, or when it assumes jurisdiction and sustains the executive or legislative act being challenged as constitutional, it legitimizes the policy choices made by the other branches of government.[83] As Professor Bickel observed:

> The Court's prestige, the spell it casts as a symbol, enables it to entrench and solidify measures that may have been tentative in the conception or that are on the verge of abandonment in the execution. The Court, regardless of what it intends,can generate consent,and impart permanence.[84]

Constitutional legitimacy is a "highly revered quality" in democratic polity that rests on the consent of the governed. "Judicial legitimation" at once reflects and implements a community consensus about how important decisions are to be made, if not about the content of such decisions. The

[82] Avelino v. Cuenco, 88 Phil. at 68.

[83] *See* BLACK, JR. THE PEOPLE AND THE COURT. 56-86. (In Chapter 3, Black analyzes the role of the Supreme Court in legitimizing the New Deal program of President Roosevelt. "We had no other means, other than the Supreme Court, for imparting legitimacy to the New Deal... . To leave the matter to Congress is to change the problem, in a manner which we have no reason to believe could ever be accepted in this country, for it is, in practical effect, to abandon the (constitutional) concept of limitation (of powers) altogether... ."*Id.* at 65).

[84] A. Bickel, *The Supreme Court 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 48 (1961).

performance of that function makes possible "continuing identifications with the community and may itself, through time, generate consent to the reality of the decisions even among the segments of the population that may heartily dislike the contents thereof."[85]

The power to "legitimize" necessarily includes the power to reject as illegitimate the policy choice in question. The Court is resembling a "political veto."[86]

Our recent experience under authoritarian rule proves this point. The Supreme Court was perceived, rightly or wrongly, as stamping the brand of legitimacy on every controversy involving Presidential power from the validity of the imposition of martial law[87] to the ratification of the 1973 Constitution.[88] An astute observer of Philippine politics noted that the "new constitution cases" were "(u)ltimately...a victory for the president (Marcos) in that it legitimized a *fait accompli*".[89]

2. ADVISORY MODE

The second manner of participation is the "consultation" or "advisory mode." It is essentially similar to the "symbolic or educational" function of the judicial review, where the Court pronounces the more fundamental values that a community seeks. The Court's decision, whether it validates or invalidates a legislative or executive measure, embodies the community's basic values.[90]

In terms of policy-making, the Supreme Court, whether or not it assumes jurisdiction over a constitutional or policy issue, or in assuming jurisdiction, nullifies or validates it, gives notice to the other branches of government of the position of the Court on the controversy involved. At times, it may go further and suggest other policy considerations to the other branches of government.

[85] Feliciano, *supra* note 19, at 458-59 (1964).

[86] R.H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 41 (1941).

[87] Aquino Jr. v. Enrile, 59 SCRA 183 (1973).

[88] Javellana v. Executive Secretary, 50 SCRA 30 (1973).

[89] Del Carmen, *Constitutionality and Judicial Politics* in D. ROSENBERG (ED.), MARCOS AND MARTIAL LAW IN THE PHILIPPINES 85 (1979).

[90] Feliciano, *supra* note 19, at 450.

For instance, in the original resolution of *Avelino v. Cuenco*[91] and *Alejandrino v. Quezon*,[92] the Court declared itself without jurisdiction due to the political nature of the controversy, yet promptly explained its views on the substance of the controversy, using the qualifying phrase "assuming it had jurisdiction." More decisions of a similar form followed these two cases. But examples of more conscious and deliberate policy suggestions occurred in cases under the present Court.

In *Enrile v. Salazar,Jr.*[93] the Supreme Court, after upholding the ruling in *People v. Hernandez*[94] that the crime of rebellion cannot be complexed with murder, made the following pronouncement:

> It may be that the light of contemporary events, the act of rebellion has lost that quintessential quixotic quality that justifies the relative leniency with which it is regarded and punished by law...
>
> It is enough to give anyone cause -- and the Court is no exception -- that not even the crowded streets of our capital city seem safe from such unsettling violence that is disruptive of the public peace and stymies every effort at national economic recovery.
>
> There is an *apparent need to restructure the law on rebellion, either to raise the penalty therefor or to clearly define and delimit the other offenses to be considered as absorbed hereby*, so that it cannot be conveniently utilized as the umbrella for every sort of illegal activity undertaken in its name. The Court has no power to effect such change, for it can only interpret the law as it stands in any given time, and what is needed lies beyond interpretation. *Hopefully, Congress will see the need for promptly seizing the initiative in this matter*, which is properly within its province.[95]

It is worth taking note that after the Court's decision in this case, several bills raising the penalty for rebellion were proposed in Congress.

A more explicit policy pronouncement made by the present Supreme

[91] 83 Phil. 17 (1949).

[92] 46 Phil. 83 (1924).

[93] G.R. No. 92163, June 5, 1990.

[94] 99 Phil. 515 (1956).

[95] *Id.* (emphasis added)

Court was in the case of *Guanzon v. De Villa*.[96]

The petitioners in this case challenged the constitutionality of "Areal Target Zoning" or "Saturation drives" conducted by the military and police in their community. "Saturation drives" are used by the military and police as part of their drive against insurgents and criminal elements. A target area is selected, and at an unannounced time, these areas are "raided" and the people of the community are searched or arrested, or both, without a warrant. The petitioners complained that these drives were done in violation of their human rights and the rights guaranteed them under the Bill of Rights.

The Supreme Court upheld the constitutionality of the "saturation drives". The Court reasoned that these were not ordinary times and that this kind of police action was necessary. But, the Court made the following statement:

> If our policy makers sustain the contention of the military and the police that occasional saturation drives are essential to maintain the stability of government and to insure peace and order, clear policy guidelines on the behavior of soldiers and policemen must not only be evolved, they should also be enforced...
>
> The problem is appropriate for the Commission on Human Rights. A high level conference should bring together the heads of the Department of Justice, Department of National Defense and the operating heads of affected agencies and institutions to devise procedures for the prevention of abuses.
>
> Further investigation of the petitioners' charges and a hard look by administration officials at the policy implications of the prayed for blanket prohibition are also warranted.
>
> Copies of this decision are likewise forwarded to the Commission on Human Rights, the Secretary of Justice, the Secretary of National Defense and the Commanding General of the PC-INP *for the drawing up and enforcement of clear guidelines to govern police actions* intended to abate riots and civil disturbances, flush out criminal elements, and subdue terrorist activities.[97]

This "advisory mode" of participation in the policy-making process enables the Court to perform just like any other advisory body in

[96] G.R. No. 80508, January 30, 1990.

[97] *Id.* (emphasis added).

governmental policy-making. The magnitude of its impact on the other branches of government, of course, will vary depending on the external societal conditions existing at the time the decision was made.

3. DIRECT POLICY-MAKING MODE

The third mode of policy-making is the "direct policy-making mode." At this level, the Supreme Court directly lays down national policy by interpreting provisions of the Constitution. Its interpretations are often based on the intentions of the framers of the fundamental law. Rarely does our Supreme Court engage in this level of policy-making.

However, a clear illustration of "judicial policy" and, for that matter, the process of Supreme Court policy-making are embodied in *Krivenko v. Register of Deeds*,[98] concerning the prohibition on alien ownership of "agricultural lands."

The 1935 Constitution prohibited the transfer of any private agricultural lands to individuals, corporations, or associations not qualified to acquire or hold lands of the public domain in the Philippines, except in cases of hereditary succession. The provision took effect on November 15, 1935, when the Commonwealth was established. Krivenko, an alien, bought a residential lot sometime in December, 1941. He sought to register the land in 1945, but the Register of Deeds denied his registration on the ground that, as an alien, Krivenko could not acquire land in the Philippines. Krivenko, after an unfavorable judgment in the lower court, appealed to the Supreme Court. As mentioned earlier in this paper, the Supreme Court dispensed with the technical limitations of the case, namely a motion to withdraw the appeal and the issuance of the Department of Justice circular ordering the Register of Deeds to allow registration of lands owned by aliens.

The Supreme Court held that the phrase "public agricultural lands" appearing in Section 1, Article XIII of the 1935 constitution includes residential lands. "It would certainly be futile to prohibit the alienation of public agricultural lands to aliens if, after all, they may be freely so alienated upon their becoming private agricultural lands in the hands of Filipino citizens...."[99]

Considering the large presence of resident aliens in the Philippines at that time, and the prevailing policy to attract foreign investments as evidenced by the Department of Justice circular, the issue in *Krivenko* was vital for the

[98] 79 Phil. 461 (1947).

[99] *Id.* at 473.

country's economic future.[100] The minority opinion in the case criticized the majority for deviating from the text of the Constitution. Further, the minority believed that the Court should have left the determination of policy to the other coordinate branches of government.[101]

Having participated directly in the policy-making process, the problem arose as to the enforcement of the Court's decision. Prior to the *Krivenko* decision, many Filipinos and foreigners believed that the phrase "agricultural land" should be construed strictly, and that the prohibition was not meant to cover residential and commercial lots. As a result, there were many transactions involving transfers of residential and commercial to alien-vendees by Filipinos vendors.[102]

Some of these Filipino vendors sought recovery of the lots they sold on the ground that the sale was null and void. Six years later a ruling was made by the Supreme Court in *Relloza v. Gaw Chee Hun*.[103] The doctrine in *Relloza* stated that the Filipino vendor had no right to recover, the parties being in *pari delicto*. Its hands tied, the Supreme Court could only take an "advisory" posture as to the enforcement of its policy. The Court said:

> The *best policy* would be *for Congress to approve a law laying down the policy and the procedure to be followed* in connection with transactions affected by our doctrine in the Krivenko case. *We hope that this should be done without much delay.*[104]

After addressing the legislative branch, the Court turned to the executive:

> And even if this legislation be not forthcoming in the near future, *we do not believe that public interest would suffer thereby if only our executive department would follow a more militant policy* in the conservation of our natural resources as ordained by the Constitution. And as we say so because there are at present two ways by which this situation may be remedied, to wit, *(1)action for*

[100] FERNANDO, *supra* note 22, at 18.

[101] *See* Krivenko v. Register of Deeds, 79 Phil. 461, at 538 (Paras, J. dissenting, at 549, and Padilla, J. dissenting.) at 549.

[102] FERNANDO, *supra* note 22,at 19.

[103] 93 Phil. 828 (1953).

[104] *Id.* at 832-33 (emphasis added).

reversion, and (2) escheat to the state.[105]

The Supreme Court even went further and cited the pertinent provisions of Commonwealth Act. No. 141 for reversion proceedings, and its effects on the questioned transactions.

Over a decade after *Krivenko*, the Supreme Court was faced with a case of the same kind, *Soriano v. Ong Hoo, et. al.*.[106] But this time, there was a growing impatience among the justices. A dissenting opinion by Justice J.B.L. Reyes reflects clearly the position of the Supreme Court in a constitutional government and its role in national policy-making. It deserves to be quoted in full:

> While the opinion of Justice Labrador is fully supported by authority, I believe the time is ripe for a revision of the position of the Court in cases of alien land tenures.
>
> For thirteen years since liberation, the Legislature has failed to enact a statute for the escheat of agricultural lands acquired by aliens in violation of the Constitution. Between this apparent reluctance of the legislative branch to implement the prohibition embodied in section 5 of Art. XIII of our fundamental charter, and the strict application by the courts of the *pari delicto* rule, the result has been that aliens continue to hold and enjoy lands admittedly acquired contrary to constitutional prohibitions, just as if the inhibition did not exist.
>
> *In view of the prolonged legislative inaction, it is up to the courts to vindicate the Constitution* by declaring the *pari delicto* rule not applicable to these transactions. After all, the rule is but an instrument of the public policy, and its application is justified only in so far as it enforces that policy. Therefore, where its continued application to a given set of cases leads to results plainly contrary to the wording and spirit of the Constitution, there is every reason to discard it. Otherwise, the express rule against alien land tenures will speedily become the object of mockery and derision.
>
> It may be that Filipinos who parted with their lands in favor of aliens morally do not deserve protection; but they are in no worse case than the alien purchasers, and moreover, the

[105] *Id.* at 832-33 (emphasis added).

[106] 103 Phil. 829 (1958).

Constitution is clearly in the favor.

> I submit that it is *more important that the constitutional inhibition be enforced than to wait for another branch of government to take the initiative.*[107]

Years passed after Justice J.B.L. Reyes' dissent, and there was still no means of enforcing the Krivenko ruling. The predicament of the Court was articulated in an editorial of the Lawyers' Journal, 31 July 1960:[108]

> In a recent scholarly address before the student body of the Francisco College, Justice Felix Bautista Angelo took occasion to mention the celebrated Krivenko case. His purpose was to support his thesis that the Supreme Court is not only committed but determined to carry out the ideals of justice in a manner compatible with the Constitution. In fact, the Court, he added, has been giving 'substance and meaning to nationalistic provisions in our Constitution which aim at conserving and developing patrimony of the nation.'
>
> So unexpected and far-reaching was the ruling at the time, the Justice continued, that it took 'by surprise those aliens who had settled in this jurisdiction and had embarked on an economic expansion, directly at the expense of the people and the country...'How could such transfers be rendered ineffective and the lands retrieved from their illegal holders? How could such ruling be implemented so that it may not remain meaningless or a mere shadow?'
>
> Justice Bautista Angelo's questions are and have remained unsettled to this day. Nothing, absolutely nothing, has been done by either the executive or the legislative branch of government to implement the Court's ruling by law or by escheat proceedings, the State having a perfectly valid and indefeasible right to the lands purchased by aliens. Thus, through sheer neglect or lack of interest on the part of the authorities, the doctrine laid down in the Krivenko case remained much like a dead letter.[109]

[107] *Id.* See Justice J.B.L.Reyes' dissenting opinion.

[108] *See* D. BATACAN, THE SUPREME COURT IN PHILIPPINE HISTORY 141-44 (1972).

[109] *Id.* at 142.

For two decades the Krivenko ruling remained a "dead letter." Then came *Philippine Banking Corporation v. Lui She*.[110] Here, the Supreme Court, in an opinion by Justice Castro, reversed itself and discarded the *Relloza* ruling. The constitutional policy laid down in the Krivenko decision "would be defeated and its continued violation sanctioned if, instead of the setting the contracts aside, and ordering the restoration of the land to the estate of the deceased Justina Santos, this Court should apply the general rule of *pari delicto*. To the extent that our ruling in this case conflicts with that laid down in *Relloza v. Gaw Chee Hun* and subsequent similar cases, the latter must be considered as *pro tanto* qualified."[111]

The Krivenko ruling was indeed an extraordinary case of judicial policy-making. It exemplifies the strategic position the Supreme Court holds in constitutional government as a "guardian of the Constitution," and its roles in the policy-making process.

The case began with the Supreme Court being called upon to decide on the scope of a constitutional provision having vital long term consequences for the national economy and patrimony. As the final interpreter of the Constitution, the Court delved into the nationalist intent of the provisions and of the men and women who framed them, and ruled accordingly. Considering the strength of the dissenting opinions, the ruling of the Court hinged on a conscious policy preference for nationalism over foreign capital.

But the story of *Krivenko* also shows the institutional limitations of the Court. Without any means of enforcing its decision, the Court was helpless, and adopted an "advisory" posture. And finally, because the executive and legislative branches of government failed or neglected to enforce the *Krivenko* ruling, thus sanctioning a violation of the Constitution, the Court, as the only institution of government left to remedy the situation, solved the problem directly. This case confirms Professor Cox's observation that "the need for judicial action is strongest in the areas of the law where political processes prove inadequate,not from lack of legislative power but because the problem is neglected by politicians."[112]

Spanning twenty years, the *Krivenko* case also shows how judicial policy-making may take place after a significant amount of time, and through series of cases.

[110] 128 Phil. 54 (1967).

[111] *Id.* at 69.

[112] Cox, *The Supreme Court 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

A more recent case of direct policy-making is the Supreme Court's decision in *Garcia v. Board of Investments (BOI)* on 9 November 1990.[113] This case was actually a sequel to the first *Garcia v. BOI*[114] case brought to the Supreme Court the previous year.

The subject of the controversy was the decision of the Board of Investments (BOI) and the Department of Trade and Industry (DTI) approving the amended application of the Bataan Petrochemical Corporation (BPC) to transfer the site of its petrochemical complex from Bataan (the original site of choice), to the province of Batangas. The BPC is a corporation formed by Taiwanese investors for the purpose of building a petrochemical plant. In its original application, the BPC applied for registration as a new domestic producer of petrochemicals, specifying Bataan as the plant site. After being accorded pioneer status and being given a host of fiscal and other incentives, including tax exemption from raw materials, the BPC sought to relocate the site to Batangas because of the allegedly unstable labor and insurgency situation in Bataan. The BOI and DTI approved the transfer; thus, prompting the petitioner, a House Representative from Bataan's second district, to file a petition for certiorari and prohibition with a prayer for preliminary injunction. He assailed the legality of the approval of the transfer.

The Supreme Court acknowledged that the "controversy vitally affects the economic interests of the country."[115] The Court then tackled the issue through the procedural aspect and avoided the policy question. It found that there was a lack of due process, and ordered, among other things, that the agencies involved publish the amended application and conduct a hearing before resolving the application transfer. The Court said:

> This Court is not concerned with the economic, social and political aspects of this case for it does not possess the necessary technology and scientific expertise to determine whether the transfer of the proposed BPC petrochemical plant from Bataan to Batangas and the change of fuel from 'naphta and/or LPG' will be best for the project and for our country. This Court is not about to delve into the economics and politics of this case.[116]

[113] G.R. No. 92024.

[114] 177 SCRA 374 (1989)

[115] Garcia v. BOI, 177 SCRA 374, 379 (1989).

[116] *Id.* at 382.

Subsequently, the Court issued two resolutions denying the petitioners motions for reconsideration asking the Court to rule on the foreign investors' claims of final choice. The Court's resolution prudently "skirted the issue of whether the investor, given the initial inducements and other circumstances surrounding its first choice of plant site may change it simply because it has the final choice on the matter."[117]

Between the time the first *Garcia* case was decided by the Court and the time the second *Garcia* case was brought to it, controversy over the petrochemical project raged in the headlines of every major newspaper.

When the second *Garcia* case was brought to the Court,the justices decided to tackle the question of "final choice." Invoking Section 1, Article VIII of the 1987 Constitution, the Court decided to "determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction" on the part of the BOI and DTI in "yielding to the wishes of the foreign investor."[118]

The Court held that the BOI committed a grave abuse of discretion in approving the transfer of the petrochemical site for the main reason that the final say is in the investor. But, the Court also answered several arguments on why the transfer should not be made. Furthermore, the majority cited Section 1, Article XII of the Constitution which provides that:

> The State shall promote industrialization and full employment based on sound agricultural development and agrarian reform, through industries that make full and efficient use of human and natural resources, and which are competitive in both domestic and foreign markets. However, the State shall protect Filipino enterprises against unfair foreign competition and trade practice.

Then before concluding that the petrochemical industry is essential to the national interest, the Court said:

> Every provision of the Constitution on the national economy and patrimony is infused *with the spirit of national interest*. The non-alienation of natural resources, the State's full control over the development and utilization of our scarce resources, agreements with foreigners being based on *real contributions to the economic growth and general welfare of the country* and the regulation of foreign investments in accordance with *national goals and priorities*

[117] Garcia v. BOI, G.R. No. 92024,pp.1-2, Nov. 9, 1990.

[118] *Id.* at 11-13.

> are too explicit not to be noticed and understood.[119]

The Court majority sought to interpret and apply these vague provisions of the Constitution. Dissenting Justice Melencio Herrera had this to say in her dissent:

> (T)he majority has actually imposed its own views on matters falling within the competence of a policy-making body of the Government. It decided upon the wisdom of the transfer of the site of the project (pp. 8-9); the reasonableness of the feedback used (pp. 8-9); the undesirability of the capitalization aspect of the project (p. 10), and injected its own concept of national interest as regards the establishment of a basic industry of strategic importance to the country (p. 13)....*It has made a sweeping policy determination and has unwittingly transformed itself into what might be termed as a 'government by Judiciary'.*[120]

The decision of the Supreme Court in the Garcia case caused a storm of controversy because of its possible consequences on the national economy. The power of the Supreme Court became the subject of passionate debate.

Changes in the new Constitution may have unintentionally expanded the power of the Supreme Court in constitutional government and increased its potential as a policy maker. That judicial power was broadened to include determining grave abuse of discretion committed by the other branches of government is obvious. Like many of the provisions in the Constitution , this was a reaction to authoritarian rule. Because of the Court's frequent use of the "political questions" doctrine under the Marcos regime in order to evade vital constitutional issues, the intent of the framers was to discourage its use.

On the other hand, the framers included broad social and economic policy statements in the Constitution apparently addressed to future legislators and Presidents. Thus, as in the Garcia case, the Supreme Court followed its constitutional duty to determine whether the BOI acted with grave abuse of discretion. Having assumed jurisdiction, the Court made a policy decision. To justify its decision the Court interpreted one of the general and ambiguous policy guidelines on the National Economy and Patrimony. It is therefore not surprising that Justice Melencio- Herrera criticized the majority as "entering the policy realm in the guise of the commission of grave abuse of discretion."

[119] (emphasis added).

[120] *Id. See* Justice Melencio-Herrera's dissenting opinion. (emphasis added).

CONCLUSIONS AND RECOMMENDATIONS

A. Summary and Conclusions

From this study we have seen how the Supreme Court participates in national policy-making in a democratic polity. The traditional notion that policy-making is the exclusive domain of government underestimates the power of the Court to influence societal change. The conventional notion that the Supreme Court is an apolitical body that merely "finds" the meaning of the law and applies it in a given situation is too mechanical and simplistic. It does not help us understand why the Court behaves as it does; nor does it appreciate the strategic position of the Supreme Court in national policy-making. These long held beliefs however, though ineffective as aids in analyzing the Court's behavior, are still necessary to maintain the Court's prestige as the ultimate interpreter of the Constitution and impartial umpire between the Executive and the Legislature.

To be sure, the Supreme Court is still a "legal institution" that impartially adjudicates rights between private litigants. But when confronted with issues of a political character, it functions as a "political institution". It makes choices between competing policy options.

In *Krivenko* and *Garcia* the options were either to protect the national patrimony and economy from excessive foreign intrusion, or to open it up for foreign participation and exploitation. Both positions can be argued persuasively on both practical and legal grounds. It becomes a question then of principle. In both cases, four decades apart from each other, the Court chose to zealously guard the national patrimony, adopting a "nationalist" position.

As a "political institution" the Court is also forced to make a choice between competing values such as in *Guazon* where individual liberties were pitted against the State's police power. Here, the Court upheld the State's right to protect itself. A more recent case illustrative of this perennial conflict, and one that deserves further study, is *Marcos v. Manglapus* (G.R. No. 8821, September 21, 1989) where the right of Ferdinand E. Marcos to travel and return home was posed against the State's police power, specifically the President's power to deny anyone that right on the ground of "national security". Here, the Supreme Court in an 8-7 vote sustained the position of the Chief Executive.

The Court's policy-making function, however, is limited by institutional constraints. The most obvious constrain is that it must function as a court of law. Hence, it cannot initiate a particular policy; it must wait for a suit to be brought before it. For this reason, the impact of the Supreme Court in national policy-making is slow and inconsistent. If there is no controversy or deadlock between the Executive and Legislative branch, then the Court cannot intervene. If it does have the opportunity to intervene, another constraint on the Court is that it has no means nor resources to implement its decisions. For this, it must rely on the Executive department. Because of these constraints and the desirability of avoiding political controversy, the Supreme Court has traditionally resorted to "self-imposed" limitations consisting of procedural technicalities. But as we have seen from the cases analysed, the Supreme Court has shown an increasing willingness to shun aside these technicalities in order to decide on politically significant cases.

From these decisions the Court has exhibited three modes of approaches to policy-making. First is the "advisory mode", wherein the Court, aware of its limitations, proceeds to advise the other branches of government on how to implement a policy decision, hoping that its opinion as a co-equal branch will be needed. Second is the "legitimating mode," where the Court lends its seal of approval on a contentious policy decision. The last is the "direct policy-making mode" which is rarely used. Here, the Court is forced to directly lay down its policy preference even if it runs counter to those of the Executive or Legislative branch. It is in this mode of participation that the Supreme Court makes its most dramatic impact in national policy-making.

The Supreme Court will inevitably continue participating in national policy-making now and in the future more than it has been in the past. There are several factors that support this conclusion.

First,there is the constitutional duty of the Court laid down in Article VIII, Section 1 "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government". The clear intent of the framers of the Constitution was to make it difficult for future justices to avoid a controversial issue by relying on the "political questions" doctrine. This is not to say that this doctrine is no longer acceptable; it still is. It has, however, become suspect,and resort to this doctrine,unless clearly justified, will merely lessen the Court's prestige and importance. The Court must therefore use it circumspectly and not merely as a pretext to avoid controversy.

Second, there are the vague and general policy statements in the 1987 Constitution which serve as a cause for constitutional adjudication and interpretation.

The combination of these two factors -- the duty of the Court to review the acts of the other branches of government and the vague provisions of the Constitution -- will draw the Court into the policy arena more often than in the past. This is what happened in the *Garcia* case. The Court took cognizance of the case by virtue of this constitutional duty to review and then drew from one of the general policy statements under the article on the National Economy and Patrimony as its justification to strike down the act of the Executive branch. We can expect more cases of this nature to fill the Court's dockets.

B. Recommendations

1. AREA STUDIES

In this study, the Supreme Court has consistently taken a "nationalist" position in the area of foreign involvement in the national patrimony and economy. This policy preference was evident from the *Krivenko* ruling to the *Garcia* decision four decades later. Further studies are recommended in other areas of policy-making where the Court's policy position or preference is discernible.

Labor and Social Justice. In this area of policy the Supreme Court has historically played a crucial role in giving flesh to the words of the Constitution calling for protection to labor and the promotion of social justice. It is also in this area where the Supreme Court's strategic position in policy-making was used to usher in a fundamental shift in social and economic philosophy concerning the relations between labor and capital and the role of the State.[122] Can we expect the present Supreme Court to continue this favorable trend towards labor and social justice?

National Security and Individual Liberties. This area of policy-making is particularly relevant today in the light of our recent experience with martial rule and dictatorship. The Supreme Court's decisions in connection with cases

[122] The most dramatic illustration of this change concerns the "freedom to contract" under the laissez faire theory upheld in the People v. Pomar, 46 Phil. 440 (1924), and discarded in Antamok Goldfields Mining Co. v. Court of Industrial Relations, 70 Phil 340. Other recommended cases for historical reference: Pampanga Bus Co. Pambusco's Employees Union, 68 Phil.541 (collective bargaining); Manila Trading v. Zulueta,69 Phil 485 (security of tenure), and International Hardwood v. Pangil Federation, 70 Phil. 602 (minimum wages).

involving violations of the Bill of Rights by the State under the "national security" doctrine provides interesting study on the Court's role in a restored democracy. At least three decisions are worth analyzing: *Guanzon v. de Villa* (G.R. No. 80508, January 30, 1990) on the constitutionality of "zonal" or "saturation drives"; *Valmonte v. de Villa* (G.R. No. 83988, May 24 1990) on the constitutionality of checkpoints; and *Marcos v. Manglapus* (G.R. No. 8821, September 15, 1989) on the constitutional right to travel. In all these cases, the Supreme Court upheld the police measures resorted to by the Executive branch of the government.

2. THE SUPREME COURT AS AN INSTITUTION.

The Selection Process. Since the Supreme Court plays a strategic role in the policy-making process then the selection of justices has important consequences. Their individual qualifications, views, prejudices, and values become legitimate concerns of the entire citizenry. In the United States, for instance, the citizens through their Senate representatives provide the necessary process of accountability in the selection of Supreme Court Justices. Under our 1987 Constitution, however, justices of the Court are selected by the President from a list of nominees prepared by an exclusive group of people called the Judicial and Bar Council. Not only are the people deprived of knowing the qualifications and level of competence of the fifteen justices who will ultimately defend their liberties, but the present selection process gives too much power and influence to a handful of people. Further studies in this area are recommended in order to strengthen the independence of the Supreme Court.

3. CONSTITUTIONAL ADJUDICATION

Further studies are recommended on the viability of constitutional adjudication before the Supreme Court as another avenue of affecting changes in national policy-making. This will particularly benefit sectoral organizations in their efforts to influence national policies affecting their welfare and interests.

The 1987 Constitution has provisions that deal with practically every conceivable sector in Philippine society, such as farmers, laborers, fisherfolk,

women, indigenous groups, and others. Any legislative or executive act that affect these different sectors can be brought to the Supreme Court to determine if they abide by the specific provisions of the Constitution.

JURISDICTION OVER INTRA-CORPORATE DISPUTES: SECURITIES AND EXCHANGE COMMISSION OR THE REGULAR COURTS?

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