A CIVIL LIBERTARIAN TURNED LEGAL APOLOGIST UNDER THE CONSTRAINTS OF HISTORY: AN INTELLECTUAL BIOGRAPHY OF THE QUINTESSENTIAL CONSTITUTIONALIST CHIEF JUSTICE ENRIQUE FERNANDO*

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How a staunch civil libertarian can metamorphose into a legal apologist can perhaps be attributed to a series of rather unfortunate historical events. The late Chief Justice Enrique Fernando was a man of brilliance, character, and ideology; yet he, like many others in his time, was held captive by history, but to him quite further, sojourning his expected route to the annals of esteemed legal luminaries. After all, armed only with his robe and gavel, his chambers could not insulate him from critics.

This bears significance in light of the historical impeachment of Chief Justice Renato Corona in 2012. It cannot be helped but to compare the two Chief Jurists. Both were appointees and former advisers of powerful (later unpopular) Presidents and as such, were allegedly beholden to the Chief Executive for decisions made during their tenure. In Corona's case, he was successfully impeached for betrayal of public trust, which involved his supposed partiality even to the extent of allowing the Court to "flip-flop" on certain cases.

It goes without saying that to peek into the inner workings of a jurist's thinking would require an in-depth and holistic analysis of separate opinions. Such kind of analysis is precisely the purpose of this intellectual biography — for students of the law to examine the works of the Justices, a tradition so entrenched in the United States, but not so in the Philippines (the apprehension perhaps because the academicians are also the practitioners). Taking this into account, one ought to possess "a certain degree of awareness of the pitfalls and delusions of certitude in view of the complexity of the strands in the web of constitutionalism which the Court must disentangle… [F]amiliarity with such doctrines… is, however, a prime requisite."[1] Perhaps if

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such analysis is done right and incessantly, another mar of this gravity to the Tribunal would be avoided.

Chief Justice Fernando was a true advocate of the freedom of expression. He was once quoted as candidly distinguishing between a *ponencia* and a separate opinion, explaining that the former does not necessarily reflect a justice's individual views — the *ponente* writing as the official mouthpiece of the Supreme Court, while the latter being given more leeway to express individual preferences.[2] The Chief Justice was possibly hinting about the divergence in decisions of the collegial body from his personal creed and those decisions, which he or the Court would eventually consider as doctrine. One of his critics and students, Justice Isagani Cruz, said:

> Yet for all my open disapproval of his espousal of the discredited Marcos regime, Fernando exhibited no displeasure or hostility toward me. We remained friends and he made no mention at all of my adverse commentaries on his mistaken loyalties. Looking back now, I feel some remorse over my impatient criticisms. I am consoled, though, that he would have understood and defended my freedom of expression, which he regarded as an article of faith.[3]

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[1] Mitra v. Comm'n on Elections, G.R. No. 56503 (Apr. 4, 1981), (Fernando, C.J.) (*citing* PAUL FREUND, ON UNDERSTANDING THE SUPREME COURT 18 (1950)).

[2] VICTOR AVECILLA, THE FERNANDO COURT: THE SUPREME COURT OF THE PHILIPPINES UNDER THE STEWARDSHIP OF C.J. ENRIQUE FERNANDO, at xiii (2010).

[3] Isagani Cruz, *Chief Justice Enrique M. Fernando,* PHIL. DAILY INQUIRER, Oct. 24, 2004, at A14, *available at* http://isaganicruz.blogspot.com/2004/10/chief-justice-enrique-m-fernando.html (last visited Feb. 28, 2012).

Hence, another objective of this paper is to give deference to the Court he so adamantly defended, and in the process, build a memoir of Fernando himself.

This intellectual biography is divided into three parts: *Part I* shortly chronicles the life of the Chief Justice, his family, his education, and career as a lawyer, educator, and academician leading to his seat in the High Tribunal; *Part II* explores his strong convictions as a civil libertarian early on as a justice trained under a policy-oriented approach to jurisprudence; and with the declaration of Martial Law, *Part III* delves into his conversion into a legal apologist, discussing the Ratification, Martial Law, and Military Commission cases, with particular note on how he justified judicial activism despite the rulings of the majority.

I. ORIGINS OF THE VENERABLE JURIST

Born on July 25, 1915 in Malate, the young Enrique Fernando's brilliance would manifest early on in his academic life as he obtained outstanding marks and was a consistent scholar in all the schools he attended. His wife, Emma Quisumbing, said that her husband *Iking*, as he is fondly called, never paid for tuition fees for himself, even in his Master of Laws in Yale University, where he was the Sterling Scholar. If there was one legacy the Chief Justice left, it would be that he was first and foremost an educator. She added, "[i]t was very important for him to teach. He never stopped teaching even when he became Chief Justice."[4]

He carried this passion from elementary education at San Andres, to his graduation at the top of his class from Araullo High School, and to his Associate of Arts degree in the University of the Philippines where he garnered a flat one (1.0)[5] for the entirety of all four semesters.[6] There was no *summa cum*

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[4] Interview with Emma Quisumbing Fernando (Jan. 9, 2012).

[5] In the University of the Philippines, the grade of 1.0 is equivalent to "excellent," which is the highest grade that the work of a student may be graded at the end of a semester. *See* University of the Philippines Faculty Manual (2003), 11.15.1 Grading System, *available at* http://ovcaa.upd.edu.ph/UPD_FACULTY_MANUAL_2003.pdf (last visited May 20, 2013).

[6] Email from Emmanuel Fernando, Professor, University of the Philippines-Diliman College of Social Sciences and Philosophy, to Nathan Marasigan (Apr. 11, 2013, 1:27 PM) (on file with authors) (*stating* remarks of Eric Fernando).

laude distinction in the University then, and no other student acquired the same record for any degree.[7]

Fernando's propensity of making history continued when he obtained *magna cum laude* honors in the University of the Philippines College of Law, holding still the highest grade point average to date. His law school batch featured three *summa cum laude* graduates from Ateneo de Manila, one of whom was Former Senator Francisco "Soc" Rodrigo, who, though cognizant of Fernando's academic achievements, boasted that one of the three would be the valedictorian. Rodrigo's hopes of becoming number one faltered, however, when Fernando, on the first week of class, was asked to recite a case. After Fernando recited the majority opinion *in verbatim* and boldly asking the professor if he would like to hear the dissent, Rodrigo and the other Ateneo graduates conceded the valedictory spot to Fernando, and discussed who would be second place instead.[8]

His intense focus and acuity for the law were honed under the learned tutelage of the likes of Justice Jose Laurel and Dean Vicente Sinco. Fernando and Emma both placed high in the Bar (the Chief Justice thirteenth place in 1938, and Emma tenth in 1947) and eventually formed their own law office.[9]

Even prior to his appointment to the Court, Fernando was already active in legal-academic circles. He was an avid member of the Civil Liberties Union and an Associate Commissioner of the Code Commission from 1954 to 1963.[10] His legal acumen was recognized not just by academics but also those in the upper echelons of power. He worked as advisers to three consecutive presidents: Ramon Magsaysay, Carlos Garcia, and Ferdinand Marcos. He was a member of the Advisory Staff of President Magsaysay, and was also the President's speechwriter.[11] The words "he who has less in life should have more in law," used by Magsaysay in a speech, are actually from Fernando,

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[7] *Id.*

[8] *Id. (relaying* the account of Francisco "Soc" Rodrigo.)

[9] AVECILLA, s*upra* note 2, at xx.

[10] Enrique M. Fernando, Supreme Court Memorabilia E-library, *available at* http://elibrary.judiciary.gov.ph/index3.php?justicetype=Chief+Justice&justiceid=a45475a11ec72b843d74959b60fd7bd6455b9b2e3d095 (last visited Feb. 28, 2012).

[11] Interview with Emmanuel Fernando (Nov. 18, 2011).

demonstrating his pro-labor leanings even before he became a member of the High Court.[12]

As an academician, Fernando taught his expertise — Constitutional Law. He was undoubtedly the quintessential constitutionalist, as his works, especially in the right of free speech, were already quoted by the Supreme Court in materializing doctrines, as in the case of *American Bible Society v. City of Manila*,[13] a case decided a decade before his appointment as Supreme Court Associate Justice. In his book published with Senator Lorenzo Tañada, he wrote:

> The constitutional guaranty of the free exercise and enjoyment of religious profession and worship carries with it the right to disseminate religious information. Any restraints of such right can only be justified like other restraints of freedom of expression on the grounds that there is a clear and present danger of any substantive evil which the State has the right to prevent.[14]

Fernando was quite the "terror" law professor, a reputation he kept even as he was only returning to the College in the early 1980s. Justice Vicente Mendoza, considered by many as Fernando's intellectual successor as the authority in Constitutional Law, was himself a "victim" of Fernando the professor.[15] He recalls that during one particular class he had not heard a question posed by Professor Fernando since he was preparing frantically for the next case, as is customary among law students. Professor Fernando again demanded, "Yes or no?" Venturing a guess, Mendoza answered with a weak "No, Sir," which to his chagrin, and to the amusement of his classmates, infuriated Fernando. The Professor, in discussing the Constitutional provision on equality, had apparently asked if there was a difference between a student and a professor.[16]

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[12] Emmanuel Fernando, *The celebration of loss*, MANILA BULLETIN, Oct. 24, 2004, *available at* http://www.mb.com.ph/node/184201 (last visited Feb. 28, 2012).

[13] G.R. No. 9637 (Apr. 30, 1957).

[14] *Id.* (*quoting* EMMANUEL FERNANDO & LORENZO TAÑADA, 1 CONSTITUTION OF THE PHILIPPINES 297 (4th ed., 1952-1953)).

[15] Vicente Mendoza, *Enrique Fernando: Friend and Teacher,* MANILA BULLETIN, Oct. 23, 2004, *available at* http://findarticles.com/p/news-articles/manila-bulletin/mi_7968/is_2004_Oct_23/enrique-fernando-friend-teacher/ai_n33819916/ (last visited Feb. 28, 2012).

[16] Telephone Interview with Vicente Mendoza, Former Associate Justice, Supreme Court (Jan. 13, 2012)

What was not denied by any of his students, however, was the skill and competence with which he taught his assigned subject, all to their benefit. His students would later on become leaders in their own right. A good number of them were, at one time or another, members of the Supreme Court. These include Justices Teodoro Padilla, Florentino Feliciano, Hugo Gutierrez, Marcelo Fernan, Flerida Ruth Romero, and Camilo Quiason.[17]

It was in one of his classes at the College of Law where he would meet his would-be wife, Emma. Fernando, though dominant in discussions of law, remained cautious and prudent when it came to women. Despite his Castilian features, he mainly impressed women with his mind.[18] Fortunately for him, Emma was his student. A good fortune was also extended to Emma's classmates since Fernando "was the quintessential terror in law school. With her in class, not only was he in a remarkably good mood but also wittier and more brilliant than usual, cracking hilarious jokes or showing off his photographic memory by quoting extensively from the opinions of Justices Cardozo or Holmes."[19]

He eventually married Emma with whom he had five children: Estela Anna Reyes, Enrique Fernando Jr., Emmanuel Ramon Fernando, Emma Luz Ester Cameron, and Enrico Fausto Fernando.

It was in Yale where he was mentored by no less than Professor Myres McDougal himself. Fernando was his student during the beginnings of McDougal and Harold Lasswell's policy science school of thought, pioneered by the two Yale professors with W. Michael Reisman, also from Yale. Fernando received the highest mark from McDougal for his dissertation on the proposal for an international bill of human rights in the United Nations, the precursor of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. So impressed was McDougal with his work that even after the year had ended, McDougal urged Fernando to pursue a doctorate, offering to grant him the degree even if they had to maintain a long-distance correspondence.

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[17] CRUZ, *supra* note 3.

[18] Emmanuel Fernando, *A Tale of Two Widows*, MANILA TIMES, May 2008.

[19] *Id.*

Their friendship would eventually outgrow the mentor-mentee relationship and McDougal soon became a close friend to Fernando, visiting each other in the Philippines or in Connecticut. In one visit to the Philippines, Emma and Emmanuel Fernando remember taking an ailing McDougal for walks in Manila Bay and describing the sunset to him as his vision had already deteriorated by then.

Despite all his eccentricities and critics, Fernando was cherished and revered by his family. To say that the country came above all else would be inaccurate, if not unfair. There existed then a dissonance between his public and private personae. Perhaps his son, Emmanuel, put it best when he said that:

> This disparity or contrast perhaps reflected the tension between two kinds of ethics, which my father subscribed to in relation to his public and private personae. As a public figure, his ethics manifested the liberal values of justice, liberty, rights, autonomy and impartiality. On the other hand, as a private person, his ethics displayed the communitarian, or if you would like socialist or feminist, values of sympathy, compassion, intimacy, concern and caring.
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> That is why in public, be it as a professor or a justice of the Supreme Court, he appeared cold, hard, gruff, distant and unapproachable. In private, however, he was mostly warm and caring. For beneath that cold and hard exterior lay a heart of gold.[20]

On the other hand, his family would also attest that this private persona did not in any way minimize Fernando's devotion to the country. As his record of public service clearly shows, his two personae were not mutually exclusive. Fernando was appointed as an Associate Justice of the Supreme Court on June 29, 1967 by President Marcos at the age of 51, one of the youngest ever to be appointed to the tribunal. Twelve years later, Fernando was appointed Chief Justice of the Supreme Court where he served until his compulsory requirement on his seventieth birthday on July 25, 1985. He resumed his private practice after retirement and spent the remainder of his life as a family man to his wife, children, grandchildren, and great-granddaughter.[21]

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[20] FERNANDO, *supra* note 12.

[21] AVECILLA, s*upra* note 2, at xxiii.

Fernando's life remains a rarity even by today's standards. He was a learned jurist and scholar, a family man, and a staunch civil libertarian. And of all the things the Chief Justice was, he was one whose flair for writing bespeaks his profound passion for the law. In the following parts, the authors quote directly from his *ponencia* in *Mitra v. Commission on Elections*,[22] which almost describes, in his own words, his innermost thoughts as a jurist during the most trying time in Philippine history.

II. THE CIVIL LIBERTARIAN

> *[Police power is] the most essential, insistent[,] and the least limitable of powers, extending as it does to "all the great public needs." … Negatively put, [it] is "that inherent and plenary power in the State which enables it to prohibit all that is hurtful to the comfort, safety, and welfare of society.*[23]

Every student of the law ought to know this definition of police power adopted in then Justice Fernando's *ponencia* of *Ermita-Malate Hotel & Motel Operators Association v. Mayor of Manila*,[24] where he noted that the standard of either procedural or substantive due process can be determined through its "responsiveness to the supremacy of reason, obedience to the dictates of justice. . . . [I]t [is] freedom from arbitrariness."[25]

Fernando referred to police power as the "power to shape policy," quoting U.S. Justice Felix Frankfurter, who also said that the "law must be sensitive to life; in resolving cases, it must not fall back upon sterile *claims*; its judgments are not derived from an abstract duel between liberty and the police power."[26]

This recognition of police power as shaping policy sheds light on Fernando's training under McDougal, clearly influencing his mode of inquiry

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[22] Mitra, G.R. No. 56503.

[23] Ermita-Malate Hotel & Motel Oper's. Ass'n. v. Mayor of Manila, G.R. No. 24693 (Jul. 31, 2011). Here, an ordinance enacted by the city government of Manila that regulated the hotel and motel business by mandating the disclosure of personal data in the public lobby, questioned as violative of due process, was upheld primarily because of the presumption of validity, which bears on every regulation unless it is void on its face.

[24] *Id.*

[25] *Id.*

[26] *Id.* at n. 4 *(quoting* Hamilton, *Preview of a Justice,* 48 YALE L. J. 819 (1939)).

and decision-making process. Such approach to jurisprudence is about making social choices, identifying and applying policy that would maintain legal order and would achieve a best approximation of the social goal,[27] and to all intents and purposes, veering away from legal realism and towards an emphasis on human rights and recognition of social values.[28]

The process of policy science is three-fold: *first*, value creation, where the question is what human desires are or ought to be part of the legal order, and this includes the knotty determination of what is to be preferred as well as the basis of such choice; *second*, value clarification, which clarifies, limits, expands, and re-assesses the "worthfulness" of such values in the context of and the changes in society and its "intrinsic value"; and *finally*, value implementation, which involves (a) the procedure and strategies, the results of which must be "consistent, compatible, and principled" with the value itself, and (b) the determination of alternatives to the proposed implementation.[29]

This policy science orientation of Fernando is apparent in his *ponencia* of *Ermita-Malate*. The purpose of the ordinance was to curb opportunities for "immoral" or "illegitimate use" of hotel and motel premises, alleged as an "ideal haven for prostitutes and thrill-seekers."[30] The tension between the treasured value of preserving morality in the City and the human desire to be free from curtailment of liberty (which curtailment in this case was through the public disclosure of certain personal information) was considered as consistent with the policy behind the law. After all, liberty is not absolute and it may be restricted in the "interest of the public health, or of the public order and safety, or otherwise within the proper scope of the police power."[31]

Another progressive decision of Fernando was the recognition, for the first time, of privacy, as a constitutional right, independent from the right to liberty. In the case of *Morfe v. Mutuc*,[32] the requirement of periodical submission of the statement of assets and liabilities of certain public officers was held as not violative of the right to privacy — a glaring indication of value creation in policy science:

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[27] W. Michael Reisman, *The View from the New Haven School of Int'l Law,* 86 AM. SOC'Y INT'L L. 118 (1992).

[28] CRISOLITO PASCUAL, INTRODUCTION TO LEGAL PHILOSOPHY 405 (1994).

[29] *Id.* at 413-414.

[30] Ermita-Malate, G.R. No. 24693.

[31] *Id. (citing* Rubi v. Provincial Board, 39 Phil. 660, 706 (1919)).

[32] G.R. No. 20387 (Jan. 31, 1968).

> [T]he rational relationship such a requirement possesses with the objective of a valid statute goes very far in precluding assent to an objection of such character. This is not to say that a public officer, by virtue of a position he holds, is bereft of constitutional protection; it is only to emphasize that in subjecting him to such a further compulsory revelation . . . there is no unconstitutional intrusion into what otherwise would be a private sphere.[33]

Fernando cited the express mention of the right to privacy in communication and correspondence and implied recognition in the clauses on search and seizure and liberty of abode in the Constitution as being similar to the enumeration of the "[v]arious guarantees [that] create zones of privacy" in the case of *Griswold v. Connecticut*.[34] However, he stated that the right to privacy "has come to its own" and such recognition has "wider implications." Here, Fernando enters into value clarification by refining the notion of the value of privacy as being distinct from the value of liberty in the context of government protection.[35] With the "private sector" belonging to the individual, his "dignity and integrity" is safeguarded, but the "public sector" may be controlled by the government. This awareness of the developments in a "technological age" and such "capacity to maintain and support this enclave of private life mark[s] the difference between a democratic and a totalitarian society."[36] Curiously, this distinction of a democratic versus a totalitarian social order can be traced to McDougal's recommendation of "postulat[ing values] … commonly described as the values of human dignity in a *free and abundant society*."[37] The individual — his person, his liberty, and concomitantly, his privacy that is so essentially appended to the individual — is nonpareil in this "formula" held by the vicars of democracy, so it is said:

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[33] *Id.*

[34] 381 U.S. 479, 484 (1965).

[35] Morfe, G.R. No. 20387, n. 66 (A "pungent observation" by a prominent historiographer who said that privacy both as an idea and in practice is absent in Filipino life, "an unnecessary imposition, an eccentricity that is barely pardonable or, at best, an esoteric Western afterthought smacking of legal trickery," was noted by Fernando. This notation could be viewed as one where Fernando opens the decision to challenge the recognition of such value. (*quoting* Carmen Guerrero-Nakpil, Consensus of One, Sunday Times Magazine (Sept. 24, 1967) at 18.)).

[36] *Id.* (*quoting* Thomas Emerson, *Nine Justices in Search of a Doctrine,* 64 MICH. L. REV. 219, 229 (1965).

[37] Myres McDougal, *Law as a Process of Decision: A Policy-Oriented Approach to Legal Study,* 1 NAT. L. F. 53 (1956), *available at* http://digitalcommons.law.yale.edu/fss_papers/2464 (last visited Feb. 26, 2012). Italics supplied.

> The supreme value of democracy is the dignity and worth of the individual; hence a democratic society is a commonwealth of mutual deference – a commonwealth where there is full opportunity to mature talent into socially creative skill, free from discrimination on grounds of religion, culture, or class. It is a society in which such specific values as power, respect, and knowledge are widely shared and are not concentrated in the hands of a single group, class, or institution – the state – among the many institutions of society.[38]

> "Intellectual liberty occupies a place inferior to none in the hierarchy of human values. The mind must be free to think what it wills . . . to give expression to its beliefs . . . seek other candid views in occasions or gatherings or in more permanent aggrupations." Embraced in such concept then are freedom of religion, freedom of speech, of the press, assembly and petition, and freedom of association.[39]

Of all the *intellectual liberties*, Fernando's most powerful expositions are with respect to freedom of expression, recognizing the "broadest scope" and "widest latitude" guaranteed to this constitutional right because of the necessity of an "uninhibited, robust, and wide-open" discussion of public issues, to that extent as to "invite[] dispute."[40] Discussed in the seminal case, *Gonzales v. Commission of Elections*,[41] freedom of speech denotes:

> [S]omething more than the right to approve existing political beliefs or economic arrangements, to lend support to official measures, to take refuge in the existing climate of opinion on any matter of public consequence. So atrophied, the right becomes meaningless. The right belongs as well, if not more, for those who question, who do not

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[38] Harold Lasswell & Myres McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 YALE L. J. 203 (1943). *See also* "[The Constitution] is a sparkling vision of the supremacy of the human dignity of every individual. This vision is reflected in the very choice of democratic self-governance: the supreme value of a democracy is the presumed worth of each individual." William Brennan, Jr., Speech, Text & Teaching Symposium, Georgetown University (Oct. 12, 1985), *available at* http://www.pbs.org/wnet/supremecourt/democracy/sources_document7.html (last visited Feb. 26, 2012).

[39] ENRIQUE FERNANDO, PHILIPPINE CONSTITUTION 565 (1974).

[40] Gonzales v. Comm'n on Elections, G.R. No. 27833 (Apr. 18, 1969). "It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." (*quoting* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

[41] *Id.*

> conform, who differ. To paraphrase Justice Holmes, it is freedom for the thought that we hate, no less than for the thought that agrees with us.[42]

Lacking one vote to strike down as unconstitutional a provision of law that limited partisan political activity to the election period, Fernando remarked that in statutes inhibiting speech, a stricter standard of statutory vagueness must be met. Thus, "a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."[43]

So again, in *Gonzales*, Fernando believed the liberty of expression to be crucial to "spurn[] the alternative of a society that is tyrannical, conformist, irrational and stagnant."[44] Yet he warns, at the same time, that even if the constitutional provision that "[n]o law may be passed abridging the freedom of speech"[45] appears to be illimitable,

> [t]he realities of life in a complex society preclude however, a literal interpretation. Freedom of expression is not an absolute. It would be too much to insist that at all times and under all circumstances it should remain unfettered and unrestrained.[46]

Such freedom can only be "justified by the danger or evil [of] a substantive character that the state has a right to prevent," and that which is not only "clear but also present."[47]

This elaborate discussion of the freedom of expression and the stringent requirement for its valid encroachment laid the foundation for such right to occupy a high place in the "hierarchy of civil liberties,"[48] as against other constitutional rights.

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[42] *Id.* (*citing* U.S. v. Schwimmer, 279 U.S. 644).

[43] *Id.* (*citing* Smith v. California, 361 U.S. 147, 151 (1959)).

[44] *Id.* (*quoting* EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966)).

[45] CONST. art. III, § 4.

[46] Gonzales, G.R. No. 27833.

[47] *Id.* In *Gonzales,* the majority of the Court believed that Rep. Act No. 4880, which made unlawful the solicitation of any campaign, publication of campaign materials, making of speeches or announcements for the election, suffered from vagueness.

[48] Phil. Blooming Mills Employment Org'n v. Phil. Blooming Mills, G.R. No. 31195 (June 5, 1973), *citing* Gonzales, G.R. No. 27833.

Not surprisingly, Fernando's treatment of free speech penetrated the delivery of opinions; and in the interplay between competing values, the effect is to create and clarify the legal entitlements of an individual living in a democratic society, doctrinally known as the "balancing of interests."[49] In one case, the two liberties examined in light of Fernando's decisions were put side to side, concluding that "the limits of freedom of expression are reached when expression touches upon matters of essentially private concern."[50]

> [T]here should be . . . full respect for free speech and press, free assembly and free association. There should be no thought of branding the opposition as the enemy and the expression of its views as anathema. Dissent, it is fortunate to note, has been encouraged. It has not been identified with disloyalty. . . . Constructive criticism is to be welcomed not so much because of the right to be heard but because there may be something worth hearing. That is to ensure a true ferment of ideas, an interplay of knowledgeable minds.[51]

This value of free speech is so deeply entrenched in policy and jurisprudence today that it is hard to imagine that it was only three decades ago that the doctrines have been set into place. Up to this day, it is still "highly ranked in our scheme of constitutional values."[52]

At this juncture, disquisitions of Fernando in four institutional contexts will be traced to the interaction of both power and value processes: *first*, in political demonstrations, *second*, in relation to the academe, *third*, with respect to the media, and *fourth*, in labor standards and relations.

Political Demonstrations

Fernando found himself "delineat[ing] the boundaries of the protected area of the cognate rights to free speech and peaceable assembly" in *Reyes v. Bagatsing*,[53] where a pressure group was denied a permit to hold a rally and march to the U.S. embassy based on police intelligence reports supposedly affirming plans of subversive or criminal elements to disrupt the assembly.

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[49] Lagunzad v. Viuda de Gonzales, G.R. No. 32066 (Aug. 6, 1979), *citing* ENRIQUE FERNANDO, BILL OF RIGHTS 79 (1970).

[50] *Id.*, *citing* Gonzales, G.R. No. 27833 and Phil. Blooming Mills, G.R. No. 31195.

[51] Mitra, G.R. No. 56503.

[52] Reyes v. Bagatsing, G.R. No. 65366 (Nov. 9, 1983).

[53] *Id.*

Fernando rejected the suggestion of the local chief executive to transfer the rally to an enclosed area, to wit:

> While prudence requires that there be a realistic appraisal not of what may possibly occur but of what may *probably occur*, given all the relevant circumstances, still the assumption — especially so where the assembly is scheduled for a specific public — place is that the permit must be for the assembly being held there. The exercise of such a right, in the language of Justice Roberts . . . is not to be "abridged on the plea that it may be exercised in some other place."[54]

The same level of deference was given to free speech and assembly even when the situation calling for a declaration of such right was already moot and academic. Noting that martial law was already lifted at the time when a petition for *habeas corpus* for the release of some political rallyists was pending, it cannot be gainsaid that "zeal in the performance of [the] duties [of the members of the Armed Forces] cannot justify any erosion in the respect that must be accorded the liberties of a citizen."[55] In terms of judicial review, *Bagatsing* accentuated the burden that "on the judiciary,—even more so than on the other departments—rests the grave and delicate responsibility of assuring respect for and deference to such preferred rights."

Educational Institutions

A student seeking admission to a graduate course in Theology filed a case claiming a right to be enrolled, which the Court, in *Garcia v. Loyola School of Theology Faculty Admission*,[56] dismissed, primarily because there was no clear right warranting the legal remedy sought. Fernando, however, being an educator and prodigy as a student, nonetheless touched on academic freedom, molding the value as one which not only covers the qualified educators' right "to inquire, discover, publish and teach the truth as they see it in the field of their competence,"[57] but also extends to the four essential freedoms of a university originally crafted by Justice Frankfurter, "to determine for itself on academic

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[54] *Id.* (*citing* Schneider v. Irvington, 308 U.S. 147,163 (1939)).
[55] Carpio v. Guevarra, G.R. No. 57439 (Aug. 27, 1981).
[56] G.R. No. 40779 (Nov. 28, 1975).
[57] *Id.*

grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study:"[58]

> [The Constitutional provision refers] to the "institutions of higher learning" as the recipients of this boon. It would follow then that the school or college itself is possessed of such a right. It decides for itself its aims and objectives and how best to attain them. It is free from outside coercion or interference save possibly when the overriding public welfare calls for some restraint. It has a wide sphere of autonomy certainly extending to the choice of students.

Even in a non-political setting, the same principle of the liberty of expression applies. In at least three cases,[59] Fernando quotes Justice Abraham Fortas in *Tinker v. Des Moines Community School District*,[60] "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." However, the power balance and the value process for free speech would collide with the rules of learning institutions: *first*, against classroom disruption, and *second*, complying with academic standards.

Citing his own decision in *Bagatsing*, Fernando laid down in *Malabanan v. Ramento*[61] certain legal tenets regarding the guarantee of the right to free speech and to peaceable assembly by students on matters which would affect their welfare and which are of public interest. It is not subject to previous restraint or subsequent punishment, unless the test of a clear and present danger is manifest. In *Malabanan*, much ado was made by the university and the then Ministry of Education not only because of the violation in the location of the rally, but also in the "tenor" of the students' speech:

> [W]ith an enthusiastic audience goading them on, utterances, extremely critical, at times even vitriolic, were let loose, that is quite understandable. Student leaders are hardly the timid, diffident types. They are likely to be assertive and dogmatic. They would be ineffective if during a rally they speak in the guarded and judicious language of the academe.

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[58] *Id.* (*quoting* Sweezy v. New Hampshire, 354 U.S. 234, 236 (1957)).

[59] *See* Malabanan v. Ramento, G.R. No. 62270 (May 21, 1984); Villar v. Technological Inst. of the Phil., G.R. No. 69198(Apr. 17, 1985); and Arreza v. Gregorio Araneta U., G.R. No. 62297 (June 19, 1985).

[60] 393 U.S. 503 (1969).

[61] Malabanan, G.R. No. 62270.

In *Villar v. Technological Inst. of the Philippines*,[62] the Court held that while the right to set academic standards was recognized, such criteria must not be "utilized to discriminate against those students who exercise their constitutional rights to peaceable assembly and free speech." Thus, four of the seven students barred from enrollment for rallying, while alluding to their one to two failing grades during the semester, did not warrant their school's refusal to enroll them, whereas the rest were justifiably barred for having failed several other subjects. Hence, if a permit is granted, but the students violate the conditions of the permit such that their speech is found to be that which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others,"[63] the sanctions must still be in proportion to the offense and must not be used to discriminate against students with the same academic standing.

Labor

The power of the freedom of association is arguably most discernable and tangible among laborers. This freedom is explicitly ordained in the Philippines (unlike, as Fernando notes, in the United States, where it is merely an offshoot of other freedoms), especially so in light of the Constitution which emphasizes the State's obligation "to assure full enjoyment of workers to self-organization and collective bargaining."[64]

Collective bargaining was characterized, in a long line of cases penned by Fernando himself, as the "essence," the "prime manifestation," the "[best] device," of industrial democracy, so that there be "no obstacle to the freedom identified with the exercise of the right to self-organization:"[65]

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[62] Villar, G.R. No. 69198.

[63] Malabanan, G.R. No. 62270 (*citing* Tinker v. Des Moines Community Sch. Dist., 393 U.S. 503 (1969)).

[64] U.E. Automotive Emp. & Workers Union v. Noriel, G.R. No. 44350 (Nov. 25, 1976) (*comparing* CONST. (1935), art. IV, § 7 & art. II, § 9, *with* Nat'l Ass'n for the Advancement of Colored People v. Alabama, 357 U.S. 449 (1958), 371 U.S. 451 (1963), *and* Bates v. City of Little Rock, 361 US 516 (1960)).

[65] Federacion Obrera de la Indus. Tabaquerav. Noriel , G.R. No. 41937 (July 6, 1976) (*quoting* United Emp. Union of Gelmart Indus. Phil. v. Noriel, G.R. No. 40810, Oct. 3, 1975; Phil. Ass'n of Free Lab. Unions v. Bureau of Lab. Relations, G.R. No. 42115, Jan. 27, 1976). "[L]aborers have the right to form unions to take care of their interests *vis-a-vis* their employees. Their freedom to form organizations would be rendered nugatory if they could not choose their own leaders to speak on their behalf and to bargain for them." Pan Am.

> [Collective bargaining] is the fairest and most effective way of determining which labor organization can truly represent the working force. It is a fundamental postulate that the will of the majority, if given expression in an honest election with freedom on the part of the voters to make their choice, is controlling. No better device can assure the institution of industrial democracy with the two parties to a business enterprise, management and labor, establishing a regime of self-rule.[66]

Fernando was not only an advocate of labor in theory, for during his leadership as Chief Justice, he was attuned to the need of the rank-and-file employees in the Supreme Court and sought the enactment of the Judiciary Development Fund.[67]

Media

Fernando himself was a casualty of free speech accorded to the press, yet he was of the belief that "[p]ress freedom is a preferred right. . . . entitled to the fullest protection that the law affords. . . . '[L]ibel can claim no talismanic immunity from constitutional limitations.'"[68]

> While there is an undeniable public interest in assuring that a man's reputation be safeguarded from calumny and unjust accusation, on matters of public concern, he cannot be shielded from the scrutiny of the press and the expression thereafter of whatever failings it might uncover on matters of public concern.

World Airways v. Pan Am. Emp. Ass'n, G.R. No. 25094, Apr. 29, 1969 (Fernando, J.). Chief Justice Fernando also penned the following related decisions: Phil. Comm. Elec. & Elec. Workers Fed'n. v. Ct. Indus. Rel'ns, G.R. No. 34531, Mar. 29, 1974; Phil. Ass'n of Free Lab. Unions v. Bureau of Lab. Rel'ns, G.R. No. 43760, Aug. 21, 1976; Tarnate v. Noriel, G.R. No. 49272, Sept. 15, 1980.

[66] Phil. Ass'n of Free Lab. Unions v. Bureau of Lab. Rel'ns, G.R. No. 42115 (Jan. 27, 1976).

[67] AVECILLA, *supra* note 2.

[68] Babst v. Nat'l Intell. Board, G.R. No. 62992 (Sept. 28, 1984) (*quoting* New York Times v. Sullivan, 376 U.S. 254 (1964)).

> . . . . [E]ven on the assumption that there has been injury to man's reputation, the damages to be assessed, if at all warranted, should not be lacking in the quality of realism.[69]

That there should be "no impermissible infringement to the freedom of expression" (as in libel), as held in *New York Times v. Sullivan*[70] in 1964, is well-nigh declared as canon in free speech jurisprudence and was already indoctrinated decades earlier in the Philippines by Justice George Malcolm in *United States v. Bustos* in 1918. To the authors, the case of *Gonzales v. Kalaw Katigbak*[71] is one of the most ardent decisions on free speech written by Fernando, where he so assiduously integrated the Constitutional provision on the "[a]rts and letters under the patronage of the State"[72] with the freedom of expression:

> Motion pictures are important both as a medium for the communication of [i]deas and the expression of the artistic impulse. Their effects on the perception by our people of issues and public officials or public figures as well as the prevailing cultural traits is considerable. . . . There is no clear dividing line between what involves knowledge and what affords pleasure. If such a distinction were sustained, there is a diminution of the basic right to free expression.
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> . . .
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> . . . There is merit to the observation of Justice Douglas that "every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor."[73]

In this case, the Court held that the State intervention through media boards is limited to classification of films. However, when the expression is obscene, then the State may censor, by "applying contemporary Filipino

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[69] *Id.*

[70] New York Times v. Sullivan, 376 U.S. 254 (1964).

[71] G.R. No. 69500 (July 22, 1985).

[72] "Arts and letters shall be under [the State's] patronage." CONST. (1935), art. XIV, § 4. *Now* CONST., art. XIV, § 15.

[73] Chief Justice Fernando noted "[the] importance of motion pictures as an organ of public opinion lessened by the fact that they are designed to entertain as well as to inform." Burstyn v. Wilson, 343 U.S. 495, 501 (1942). Kalaw Katigbak, G.R. No. 69500 (*quoting* Superior Films v. Regents of University of State of New York, 346 U.S. 587, 589 (1954)).

cultural values as standard" and a "less liberal approach" when the films are shown in television under the doctrine of *parens patriae*.[74]

> [Government should not] invade the sphere of autonomy that an artist enjoys. There is no orthodoxy in what passes for beauty or for reality. . . . [A]rt and *belles lettres* deal primarily with imagination, not so much with ideas . . . . What is seen or perceived by an artist is entitled to respect, unless there is a showing that the product of his talent rightfully may be considered obscene. [According to] Justice Frankfurter . . . "the widest scope of freedom is to be given to the adventurous and imaginative exercise of the human spirit" in this sensitive area of a man's personality.[75]

III. THE LEGAL APOLOGIST

Marcos' strongest critics all consistently lament how the Supreme Court, during the 14 years that spanned Martial Law, was reduced by the dictator to a proverbial "rubber-stamp," a "legitimizer" to his decisions as Chief Executive, who so conveniently "sought refuge in the doctrine that the issues being raised were 'political questions' and therefore beyond the purview of the Court."[76] No less than the former Solicitor General Estelito Mendoza (whose brainchild was the "political question" doctrine, widely criticized for its abuse by the Court in cases where judicial restraint was exercised over judicial review) admits that the 1987 Constitution was written mainly to avoid all possible means of repeating the Marcos era's evisceration of the judicial branch; venturing so far as to call it a "legacy" of the late President.[77]

Clearly the pundits, in labeling the High Court as composed of a "pack [of] cronies . . . terrorized into submission,"[78] automatically counted Fernando

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[74] Kalaw Katigbak, G.R. No. 69500 (*comparing* Roth v. United States, 354 U.S. 476, 488-489 (1957) ("[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."), *with* Regina v. Hicklin, L.R. 3 Q.B. 360 (1868) ("Obscene material is to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons.").

[75] *Id.* (*quoting* Kingsley v. Regents, 360 U.S. 684, 695 (1959) (Frankfurter, J., *concurring*)).

[76] Sheila Coronel, *The Dean's December*, PUBLIC EYE, April-June 1997, *available at* http://pcij.org/imag/PublicEye/dean.html (last visited Feb. 26, 2012).

[77] Estelito Mendoza, Former Solicitor General, Centennial Lecture at the University of the Philippines College of Law: 1987 Constitution: A Marcos Legacy (Nov 22, 2011).

[78] CORONEL, *supra* note 76.

as one of those "allied" with the strongman. An observation that is perhaps not entirely unfair, as all the relevant circumstances would seem to point to that conclusion.

However, a careful perusal of Fernando's separate opinions and *ponencias* would evince a rather different, if not opposite, conclusion. Even as an Associate Justice, his independence as a jurist was embedded deeply in his writings — an irrefutable spirit of non-conformity greatly enhanced by the scholarship that characterized all of his works. Perhaps the most glaring example of this would be his oft-ignored dissent in the seminal case of *Javellana v. Executive Secretary*,[79] where the ratification of the 1973 Constitution was put in issue.

A. The "Flowering of Judicial Review"

Foremost of the cases allegedly evincing his subservience to the dictator under his leadership as Chief Justice is *Occena v. Commission on Elections*,[80] where the Court put an end to all doubts "as a matter of law" as to the validity of the 1973 Constitution, elucidating the *Javellana* ruling that "there is no further judicial obstacle to the new Constitution being considered in force and effect."[81] Judicial review, according to the Court speaking through Fernando himself, has two fundamental aspects: "[to] check as well as [to] legitimate."[82] It may not only nullify the acts of coordinate branches but may also sustain their validity, and in the latter, there is an affirmation that what was done cannot be stigmatized as constitutionally deficient "with the recognition of the cardinal postulate that what the Supreme Court says is not only entitled to respect but must also be obeyed, a factor for instability was removed."[83]

Fernando was a believer of the Court's role, even saying that "[t]here is thus an inevitability to the flowering of judicial review."[84] In this regard, in light of the governing tradition of late, it is well to note that "counter-majoritarianism" upholds judicial supremacy, to wit:

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[79] G.R. No. 36142 (Mar. 31, 1973).
[80] G.R. No. 56350 (Apr. 2, 1981).
[81] Javellana, G.R. No. 36142.
[82] Occena, G.R. No. 56350.
[83] *Id.*
[84] Javellana, G.R. No. 36142.

> 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 coordinate 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 non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for questioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[85]

Prior to *Occena*, the Court in *Sanidad v. Commission on Elections*[86] upheld the validity of the 1976 Amendments proposed by Marcos, which, among others, established the Interim *Batasang Pambansa* with all the powers of the Interim or Regular National Assembly.

To contextualize, the 1971 Constitutional Convention was convened, and on September 21 the next year, President Marcos declared Martial Law. The Convention approved the proposed amendments to the Constitution two months after the declaration of Martial Law. A month after the declaration, Marcos issued Presidential Decree No. 96 creating citizen assemblies in every barrio or city district in relation to the submission of the Constitution's ratification to the people. On January 17, 1973, he signed Proclamation No. 1104 declaring the continuation of Martial Law, Proclamation No. 1102 confirming referendum results and announcing the ratification of the new Constitution, and Proclamation No. 1103 suspending the convening of the Interim National Assembly. On September 22, 1976, Marcos decided to amend further the Constitution (through Presidential Decree No. 1033), which includes, among others, replacing the Interim National Assembly with the Interim *Batasang Pambansa* and making the President a member tasked with convening and presiding over its sessions until the speaker was elected, naming himself prime minister and authorized to exercise his powers and prerogatives under the 1973 Constitution and 1976 amendments,[87] including the authority to

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[85] Baker v. Carr, 369 U.S. 186 (1962).

[86] G.R. No. 44640 (Oct. 12, 1976).

[87] FILEMON RODRIGUEZ, THE MARCOS REGIME: RAPE OF THE NATION (1985). Critics point to Amendment No. 6 as the perhaps the most "devastating" provision: "Whenever in the judgment of the president (Prime Minister), there exists a grave emergency or a threat or imminence thereof, or whenever the *Interim Batasang Pambansa* or the Regular National

exercise legislative power. Martial law was only officially lifted on January 17, 1981.[88]

The Court also dismissed the questioned infirmity of the Interim *Batasang Pambansa* Resolutions, which proposed further constitutional amendments, with eight justices concurring with the *ponencia* and Justice Teehankee interposing the lone dissent. Pursuant to his dissenting opinion in *Sanidad*,[89] Teehankee was of the view that the proposed amendments at bar, having been adopted by the Interim *Batasang Pambansa* as the "fruit" of the constitutionally infirm 1976 Amendments, "must necessarily suffer from the same congenital infirmity."[90] He objected to the fact that the amendments were neither proposed nor adopted in accordance with the mandatory provisions of the 1973 Constitution, which, according to him, vested such constituent power in the National Assembly, and not the President (Prime Minister), from whom such powers were withheld.[91]

This decision, it would seem, exemplifies one of the epic clashes of opinion between Fernando and Teehankee, which helped foment the notion of the latter being the former's main dissenter. Interestingly, Fernando points out in a footnote that at one point they were in fact on the same side. Enumerating several cases where the 1973 Constitution was applied by the Court after *Javellana*, Fernando notes:

> It may be mentioned that the first of such cases, Garcia, was promulgated on July 25, 1973 with the writer of this opinion as opposite and the next case, Buendia, also on the same date, with

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Assembly fails or is unable to act adequately on any matter for any reason that in his judgment requires immediate action, he may, in order to meet the exigency issue the necessary decrees, orders, or letters of instructions, which shall form part of the Law of the Land".

[88] *Id.*

[89] *Id.* A few months after, presidential elections were held on June 1981, pitting Marcos against retired Gen. Alejo Santos. The opposition boycotted the national election. Marcos overwhelmingly won again, constitutionally granting him another six-year term. Then Finance Minister Cesar Virata was elected as Prime Minister by the Batasang Pambansa. On August 21, 1983, opposition leader and staunch critic of the Marcos administration, Benigno "Ninoy" Aquino Jr. was assassinated at the Manila International Airport upon his return to the Philippines after a long period of exile. A peaceful civilian initiated and military supported uprising, known as the *EDSA* Revolution, forced Marcos into exile in Hawaii and installed Corazon Aquino as president on February 25, 1986.

[90] *Id.*

[91] *Id.* (Teehankee, J., *dissenting*). *See* CONST. (1973), art. XVII.

> Justice Teehankee as *ponente*, both of whom were dissenters in *Javellana, but who felt bound to abide by the majority decision.*[92]

Thus, to the unlearned person's mind, Fernando would have, from the beginning, ruled in favor of the ratification of the 1973 Constitution in *Javellana*, and the 1976 Amendments in *Sanidad*, as this would entail effectively placing the judiciary's imprimatur on the president's actions. A Justice so beholden to his appointer, as Fernando's loudest critics, rather inaccurately, claim him to be, would naturally have had his supposed master's paramount political considerations in mind. On the contrary, Fernando opined against the Solicitor General in three out of the five main issues involved in *Javellana*, refraining from voting on two issues; whereas in *Sanidad*, he dissented to the holding that there is concentration of powers in the Executive during periods of crisis, thereby raising serious doubts as to the power of the President to propose amendments to the Constitution. The supposition that Fernando was one to hide in the sanctuaries of judicial restraint can be examined in light of the said cases.

The cases filed in *Javellana* (often referred to as the Ratification Cases) were the culmination of the opposition against the draft of the Constitution formulated by the 1971 Constitutional Convention.[93] So divisive was the issue of the ratification of the proposed Constitution that most of the Justices entered separate opinions. However, the key issue on whether to merely give due course to the petitions was dismissed by a majority of six out of ten. Four justices,[94] including Fernando and Teehankee, had a clear stand — the issue as to the 1973 Constitution's coming into force and effect was justiciable and the

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[92] Occena, G.R. No. 56350, n. 13 (*referring to* Garcia v. Domingo, G.R. No. 30104 (July 25, 1973) *and* Buendia v. City of Baguio, G.R. No. 34011 (July 25, 1973)). (Emphasis supplied)

[93] *Javellana* essentially involved the following issues:

1. Is the issue of the validity of Proclamation No. 1102 a justiciable, or political and therefore non-justiciable, question?
2. Has the Constitution proposed by the 1971 Constitutional Convention been ratified validly (with substantial, if not strict, compliance) conformably to the applicable constitutional and statutory provisions?
3. Has the aforementioned proposed Constitution acquiesced in (with or without valid ratification) by the people?
4. Are petitioners entitled to relief?
5. Is the aforementioned proposed Constitution in force?

[94] The four justices referred to are: Chief Justice Roberto Concepcion, Justices Calixto Zaldivar, Fernando and Claudio Teehankee

1973 Constitution had not been ratified validly. Another set of four justices[95] was likewise unambiguous in their opposition — the question of ratification was political and consequently non-justiciable, and that the Constitution was validly ratified. With a divided Court, the votes of the two remaining members of the High Court[96] voted to dismiss the petition without conclusively addressing the issue of ratification.

Then Assistant Solicitor-General Vicente Mendoza had this to say:

> Unhappily there is much in their joint opinion that is merely *dictum* (i.e., the discussion on the validity of the Constitution as a result of popular acquiescence).
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> . . .
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> But the Justices made it clear elsewhere in their opinion that they *did not regard the question of ratification as relevant***.** To them the "pivotal question" was whether the Constitution had nevertheless become effective because of popular acquiescence. *But since in their view this was a political question,* they joined the Makasiar Group in voting "not to give due course to the instant petitions."[97]

In this regard, Fernando opposed, almost totally, the notion that the proposed Constitution had already been properly ratified in law.[98] At the outset,

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[95] The other four justices are: Justices Antonio Barredo, Felix Makasiar, Felix Antonio and Salvador Esguerra.

[96] The two tie-breakers were: Justices Querube Makalintal and Fred Ruiz Castro.

[97] Vicente Mendoza, Annotation to *Javellana,* G.R. No. 36142. (Emphasis supplied)

[98] Then Justice Fernando dissented in *Javellana,* as follows:

1. That the question was judicial and *against* the attempted use by the respondents of the political question doctrine, thereby advocating for the Tribunal's exercise of judicial review;

2. That the 1973 Constitution was *not ratified* in accordance with the 1935 Constitution, which provided a single method of ratification, i.e., through "an election or plebiscite held in accordance with law and participated in only by qualified and duly registered voters." CONST. (1935), art. XV, § 1;

3. That he was *not* prepared to rule on the question of whether there was acquiescence by the people in the new Constitution in light of the "shortness of time that has elapsed and the difficulty of ascertaining what is the mind of the people in the absence of the freedom of debate that is a concomitant feature of martial law";

4. For the denial of the respondents' motions to dismiss and consequently *for the granting of relief* to the petitioners; and

Fernando's quick dismissal of sidestepping judicial review is readily observable. For him, it would be "an indefensible retreat, deriving no justification from circumstances of weight and gravity, if this Court were to accede to what is sought by respondents and rule that the question before us is political."[99]

When the Executive Department, as Respondents in the case, argued for judicial restraint, citing the works of Yale Professor Alexander Bickel and Harvard Professor Paul Freund, the ever-academic Fernando had this to say:

> Whatever be the merit inherent in [Professors Bickel and Freund's] lack of enthusiasm for a more active and positive role that must be played by the United States Supreme Court in constitutional litigation, *it must be judged in the light of our own history*. It cannot be denied that from the well-nigh four decades of constitutionalism in the Philippines, even discounting an almost similar period of time dating from the inception of American sovereignty, there has sprung a tradition of what has been aptly termed as judicial activism.[100]

Thus, in light of Philippine history, Fernando reviewed the utterances of Claro Recto (of the 1935 Constitutional Convention) and Justice Laurel's *ponencia* as early as 1937, and in very strong words stated that judicial review, in appropriate cases, is a duty of the Supreme Court, a "part of the living Constitution:"

> It is one of the paradoxes of democracy that the people at times place more confidence in instrumentalities of the State other than those directly chosen by them for the exercise of their sovereignty.
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> It would thus appear that even then this Court was *expected not to assume an attitude of timidity and hesitancy when a constitutional question is posed.* There was the assumption of course that it would face up to such a task, *without regard to political considerations and with no thought except that of discharging its trust.*
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> [The Judiciary is] independent of the Executive no less than of the Legislative department . . . in the performance of our functions, undeterred by any consideration, free from politics, indifferent to popularity, and unafraid of criticism in the accomplishment of our

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5. That he *could not state* with judicial certainty *whether or not the people have accepted* the Constitution. (Javellana, G.R. No. 36142, (Fernando, J., *dissenting*). (Emphasis supplied)

[99] *Id.*

[100] *Id.* (Emphasis supplied)

> sworn duty as we see it and as we understand it." *The hope of course was that such assertion of independence impartiality was not mere rhetoric.*[101]

Touching upon the perennial counter-majoritarian dilemma in discussions involving the Court's power of review of executive or legislative action, albeit under the requirements of a justiciable case or controversy, is "an undemocratic shoot on an otherwise respectable tree. It should be cut off, or at least kept pruned and inconspicuous."[102] Fernando defended the judiciary's mandate, citing Professor Samuel Konefsky's assertion that the founders of modern democratic society, in its inception, did not contemplate rule by a single group of citizens unchecked by any other institution.[103] Had Fernando in fact been the Marcos lackey that his critics painted him to be, the above statements would be the greatest contradiction in the Supreme Court's history—calling unwarranted judicial restraint "temerity," and in the end strongly dissenting in what was perhaps the most significant decision in favor of the dominant presidency during those trying times.

This calls to mind the footnote in *Occena*, which the authors construe as Fernando's hinting of the importance of the principle of *stare decisis et non quieta movere*, which gains significance considering that it was made almost a decade after *Javellana* and towards the end of the Chief Justice's term. Ever the academic, the Chief Justice placed such principle higher than most of his contemporaries.

While Fernando penned *Occena* and concurred in the ultimate issue in *Sanidad*, he was nonetheless against the majority opinion's statement that:

> In general, the governmental powers in [] a crisis government today are more or less concentrated in the President. According to Rossiter, "(t)he concentration of government power in a democracy faced by

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[101] *Id.* (*quoting* Claro Recto, Valedictory Address, 1935 Constitutional Convention; and People v. Vera, 65 Phil. 56 (1937). (Emphasis supplied)

[102] *Id.*

[103] *Id.* (*quoting* SAMUEL KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS 293 (1956). When it is said that judicial review is an undemocratic feature of our political system, it ought also to be remembered that architects of that system did not equate constitutional government with unbridled majority rule. Out of their concern for political stability and security for private rights, they designed a structure whose keystone was to consist of barriers to the untrammeled exercise of power by any group.

> an emergency is a corrective to the crisis inefficiencies inherent in the doctrine of the separation of powers."[104]

To Fernando, Professor Clinton Rossiter's statement was "an alien element in the limited concept of martial law as set forth in the Constitution," a "constitutional dictatorship" that Rossiter himself warned as a "dangerous thing,"[105] and which Fernando quotes:

> A declaration of martial law or the passage of an enabling act is a step which must always be feared and sometimes bitterly resisted, for it is at once an admission of the incapacity of democratic institutions to defend the order within which they function and a too conscious employment of powers and methods long ago outlawed as destructive of constitutional government. Executive legislation, state control of popular liberties, military courts, and arbitrary executive action were governmental features attacked by the men who fought for freedom not because they were inefficient or unsuccessful, but because they were dangerous and oppressive. The reinstitution of any of these features is a perilous matter, a step to be taken only when the dangers to a free state will be greater if the dictatorial institution is not adopted.[106]

B. Wilting Abstractions

> *There must be, however, this caveat. Judicial activism gives rise to difficulties in an era of transformation and change. A society in flux calls for dynamism in the law, which must be responsive to the social forces at work. It cannot remain static. It must be sensitive to life. This Court then must avoid the rigidity of legal ideas. It must resist the temptation of*

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[104] Sanidad, G.R. No. 44640 (*quoting* CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP 288-290 (1948)).

[105] *Id.* (Fernando, J., *concurring & dissenting) (discussing* Rossiter). Fernando observed that Rossiter's view that martial law was "a device designed for use in the crisis of invasion or rebellion" was proper, but studying further, he said that Rossiter's opus was "more of the common law jurisdiction" compared to a power granted expressly through the Constitution, which though lawful to contend with "emergency conditions in times of grave danger," is still "subject to attendant limitations in accordance with the fundamental postulate of a charter's supremacy."

[106] *Id.* (*quoting* Rossiter, ch. XVIII).

> *allowing in the wasteland of meaningless abstractions. It must face stubborn reality. It has to have a feel for the complexities of the times.*[107]

Despite Fernando's stance in *Javellana*, one could easily rebuff the assertion that his juristic independence, which set him apart from an exceedingly dominant Chief Executive, was steadfast throughout his stay in the High Court. The unavoidable question would then be—was his view consistent even after being appointed by President Marcos as Chief Justice?

This is where we see the shift in Fernando's active libertarian approach and his becoming an apologist, not because of the Marcos policies *per se*, but of the doctrines espoused by the Supreme Court and the acquiescence of the public through time, when he was expected to have challenged them head-on. Often, the views he took were so learned that he rarely presented arguments in a lopsided manner. To say, however, that he reversed his views in favor of the dictator is inaccurate, if not completely false. The difficulty, however, of this distinction is not only gray but also composed of a very thin line, which arguably accounted for the impression that the distinction had the same practical outcome.

We examine the decisions in view of the conflicting values of a strong executive versus individual liberty, taking into account aspects of policy science, as well as the surge and eventual waning of judicial authority through an analysis of the two important powers of the President: the suspension of the writ of *habeas corpus* and the declaration of a state of martial law.

The earliest ruling by the Tribunal on the matter was in 1905 in the case of *Barcelon v. Baker*,[108] where the Court ruled against the issuance of a writ of *habeas corpus*, for the reason that the law gave the President the sole power to determine whether "public safety" necessitated the suspension of the privilege of the writ of *habeas corpus*, thus: "such authority is exclusively vested in the legislative and executive branches . . . and their decision is final and conclusive upon [the judiciary] and upon all persons."[109]

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[107] Mitra, G.R. No. 56503.

[108] 5 Phil. 87 (Sept. 30, 1905). In *Barcelon,* the Supreme Court denied the privilege of the writ of *habeas corpus* to Barcelon who was detained pursuant to orders by Colonel Baker of the Philippine Constabulary. Then Governor-General Luke Wright had suspended the privilege of the *writ of habeas corpus* upon recommendation of the Philippine Commission.

[109] *Id.*

Barcelon, while not explicitly stating the phrase "political question" except for a quotation lifted verbatim from *Philips v. Hatch*,[110] laid the political question doctrine, ratiocinating that the power to suspend the writ was not justiciable, since the President's competence to assess the conditions of peace and order in the country was superior to all others.

Then Justice Fernando first had the opportunity to air his opinion on the issue in his concurring and dissenting opinion in *Lansang v. Garcia*.[111] President Marcos, in response to the Plaza Miranda bombings,[112] suspended the privilege of the writ, stressing the need to curtail the growth of Maoist groups. The doctrine in *Barcelon*,[113] subsequently affirmed in *Montenegro v. Castaneda*,[114] was abandoned by the Court in declaring that it had the power to inquire into the factual basis of the suspension of the privilege and to annul the same should there be no legal ground sufficiently established, or after deliberations, decide to uphold the suspension of the privilege of the *writ* in finding that there was in fact a widespread danger of a Communist plot to overthrow the incumbent government.[115]

In his separate opinion, Fernando readily concurred, stating that "it was about time" to abandon the "dictum" in *Montenegro* of exercising judicial restraint with the "lack of competence" argument and lauded the more progressive stance taken by the *ponente* Chief Justice Concepcion. In support of this, Fernando wrote:

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[110] *Id.* "Judges have their peculiar duties which, if faithfully and learned studied, have little tendency to make them familiar with current and rapidly changing conditions upon which depend the important political question of whether it is safe to relax, on the instant, military rule and restore intercourse and trade." Philips v. Hatch, 1 Dill. 571, Fed. Cas. No. 11094.

[111] G.R. No. 33964 (Dec. 11, 1971).

[112] *Id.* In *Lansang*, the circumstances that led to the suspension of the privilege of the writ of *habeas corpus* this time involved the throwing of two hand grenades in a caucus conducted by the Liberal Party in Plaza Miranda on August 21, 1971 causing the death of eight people and injuries incurred by many others. President Marcos proclaimed Proclamation No. 889, which suspended the privilege of the writ of *habeas corpus*. Subsequently, Teodosio Lansang and the other petitioners were invited by the Philippine Constabulary, headed by Brig. Gen. Eduardo Garcia, for interrogation and investigation.

[113] Barcelon, 5 Phil. 87.

[114] G.R. No. 4221 (Aug. 30, 1951).

[115] Lansang, G.R. No. 33964.

> *[T]his Court, even if denied the fullness of information and the conceded grasp of the Executive still must adjudicate the matter as best it can. It has to act not by virtue of its competence but by the force of its commission a function authenticated by history.* That would be to live up to its solemn trust. . . of preserving the great ideals of liberty and equally against the erosion of possible encroachments, whether minute or extensive.[116]

Fernando was appalled by the idea of judicial restraint where the Constitutional mandate of the Court to decide is necessarily called into play by the circumstances of the case. In his view, even if the President has in his arsenal the advantage of experience as well as information, these are not reasons sufficient to render the Judiciary, as a co-equal branch of government, apathetic. Such fact does not "warrant for an unquestioning and uncritical acceptance of what was done," or "fold its hands and evince an attitude of unconcern," but must decide the case, which otherwise would be tantamount to "judicial abdication."[117]

However, this doctrinal ruling in *Lansang* was overturned in *Garcia-Padilla v. Enrile*,[118] three years after Fernando sat as Chief Justice. Although published and labeled in the reports as a concurring opinion, his stance remained consistent, that is, he expressly rejected the abandonment of the *Lansang* doctrine. In *Garcia-Padilla*, the Court upheld the validity of a Presidential Commitment Order issued by virtue of Letter of Instruction No. 1211, which was in effect a warrant of arrest, stating that "the function of the PCO is to validate, on constitutional ground, the detention of a person for any of the offenses covered by Proclamation No. 2045 which continues in force the suspension of the privilege of the writ of *habeas corpus*."[119] Where the arrest has been made initially without a warrant, its legal effect is to render the writ unavailable as a means of judicially inquiring into the legality of the detention.[120] The Court's abandonment, penned by Justice Pacifico De Castro, reads:

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[116] *Id.* (Fernando, J., *concurring & dissenting*) (*citing* BENJAMIN CARDOZO, THE NATURE OF JUDICIAL PROCESS 92-93 (1921)). (Emphasis supplied)

[117] *Id.*

[118] G.R. No. 61388 (Apr. 20, 1983).

[119] *Id.*

[120] *Id. Garcia-Padilla* provides that the detention through the commitment order is corollary to the suspension of the privilege of the *writ*, hence, such executive power granted "provides the basis for continuing with perfect legality the detention" so long as public safety still requires it and that the rebellion has not yet been quelled.

> The significance of the conferment of this power, constitutionally upon the President as Commander-in-Chief, is that *the exercise thereof is not subject to judicial inquiry*, with a view to determining its legality in the light of the bill of rights guarantee to individual freedom. This must be so because the suspension of the privilege is a military measure the necessity of which *the President alone may determine as an incident of his grave responsibility as the Commander-in-Chief of the Armed Forces*, of protecting not only public safety but the very life of the State, the government and duly constituted authorities.[121]

Fernando, although concurring in the result, decried this express reversal by the Court, finding it highly unnecessary to reexamine the unanimous ruling in *Lansang* providing that the suspension of the privilege of the writ of *habeas corpus* raises a judicial rather than a political question:

> With due respect, I cannot agree to such a conclusion. In the first place, there was no need to go that far. For me, at least, the rationale that this Court must accord deference to a presidential commitment order suffices for the decision of this case. Nor would I limit my dissent on that ground alone. *It is for me, and again I say this with due respect, deplorable and unjustifiable for this Court to turn its back on a doctrine that has elicited praise and commendation from eminent scholars and jurists here and abroad.*[122]

This statement the authors find worthy of note, for Fernando was not afraid to state in glaring words whenever he believed that the Court was pronouncing a doctrine which in his opinion was so starkly erroneous. It is apparent that this is the rhetoric of an advocate of judicial power and the supremacy of law. It could be said that Fernando was a precursor of sorts to future Chief Justices Hilario Davide and Reynato Puno, whose legacies in the Tribunal were mostly characterized by acts considered by many as judicial activism.

Less than a month later, the Supreme Court virtually overturned the ruling in the case of *Morales v. Enrile*,[123] which Fernando briefly concurred to, stating: "*I am in complete agreement.* That was the point of my dissent in the

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[121] *Id.* (Emphasis supplied)

[122] *Id.* (Fernando, C.J., *concurring*). (Emphasis supplied)

[123] G.R. No. 61016 (Apr. 26, 1983).

recently decided case of *Garcia-Padilla v. Enrile*."[124] Despite the seeming reversal of the unwise doctrine in *Garcia-Padilla*, some have said that the same could not have been vested with doctrinal status as the voting was far from a majority of the Court,[125] but this observation has already been rendered moot by the current Constitution, which mandates that the suspension of the privilege of the writ of *habeas corpus* is subject to judicial review.[126]

However, Fernando's discourse in *Lansang* was not limited to his concurrence to the abandonment of the *Barcelon* doctrine of judicial restraint in dealing with *habeas corpus* cases, as previously discussed. Talking about the merits on the arbitrariness in the promulgation of the suspension of the writ, where he found the allegations of improvidence or abuse difficult to sustain: "[t]he most that can be said is that there was a manifestation of presidential power well-nigh touching the extreme border of his conceded competence, beyond which a forbidden domain lies." His dissent then lies in the applicability of the Proclamation:

> My basic premise is that the suspension of the privilege of the writ partakes of an executive action which if valid binds all who are within its operations. The function of enacting a legal norm general in character appertains to either Congress or the President. Its specific application to particular individuals . . . is however a task incumbent on the judiciary. . . . [I]ts validity may be tested in courts. Even if valid, any one may seek judicial determination as to whether he is embraced within its terms. *After our declaration of the validity of the Proclamation No. 889 as amended, the next question is its applicability to petitioners.*
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> . . .
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> It would follow to my way of thinking then that the *petitioners still detained ought not to be further deprived of their liberty in the absence of a warrant of arrest* for whatever offense they may be held to answer, to

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[124] *Id.* (Fernando, C.J., *concurring*). (Emphasis supplied)

[125] AVECILLA, *supra* note 2, at 110. In *Garcia-Padilla,* although the Court's concurrence was unanimous in the result, only Justices Claudio Teehankee, Lorenzo Relova and Hugo Gutierrez, Jr. concurred in the *ponencia* itself.

[126] CONST. art. III, §18. "The Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ of *habeas corpus* or the extension thereof, and must promulgate its decision thereon within thirty days from its filing."

> be issued by a judge after a finding of probable cause. That is to comply with the constitutional requirement against unreasonable search and seizure.[127]

In concluding, Fernando makes one final, albeit revealing observation and suggestion as regards the presidential powers of suspending the writ of *habeas corpus* as well as declaring martial law:

> [I]f there is really a resolve to maintain inviolate constitutional rights for all, more especially so for those inclined and disposed to differ and to be vocal, perhaps even intemperate, in their criticism, that *serious thought should be given to the desirability of removing from the President his power to suspend the privilege of the writ of* habeas corpus *as well as the power to declare martial law.*[128]

Fernando reasons that should these powers be stripped off the President, then, insofar as the individual's rights are involved, the Constitution ought to be "at all times supreme, as it ought to be, whether it be in peace or in war or under other crisis conditions."[129] Until there is a proper amendment of the Constitution and as long as such discretion is granted to the President by the supreme law of the land, "it would not be proper for the courts not to accord recognition to its exercise," and can only "nullify what would amount to an unconstitutional application."[130]

The waning of the view that judicial supremacy is the groundwork of the rule of law is burgeoning today in the country – gradually unseated by "popular constitutionalism," where the people themselves are the authors, interpreters, and implementers of the Constitution, on which the rule of law ought to lie. This has been a theory traced as early as 1936 in *Angara v. Electoral Commission*:

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[127] Lansang, G.R. No. 33964 (Fernando, J., *concurring & dissenting*). (Emphasis supplied) "[T]o keep them in confinement after the ordinary processes of the law are to be availed of, as thereafter decreed by the Executive itself is to ignore the safeguard in the Bill of Rights that no person shall be held to answer for a criminal offense without due process of law . . . . These six petitioners . . . have, for me, *become immune from the operation of the proclamation suspending the privilege of the writ of habeas corpus and are thus entitled to their liberty*." (Emphasis supplied)

[128] *Id.* (Emphasis and underscoring supplied)

[129] *Id.*

[130] *Id.*

> But much as we might postulate on the internal checks of power provided in our Constitution, it ought not the less to be remembered that, in the language of James Madison, the system itself is not "the chief palladium of constitutional liberty . . . the people who are authors of this blessing must also be its guardians . . . their eyes must be ever ready to mark, their voice to pronounce . . . aggression on the authority of their constitution." In the last and ultimate analysis, then, must the success of our government in the unfolding years to come be tested in the crucible of Filipino minds and hearts than in consultation rooms and court chambers.[131]

Why Fernando himself acquiesced to the 1973 Constitution two years after *Javellana*, can be traced even to his dissent in the same case:

> [O]nly with the recognition of the nation as the separate political unit in public law is there the juridical recognition of the people composing it "as the source of political authority." . . . "[T]he highest possible embodiment of human will," which is supreme and must be obeyed.[132]

It can be said that Fernando believed in civilian supremacy and the will of the people at all times, before the Executive and the ivory tower of scholarly "chronic fetishism of the Constitution" by the Judiciary. Even though he was first an academician, he knew when to withdraw from the "extravagant if not obsessive reverence for the icons, liturgies and orthodoxies of our Constitutionalism to which quasi-supernatural powers, beyond human agency, are commonly attributed,"[133] and to defer to the people.

C. Convergence of "Principle & Practicality"`

> *This is not to discount the risk that it may be swept too far and too fast in the surge of novel concepts. The past too is entitled to a hearing; it cannot just be summarily ignored. History still has its uses. It is not for this*

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[131] Angara v. Electoral Comm'n, G.R. No. 45081(July 15, 1936).

[132] Javellana, G.R. No. 36142 (Fernando, J., *dissenting*) (*citing* HAROLD LASKI, GRAMMAR OF POLITICS 34 (4th ed., 1937); *quoting* ROBERT MORRISON MCLVER, THE WEB OF GOVERNMENT 84 (1947), and Edwin Corwin, The Doctrine of Judicial Review, *in* 1 SELECTED ESSAYS ON CONSTITUTIONAL LAW 449, 450 (1938)).

[133] RICHARD PARKER, HERE THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO 64, 79 (1999).

> *Court to renounce the virtue of systematic jural consistency. It cannot simply yield to the sovereign sway of the accomplished fact. It must be deaf to the dissonant dialectic of what appears to be a splintered society. It should strive to be a factor for unity under a rule of law. There must be, on its part, awareness of the truth that a new juridical age born before its appointed time may be the cause of unprecedented travail that may not end at birth. It is by virtue of such considerations that I did strive for a confluence of principle and practicality.*[134]

The majority opinion in *Gumaua v. Espino*[135] is perhaps most useful for laying down the jurisprudential foundation of the President's dominant powers by tracing its salient rulings, which would be the most concise summary of doctrines set during the Martial Law Period:

First, the 1973 Constitution has been validly ratified by the sovereign people and is now in full force and effect;[136]

Second, Proclamation No. 1081 placing the entire country under martial law is valid;[137]

Third, the proclamation of martial law automatically suspends the privileges of the writ of *habeas corpus*;[138] and

Fourth, the President of the Philippines, as commander-in-chief and enforcer or administrator of martial law can "*promulgate proclamations, orders and decrees during the period of martial law* essential to the security and preservation of the Republic."[139]

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[134] Mitra, G.R. No. 56503.

[135] G.R. No. 36188 (Feb. 29, 1980).

[136] *Id.*, *citing* Aquino v. Comm'n on Elections, G.R. No. 40004 (Jan. 31, 1975); Aquino v. Enrile, G.R. No. 35546 (Sept. 17, 1974); *In re* Diokno, G.R. No. 35546 (Sept. 17, 1974); and Javellana, *supra* note 80.

[137] *Id.*

[138] *Id., citing* Aquino v. Enrile, G.R. No. 35546.

[139] *Id.* (Emphasis supplied), *citing* Aquino v. Comm'n on Elections, G.R. No. 40004. "[Essential also] to the defense of the political and social liberties of the people, and to the institution of reforms to prevent the resurgence of rebellion or insurrection or secession or the threat thereof as well as to meet the impact of a world wide recession, inflation or economic crisis which presently threatens all nations including highly developed countries."

Pursuant to the foregoing doctrinal pronouncements, the Court held that the Chief Executive, as legislator during martial law, *can lawfully create military commissions* to try for specified offenses, both members of the armed forces and even civilian offenders.[140]

This is where the shift to the apologist mindset of Fernando can be confirmed. In his concurring opinion in *Gumaua*, Fernando explained that while he was unprepared at the time of *Javellana* to rule as to the acquiescence of the people to the 1973 Constitution, in his opinion in *Aquino v. Commission on Elections*[141] two years after, he recognized then that the assent of the Filipino people was already manifest, noting that the operation and validity of the Constitution was "dependent not solely on the regularity with which ratification was obtained but likewise on acquiescence."[142] Here, the learnedness of Fernando in his inquiry is well-defined and significant, especially apparent because of his training in policy science, which involves the determination of authority or control or both. He delved into the authority to decide the declaration of martial law as reposed to the President, the supposed authority's findings of conditions of safety and security that would warrant such proclamation, the seemingly primarily discretionary process of such determination, and whether such power includes within its scope the power to create military commissions as well as the power of the President to declare martial law, which extends to civilians.[143] What Marcos had was both control

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[140] *Id., citing* Go v. Olivas, G.R. No. 44989 (Nov. 29, 1976); and Aquino v. Enrile, G.R. No. 35546).

[141] Aquino v. Comm'n on Elections, G.R. No. 40004.

[142] Gumaua, G.R. No. 36188 (Fernando, C.J., *concurring*) (*quoting* Javellana, G.R. No. 36142 (Fernando, J., *dissenting*)). Once again, I felt obeisance to the fundamental doctrine that the national will, once ascertained on matters of great significance, should be controlling. By [the time of the *Aquino* decision in 1974], it was clear to me that the evidence was unmistakable as to such acceptance by the Filipino people. Thus: "Parenthetically, it may be observed that in 1973 when the *Javellana* decision was promulgated, I could not detect sufficient evidence as to the fact of acquiescence to the [1973] Constitution. . . . Since then, with well-nigh two years having gone by, it is quite evident that the matter is no longer open to doubt."

[143] Harold Lasswell & Myres McDougal, *Criteria for a Theory About Law,* 44 S. CAL. L. REV. 362, 384-385 (1970-71). Applying the recommendation of Lasswell and McDougal to clarify conceptions of authority and control:

"[M]ake inquiry about perspectives of authority both establishing certain decision-makers (who is authorized to make what decisions, with respect to whom, and by what procedures) and indicating appropriate criteria for decision, relating to the scope, range, and domain of the values authorized to be affected and to the detailed shapings and sharings of values regarded as appropriate for particular contexts. It will observe whether these concep-

and authority to declare martial law, as well as concomitant powers, but the abuses led to the disavowal of his administration. The legal order at the time is now operationalized in the current Constitution, which specifically provides for the power to declare martial law, but with safeguards expressly provided for in the Constitution, such that the power was expanded in *Lacson v. Perez*[144] and *Sanlakas v. Executive Secretary*,[145] but clarified in *David v. Macapagal-Arroyo*.[146] Article VII, section 18 of the Constitution lists down the three "commander-in-chief" powers seemingly according to the degree of graveness affecting individual rights: to "call out the armed forces," to suspend the writ of *habeas corpus* and to authorize warrantless arrests, or to proclaim martial law.[147] As a lesson learned from the Marcos era, such powers are now subject to automatic review by Congress within fixed time-periods "without need of a call,"[148] and the Judiciary's review power, which may be triggered by any citizen, necessarily dispensing with the injury requirement for legal standing.[149]

Finally, for emergencies of an economic nature, the state may "temporarily take over or direct the operation of any privately-owned public utility or business affected with public interest."[150]

In relation to the power of the President to create military commissions, therefore, Fernando ultimately, although hesitantly, expressed his assent both through his concurrence in *Gumaua* and a year later in his *ponencia* of *Buscayno v. Enrile*,[151] which re-examined the doctrines in the three Aquino

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tions are empirically or transempirically grounded, whether regarded as a part of the social process or transcendent of the social process, and whether presented as demand or non-demand.

. . .

[To] regard control as a function of many interrelated variables and will project empirical inquiry about the factors which in fact affect decision. It will be concerned with tra-ditional notions of 'obligation' and 'binding' only insofar as these notions realistically reflect the subjectivities of participants in an arena."

144 G.R. No. 147780 (May 10, 2001).

145 G.R. No. 159085 (Feb. 3, 2004).

146 G.R. No. 171396 (May 3, 2006).

147 CONST. art. VII, § 18.

148 § 18.

149 § 18.

150 Art. XII, § 17.

151 G.R. No. 47185 (Jan. 15, 1981).

cases, namely: *Aquino v. Enrile*,[152] *Aquino v. Commission on Elections*,[153] and *Aquino v. Military Commission No. 2*.[154]

In the first *Aquino* case decided in 1974, Fernando observed that in U.S. law, there is nothing that even hints of a declaration of martial law substituting civil law for military law. In the second *Aquino* case promulgated in January 1975, even during the period of martial law in the U.S., the executive still cannot exercise legislative power.[155] Therefore, the proclamation's "legal effect" does not go beyond a mere warning on the citizens that:

> [M]ilitary powers have been called upon by the executive to assist him in the maintenance of law and order and that, while the emergency lasts they must, upon pain of arrest and punishment not commit any acts which will in any way render more difficult the restoration of order and the enforcement of law.[156]

His "utmost reluctance" was explicit in the third *Aquino* case, decided in May 1975, where Fernando noted that military commissions' jurisdiction over civilians – even for specific offenses inciting or continuing rebellion – would be unspeakable were it not for the Transitory Provisions (and hence the Amendments granting the President and Commander-in-Chief legislative powers). Here, Fernando traces the roots of the power to declare a state of martial law in the 1935 Constitution to the Philippine Autonomy Act, analogous to the Hawaiian Organic Act. As provided in *Duncan v. Kahanamoku*,[157] "[t]he Courts and the procedural safeguards . . . . were set up by our founders to protect the liberties they valued." This is where Fernando discovered the basis for the controlling principle regarding the creation of military courts:

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[152] Aquino v. Enrile, G.R. No. 35546.

[153] Aquino v. Comm'n on Elections, G.R. No. 40004.

[154] G.R. No. 37364 (May 9, 1975).

[155] Gumaua, G.R. No. 36188 *(Fernando, C.J., concurring) (citing* WESTEL WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1591 (2nd ed., 1929); CHARLES BURDICK, THE LAW OF THE AMERICAN CONSTITUTION 261 (1922); and HUGH EVANDER WILLIS, CONSTITUTIONAL LAW 449 (1936)).

[156] *Id.* (Fernando, C.J., *concurring)* (*quoting* WESTEL WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1591 (2nd ed., 1929)).

[157] Duncan v. Kahanamoku, 327 U.S. 304, 322-324 (1946) (*quoting* Ex parte Quirin, 317 U.S. 1, 19 (1942)).

> Our system of government clearly is the antithesis of total military rule . . . They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws . . . [W]hen Congress . . . authorized the establishment of martial law . . . [it] did not wish to exceed the boundaries between military and civilian power, in which our people have always believed . . . The phrase 'martial law' as employed in that Act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the island against actual or threatened rebellion or invasion, [it] was not intended to authorize the supplanting of courts by military tribunals.[158]

Despite this, he justified his defense of his concurrence to the majority's decision with two "reassurances:" *first*, from the *ponente* of the third Aquino case, Justice Antonio, that in the conduct of cases, respect for the constitutional rights of the accused shall be accorded him; *second*, Fernando took judicial notice of the declarations of Marcos himself, that among others, there shall be immediate release of persons without cases filed and the transfer to the custody of civil officers those charged with "ordinary crimes," the speedy phasing out of military trials "as soon as they finish the trial of pending cases," and the amnesty of 1,500 prisoners.[159]

> I must confess that I did approach the matter with some misgivings and certainly without any illusion of omniscience. I am comforted by the thought that immortality does not inhere in judicial opinions. I am thus led by my studies on the subject of constitutional law and, much more so, by previous judicial opinions to concur in the dismissal of the petitions. If I gave expression to views not currently fashionable, it is solely due to deeply ingrained beliefs.[160]

This calls to mind the disparagement of Fernando's Court, that "upon the proclamation of martial law and while it was in force, constitutionalism, in terms of the exercise of the power of judicial review and respect for individual rights, no longer held sway in the Philippines," which he himself recorded in his *ponencia* in *Mitra*[161] in 1981. Again, his arguments were defensive, vindicating

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158 Gumaua, G.R. No. 36188 (*quoting* Duncan v. Kahanamoku, 327 U.S. 304, 322-324 (1946)).

159 President Ferdinand Marcos, Address: Pledge of Loyalty of Armed Forces of the Phil. (Sept. 10, 1979).

160 G.R. No. 44640 (Oct. 12, 1976).

161 Mitra, G.R. No. 56503.

the difficulties encountered by his Court through a lecture of Australia's High Court Justice Lionel Keith Murphy, who said:

> [O]ne can observe with admiration the concern of the judiciary to maintain the fundamental liberties of the people even under the most difficult conditions. . . . Violations of human rights have occurred and do occur in the Philippines. . . . in Australia. . . . in the United States and elsewhere. But the Philippines and the United States have courts which are able to enforce mandatory provisions in the Bill of Rights. Your Supreme Court does so daily, openly and in reasoned decision given by your Justices.[162]

Recall footnote number 13 in *Occena*, which resonates in the case of *Mitra*, where Justice Murphy enumerated the series of cases which the Supreme Court stumbled upon during Fernando's tenure, i.e., The Anti-Subversion, The Plebiscite, The Ratification, The Martial Law, The Referendum, The Right to Counsel, and The Military Tribunal Cases. In *Mitra*, Fernando once again in a footnote, this time number 61, as well as in several others, defended his views:

> The challenge against the validity of the Anti-Subversion Act failed, the decision of the Court being announced in *People v. Ferrer* . . . . *The writer of this opinion dissented.* In the denial of the motion for reconsideration, Justice Teehankee concurred and dissented in a separate opinion. *The writer of this opinion stood fast in his dissent.*[163]

CONCLUSION

> *Certainly, I am the first to recognize the worth of the social and economic reforms so needed by the troubled present that have been introduced and implemented. There is no thought then of minimizing, much less of refusing to concede, the considerable progress that has been made and the benefits that have been achieved under this Administration. Again, to reiterate one of my cherished convictions, I certainly approve of the adherence to the fundamental principle of popular sovereignty which, to be*

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[162] *Id.*, *quoting* Justice Lionel Keith Murphy, Human Rights & the Judiciary: Reflections on the Australian and Philippine Experience, Second Comparative Law Lecture Integrated Bar of the Philippines (Mar. 17, 1981).

[163] Mitra, G.R. No. 56503, at n. 61, *citing* People v. Ferrer, G.R. No. 32613-14 (Dec. 27, 1972), 48 SCRA 382; 56 SCRA 793 (Reconsideration) (Citations omitted). (Emphasis supplied)

> *meaningful however, requires both freedom in its manifestation and accuracy in ascertaining what it wills.*[164]

In his stewardship as Chief Justice, Fernando was criticized for legitimizing the acts of the now-deposed dictator, for his supposed failure to uphold the Court's duty as the "surest expositors" of justice when the laymen, "creatures without reason, ever in thrall to irrational emotions," could not.[165] In Chief Justice Corona's case, we have the opposite — a Court anchored on judicial supremacy, almost deified in *Francisco v. House of Representatives*,[166] and the disparaging debate on the power of the Senate Impeachment Court to review judicial decisions doubted (though not without reason) by the anti-populist mob:

> In times of social disquietude or political excitement, the great landmarks of the Constitution are apt to be forgotten or marred, if not entirely obliterated. In cases of conflict, 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.
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> . . . 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.

The purpose of this paper is mainly to provoke discussion on these *deities* in their ivory tower, to bring them down to the level of the mortal and to examine them as individuals and not just as members of the collegial body vested with the awesome power of judicial review. Going beyond the mere *fallo* of each case and dissecting the rationale behind each and every *ponencia* or separate opinion ultimately provides invaluable insight into the decision itself. An analysis of a case not confined in a vacuum, but rather, one that is attuned

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[164] Mitra, G.R. No. 56503.

[165] LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM & JUDICIAL REVIEW 239 (2004).

[166] G.R. No. 160261 (Nov. 10, 2003).

to the intricacies of the specific period when the case was decided will further enrich learning as well as the free exercise of democratic processes.

It is precisely with this end in mind that such method of historical analysis was adopted by the authors of this paper, along with the intention of comprehending the enigma and character of Chief Justice Fernando. In this study, the authors were greatly humbled by how erudite the Chief Justice was, and the cases studied and scrutinized produced a different insight into the man that he was: a scholar of the first order, a consummate academician.

Our duty was to bring to the fore exactly that aspect of Fernando that was hidden by a conglomeration of circumstances, including, not in a small part, his being appointed by Marcos, which may have overshadowed his academic brilliance.

A return of sovereignty to the people is thus urged, especially in times like these, when democratic checks on one branch of government by another co-equal branch, are called into operation. Dean Raul Pangalangan of the UP College of Law had this to say:

> No, this is not judicial review. What the Senate is doing is express its disagreement with judicial doctrine – not to overturn a decided case but to remove a person, by telling the courts that their reading of the Constitution is out of sync with that of the sovereign people. *Impeachment is the only democratic safeguard when the Court's verdicts collide with the people's sense of justice.* Judicial review is power to review a decision. Impeachment is power over the person who makes that decision. It is an extraordinary remedy, for sure, but that is why it is hedged in with heavy-duty institutional safeguards.[167]

In 1937, Franklin Roosevelt, in a radio broadcast, said: "We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. . . . We want a Supreme Court which will do justice under the Constitution and not over it."[168] The

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[167] Raul Pangalangan, Opinion: Passion for Reason, *Anti-Democratic Constitutionalism,* PHIL. DAILY INQUIRER, Jan. 12, 2012, at A14, *available at* http://opinion.inquirer.net/21017/anti-democratic-constitutionalism. (Emphasis supplied)

[168] US President Franklin Roosevelt, Fireside Chat on Reorganization of the Judiciary, Radio Broadcast, May 9, 1937 (transcript *available at* http://www.pbs.org/wnet/supremecourt/capitalism/sources_document4.html (last visited Feb. 19, 2012).

phrase "sovereignty residing in the people" is given a new lease, by taking its significance out of the realm of rhetoric and thrusting it into reality.

This was precisely what Fernando believed in — a judicial activism tempered by the assurance that sovereignty always remains with the people. Only when people become involved and examine the members of the Supreme Court will these democratic ideals that our forebears envisioned be given justice, providing an answer to the perennial query posed by the Roman poet Juvenal: *Quis custodiet ipsos custodes*?[169] Who guards the guardians?

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[169] JUVENAL, SATIRE VI lines 347–8.