ON JUSTICE FERNANDO'S METHOD IN CONSTITUTIONAL CASES

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This essay begins with a study of Mr. Justice Enrique Fernando's conception of the judicial function in judicial review and then inquires into how such a view augurs for the Philippine Supreme Court. The framework of assaying Justice Fernando's judicial method are the textbook fundamentals of basis and origin of judicial review, case and controversy, and adjudicatory method, to which his opinions are juxtaposed. As the scheme seems rigid and mechanical it is for the serious students of the Court to write of Justice Fernando's method in the impeccable way Prof. Dowling did in his classic on Mr. Justice Stone.[1]

The idea started as a reaction to the thrust of the recrimination in the wake of the Ratification Cases:[2] the assaying of a legal opinion in terms of meta-legal influences.[3] The more laborious path of course is to ascertain consistency between judicial view and judicial pronouncement as a purpose of a study into a judge's juridical leanings in prediction of his vote.[4] In the end we realized that the influence of a justice's conception of the judicial function on the role of the Court presents the more fruitful inquiry rather than congruence between thought and decision or the elusive role of meta-legal factors.[5]

I

ORIGIN AND BASIS OF JUDICIAL REVIEW

Justice Fernando's approach towards the basis and origin of judicial review is a key to understanding his views on Court and Constitution.

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[1] Dowling, "The Methods of Mr. Justice Stone in Constitutional Cases," 41 COL. L. REV. 1160 (1941).

[2] Javellana v. Executive Secretary, G.R. No. L-36142, March 31, 1973.

[3] Schmidhauser, THE SUPREME COURT, ITS POLITICS, PERSONALITIES, AND PROCEDURES (1961). See Pascual, INTRODUCTION TO LEGAL PHILOSOPHY 291-308 (1972) on the metal-legal factors that worked on Justice Frankfurter in Minersville School District v. Gobitis, 310 U.S. 486, 60 S.Ct. 1010 (1940) and compare with Freedman, "Justice Frankfurter and Judicial Review," in PERSPECTIVE ON THE COURT 21-23 (1967) where Freedman makes a vehement denial of the role of extra-legal influences on Frankfurter in the decision.

[4] Mendoza, "The Bill of Rights," Book Review, 46 PHIL. L. J. 663 (1971).

[5] At an extreme some political scientists have tended to view the judicial function as one of "free decision making" where the answer habitually precedes the rationalizing process of each opinion. See Beany, "The Supreme Court: The Perspective of Political Science," in PERSPECTIVE ON THE COURT 40 (1967).

As said by Justice Frankfurter the conception by a judge of the scope and limits of his function may exert an intellectual and moral force as much as his responsiveness to a particular audience or congenial environment.[6] Justice Fernando quotes Justice Malcolm that most constitutional issues are determined by the court's approach to them.[7]

Diametrically opposed positions on the origins of judicial review resulting in equally differing attitudes towards its exercise are shown in Judge Learned Hand and Wechsler,[8] and Thayer and Rostow. Judge Learned Hand, the "patient democrat,"[9] insisting that the power cannot be found within the words of the American constitution cogently asserts:[10]

> Since this power is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or think it sees, an invasion of the Constitution. It is always a preliminary question how importunately the occasion demands an answer. It may be better to leave the issue to be worked out without authoritative solution; or perhaps the only solution available is one that the court has no adequate means to enforce."

In sharp contrast Wechsler who submits that "the power of the courts is grounded in the language of the constitution and is not a mere interpolation" expectedly arrives at a variant conclusion. Dismissing the standard of Judge Hand he argues, "For me, as for anyone who finds the judicial power anchored in the Constitution, there is no such escape from the judicial obligation; the duty cannot be attenuated in this way."[11]

Thayer, who did not find the logic of *Marbury v. Madison*[12] inescapable, would limit it: "When at last this power of the judiciary was everywhere established, and added to the other bulwarks of our con-

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[6] Frankfurter, "John Marshall and the Judicial Function," 69 HARV. L. REV. 228 (1955).

[7] Manila Trading and Supply Co. v. Reyes, 62 Phil. 461 (1955), cited in Fernando, THE POWER OF JUDICIAL REVIEW 54 (1967).

[8] For the antimony between Judge Hand and Wechsler see Scharpf, "Judicial Review and Political Questions: A Functional Analysis," 75 YALE L. J. 520 (1966).

[9] Mendelson, "Learned Hand, Patient Democrat," 76 HARV. L. REV. 322, 335 (1962).

[10] Quoted in Wechsler, "Toward Neutral Principles of Constitutional Law," 73 HARV. L. REV. 5 (1959).

[11] *Supra*, 6.

[12] 1 Cranch 137, 2 L. Ed. 60 (1803).

stitutions, how was the power to be conceived of? Strictly as a judicial one. x x x x x Therefore, since the power in question was a purely judicial one, in the first place, there are many cases where it had no operation."[13] Rostow, who strongly defends the democratic character of judicial review, would counter "As far as the American Constitution is concerned, there can be little doubt that the courts were intended from the beginning to have the power they have exercised. The Federalist papers are unequivocal; the debates as clear as debates normally are x x x x The power and duty of the Supreme Court to declare statutes or executive action unconstitutional in appropriate cases is part of the living constitution."[14]

Mr. Justice Fernando's pronounced inclination towards a more assertive and expansive employment of the power no doubt partly traces its roots in his appreciation of its legitimate basis both in the Philippines and in the United States.

He notes that the power of judicial review is expressly provided for in the Philippine Constitution.[15] He also traces recourse to the institution even prior to the 1935 Constitution to emphasize its long-standing acceptability.[16]

We would not comprehend the full weight of Justice Fernando's views on the legitimate basis of the power if we read him as anchoring it solely on the express provisions of the Constitution.[17] His think-

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[13] Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 HARV. L. REV. 131 (1893).

[14] Rostow, THE SOVEREIGN PREROGATIVE 117 (1962).

[15] Const., art. VIII, sec. 2 (1) "x x x All cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in question." Art. VIII sec. 10 "All cases involving the constitutionality of a treaty or law shall be heard and decided by the Supreme Court en banc, and no treaty or law may be declared unconstitutional without the concurrence of two-thirds of all the members of the court." Its counterparts in the 1973 Constitution are Art. X sec. 2 (2) and Art. X sec. 5 (2) the change being that in all "cases involving the constitutionality of a treaty, executive agreement, or law shall be heard and decided by the Supreme Court in banc and no treaty, executive agreement, or law may be declared unconstitutional without the concurrence of *at least ten members.*"

[16] "The Filipino justices and judges who with their American brethren administered justice were soon made aware that the power to pass on the constitutionality of such statutes and executive orders was part of their judicial function. The Filipino lawers vied with the American members of the bar in raising the question of constitutionality whenever appropriate," in Fernando, JUDICIAL REVIEW 12.

[17] In elucidating on Marbury v. Madison he said "There is some interest and relevance in pursuing the matter further in view of the undeniable influence of American constitutional law on our own. *Supra.*

ing on its philosophical foundations may be the more decisive influence that produced the readiness to invoke the power in the shaded areas of constitutional litigation.

Three views of Justice Fernando strengthen his position on the legitimacy of judicial review. These, to borrow from Chief Justice Warren in *Flast v. Cohen,*[18] partake of an "iceberg quality" for they are the visible choice between competing philosophies submerged from the surface.

They are his approval of *Marbury v. Madison,*[19] the view that judicial review could be rested on the supremacy clause of the American constitution,[20] and his notion of the functions and implications of a written constitution.

Marbury v. Madison

Of *Marbury v. Madison* Justice Fernando aligns himself with those who regard it as a legitimate touchstone of judicial review even as he notes its political setting.[21] He is in the company of Rostow who asserts it "beyond possibility of doubt in terms of both language and legislative history of the document."[22] He comes near the sympathetic formulation of Professor Black: "He (Marshall) set out, in a word, to perform a neat geometrical demonstration of the logical necessity of judicial review, and he failed. x x x x he presented his case as one of inescapable logic, and thus set himself an infeasible task, for the logic of human political arrangements is never inescapable."[23]

Where one throws his choice in the pull between the "bold act of usurpation" partisans and the Marshall sympathizers decides one's judicial view. As put by Professor Black whose brief for a steadfast sense of judicial obligation is most met by Justice Fernando's sense of judicial duty:

> "But it (myth of bold act of usurpation) colors some fashionable attitudes toward judicial review. This institution tends to be looked on in some quarters with suspicion and dis-

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[18] 398 U.S. 83, 88 S.Ct. 1942, 20 L. Ed. 497 (1968).

[19] *Supra* note 12.

[20] U.S. Const. Art. VI, sec. 2 "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[21] "It bore the earmarks of a deliberate partisan coup," quoting Corwin, *supra* note 16, 8.

[22] *Supra* note 14.

[23] Black, THE PEOPLE AND THE COURT 26 (1960).

> taste, and as all things thought to be cursed and crooked in their origin. It must be apologized for and held to a minimum of effectiveness even though tolerated as an evil that time and custom have so interwoven with the other activities of government as to make it impolitic to throw it over outright. The "usurpation" myth thus powerfully supports the case of those who would apply the concept of "judicial restraint" to cut judicial review down to nothing. It is natural to favor "restraint" in the exercise of a supposedly usurped function. For all that, the myth is only a myth."[24]

Supremacy Clause

Next is Justice Fernando's analysis that the supremacy clause[25] of the United States constitution is an expressed provision for judicial review. This position not only complements rejection of the "usurpation" theory; it cures doubts caused by the logic of *Marbury v. Madison*.

That the supremacy clause provides the written word for the basis of the power which its opponents fail to see textually is itself the bone of intense contention. Wechsler[26] and Rostow[27] would give it such a reading, while Bickel even conceding that it is the nearest there can be to a textually identifiable grant of power would still deny it.[28]

Justice Fernando in adverting to the clause was aligning himself with a distinct stance. The reading is very strong point against the "usurpation" gloss and added ammunition for a would be judicial activist.

Constitution as Supreme Law

A third pivotal idea in Justice Fernando's view is the Constitution as Supreme Law. He defines a constitution as a written instrument organizing the government, distributing its powers, and safeguarding the rights of the people.[29] He posits that the supremacy of the constitu-

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[24] *Supra*, 27.
[25] *Supra* note 20.
[26] *Supra* note 10.
[27] *Supra* note 14. See also McClain, CONSTITUTIONAL LAW IN THE UNITED STATES 43 (1910).
[28] Bickel, THE LEAST DANGEROUS BRANCH 17 (1962). For more of those who advance that the supremacy clause is not a basis for the power: Corwin, THE CONSTITUTION AND WHAT IT MEANS TODAY 178-180, 238-249 (1958); Powell, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 16 (1956); Rozell, THE WARREN REVOLUTION 227-257 (1966).
[29] Fernando, JUDICIAL REVIEW 26, citing Tañada and Fernando, THE CONSTITUTION OF THE PHILIPPINES 1 (1952).

tion as fundamental law is a basic postulate of our system of government.[30] The concept of the Constitution as the supreme law, expressed in written form, for Justice Fernando embodies the notion of the government being one of laws and not of men.[31]

The repeated reference to the Constitution as "supreme law" and "fundamental law" is not mere rhetoric. That the constitution is *law* was first enunciated in *Marbury v. Madison*:[32]

> "Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.
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> "If the former part of the alternative be true, then a legislative act contrary to the Constitution is no law; if the latter part be true, then written constitutions are absurd attempts, on the part of a people, to limit a power in its nature illimitable."

Haines[33] explains the contrary view on the constitution being a document comprising political laws: "In continental European countries where written constitutions were formulated and applied, the constitution is regarded mainly as a document comprising groups of *political laws* which are in charge of the *political departments* to interpret in doubtful cases. Essentially, the guardianship of the constitution in these countries belongs to the legislature or lawmaking agencies of government. x x x x The theory of the separation of powers which is held by American judges to involve, of necessity, judicial review of legislative acts and the declaration of the supremacy of the constitution as law is, therefore considered to have exactly the opposite result. x x x x With the constitution being regarded as enforceable and to be treated as other laws are treated, it was assumed that no distinction should be made between provisions which were primarily political in character and those which had more exact legal import. With this attitude toward the constitution — the written document being declared to be law — a chain of reasoning with seeming logical necessity and exactness was constructed. The assumption and premises arising therefrom were presumed

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[30] Mutuc v. Comelec G.R. L-32717, Nov. 26, 1970, 36 SCRA 228.
[31] *Supra* note 29, 27.
[32] *Supra* note 12.
[33] Haines, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1935 14 (1944).

to be so clear and necessary to certain lawyers and jurists that the doctrine of review of acts of Congress was deemed to be expressly warranted by the language of the Constitution."

To which Justice Fernando would answer in no clearer terms that the Constitution is law, supreme law, and judicial review the institutional procedure precisely to insure its supremacy.[34]

Justice Fernando's exposition on the basis and origin of judicial review shortly after he was appointed to the Court attempts to present both faces of the controversy although the inclination towards accepting the legitimate beginnings of the power is more than discernible.[35] He cites Taney,[36] Watson,[37] Tucker,[38] and Chief Justice Hughes[39] among the pros and Boudin,[40] Black,[41] Jackson,[42] and Curtis[43] among the antis.

This subdued leaning in favor of the legitimacy of the power concretizes into a steadfast position in *Javellana v. Secretary*.[44] Said case leaves no doubt on where Justice Fernando stands on the checkered history of the power, marshalling friendly authorities to support his position. He cites Corwin[45] for the proposition that judicial review is incidental to the power to decide; Hughes[46] on the constitution being what the judges say it is; Haines[47] on the inextricability of the institution in the American system; Rostow[48] on the democratic character of judicial review; Mason[49] on the perils of judicial abdication, and Konefsky[50] on the legitimate origins of the power.

A basic postulate in Justice Fernando's view of the judicial function in judicial review is the judicial duty to uphold the Constitution. We

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[34] Fernando, JUDICIAL REVIEW, 4.
[35] *Supra*, 9. Justice Fernando was appointed to the Court in 1967.
[36] Ableman v. Booth, 21 How. 517 (1859).
[37] WATSON ON THE CONSTITUTION (1913).
[38] TUCKER ON THE CONSTITUTION (1899).
[39] Hughes, THE SUPREME COURT OF THE UNITED STATES (1928).
[40] GOVERNMENT BY JUDICIARY (1932).
[41] HANDBOOK ON AMERICAN CONSTITUTIONAL LAW (1895).
[42] THE STRUGGLE FOR JUDICIAL SUPREMACY (1941).
[43] LIONS UNDER THE THRONE (1947).
[44] *Supra* note 2.
[45] Corwin, Judicial Review in I SELECTED ESSAYS ON CONSTITUTIONAL LAW, 449, 450 (1938).
[46] ADDRESSES AND PAPERS OF CHARLES EVAN HUGHES 139-140 (1908).
[47] Haines, supra note 33.
[48] Rostow, "The Democratic Character of Judicial Review," in SELECTED ESSAYS ON CONSTITUTIONAL LAW 1938-1962 2 (1962).
[49] Mason, THE SUPREME COURT FROM TAFT TO WARREN 154 (1967).
[50] Konefsky, THE LEGACY OF HOLMES AND BRANDEIS 293 (1956).

have attempted to show that such acute sense of judicial duty has emanated largely from Justice Fernando's equally enthusiastic acceptance of the legal, philosophical, and historical foundations of the duty.

II

CASE AND CONTROVERSY

The requirement of case and controversy Mr. Justice Fernando calls the "standards for the exercise of the power." As twin to the exercise of judicial power it is logically irrefutable; applied to facts of constitutional contests they are transmuted into impenetrable barriers or flexible commands following one's view of the judicial function.[51]

Justice Brandeis' classic formulation in *Ashwander v. Tennessee Valley Authority*[52] on the requirements of case and controversy is a constitutional star for strict adherents to the standard. A decade later it would be reiterated in detail by Justice Rutledge in *Rescue Army v. Municipal Court.*[53] In *Javellana v. Secretary*[54] Justice Fernando referred to Bickel[55] and Freund[56], on whom the Solicitor-General relied to some extent in the call for self-restraint, as "unabashed admirers of Justice Brandeis." The appellation is small wonder for Justice Fernando's article of faith on case and controversy is that the standards are not inexorable commands.

In his treatise on judicial review Justice Fernando describes Justice Laurel as making "full use of the intellectual resources he could summon to show that such requisites are not meant to be inexorable commands, but merely standards by which, if the Supreme Court were so minded, it could avoid the task of inquiring into the validity of acts of coordinate branches of government..." He further states: "There may be objections on the part of authors inclined to follow mechanically certain rules and principles. For by such course of conduct certainty and stability may be assured. Equally so, students of constitutional law, cogni-

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[51] See Cox, THE WARREN COURT (1969); Bickel, *supra* note 28; Bickel, "Foreword: The Passive Virtues," 75 HARV. L. REV. 40 (1961); for a critique of Bickel see Gunther, "The Subtle Vices of the 'Passive Virtues' — A Comment on Principle and Expediency in Judicial Review," 64 COL. L. REV. 1 (1964).

[52] 297 U.S. 288, 56 S.Ct. 466, 80 L. Ed. 688 (1936).

[53] 331 U.S. 549, 67 S.Ct. 1409, 91 L. Ed. 1666 (1947).

[54] *Supra* note 2.

[55] *Supra note* 51.

[56] Freund, ON UNDERSTANDING THE SUPREME COURT (1949), THE SUPREME COURT OF THE UNITED STATES (1961).

zant of the mischief that an indiscriminate exercise of such power by lower courts may bring about, could no doubt stress the desirability of having them thus limited and restricted. Nonetheless, the Supreme Court need not follow such standards of judicial self-restraint with undeviating rigidity. It enjoys ample freedom to determine for itself when circumstances call for this function of gravity and delicacy to be discharged."[57]

Justice Fernando cites *People v. Vera*[58] as enumerating the standards: (1) the existence of an appropriate case (2) an interest personal and substantive by the party raising the constitutional question (3) invocation of the power at the earliest opportunity (4) the necessity that the constitutional question be passed upon, in order to decide the case.

The adverted thoughts of Justice Fernando shortly after he became a justice may have been those of an academic scholar; at the bench the theory has become a most distinguishing mark of his judicial view. Justice Fernando would readily set aside strict compliance with the requirements of case and controversy if to do otherwise would deprive the Court of opportunity to decide important constitutional issues.

In *Gonzales v. Comelec*[59] the validity of the Tañada-Singson Law[60] enacted to purge the electoral process of prolonged political campaigns[61] was challenged. Petitioners were Felicisimo Cabigao, candidate for vice-mayor of Manila for the 1967 elections and Arsenio Gonzales, a political ward leader of the former. The case was filed in 1967 but decided only 1969. In 1967 Cabigao won as vice-mayor of Manila and when the decision came in 1969 was no longer a candidate. The Court treated the action for declaratory relief as one for prohibition and through Justice Fernando held that although from the remedial law point of view the Comelec was not sought to be restrained from performing any specific act, making the suit a mere request for advisory opinion the issue was justiciable. Justice Fernando underscored the grave importance of the issue that needed a definitive ruling.

Another procedural obstacle which Justice Fernando did not find insuperable was the requirement that petitioner must have or will sustain direct injury as a result of the enforcement of the act, as petitioners

[57] Fernando, JUDICIAL REVIEW, 31.
[58] 65 Phil. 56 (1937).
[59] G.R. No. L-278833, Apr. 18, 1969, 27 SCRA 835.
[60] R.A. 4880 (June 17, 1967).
[61] Secs. 50-A and 50-B.

were not candidates. Justice Fernando advanced that in the Philippines the rule on taxpayer suits has been relaxed.

The majority opinion elicited a sharp rejoinder from Justice Barredo who in a lone dissent condemned the act of the majority as motu proprio converting a declaratory suit into a taxpayer's suit, which was not even proper as there was no specific expenditure of public funds involved.[62] It also drew response from the academic community. Six members of the Court voted to strike down the law but this was less than the eight votes required to declare a statute unconstitutional.[63] It is pointed out that as a result of the liberties taken with the rule of case and controversy "the inconclusiveness of the result, aggravated by the unsatisfactory abstractness of the record, deprives the case of precedential value and makes the opinion delivered little more than advisory opinion."[64]

Justice Fernando would nevertheless give much weight to the importance of the issue in several more cases. In *Tinio v. Mina*[65] Sec. 168 of the Agricultural Land Reform Code[66] providing for processing of applications to mechanize farming as a mode of taking it back from tenants was challenged. As found by the Court through Justice Fernando, there was absence of cause of action, no showing having been made that there was full compliance by plaintiff Tinio of certain conditions precedent under Sec. 168. Nevertheless the Court assumed jurisdiction instead of dismissing the case. Justice Fernando said that to leave the constitutional question open was "fraught with undesirable consequences" as other tenants and landowners similarly situated awaited guidance.

In his BILL OF RIGHTS Justice Fernando viewed the decision as part of a trend towards relaxing the requirements of case and controversy. "As a matter of fact, the current trend is for a more liberal, or to some, an activist approach."[67] It goes without saying that a prime mover of such a trend is Justice Fernando himself.

In *J.M. Tuason & Co., Inc. v. Land Tenure Administration*[68] Justice Fernando similarly hurdled with ease procedural obstacles. R.A. No. 2612 expropriating the Tatalon Estate in Quezon City for distri-

[62] Barredo dissenting, Gonzales v. Comelec, *supra*.
[63] Const. Art. VIII Sec. 10.
[64] Mendoza, "Constitutional Law Survey," 45 PHIL. L. J. 66 (1969).
[65] G.R. No. L-29488, December 24, 1968, 26 SCRA 512.
[66] R.A. No. 3844 (August 8, 1963).
[67] Fernando, BILL OF RIGHTS, 16.
[68] G.R. No. L-21064, Feb. 18, 1970, 31 SCRA 88.

bution to tenants was challenged. The procedural bar was that it was a suit against the state without its consent. Justice Fernando did not find the argument persuasive.[69]

Edu v. Ericta[70] again brought to fore the role of the public importance of the issue. In a suit for certiorari and prohibition with preliminary injunction assailing the validity of the Reflector Law[71] which prohibited registration of motor vehicles without reflectorized tape at the front and rear end of said vehicles, Judge Ericta enjoined enforcement. Edu, as Land Transportation Commissioner, instituted certiorari proceedings. Although the only issue before the Supreme Court was whether Judge Ericta abused discretion in issuing the injunction, the Court, through Justice Fernando, decided to tackle the constitutional issue pending before the Court of First Instance. It was deemed ripe for decision so as to save time in view of the uncertainty in the public mind caused by the suit.

In *de la Camara v. Enage*[72] assumption of jurisdiction was even more liberal and in clear deviation from established rules of case and controversy. The issue had become moot and academic as was admitted by the Court. Defendant Enage was accused of multiple murder and multiple frustrated murder and the trial court fixed bail at ₱1,195,200. Enage asked for reduction of such bail as it was excessive and he filed a petition for certiorari in the Court but while his case was pending he escaped from jail. The Court through Justice Fernando said that "While under the circumstances a ruling on the merits of the petition for certiorari is not warranted, still, the fact that this case is moot and academic should not preclude this Tribunal from setting forth in language clear and unmistakable, the obligation of fidelity on the part of lower court judges to the unequivocal command of the Constitution that excessive bail shall not be required."

It is pointed out that in contrast when a similar situation happened in the United States the American Supreme Court dismissed the case in *Eisler v. United States.*[73] It is also pointed out that the Court in *de la Camara v. Enage* must have been swayed by what it conceived as

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[69] See Ministerio v. Court of First Instance G.R. No. L-31635, Aug. 31. 1971, 40 SCRA 464, where Justice Fernando held that the doctrine of government immunity from suit cannot serve as an instrument for perpetuating injustice to a citizen.

[70] G.R. L-32096, Oct. 24, 1970, 35 SCRA 134.

[71] R.A. No. 5715 (June 21, 1969).

[72] G.R. No. L-32951, Sept. 17, 1971, 41 SCRA 1.

[73] 338 U.S. 189, 69 S.Ct. 1453, 93 L. Ed. 49 (1949).

its duty to another constituency, the nation, the Justices being in Rostow's phrase "inevitable teachers in a vital national seminar,"[74] while reminding of the equally fundamental obligation of the Court to conserve its influence by speaking only in real controversies.

Does Mr. Justice Fernando's decision in *Tan v. Macapagal*[75] run counter to his ruling in *Gonzales v. Comelec*[76] and his liberal attitude towards taxpayer's suits? In *Tan v. Macapagal* the Court, through Justice Fernando, unanimously refused standing to petitioner Tan who impugned the validity of the Laurel-Leido Resolution[77] in the 1971 Constitutional Convention on the range of authority of said Convention to propose constitutional amendments. Justice Fernando said that as far as a taxpayer's suit is concerned the Court is not devoid of discretion as to whether it should be entertained.[78] The answer perhaps may be in what the Court perceived as patent lack of merit of the petition: a plea of such seriousness hurriedly compressed in a five-page pleading. The other ground for denying the petition was lack of ripeness.[79]

Otherwise, Justice Fernando's partiality towards taxpayer's suits is long-held. He notes in his BILL OF RIGHTS that while the United States Supreme Court has not been niggardly in availing itself of the rule of direct injury to escape the need for passing upon the validity of statutes the Philippine Court has been more liberal. He would consider the taxpayer's suit as used in the Philippines an even more clearer inroad in the otherwise restrictive rule of direct injury.[80]

The foregoing does not seek to show, nor does it prove, that Justice Fernando altogether rejects the orthodox requirements of case and controversy. In *Tan v. Macapagal* he joined the Court in refusing standing to petitioner; in *Tan v. Macapagal* he dismissed for lack of ripeness, and in the Plebiscite Cases he was for dismissal on ground of mootness.[81] But they do show a particular attitude, a reservation of wide

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[74] Mendoza, "Constitutional Law Survey," 47 PHIL. L. J. 84 (1971).

[75] G.R. No. L-34161, Feb. 29, 1972, 43 SCRA 677.

[76] *Supra* note 59.

[77] Res. No. 2127.

[78] See Sedler, "Standing to Assert Constitutional Jus Tertii in the Supreme Court," 71 YALE L .J. 599 (1962); Jaffe, "Standing to Secure Judicial Review: Public Actions," 74 HARV. L. REV. 1265 (1961).

[79] Davis, "Ripeness of Governmental Action for Judicial Review," 68 HARV. L. REV. 1122 (1955).

[80] Fernando, BILL OF RIGHTS, 87.

[81] Planas v. Comelec, G.R. No. L-35925, Jan. 22, 1973, 49 SCRA 105.

freedom to use case and controversy as guidelines rather than restrictive rules. The attitude becomes decisive in the threshold question of jurisdiction.

Political Questions

The doctrine of political questions is taken together with case and controversy as it is similarly important as a threshold question. However, whether or not the political question doctrine may be classified as another of the Court's avoidance techniques is still problematical.[82]

Justice Fernando's attitude towards political questions is circumscribed by his firm belief in separation of powers: utmost respect for the political departments while in the same measure limiting the scope of the doctrine.

His formulation of what constitutes a political question, first enunciated in *Lansang v. Garcia*[83] and reiterated in *Javellana v. Secretary*[84] runs thus:

> "If to be delimited with accuracy, 'political question' should refer to such as would under the Constitution be decided by the people in their sovereign capacity or in regard to which full discretionary authority is vested either in the Presidency or in Congress... Unless clearly falling within the above formulation, the decision reached by the political branches whether in the form of a congressional act or an executive order could be tested in Court. Where private rights are affected, the judiciary has no choice but to look into its validity. It is not to be lost sight of that such a power comes into play if there is an appropriate proceeding that may be filed only after either coordinate branch has acted. Even when the President or Congress possesses plenary power, its improvident exercise or the abuse thereof, if shown, may give rise to a justiciable controversy. For the constitutional grant of authority is not usually unrestricted. There are limits to what may be done and how it is to be accomplished. Necessarily then, the courts in the proper exercise of judicial review could inquire into the question of whether or not either of the two coordinate branches had adhered to what is laid down by the Constitution."

Justice Fernando's aversion to extending the scope of the political question doctrine is borne out not only by his concurrence with Chief

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[82] Marcello, "The Political Question Doctrine," 44 TULANE L. REV. 377 (1970).

[83] G.R. No. L-33964, Dec. 11, 1971, 42 SCRA 448.

[84] *Supra* note 2.

Justice Concepcion's exposition on how and why the doctrine has been weakened by a succession of cases[85] but by an explanation of why *Mabanag v. Lopez Vito*[86], the high point in the political question doctrine, should be overruled. In a rare reference to the unwritten but nevertheless compelling reasons behind a judicial decision Mr. Justice Fernando said: "There is comfort in the thought that the view that thus prevailed was itself a product of the times... The consequences of a judicial veto on the proposed amendment on the economic survival of the country, an erroneous appraisal, it turned out later, constituted an effective argument for its submission. The assumption could have been indulged in. It could very well be the inarticulate major premise."[87]

It is interesting that quite early in his judicial career Justice Fernando noted that the doctrine of political questions is a device by which the Court if it were so minded might decline jurisdiction without losing face. "At any rate under vague contours of the catch-all political questions, the Court can beat a retreat without undue loss of prestige. This failure to see a justiciable case may furnish the occasion for the political branches to carry through a policy deemed by them to be desirable. The trend seems to be however, against enlarging the scope of such doctrine."[88] To date Justice Fernando has still to beat a retreat with the court via the political question doctrine; quite the contrary he has made his most vigorous and scholarly delimitation of its application in the transcendental case of *Javellana v. Executive Secretary*.[89]

In said case he swept across judicial history from *Marbury v. Madison*[90] to *Baker v. Carr*[91] and *Powell v. McCormack*[92] in the United States and from *Angara v. Electoral Commission*[93] to *Planas v. Comelec*[94] in the Philippines to show that the Court's role as arbiter of the constitution is not unduly restricted by the doctrine. He reads American

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[85] Suanes v. Chief Accountant of the Senate, 81 Phil. 818; Avelino v. Cuenco, 83 Phil. 17; Tañada v. Cuenco, 103 Phil. 1051.

[86] 78 Phil. 1 (1947).

[87] For the view that Mabanag v. Lopez Vito is not overruled by later cases see Mendoza, "Judicial Review of the Effectivity of the New Constitution and the Political Question Doctrine," in Fernando, the BILL OF RIGHTS IN THE NEW CONSTITUTION, 173 (1973).

[88] Fernando, JUDICIAL REVIEW, RV-RB.

[89] *Supra* note 2.

[90] *Supra* note 12.

[91] 369 U.S. 185, 82 S.Ct. 691, 7 L.Ed. 2d 663 (1962).

[92] 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed. 2d 98 (1969.

[93] 63 Phil. 139 (1936).

[94] *Supra* note 82.

legal scholarship as pushing back the doctrine despite the "discernible tendency on the part of some distinguished faculty minds to look askance at what for them may be unadvisable extensions of judicial authority."[95]

The most Justice Fernando would concede is, as so characteristic of him, due care and circumspection exercised before a matter is designated a political question. That far he will go but would deny it such classification unless the insistence be sufficiently persuasive and not merely plausible.

On the bench, Justice Fernando has become drawn to the classical theory to explain the political question doctrine. It holds that the doctrine is a necessity arising out of separation of powers,[96] a product of constitutional interpretation,[97] a matter of constitutional delegation and none other.[98] Here is shown the close and necessary relationship between the view of legitimacy of judicial review and the treatment of political questions, legitimacy giving way to duty, and duty to the classical theory.[99]

III

METHODOLOGY IN JUDICIAL REVIEW

Justice Fernando's methodology in constitutional adjudication shapes itself along three major contours: (1) an activist judicial attitude stressing judicial duty; (2) a staunch respect for separation of powers dictating presumptive validity of legislative and executive acts; (3) the libertarian in Justice Fernando which turns the tables on presumptive validity whenever "preferred" freedoms are imperilled.

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[95] Javellana v. Secretary.
[96] Baker v. Carr, *supra*.
[97] Wechsler, *supra*, 7-8.
[98] Weston, Political Questions, 38 HARV. L. REV. 296 (1925).
[99] For the competing theories see Judge Learned Hand stressing the discretionary element in the power in THE BILL OF RIGHTS 15-18 (1958); Bickel on its use as an avoidance technique, Bickel *supra* note 51; also the "prudential views": the opportunistic theory of avoiding prickly issues in Finkelstein, "Judicial Self-Limitation," 37 HARV. L. REV. 338, 336 (1924) and Finkelstein, "Further Notes on Judicial Self-Limitation," 39 HARV. L. R51. 221 (1926); the cognitive theory which explains avoidance as a consequence of lack of judicially manageable standards in Field, "The Doctrine of Political Questions in the Federal Court," 8 MINN. L. REV. 485, 512 (1924); normative theory stressing inadequacy of legal principle to explain it in Jaffe, *supra* note 79. For a discussion of the theories see Marcello, *supra* note 83. The latest approach is the functional analysis in Scharpf, *supra* note 8. The need for a functional analysis was noted as early as 1964 in Feliciano, "On the Functions of Judicial Review and the Doctrine of Political Questions," 39 PHIL. L. J. 444 (1964).

Judicial Activism

Justice Fernando's view on judicial duty is a deep-rooted and long-held conviction. A recurring reference in his works and opinions is Justice Laurel's formulation in *Angara v. Electoral Commission*[100] on judicial duty: "...but only asserts the solemn and sacred obligation assigned to it by the constitution to determine claims of authority under the Constitution..." Justice Fernando refers to the duty as a function partaking more of an obligation than a power,[101] a responsibility which cannot be evaded except on pain of abdication,[102] an exercise which is unavoidable, [103] an awesome responsibility,[104] and a responsibility arising from the function.[105] The stress on judicial duty is foreshadowed by his unwavering intellectual commitment to the legitimate philosophical and historical foundations of judicial review.

Judicial activism is a logical corollary to an acute sense of judicial duty. The label "judicial activist" is guardedly used for lack of a more accurate description. Justice Fernando is certainly not in the company of the activism of Sutherland;[106] he has reservations with the absolutes of Black[107] and neither is he enamoured with the self-restraint of Frankfurter.[108] We use the label confessedly inexactly but for all its limitations it most nearly describes Justice Fernando's judicial mood.[109]

Justice Fernando has himself used the label. "If the judiciary especially the Supreme Court adopts an attitude that does not stress unduly procedural obstacle 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

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100 63 Phil. 139 (1937).

101 Citing Chief Justice Concepcion, in Mutuc v. Comelec, G.R. No. L-32717, Nov. 26, 1970, 36 SCRA 228.

102 *Supra.*

103 Vera v. Arca, G. R. No. L-25721, May 26, 1969, 28 SCRA 351.

104 *Supra.*

105 Javellana v. Executive Secretary.

106 Paschal, MR. JUSTICE SUTHERLAND, A MAN AGAINST THE STATE (1951). (1951).

107 Frank, MR. JUSTICE BLACK (1949); Dilliard, ed., ONE MAN'S STAND FOR FREEDOM (1963); Williams, HUGO L. BLACK (1950).

108 Mendelson, FELIX FRANKFURTER, THE JUDGE (1964); Konefsky, THE CONSTITUTIONAL WORLD OF MR. JUSTICE FRANKFURTER (1949); Thomas, FELIX FRANKFURTER:SCHOLAR ON THE BENCH (1960); Phillips, FELIX FRANKFURTER REMINESCES (1960).

109 Rostows cautions against indiscriminate use of the labels activist, liberal, etc. in classification of legal perspectives. "The similarities and agreements among these gladiators are far more striking than their clashes." Rostow, "The Supreme Court as a Legal Institution," in PERSPECTIVE ON THE COURT (1967).

Congress or Executive, and in view of the possible embarrassment it may cause such agencies when their acts are striken down, there is at times understandable reluctance to pass on the question of validity... That approach goes by the name of judicial self-restraint as contrasted with the former which has been popularly referred to as activist.[110]

In *Javellana v. Executive Secretary*[111] he casts his lot with judicial activism reading the "unequal" contest between judicial activism and self-restraint settled in favor of the former. Justice Fernando calls this part of a justice's thinking "attitude" denoting the proper outlook as contrasted to "awareness" of controlling constitutional doctrines.[112] This approach is nowhere made more clear than in his liberal handling of the requirements of case and controversy.

Justice Fernando assays Philippine judicial history as proceeding from the start towards judicial activism. To prove that the Court should turn its back on timidity and hesitancy in constitutional cases he would gather strength from the Philippine rather than the American experience. "Whatever be the inherent merit in their 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 wellnigh 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 "judicial activism."[113] Such tradition he traces to the valedictory address of Claro M. Recto before the 1935 Constitutional Convention[114] and the path breaking decisions of Justice Laurel who was conscious of a certain degree of judicial activism while Philippine Constitutional Law was in its formative stage.[115]

He draws comfort from what he interprets as the people's continuing approval and encouragement of such activism from Laurel's time to

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[110] Fernando, JUDICIAL REVIEW, 54.

[111] *Supra* note 2.

[112] Gomez v. Palomar, G.R. No. L-23645, Oct. 29, 1968, 25 SCRA 827.

[113] Javellana v. Executive Secretary.

[114] "It is one of the paradoxes of democracy that the people at times place more confidence on instrumentalities of the State other than those directly chosen by them for the exercise of their sovereignty." cited in Javellana v. Executive Secretary.

[115] People v. Vera, 65 Phil. 566 (1937).

date. He posits that the assumption that judicial review is incident to the exercise of judicial power a deeply implanted belief of the nation.[116]

Justice Fernando takes issue with the call for self-restraint based on the direction of American legal scholarship. He flatly rejects what the Solicitor-General in *Javellana v. Executive Secretary* sees as a continuing controversy between the forces of activism and self-restraint. For him the once lively debate is long-settled, "what once was fitly characterized as the booming guns of rhetoric, coming from both directions, have been muted."[117]

Justice Fernando reads contemporary American legal scholarship no longer as a battle on the legitimacy of judicial review but one in search for standards to govern its exercise. He cites Wechsler's essay on neutral principles of adjudication[118] and takes effort to list a long bibliography of law review articles that the piece provoked to prove his reading. He considers Freund and Bickel, the two most cited constitutional authorities by the Solicitor-General as having mellowed in their claim for judicial self-restraint.[119]

For the preliminary question of jurisdiction Justice Fernando's judicial attitude of activism weighs heavily in favor of the Court seizing a case as fit for review. The caveat is that his activism does not substitute judicial choice for political wisdom. Where the assertive activist attitude fades into the merits of a controversy the moderating deference to separation of power takes shape.

Separation of Powers

The second major contour of Mr. Justice Fernando's methodology in constitutional adjudication is respect for separation of powers. Its most noticeable by-products are the twin concepts of presumptive validity of acts of coordinate branches and the burden of proof necessary to overhaul the presumption. The corollary effects are on partial invalidity of coordinate acts, total invalidity, and competence of lower courts in constitutional contests.

His basic postulate is that the judiciary is circumscribed by the constitution into the judicial power. Policy formulation is for the polit-

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116 *Supra.*

117 *Supra.*

118 *Supra* note 10.

119 He notes that Bickel appeared for the New York Times in New York Times Co. v. U.S. 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed. 822 (1971).

ical branches. He quotes Justice Laurel that the responsibility of upholding the Constitution rests as well on the legislature as on the court.[120] In *Municipality of Malabang v. Benito*[121] Justice Fernando says: "Once we accept the basic doctrine that each department as a coordinate agency of government is entitled to the respect of the other two, it would seem to follow that at the very least, there is a presumption of the validity of the act performed by it, unless subsequently declared void in accordance with legally accepted principles. The rule of law cannot be satisfied with anything less."

The presumption of validity is inevitably tied with the burden of proof to overcome the presumption. The burden of reversing the presumption by presenting a factual foundation to overcome it is on him who challenges the validity of the act. This concept in his methodology he laid down at length with vigor and detail in *Ermita-Malate Hotel and Motel Operators Association, Inc. v. City Mayor of Manila*.[122] An ordinance[123] of the City of Manila prohibiting clandestine entry, presence, and exit in motels and hotels was challenged for violation of due process, invasion of privacy, self-incrimination, and unreasonable search and seizure. The Court unanimously upheld the ordinance valid.

Justice Fernando laid down the test, the O'Gorman rule in American jurisprudence. He cites Justice Brandeis: "As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute."[124]

However it was the motion for reconsideration[125] of the same case which prodded Justice Fernando to set in clearest terms the weight of the O'Gorman rule in his system. Counsel's "unorthodoxy of view" sparked the reference to a formidable array of authorities who point to the

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[120] Angara v. Electoral Commission. Cited in Fernando, JUDICIAL REVIEW, 110.

[121] G.R. No. L-28113, March 28, 1969, 27 SCRA 533.

[122] G.R. No. L-24693, Oct. 23, 1967, 21 SCRA 449.

[123] Ord. No. 4760.

[124] O'Gorman & Young v. Hartford Fire Insurance Co., 282 U.S. 251, 51 S.Ct. 130, 75 L.Ed. 324 (1931). On facts and burden of proof in constitutional cases see Freund, ON UNDERSTANDING THE SUPREME COURT 51, 86-91 (1949); Bickle, "Judicial Determination of Questions of Facts Affecting the Constitutional Validity of Legislative Action," 38 Harv. L. Rev. 6 (1924); Davis, "An Approach to Problems of Evidence in the Administrative Process," 45 Harv. Law Rev. 364, 402-410 (1942); Kadish, "Methodology and Criteria in Due Process Adjudication," 66 Yale L. J. 319 (1957).

[125] G.R. No. L-24693 Oct. 23, 1967, 21 SCRA 499.

validity of the doctrine: Dodd,[126] Dowling,[127] Freund,[128] Kauper[129] Frankfurter and Landis,[130] and Professor Hamilton of Yale Law School.[131]

Not that the process is a mechanistic one of putting on one side of the scales the presumption and weighing it against proof on the other. Two more considerations in Justice Fernando's system spell the difference that could tip the balance. The first is his approach towards the presumption and proof and the second his dichotomy in the proper judicial attitude towards governmental interference with economic as contrasted to civil and political rights.

Justice Fernando's view about the approach towards the presumption and need of proof rejects an absolute rule of the presumption vanishing upon mere forwarding of factual foundation of invalidity. Faithful to his basic philosophy of the exercise of utmost care in passing upon validity of statutes he calls for a balancing between the presumption and the proof. So fastidious is Justice Fernando with the nuances of a formulation and the process of the formulation that he so stressed the difference in *Philippine American Life Insurance Co. v. The Auditor General.*[132] Here section 3 of the Margin Law[133] exempting certain obligations from the payment of the fee was upheld. Justice Fernando deemed it necessary to write a concurring opinion.

> "It is equally accurate to affirm that 'The State may, through its police power, adopt whatever economic policy may be reasonable to promote public welfare, and to enforce that policy by legislation adopted for the purpose.' In that sense necessarily the guarantee against impairment as the majority so aptly states 'does not bar a proper exercise of the police power.'
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> "Such a statement provokes a further thought. It cannot be said without rendering nugatory the constitutional guarantee of non-impairment, and for that matter both the equal protection and due process clauses which equally serve to protect property rights, that at the mere invocation of the police power, the objection of non-impairment grounds automatically loses force. Here, as in other cases where governmental authority may trench upon property rights, the process of balancing, adjustment or harmonization is called for.

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126 CASES ON CONSTITUTIONAL LAW 86 (1949).
127 CASES ON CONSTITUTIONAL LAW 769 (1950).
128 CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 122)1954).
129 CONSTITUTIONAL LAW: CASES AND MATERIALS 62 (1960).
130 Frankfurter and Landis, "The Business of the Supreme Court at October Term, 1930," 45 HARV. L. REV. 271, 325 (1930).
131 Hamilton, "The Jurist's Art," 31 COL. L. REV. 1073-1075 (1931).
132 G.R. L-19255 Jan. 18, 1968, 22 SCRA 135.
133 R.A. No. 2609 (July 16, 1959).

> "It is not then the *formulation* of the applicable principle which, as above stated, has been set forth with clarity and accuracy that invites further scrutiny. It is rather the *process* by which the disposition of a controversy whenever the protection of the contract clause is sought that to my mind, needs additional emphasis."

Justice Fernando's attitude towards a "double standard" in constitution adjudication of economic as contrasted to civil and political rights is another major influence. As early as his treatise on judicial review he said:[134] "As long as the governmental measures challenged deal with efforts to achieve economic security and a modest competence for the vast majority of our impoverished people, such a judicial attitude, which reflects adherence to the social justice and protection to labor provisions deserves commendation. It cannot be viewed with approval where restraints are imposed on liberty, whether of the mind or of the person. As had already been made clear, judicial vigilance should not be lulled by reliance on the presumption of validity." The attitude towards economic rights is a central factor in upholding the validity of the ordinance in *Ermita Hotel-Motel Association, Inc. v. City of Manila.*[135] In *Alalayan v. National Power Corporation*[136] he would elaborate: "for it is to be remembered that the liberty relied upon is not freedom of the mind, which occupies a preferred position, nor freedom of the person, but the liberty to contract, associated with business, which may be subject in the interest of general welfare under the police power, to restrictions..."

Justice Fernando's deference to the legislature engaging in social and economic engineering are most shown in cases upholding the validity of the Land Reform Act.[137] This deference in the economic field is what sets him apart from the activism of the New Deal.[138]

It may not be inappropriate to note that part and parcel of the presumption of validity is Justice Fernando's partiality towards constitutional construction to accommodate to the limits constitutional allocation of power in giving effect to legislative intent[139] and the hesitance

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[134] Fernando, JUDICIAL REVIEW, 115.

[135] *Supra* note 123.

[136] G.R. No. L-24396, July 29, 1968, 24 SCRA 172.

[137] *Supra* note.

[138] Rodell, NINE MEN 213-255 (1955), Schlesinger, Jr. THE POLITICS OF UPHEAVAL 447-484 (1960).

[139] Palanan Lumber and Plywood v. Arranz, G.R. No. L-27106, March 20, 1968, 22 SCRA 1186.

to unduly limit powers of coordinate branches insofar as their internal operations are concerned.[140]

The foregoing approach has spawned distinct attitudes toward three facets of constitutional adjudication: partial invalidity, effects of invalidity, and the competence of lower courts in passing on constitutionality.

Partial Invalidity

The effort to give effect, even partially, to a statute otherwise declared unconstitutional as to part is a logical corollary of the belief in separation of powers. In his BILL OF RIGHTS Justice Fernando notes the *prima facie* presumption that a statute may be divided into parts in place of a general presumption that every statute is an indivisible unit as created.[141]

In *Bara Lidasan v. Comelec*[142] Justice Fernando was the lone dissenter to the ruling that invalidated a law[143] creating a municipality in the province of Lanao but which statute included two barrios situated in another province. Justice Fernando would choose to give it effect even in the apparent face nullity of the bill which embraced more than one subject.[144] He cites Chief Justice Stone on interpretation with an eye to avoid invalidity[145] and Justice Devanter on construction free from peril of invalidity where possible.[146]

Effect of Declaration of Invalidity

Separation of powers also dictates for Justice Fernando restricting the effects of a declaration of invalidity as not to do injustice to acts consummated while the statute was in effect. In *Municipality of Malabang v. Benito*[247] it was ruled that the President cannot create a municipality by mere executive order[148] on authority of *Pelaez v. Auditor General*.[149] On the effects of the declaration of invalidity Justice

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[140] Lacson Magallanes Co. Inc. v. Paño, G.R. No. L-27811, Nov. 17, 1967, 21 SCRA 895.

[141] Fernando, BILL OF RIGHTS, 16.

[142] G.R. No. L-28089, Oct. 25, 1967, 21 SCRA 496.

[143] R.A. No. 4790 (June 14, 1966).

[144] Const. Art. VI Sec. 21 (1) "No bill which may be enacted into law shall embrace more than one subject which shall be expressed in the title of the bill."

[145] Lucas v. Alexander, 279 U.S. 573, 49 S.Ct. 426, 73 L.Ed. 851 (1928).

[146] Chippewa Indians v. United States, 301 U.S. 358, 57 S.Ct. 826, 81 L. Ed. 1156 (1937).

[147] *Supra* note 122.

[148] Exec. Order 386.

[149] G.R. No. L-23825, Dec. 24, 1965, 15 SCRA 569.

Fernando in a concurring opinion stated that because of a time-lag between the passage of the law and its final declaration of nullity the orderly processes of government require that there be a presumption of validity in the interim. It would be productive of injustice if no notice of its existence as a fact be paid to it even if afterwards it be stricken down.

Lower Courts and Constitutional Questions

A most strongly held view of Justice Fernando on the power of lower courts in constitutional cases springs from the courtesy due coordinate branches. While he concedes that judicial duty may sometimes require adjudication by a lower court of such issues he cautions that the greatest care and circumspection be observed. He would even advise refraining from such attempts.[150]

In *Palanan v. Arranz*[151] he chided the Court of First Instance which issued an injunction against the Executive Secretary on a dispute as to which party was rightly adjudicated lumber rights. He calls attention to the rigorous requirements of a two-thirds vote for the Supreme Court to annul a statute[152] to remind lower court judges to go slow in their otherwise unbridled confidence in declarations of invalidity of one-man courts. He cites Justice Black[153] on the practical effect of an injunction as delaying the date selected by Congress to put its chosen policies into effect.

It may not be amiss to note that in the case the lower court judge issued the injunction without benefit of a factual foundation but ruled on purely legal issues. Justice Fernando recommends corrective legislation calling attention to existing laws which deny lower court jurisdiction in certain cases.[154]

Libertarian Activism

The third major shape in Justice Fernando's methodology is his latitudinarian concept of civil and political liberties. For our preesnt

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[150] *Supra* note 104.
[151] *Supra* note 141.
[152] Const. Art. VII Sec. 10..
[153] Heart of Atlanta Motel v. United States 379 U.S. 241, 85 S.G. 348, 13 L.Ed. 258 (1964).
[154] Public Service Commission (Sec. 35 Com. Act No. 146 as amended, Iloilo Commercial and Ice Co. v. Public Service Commission, 54 Phil. 28 (1931); Securities and Exchange Commission (Sec. 35 Com. Act No. 83 as amended, Afag Veterans Corps v. Pineda G.R. No. L-17159, Nov. 23, 1965, 15 SCRA 254; Social Security Commission (Sec. 5 (a) and (c) of R.A. 1561) Poblete Construction v. Social Security Commission, G.R. No. L-17605, Jan. 22, 1964, 10 SCRA 1.

purposes it is enough to give his libertarianism an overview in specific reference to how it affects his method.

Justice Fernando adheres to Freund's dual standard in the appreciation of economic and personal rights. "In short, when freedom of the mind is imperiled, it is the lawmaker's judgment that commands respect. This dual standard may not precisely reverse the presumption of constitutionality in civil liberties cases, but obviously it does set up a hierarchy of values within the due process clause."[155]

The earlier note of this dual standard is his qualification to the application of the O'Gorman rule in *Ermita-Malate Hotel and Motel Operators Association, Inc. v. City Mayor of Manila.*[156] "This is not to discount the possibility of a situation where nullity of a statute, executive order, or ordinance may not be readily apparent but the threat to constitutional rights, especially those involving the freedom of the mind, is present and ominous. That in such event there should be a rigid insistence on the requirement that evidence be presented does not argue against the force of the weight to be accorded the O'Gorman doctrine in this case."

Underlying it is Justice Fernando's view of "preferred freedom" in the Constitution. "For it is to be remembered that the liberty relied upon is not freedom of the mind, which occupies a preferred position, nor freedom of the person..."[157] The concept of preferred freedoms does away with the need for a factual foundation to overcome the presumption of validity; it is enough if the statute is unconstitutional on its face.[158] In *Vera v. Arca*[159] he said except in cases where the specific freedoms of belief, assembly, and association are concerned the need for introducing evidence to counteract the assumption that a statute is valid is unavoidable.

In *Badoy v. Ferrer*[160] Justice Fernando explained: "Where the constitutional infirmity of the challenged statute may be discerned from

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[155] Freund, ON UNDERSTANDING THE SUPEME COURT 11 (1950) cited in Fernando, THE BILL OF RIGHTS 5. See also Freund, THE SUPREME COURT OF THE UNITED STATES Chap. III (1961).

[156] *Supra* note 136.

[157] For history of the preferred freedom concept see Haines, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 185-190 (1914); Kauper, FRONTIERS OF CONSTITUTIONAL LIBERTY 51-52, 88-93 (1956); for the cases McKay, "Preference for Freedom," 34 N.Y. UNIV. LAW REV. 1182 (1959); for a criticism of preferred freedoms see Mendelson, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 126-129 (1961).

[158] See Kauper, CIVIL LIBERTIES AND THE CONSTITUTION 55, 86 (1962).

[159] *Supra* note 104.

[160] G.R. No. L-32547, Oct. 17, 1970, 35 SCRA 285.

G.R. No. L-32547, Oct. 17, 1970, 35 SCRA 285.

a reading thereof, the burden of disproving that there is no unconstitutional taint falls on the shoulders of those disposed to uphold it. Where there exists a reasonable apprehension of a trespass on the forbidden domain of free speech and free press, the deference that is due the judgment of a coordinate branch must yield to the supremacy that at all times must be accorded to what the Constitution in plain and explicit language ordains."

With this dual standard it is not surprising that the 1970 term of the Court, described as a year with accent on the passive virtues[161] the Court rejecting challenges to the Constitution Convention Act,[162] finds Justice Fernando consistently dissenting where the act infringed on preferred freedoms.

In *Badoy v. Ferrer*[163] Sec. 12 (f) of R.A. 6132 prohibited advertisement outside of Comelec space, or the mention of the candidacy of an aspirant in any news medium without mention of all other candidates in the district. Justice Fernando, dissenting, held this void as a violation of the preferred freedoms of expression and free speech. In *Imbong v. Ferrer*[164] Sec. 8 (a) of R.A. 6132 banned all political parties and other organized groups from supporting candidates in the election for constitutional convention delegates. Justice Fernando, dissenting, viewed this as entering the forbidden domain of freedom of speech and association. He distinguished this from *Gonzales v. Comelec*[165] which merely prohibited partisan activity before a specified date prior to election day. Even then in *Gonzales v. Comelec* he warned on like legislative enactment: "Candor compels the admission that the writer of this opinion suffers from the gravest doubt. For him, such statutory prescription could very well be within the outermost limits of validity, beyond which lies the abyss of unconstitutionality."

This libertarianism extends to violations of physical liberty.[166] In *Baking v. Director of Prisons*[167] petitioner was convicted of rebellion and sentenced to ten years imprisonment. When the sentence was handed down, however, Baking had already served eighteen years under preventive detention. Baking sought in a petition for *habeas corpus* to credit his preventive detention for the sentence. The majority credited his pre-

161 Agabin, "Constitutional Law Survey," 46 PHIL. L. J. 191 (1971).
162 R.A. 6132 (August 24, 1970).
163 G.R. No. L-32547, Oct. 17, 1970, 35 SCRA 285.
164 G.R. No. L-32432, Sept. 11, 1970, 35 SCRA 28.
165 *Supra* note 59.
166 See Fernando, BILL OF RIGHTS 215-324.
167 G.R. No. 30603, July 28, 1969, 28 SCRA 850.

ventive detention for only half of his sentence.[168] Justice Sanchez, ponente, stressed, "We cannot rewrite the law. This is the function of Congress." Justice Fernando dissented. "What is involved is liberty, and of that issue it is the theory of our constitutional regime, confirmed by constant and uninterrupted practice, that the role thrust upon the judiciary is far from modest." Justice Fernando argued that in this instance the law should not be applied.

IV

METHODOLOGY, THE COURT, AND THE CONSTITUTION

The most distinctive badges of Justice Fernando's judicial method are his libertarian activism and classical appreciation of political questions. His methodology more than reflects his view on Court and Constitution; method and view coalesce into a formula for the proper role of the Court. How such formula dovetails with a role for the Court should be interesting as the retirement of Justice Concepcion and soon of Justice Zaldivar whose libertarian company Justice Fernando shares thrusts upon the latter the leadership in seniority among the libertarians of an expanded Court.

Underscoring Justice Fernando's view is his focal prescription: a more than enthusiastic, perhaps crusading, advocacy for an activist Court. Such function he deems imperative from popular endorsement of what he reads an activist court tradition. If a Supreme Court has great power not because it interprets the Constitution but because it reads the immanent patterns of a people's behaviour into the Constitution,[169] if the Filipinos have embraced judicial activism, is it a historical inevitability and irreversible philosophic must in the Philippine context?

Bases of Activism

Three salient points of Justice Fernando's theory on activism are *Angara v. Electoral Commission*[170] as a touchstone for activism, the yearn-

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[168] Revised Penal Code, Art. 29 "Offenders who have undergone preventive imprisonment shall be credited in the services of their sentences consisting of deprivation of liberty, with one-half of the time during which they have undergone preventive imprisonment."

[169] Mendelson, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 112 (1961).

[170] 63 Phil. 139 (1937).

ing for an "independent" judiciary as well-spring for activism, and the historicity of an activist Philippine Court.[171]

Of *Angara v. Electoral Commission* the pertinent query is whether it was truly a pillar for activism or an apology, a benign justification, for review.

Of the independence of the judiciary the classic episode is the *Cuevo-Barredo* case. The Court of First Instance and Court of Appeals denied compensation to the heirs of a laborer who died retrieving logs of his employer in the Pasig River. An incensed President Quezon castigated the decision and thereby drew an avalanche of criticism of executive interference with the judiciary.[172]

Even earlier Justice Malcolm relates how the Supreme Court proved a jealous defender of judicial independence when it upheld the refusal of a judge to be appointed to another district without his consent.[173] The judge earned the ire of local politicians for his unbending character. Reacting, the Philippine Legislature passed a law which provided for lottery of judicial positions every five years. This was likewise stricken down[174] the decision in both cases "resting on fundamental conception of an independent, fearless, and incorruptible judiciary."[175]

The modern prototype is the Liwag-Court tiff. Juan R. Liwag was Secretary of Justice to President Diosdado Macapagal whose "New Era" met a series of rebuffs from the Court. Smarting from a Court reversal in *Garcia v. Executive Secretary*[176] Liwag posed the query of whether the "weakest" branch of government had become the strongest.[177]

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[171] Javellana v. Executive Secretary G.R. No. L-36142, March 31, 1973.

[172] Quirino, QUEZON: PALADIN OF PHILIPPINE FREEDOM 54 (1971).

[173] Borromeo v. Mariano, 41 Phil. 322 (1921).

[174] Concepcion v. Paredes, 42 Phil. 599 (1921).

[175] Malcolm, THE COMMONWEALTH OF THE PHILIPPINES 178-181 (1936). (1936).

Malcolm, FIRST MALAYAN REPUBLIC 236-238 (1951).

[176] G.R. No. L-19748, Sept. 13, 1962, 6 SCRA 1.

[177] Liwag, "Supreme Court and the Rule of Law," 28 LAWYERS JOURNAL 3 (1963).

"The Liwag Speech," (editorial) 28 LAWYERS JOURNAL 1 (1963).

"On Liwag versus the Supreme Court," (editorial) 56 PHILIPPINES FREE PRESS 8 (1963).

Locsin, "Juan R. Liwag versus the Supreme Court," 56 PHILIPPINES FREE PRESS 4 (1963).

Valmonte, "The Secretary of Justice versus the Supreme Court," LAWYERS JOURNAL 6 (1963).

Vera, "Liwag's Blast at the High Court," 44 PHILIPPINES HERALD MAGAZINE 6 (1963).

Macapagal, "The Supreme Court in a Democracy," 32 LAWYERS JOURNAL 116 (1967).

It seems these instances do not involve debate on the role of the Court vis-a-vis the political branches in matters of policy so attendant a controversy on activism. "Independence" is limited to freedom from partisan influence elementarily necessary in any judiciary with or without judicial review.

Dr. Abelardo Samonte's path-breaking "THE PHILIPPINE SUPREME COURT: A STUDY OF JUDICIAL ATTRIBUTES, ATTITUDES AND DECISION MAKING"[178] sheds light on the historicity of an activist tradition. The random years 1928, 1938, 1948 and 1954 representing respectively the Colonial, Commonwealth, Early Republic and Late Republic Courts were analyzed for Supreme Court response to civil liberties, economic liberalism, and judicial activism.

The findings are as revealing as the behavioural approach to decision-making is novel. "Over the last four decades, the Philippine Supreme Court has demonstrated a considerable degree of judicial restraint. In the four Courts studied, each had more decisions which restricted than those which broadened the jurisdiction of the court. Comparatively, it is interesting to note that the Commonwealth Court (1938) which had the highest positive response to civil liberties and economic liberalism, practiced the strongest judicial restraint."[179] The percentage of positive response in activism cases was 43% in 1928, 27% in 1938, 38% in 1948 and 47% in 1954. This raises doubt on the popular assumption that the Commonwealth Court under Justice Laurel was consciously activist.

The Samonte piece of valuable scholarship is of course limited by factors not of its fault. Empirical data of random years may not reflect qualitative doctrinal trends.

There could be other conditions that spawned activism antedating and merely reflected in *Angara v. Electoral Commissions.* Perhaps activism was indiscriminately equated with activism or consciously so modified by native genius at its implantation from American jurisprudential soil culminating in the expressed Constitutional provision for review,[180] described as placing us "logically in advance" of the American

[178] Samonte, THE PHILIPPINE SUPREME COURT: A STUDY OF JUDICIAL ATTRIBUTES, ATTITUDES, AND DECISION-MAKING (1967).

[179] *Supra*, 31.

[180] Const. Art. VIII sec. 2 (1) and Art. VIII sec. 10.

Constitution.[181] Perhaps the national preoccupation for an independent judiciary[182] is proof rather than cause of an activist tradition.

As aptly put "This question (independent judiciary) however, more properly relates to the political tradition or morality prevailing among judges and other judicial officers, or their personal attitudes toward their own personal status, rather than to constitutional organization principles."[183] That the issue is more partisan than constitutional could only be expected in such a "highly political" country as the Philippines.[184] The main thrust of the Liwag attack was disputing the legal principles in the Garcia decision and only secondarily and unconvincingly on the proper role of a Court indicative of mere afterthought.[185] Such "rare" occurrences as the Liwag blast do not blur what foreign observers perceive as unquestioned deference to Supreme Court decisions.[186]

Popular Support for Activism

When Justice Fernando falls back on the popular support and clamor for activism he is on higher and surer grounds, whatever the bases of an activist tradition or however one may deny such trend. "The public acceptance of its (the Court's) vigorous pursuit of the task of assuring that the Constitution be obeyed is easy to understand."[187] He may as well have said the Filipino tends to equate judicial review with judicial supremacy.

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[181] Masamichi and Tatsuji, THE PHILIPPINE POLICY:A JAPANESE VIEW 95 (1967).

[182] Bautista, Angelo, "The Independence of Our Judiciary Under the Constitution." 29 LAWYERS JOURNAL 35 (1964).
Sanchez, "Towards our Goal — A Truly Independent Judiciary," 25 LAWYERS JOURNAL 66 (1960).

[183] Grossholtz, THE PHILIPPINES 125 (1964).
Tupas, "Keep the Supreme Court out of Politics," 36 SUNDAY TIMES MAGAZINE 14 (1965).
Rama, "On the Appointment of Justices," 61 PHILIPPINES FREE PRESS 6 (1968).
Macapagal, "Political Control Over Judges," 23 LAWYERS JOURNAL 257 (1958).
"Will Macapagal Purge the Supreme Court?" (editorial) 29 GRAPHIC 1 (1962).

[184] Corpuz, THE PHILIPPINES (1965).
Lande, LEADERS, FACTIONS, AND PARTIES (1965).

[185] *Supra* note 177.
Liwag, "A Critique of the Supreme Court," LAWYERS JOURNAL Vol. 28 No. 1 (Jan. 31, 1963), 3-5.

[186] Bacuñgan, "Political Law Survey," 44 PHIL. L.J. 115 (1969).
American University AREA HANDBOOK FOR THE PHILIPPINES 186 (1969).

[187] *Supra* note 171.

The press is the most avid and effective harbinger of overzealous reverence, bordering on obeisance, for the Court. The rhetoric bears witness: citadel of liberty, last bulwark of democracy, rock of liberty, court of last resort, guardian of the constitution, defender of the constitution.[188] Criticism is peripheral as when the press questions the legal principles used in decisions.[189] Two extreme and ludicrous examples show how the press can, so to speak, be more popish than the pope in preserving the integrity of the Court: in the 1930's justices were criticized for "undignifiedly" participating in a foot parade, and President Quezon for taking a seat reserved for an absent justice during a function.[190]

The bar is only a little bit less shrill than the press in its adulation.[191] The law schools and the law journals contribute in their own bland manner. These are of far-reaching effects as for Justice Frankfurter the only criticism that matters to a Court is expressed by the bar and the learned law journals.[192] Philippine legal scholarship is indicted as sporadic, occasional, and unorganized;[193] constitutional law scholarship as uncritical of the role of the Court in judicial review.[194] Is this a serious failing or a studied omission precisely because the activist role of the Court is far too settled?

How the triad of press, bar, law school and journal engenders an already favorable medium for activism may be illustrated. The Supreme Court's adamant refusal to rule on an internal legislative strife in

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[188] "The Last Bulwark," (editorial) MANILA CHRONICLE (July 26, 195i).
"Rock of Our Liberties," (editorial) PHILIPPINES FREE PRESS (Sept. 29, 1962).
"Strongest Still in Public Esteem," (editorial) 37 GRAPHIC 1 (1970).
Guerrero, "Court of Last Resort," 37 GRAPHIC 18 (1970).
Locsin, "Defenders of the Constitution," 19 CHRONICLE MAGAZINE 4 (1964).
Mutuc, "The Supreme Court — Palladium of our Freedoms," 5 WEEKLY NATION 4 (1970).
Vera, "The Supreme Court: Guardian of the Constitution," 44 PHILIPPINES HERALD MAGAZINE 10 (1963).

[189] Badoy, "On the Supreme Court Justices and the Suspension of the Writ of Habeas Corpus," 64 PHILIPPINES FREE PRESS 3 (1972).

[190] Cited in: Batacan, THE SUPREME COURT IN PHILIPPINE HISTORY 299 (1972).

[191] *Supra* note 190.

[192] Freedman, "Justice Frankfurter and Judicial Review," in PERSPECTIVES ON THE COURT 6 (1967).

[193] Laureta, "Report on the Research Program of the U.P. Law Center," 39 PHIL. L. J. 523 (1964).
Sta. Maria, "Scholarly Publishing in the Philippines," 21 PHILIPPINE STUDIES 3 (1973).

[194] Prof. V. V. Mendoza, University of the Philippines.

Avelino v. Cuenco[195] was pointedly chastised by Senator Claro M. Recto and Justice Jose P. Laurel.[196] Later, the grudging Court intervention was hailed.[197] An editorial said it proved the political maturity of the people as the sudden reversal in political power resulted not in riots but graceful submission to an adverse verdict.[198] Perhaps it placed beyond doubt the abiding faith of the Filipino in the Court *more especially and even* when the latter enters what Justice Frankfurter calls the "political thicket."[199]

Macias v. Comelec[200] where the Supreme Court struck down a redistricting law[201] came even before *Baker v. Carr*[202] but was not a revolution of sorts such as the latter touched off in the United States. Hailed as democracy in action in the law journals[203] the press played it up as a victory against gerrymandering and legislative railroading. All this without benefit of debate on the essentially political act of redistricting.[204]

In *Aytona v. Castillo*[205] where an outgoing president made "midnight appointments" the Court assumed jurisdiction. Only the occasion was reminiscent of *Marbury v. Madison*[206] for its epilogue was not soul searching on separation of powers. The law journals questioned not the power of the Court to decide but the legal principles underlying the decision.[207]

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[195] 83 Phil. 17 (1949).
[196] Batacan, *supra* 214-218.
[197] *Supra*, 221.
[198] "The Nation's Political Maturity," LAWYERS JOURNAL 1 (March 31, 1949).
[199] Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663 (1962).
[200] G.R. No. L-18684, August 23, 1961, 3 SCRA 1.
[201] R.A. No. 3040 (November 6, 1961).
[202] *Supra* note 199.
[203] Eufemio, "Constitutional Law in Retrospect," 37 PHIL. L. J. 1 (1962).
Manalad and Layaoen, "The Court's Attitude Towards 'Political Questions' Revisited," 36 PHIL. L. J. 599 (1961).
[204] "Supreme Court Reverses Congress," PHILIPPINES FREE PRESS 1 (March 10, 1962).
In contrast see Baker v. Carr, *supra*, and the spate of comments it provoked:
Baker, THE REAPPORTIONMENT REVOLUTION, (1966).
Bickel, POLITICS AND THE WARREN COURT 175-196 (1965).
Cox, THE WARREN COURT 114-135 (1968).
For law review articles see the listing in Kauper, CONSTITUTIONAL LAW CASES AND MATERIALS 44 (1966).
[205] G.R. No. L-19313, January 20, 1962, 4 SCRA 1.
[206] 1 Cranch 137 (1803).
[207] Pacis, "Supreme Court Poses Challenge to Democracy," 4 U.E. LAW JOURNAL 261 (1962).
Geronimo, "Midnight Appointments in the Light of Day," 16 ATENEO L. J. 35 (1967).
Platon, "The Case of Aytona v. Castillo — A Second Look," 37 PHIL. L. J. 626 (1962).
Tolentino, "Speech Assailing Aytona v. Castillo," 27 LAWYERS JOURNAL 102 (1962).

Libertarianism

Of the historicity of a court libertarian tradition Dr. Samonte confirms: "Except in 1948, the Court had more decisions which strengthened free speech, due process, equal protection, or privacy. But the Commonwealth (1938) and Republic (1954) Courts showed higher positive response than the Colonial (1928) Court. It is interesting to note, however, a sharp increase in the number of civil liberties cases in 1948, accompanied by a sharp drop in the percentage of positive decisions. This indicates a conservative judicial response to early post-war issues or problems such as political collaboration, treason, and the Huk rebellion."[208] The percentage of positive decisions for libertarian activism are 55% in 1928, 67% in 1938, 35% in 1948 and 61% in 1954.

It is submitted that this libertarian tradition is the Philippine legal system's signal contribution to the now worldwide concern for protection of individual rights. Such tradition is so rooted in abhorrence of centuries of oppression that the Filipino undertook with seriousness and anxiety to assert private rights in a Bill of Rights for the Malolos Constitution.[209] The Philippines' was not a shift from a jurisprudence of property to a jurisprudence of status as was in the United States.[210]

Yet sustained libertarianism could involve pitfalls. Scholars have accurately characterized the Filipino as "oversensitive and self-conscious" in demanding individual rights to the prejudice of national development.[211] The self-consciousness rests on stress of freedom from interference to the neglect of responsibilities, much less the equally fundamental consciousness of the vigilance to secure such liberties. This could be the exacting price for the over-veneration of the Court as *the* guardian of a people's freedoms. Justice Laurel's words in *Angara v. Electoral Commission*[212] stand as a poignant reminder: "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 the Filipino minds and hearts than in the consultation rooms and court chambers."

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[208] Samonte, *supra* note 178, 29.

[209] Masamichi and Tatsuji, *supra* note 181.

[210] Pritchett, THIRD BRANCH OF GOVERNMENT 7 (1963).

[211] Masimichi and Tatsuji, *supra* note 181.
Averch, Koehler, and Benton, THE MATRIX OF POLICY IN THE PHILIPPINES 32 (1971).

[212] 63 Phil. 139 (1936).
Mendoza, "A Positive Approach to Freedom," 29 LAWYERS JOURNAL 66 (1964).

Political Questions and the Court as Political Opposition

A most perceptive analysis of the role of the Philippine Supreme Court is that it is the most important legitimating institution of the country[213] and one of the most important factors in encouraging stable political development.[214] Truly a paradox in view of the origins of judicial review in the country.

The Insular Cases decided by the American Supreme Court on the status of the Philippines ruled that the American Constitution did not follow the flag to the Philippines. This proved no handicap for even if the organic laws did not provide for judicial review there evolved Philippine constitutional development by judicial interpretation.[215] Justice Fernando describes the eagerness of Filipino and American lawyers to raise constitutional questions even before the 1935 Constitution.[216]

This was a complete overthrow of the legislative supremacy permeating the Malolos Constitution. The framers of the latter, distrustful of a strong executive, adopted the Calderon draft with the legislature holding great power over the executive and the Court. No provision was made for judicial review. What was truly indigenous was supremacy of the most representative political branch.[217]

Judicial review established itself spared from the questionable birth, historical accident, and bad logic attendant to its American forebear. Thus while the institution is not disputed here, in the country of its origin

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[213] Grossholtz, *supra* note 183.

[214] Almond, Coleman, eds., THE POLITICS OF DEVELOPING AREAS 1q4-178 (1960).

[215] Malcolm, *supra note* 175.

[216] Fernando, JUDICIAL REVIEW, 11.

[217] Majul, THE POLITICAL AND CONSTITUTIONAL IDEAS OF THE PHILIPPINES REVOLUTION 160-168, 196 (1957).

Agoncillo, MALOLOS: THE CRISES OF THE REPUBLIC 250 (1960).

Bernas, A HISTORICAL AND JURIDICAL STUDY OF THE PHILIPPINE BILL OF RIGHTS 1-2, 3 (1971).

Aruego, "The Malolos Constitution," in Abueva and de Guzman, FOUN-

Aruego, PHILIPPINE POLITICAL LAW 39 (1950).

In the 1935 Constitutional Convention the power of judicial review was not even debated. The controversies centered on a constitutional court of appeals, etc. see:

Aruego, THE FARMING OF THE PHILIPPINE CONSTITUTION 442, 493 (1949).

Laurel, PROCEEDINGS OF THE PHILIPPINE CONSTITUTIONAL CONVENTION 886 (1966).

Compare with the treatment of judicial review in the 1971 Constitutional Convention as foreshadowed by:

U.P. LAW CENTER CONSTITUTIONAL REVISION PROJECT, 482, 533 (1970).

the debate on the role of the judicial branch is as alive in Burger's Court as it was in Marshall's.[218]

These local twists, whether corruption or improvements, to an otherwise peculiarly American practice bring about a unique and potentially dangerous conception of the Court as non-political political opposition. Almond most succinctly articulates this peculiarity. Singling out the Philippines he notes "In some cases, the Courts have performed the important function of serving as the main restraint upon and as loyal opposition to the dominant political party."[219] This role, largely unarticulated but prevalent, was solicitously encouraged by the press[220] which called it a virtue and sophistication of the republic.[221]

This role was seriously espoused by Justice Jesus Barrera. He advocated a novel function for the Court — responsiveness to constitutional challenge — a predisposition on its part to pay heed to grievances based upon a plausible claim of constitutional right. He advanced that judicial self-restraint in the United States has a genesis and development different from the Philippine experience. The Philippine Court substitutes for the institutional checks other than the federal judiciary on government absent in the Philippines: a well-developed, well-informed, and militant public opinion, fifty state governments, and a powerful press.[222]

That a non-political political opposition is a contradiction is overlooked. The age-old dilemma of the dual role of a Court as policy-maker and court of justice is denied. The Philippines took on the institution minus its basic bifurcations: between popular sovereignty suggesting sovereign will and fundamental law suggesting limit,[223] between passive institution and arbiter of critical social, economic, and political questions.[224] Even then paradox gives way to a marvel. Given such preca-

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[218] Gunther, "Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 HARV. L. REV. 1 (1972).
Abad Santos, "The Role of the Judiciary in Policy Formulation," 41 PHIL. L. J. 570-573.

[219] Almond, *supra* note 217.

[220] Makabenta, "The Supreme Court in Our Changing Times," 34 GRAPHIC 18 (1968).
See Cortez, "Political Law Survey," 42 PHILIPPINE LAW JOURNAL 1 (1967), on the heavy political undertones of many constitutional cases.

[221] Rama, "The Supreme Court and the New Era," PHILIPPINES FREE PRESS 2 (1964).

[222] Barrera, "The New Orientation in the Role of the Supreme Court under the Constitution," 30 LAWYERS JOURNAL 69 (1965).

[223] McCloskey, *supra* note 215, 224.

[224] Cox, *supra* note 204, 3.

rious role the Court has been spared what has been termed in its American counterpart as bruising "self-inflicted wounds" from skirmishes with the political branches. Does this prove the viability and genius of local adaptations for the power? Or because there has been no challenge, much less a serious one, on judicial review?[226]

For Justice Fernando the poser would be whether libertarian activism and a classical handling of political questions would push the Court to its first self-inflicted wound. As Justice Frankfurter said the Supreme Court to a large extent is the reflector of that impalpable but controlling thing, the general draft of public opinion.[226] A lesson of the New Deal is that the court could not veer far from what the people want. If the people clamor for judicial supremacy could a Court last if it insists on self-restraint? Yet another lesson of the New Deal is that the great successes of the American Court were achieved when it operated near the margin rather than the center of political controversy, when it "nudged and gently tugged the nation, instead of trying to rule it."[227]

For a judicial activist of Justice Fernando's persuasion[228] the dilemma is a serious one. *Lansang v. Garcia*[229] and *Javellana v. Secretary*[230] seem to heighten a locking of horns between activism and self-restraint. Was *Javellana v. Executive Secretary* much too close for comfort, almost causing a "self-inflicted" wound? There is no ready answer but the influence of Justice Fernando's judicial activism on the matter has been and, safe to say, will be, to borrow a phrase from him, "far from modest."

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[225] Bacungan, *supra* note 186.

[226] Mendelson, JUSTICES FRANKFURTER AND BLACK: CONFLICT IN THE COURT 129 (1961).

[227] McCloskey, *supra* note 215, 229.

[228] Fernando, "The Right to Dissent," 20 M.L.Q. LAW QUARTERLY 257 (1970).

Fernando, "An Inquiry into the Constitutional Right to Liberty, 26 PHIL. L. J. 178 (1951).

Fernando, "One Year of Constitutional Law," 27 PHIL. L. J. 197 (1952).

Fernando, "Another Year of Constitutional Law," 28 PHIL. L. J. 1 (1953).

Fernando, "A Third Year of Constitutional Law: 1953," 29 PHIL. 1 (1954).

Fernando, "The Search for Justice: Reflections on the Judicial Process," 32 LAWYERS JOURNAL 290 (1967).

[229] G.R. No. L-33964, December 11, 1971, 42 SCRA 448.

[230] G.R. No. L-36142, March 31, 1973.