BOOK REVIEW

THE BILL OF RIGHTS. By Enrique M. Fernando.* Manila: Central Lawbook Publishing Co., Inc. 1970. Pp. viii, 338. ₱30.00.

THE POWER OF JUDICIAL REVIEW. By Enrique M. Fernando.* Quezon City: EQF Press. 1967. Pp iii, 152. ₱16.00.

In discussing the relevance of professional association to the selection of Supreme Court justices, Zechariah Chafee, Jr., author of the classic *Free Speech in the United States* (1941), observed that "It is less revealing to examine the list of clients in the nominee's office than to investigate the books in his library." [1] In the case of Mr. Justice Fernando one examines not only the books he has in his vast personal library; one examines as well the books he has written, alone or in collaboration with others, and the numerous law review articles he has authored for an understanding of his constitutional philosophy and even, in some cases, for a prediction of his vote in crucial Supreme Court litigation. Two recent cases will fairly illustrate my point. His separate opinion in the Habeas Corpus cases,[2] which held that the factual bases supporting the President's decision to suspend the privilege of the writ of habeas corpus are subject to judicial review is consistent with what he had written in 1953.[3] And his opinion for the Court in the recent cases [4] denying the claim of delegates to the Constitutional Convention of immunity from arrest in criminal cases states the position expressed in another book [5] with respect to the members of Congress.

That philosophy reflects the impress of his mentors at the University of the Philippines College of Law: Vicente G. Sinco and Jose P. Laurel. And though the dean had become Mr. Justice George A. Malcolm by the time the author enrolled in the College of Law, nevertheless the atmosphere was so permeated with the thinking of the former that the latter imbibed much of his teachings. It is surely a happy circumstance that today Mr. Justice Fernando holds the Malcolm and Jose P. Laurel professorships in constitutional law at the UP College of Law and the Lyceum of the Philippines, respectively. For Malcolm's view of the Bill of Rights, specially in free speech cases, and Laurel's conception of the judicial function have been uppermost in the consciousness of Mr. Justice Fernando.

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1 Chafee, *Charles Evans Hughes,* 93 PROC. AM. PHILOS. SOC'Y 189, 198-99.

2 Lansang v. Garcia, L-33964 Dec. 11, 1971, 42 SCRA 448.

3 1 E. FERNANDO, POLITICAL LAW 394-401 (1953).

4 Martinez v. Morfe, L-34022 & 34046, March 24, 1972.

5 2 L. TAÑADA & E. FERNANDO, CONSTITUTION OF THE PHILIPPINES 869-870 (4th ed. 1953).

The Bill of Rights is the Justice's latest book, articulating a deeply-felt philosophy, what he calls his "convictions, or as some may assert, prejudices and predilections." (p.vii) Its theme is that the essence of constitutionalism is the reconciliation of the conflicting claims of state authority and individual rights. (p. 7) In chapter 1, therefore, he opens with a discussion of the affirmative powers of the state (police power, taxation, eminent domain and the promotion of social justice) as these affect the enjoyment of liberty and property. In the rest of the chapters (chapters 2-4) he explores the protection afforded by the several guaranties of the Bill of Rights (except the provisions on titles of nobility and free access to the courts), as these limit the powers of government.

But for him the interests of property do not carry the same weight as the interests of liberty, particularly the freedom of the mind. He embraces Paul A. Freund's double standard of review in civil liberties cases. He quotes approvingly Freund's formulation of that standard: "When freedom of the mind is imperiled by law, it is freedom that commands a momentum of respect. When property is imperiled, it is the lawmakers' judgment that commands respect." (p. 5)

His view of property is Lockean:

> [W]here property is identified with economic security, in terms of the right to earn a living and to have those possession necessary for a decent existence, it deserves the fullest and most ample protection that the Constitution affords. Such should not be the case where it takes the form of concentrated wealth, whether derived from industry, commerce, agriculture or finance. The state as a matter of public interest is called upon to impose limitations and restrictions, especially so where the Constitution like that of the Philippines assures social justice and protection to labor. If it were not so, it could, as already noted, be utilized to exploit and oppress others. . . . Every curtailment of property rights in the latter sense, therefore, which is likely to be resisted by the allegation that there is deprivation of constitutional rights, is to be scrutinized carefully, lest in paying heed to such an objective, the governmental effort to reduce the inequities of wealth is nullified. (p. 9)

In contrast, he would apply a different standard to legislation affecting freedom of expression. Such legislation "does not have in its favor the presumption of validity." (p. 25) "Supreme Court decisions in free speech and free press cases is one of utmost sympathy for the exercise of such vital rights." (pp. 80-81)

Indeed, in a representative self-governing society, reliance should be placed primarily on the political process for the solution of some of the hard questions of how far the law can go to regulate men's affairs, but as such a society presupposes access to, and participation in, the decision making processes of the community, there falls to the Supreme Court the burden of maintaining a responsive and responsible government. It is a

primary responsibility of the Court to help maintain the constitutional order [6] by safeguarding the right to speak, "the individualized legal reflection of the more general right to hear, which is basic to the political flux." [7]

Here the role of the Supreme Court, Congress and the other agencies of the government becomes relevant. Constitutional issues do not present a clash of right against wrong but of right against right: freedom of expression versus the interest in the conservation of the nation's energies against dissipation by partisan political activities; [8] freedom of assembly and petition versus regulation of the use of streets and parks in the interest of peace and order; [9] the right of the accused to a fair trial versus effective law enforcement.[10] The resolution of these questions is illuminated by a consideration of the place of the Supreme Court in the scheme of separated powers.

The companion volume on *The Power of Judicial Review* provides the institutional framework for the discussion in *The Bill of Rights*. Must the Court be activist, or must it practice self restraint in reviewing the acts of the other branches of government? The doctrine of political questions, the rule on standing, and the requirement of case or controversy merely provide the basis, rather than dictate, the Court's decision whether to engage in constitutional review in specific controversies. Whether to review or not to review is actually a function of attitude, of the judge's view of his office.

> If the judiciary especially the Supreme Court adopts an attitude that does not stress unduly procedural obstacles to the institution of a suit to annul a statute, executive order or ordinance, then this delicate task comes into play more often. On the other hand, out of respect for a coordinate branch, whether Congress or Executive, and in view of the possible embarrassment it may cause such agencies when their acts are stricken down, there is at times an understandable reluctance to pass on the question of validity. (p. 54)

The author observes that in the formative era of the Commonwealth Government in the Philippines the Supreme Court embarked on an activist role. (p. 55) Jose P. Laurel, one of the strong figures of that Court, was apprehensive, lest "a numerical majority and the vast power lodged in the Executive would make a myth of the creed of the supremacy of the Constitution." (p. 83) Nevertheless, the Court did not lack advocates of judicial self restraint.[11] Chief Justice Bengzon was the most notable member of this school of thought. (p. 67)

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[6] P. A. Freund, *Comment*, in GOVERNMENT UNDER LAW 355 (A. Sutherland ed. 1956).

[7] P. A. FREUND, THE SUPREME COURT OF THE UNITED STATES 81 (1961).

[8] Gonzales v. Commission on Elections, L-27833, April 18, 1969, 27 SCRA 835.

[9] Primicias v. Fugoso, 80 Phil. 71 (1948); Ignacio v. Ela, 99 Phil. 346 (1956); Navarro v. Villegas, L-31687, Feb. 26, 1970, 31 SCRA 730.

[10] Mapp v. Ohio, 367 U.S. 643 (1961); Stonehill v. Diokno, L-19550, June 19, 1967, 20 SCRA 383.

[11] Professor Alexander M. Bickel calls it the "passive virtues." THE LEAST DANGEROUS BRANCH ch. 4 (1962).

The balance of the book discusses the presumption of validity, burden of proof and the effect of a declaration of unconstitutionality of statutes.

These volumes are the product of high scholarship. It would not detract from their merit to venture the following observations:

1. Greater understanding would be promoted if at the beginning of each topic the evolution of standards had been presented. This presentation would also give the reader a sense of continuity and change that mark the process of deriving meanings from the spacious clauses of the Bill of Rights.

For instance, in the chapter on freedom of expression (chapter 3) of *The Bill of Rights* it could be shown that in the United States, while the "clear and present danger" test in cases involving national security had its beginning in 1919, it was actually the "dangerous tendency" rule that the Supreme Court followed, until 1969 when it discarded the rule and held that advocacy of the use of force or of law violation may not be forbidden or proscribed except where such advocacy is directed "to inciting or producing imminent lawless action and is likely to incite or produce such action." [12] The course of adjudication in the United States from *Schenck v. United States,* 249 U.S. (1919), through *Gitlow v. New York,* 268 U.S. 652 (1925) and *Whitney v. California* 274 U.S. 357 (1927), through *Herndon v. Lowry,* 301 U.S. 242 (1937); *Dennis v. United States,* 341 U.S. 494 (1951) to *Brandenburg v. Ohio,* 395 U.S. 444 (1969) would explain why the Philippine Supreme Court from the early 1932 prosecution of communists for sedition [13] until its 1951 decision in *Espuelas v. People,* 90 Phil. 524 adhered to the "dangerous tendency" rule.

2. As befits the 1970's greater attention should have been given to the problems of demonstrations and other protest actions and symbolic expressions. As it is, discussion of these problems is subsumed under "Freedom from previous restraint or censorship" and occupies no more than eight pages (pp. 124-131) of *The Bill of Rights.* A separate topic could deal in detail with these problems, drawing on recent decisions [14] of the U.S. Supreme Court: *Cox v. Louisiana* (I), 379 U.S. 536 (1965) and (II), 379 U.S. 559 (1965) (picketing the premises of a courthouse); *Brown v. Louisiana,* 383 U.S. 131 (1966) (sit-in in a public library); *Adderly v. Florida,* 385 U.S. 39 (1966) (demonstration within the premises of a jail house); *Walker v. Birmingham,* 388 U.S. 307 (1967) (protest march in violation of a court injunction); *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969) (protest march without permit); *United States v.*

[12] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[13] People v. Earnshaw, 57 Phil. 255 (1932); People v. Feleo, 57 Phil. 451 (1932); People v. Nabong, 57 Phil. 455 (1932).

[14] Some of these cases are mentioned in note 147 at page 127 of THE BILL OF RIGHTS.

O'Brien, 391 U.S. 367 (1968) (draft card burning in public); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (arm bands display); and *Street v. New York*, 394 U.S. 576 (1969) (flag burning in the street).

3. A reprinting of section 17 of the Judiciary Act of 1948 to indicate the present statutory basis of Supreme Court review doubtless would have enhanced the value of *The Power of Judicial Review*.

Also, a detailed index would greatly facilitate the use of these two books. *The Power of Judicial Review* has no index, while *The Bill of Rights* has one but it is rather skeletal to be of real use. A separate Table of Cases would add to the utility of these books.

I have been using these books in my class in constitutional law. They are useful and excellent summaries of the cases listed in a syllabus I distribute in class at the beginning of every year. The author has placed us in debt by giving us these volumes on constitutional law.

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