

FOREWORD

ENRIQUE M. FERNANDO: FRIEND AND TEACHER*

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"When a great tree falls," Oliver Wendell Holmes said, "we are surprised to see how meager the landscape seems without it." So are we with the passing of Chief Justice Enrique M. Fernando. For his life was no less than the "passionate dedication of great gifts to great purposes."

Today I would like to speak of Chief Justice Fernando as a teacher and as a friend. Chief Justice Fernando was first and foremost a teacher not only in the sense of being an academic presiding over a class, which he was when I first met him, but also in the sense of someone able to impart knowledge to others not formally his students.

When we were in his class at the University of the Philippines College of Law, we were always in a state of tension as he demanded the best in every one of us. Like Thomas Jefferson who said he had "sworn on the altar of God eternal hostility to every form of tyranny over the mind of man,"¹ Professor Fernando's policy was one of "maximum intolerance" toward every form of ignorance, as he excoriated those who recited in class "with all the valor of ignorance."

* Eulogy delivered during the necrological services for Chief Justice Enrique M. Fernando (1915-2004) held at the Supreme Court last October 22, 2004. This article was also published in *The Manila Bulletin*, available at <http://www.mb.com.ph/OPED2004102321045.html>. The Volume 79 student editorial board and Professor Emmanuel Fernando are presently collecting articles that discuss the late chief justice's 998 decisions, and will publish them in a special memorial issue if a sufficient number are gathered.

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¹ Letter to Dr. Benjamin Rush (Sep. 23, 1800). This sentence is inscribed on the Jefferson Memorial.

Endowed with a prodigious memory and the gift of tongue and pen, he was a daunting figure. He was dubbed the "walking encyclopedia." I.P. Soliongco, the *Manila Chronicle* columnist, called him the "undernourished celestial," undoubtedly to describe his frail constitution which housed a dynamo generating power for an incandescent mind.

When we were in his class, he was already an authority on constitutional law, whose influence as a teacher of the subject radiated beyond the classroom to a wider class outside – whether this was at the Botica Boie on the Escolta, the Taza de Oro on what was then Dewey Boulevard, the Manila Hotel at the Luneta, or the Supreme Court in its old building on Taft Avenue.

He was an *amicus curiae* who successfully argued a number of landmark cases before the Supreme Court, and its decisions later bore the mark of his scholarship. Some of these cases were: *Nava v. Gatmaitan*,² on the availability of bail to those charged with rebellion when the privilege of the writ of habeas corpus is suspended; the Emergency Powers cases³ on the validity of President Quirino's continued exercise of legislative powers after Congress had been able to meet in regular session following the war; and *Hebron v. Reyes*,⁴ on the extent of the President's power over local governments.

The issues stirred by these cases were, in their day, much mooted. Although they are seen today as no more than battles fought long ago, the decisions resolving them are now provisions in our Constitution.

*In re Parazo*⁵ was another case in which he was *amicus curiae*. A news reporter was found guilty of contempt of the Supreme Court for refusing to disclose the source of his information concerning the leakage in the 1948 bar examinations on the ground that disclosure was demanded by the "interest of the state,"⁶ a rather elastic concept. Although Professor Fernando's efforts on the reporter's behalf failed in the Court, his efforts later paid off when Congress passed Rep. Act No. 53 allowing compulsory disclosure of information by a news reporter only when demanded by the "security of the

² G.R. No. 4855, 90 Phil. 172, Oct. 11, 1951.

³ *Araneta v. Dinglasan*, G.R. No. 2044, 84 Phil. 368, Aug. 26, 1949.

⁴ G.R. No. 12809, 104 Phil. 175, Jul. 25, 1958.

⁵ *In re Investigation of Angel Parazo* for alleged leakage of questions in some subjects in the 1948 Bar Examinations, 82 Phil. 230, Dec. 3, 1948.

⁶ *Id.* at 244.

state,"⁷ certainly a narrower exception to the constitutional right of the press. Professor Fernando afterward became counsel of the National Press Club.

He was also adviser on constitutional matters to President Ramon Magsaysay and later to President Carlos Garcia, a fact which sometimes explained his tardiness for classes. But woe to the students who called it a day after ten minutes of waiting for him. The students were not only marked absent for that day but later called to account for their absence. Woe also to those who stayed because they had to do more than their share of the day's oral reports.

Even after he became Mr. Justice, and later, Mr. Chief Justice Fernando, he did not cease to be a teacher, although now he was teaching, as it were, in a vast national seminar. His opinions on the bench were like law review articles, with footnotes and copious citations of authorities – the familiar paraphernalia of legal writing – just as his articles in the academe, particularly those he wrote as PHILIPPINE LAW JOURNAL faculty editor, resembled,⁸ so the students thought, the decisions of cases in the *Philippine Reports* because of their magisterial tone.

He penned *Reagan v. Commissioner of Internal Revenue*,⁹ which held that a state, although sovereign and independent within its territory, may nonetheless agree to a curtailment of its otherwise exclusive power, as he sustained the grant of tax exemption to American servicemen living in United States military bases in the Philippines. He cited Jellinek who taught

⁷ Rep. Act No. 53, § 1 (Oct. 5, 1946). "An Act to Exempt the Publisher, Editor or Reporter of Any Publication from Revealing the Source of Published News or Information Obtained in Confidence."

⁸ Professor Fernando served the UP College of Law in this capacity from 1952 to 1954. During this time, he wrote: *Academic Freedom as a Constitutional Right*, 52 PHIL L.J. 289 (1977); *Of Chief Justice Roberto Concepcion: Suaviter in Modo, Fortiter in Re*, 47 PHIL L.J. 537 (1972); *The Constitution & Environmental Law: the Relevance of the Malcolm Activist Approach*, 67 PHIL L.J. 117 (1994); *Malcolm on Judicial Review its Relevance Under a Parliamentary Regime*, 49 PHIL L.J. 425 (1974); *The Movement for Equal Rights: the Validity of Legislation Beneficial to Women*, 51 PHIL L.J. 441 (1976); *Perspective on Human Rights: the Philippines in a Period of Crisis and Transition*, 56 PHIL L.J. 1 (1981); *The Supreme Court & the Constitution: the Function of Judicial Review*, 67 PHIL L.J. 287 (1993); *The Writ of Liberty Under Martial Law: Malcolm on Habeas Corpus Revisited*, 50 PHIL L.J. 274 (1975).

⁹ G.R. No. 26379, 30 SCRA 968, Dec. 27, 1969.

that a state has "the exclusive capacity of legal determination and self-restriction."¹⁰

Again speaking for the Court, in *J.B.L. Reyes v. Bagatsing*,¹¹ he laid down procedures for regulating the holding of peaceful rallies and assemblies in streets and other public places. The procedures are now embodied in Batas Blg. 880, the Public Assembly Act of 1985, as guidelines for local executives in issuing permits for the holding of public assemblies.

Chief Justice Fernando made us proud of the fact that our Supreme Court was forty-six years ahead of its American counterpart in denying recovery of damages for criticism of official conduct, unless the criticism was actuated by malice. He pointed out that way back in 1918, our Supreme Court had already held in *United States v. Bustos*,¹² that "a complaint made in good faith and without malice in regard to the character or conduct of a public official [is privileged]. Even when the statements are found to be false, if there is probable cause for belief in their truthfulness and the charge is made in good faith, the mantle of privilege may still cover the mistake of the individual." Public officials, the Court went to say, must not be "too thin-skinned," because their wounds "can always be assuaged by the balm of a clear conscience."¹³

This was already settled doctrine in this jurisdiction, Chief Justice Fernando said, when in 1964, the American Court held in *New York Times v. Sullivan*¹⁴ that "a public official cannot recover damages for defamatory falsehood relating to his official conduct" unless he proves that the statement was made with actual malice – that is, with knowledge that it was false or with reckless disregard of whether it was false or not."¹⁵

¹⁰ *Id.* at 973, citing Georg Jellinek as quoted in HYMEN EZRA COHEN, RECENT THEORIES OF SOVEREIGNTY 35 (1937).

¹¹ G.R. No. 65366, 125 SCRA 553, Nov. 9, 1983.

¹² G.R. No. 12592, 37 Phil. 731, Mar. 8, 1918.

¹³ *Id.* at 742-43. The citation to *Bustos* and Justice George Malcolm's now classic phrase was highlighted in *Phil. Comm'l & Ind'l Bank v. Philnabank Employees' Ass'n*, G.R. No. 29630, 105 SCRA 314, 319, Jul. 2, 1981. The impact of this proud proposition has not gone unnoticed in the JOURNAL. See, e.g., Oscar Franklin Tan, Foreword, *Sisyphus' Lament, Part I: The Next Ninety Years and the Transcendence of Legal Writing*, 79 PHIL. L.J. 7, 14 n.43 (2004), citing *Phil. Comm'l & Ind'l Bank*, 105 SCRA at 319; *Borjal v. Court of Appeals*, 301 SCRA 1, 23, G.R. No. 126466, Jan. 14, 1999.

¹⁴ 376 U.S. 254 (1964).

¹⁵ *Id.* at 281.

Nor did Chief Justice Fernando simply reiterate settled legal principles. He took Justice Jose P. Laurel's statement in *People v. Vera*¹⁶ that "all reasonable doubts should be resolved in favor of the constitutionality of a statute"¹⁷ for which reason it will not be set aside "except in a clear case," and fused this with Justice Louis Brandeis's ruling in *O'Gorman & Young v. Hartford Fire Insurance Co.*¹⁸ Justice Fernando then announced as a principle of judicial review that "as underlying questions of fact may condition the constitutionality of legislation... the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute," making it clear, however, that the presumption does not apply "where [although] the nullity of a statute, executive order, or ordinance [is not] readily apparent... the threats to constitutional rights, especially those involving the freedom of the mind, [are] present and ominous..."¹⁹

Through his writings, whether on or off the bench, Chief Justice Fernando showed himself the intellectual heir of Malcolm and Laurel, for which he was justly honored with appointments to the Malcolm Chair in Constitutional Law at the UP College of Law and to the Jose P. Laurel Chair, also in Constitutional Law, at the Lyceum of the Philippines. From him, generations of students – including no less than eleven who at one time or another were members of the Supreme Court – heard of Malcolm and Laurel in the same breath that they heard of Holmes, Brandeis, and Cardozo from him. But for Chief Justice Fernando, these great names would perhaps only be ancestral voices from a dim and distant past. Because of him, however, these great figures came to life, and it is now a mark of distinction for us to cite or quote them.

Indeed, throughout his career, Chief Justice Fernando was a teacher. I had an indelible experience as a student in his class in UP. We were discussing the equal protection guarantee in the Constitution. He called my name and asked a question which unfortunately I did not catch. I could not ask him to repeat the question as we were all expected to give full attention to the discussion. The truth was I was frantically preparing for the next case, thinking that the finger of fate would point to me when that case was called.

¹⁶ G.R. No. 45685, 65 Phil. 56, Dec. 22, 1937.

¹⁷ *Id.* at 95.

¹⁸ 282 U.S. 251, 328 (1931).

¹⁹ *Ermita-Malate Hotel and Motel Operators Ass'n, Inc. v. Mayor of Manila*, G.R. No. 24693, 21 SCRA 449, 452-54, Oct. 23, 1967.

What was the answer, he demanded to know, "Yes or no?" In a voice that was barely audible, I said, "No, sir."

He was furious! To my embarrassment it turned out he wanted to know, as a preliminary matter, whether there was a difference between a professor and a student, to illustrate the exception to the equality provision of the Constitution. Of course there was a difference, but here I was saying, "No, there wasn't a difference!" To the amusement of my class, he said to me: "If there is no distinction between the two, why don't you apply to the dean for a teaching position and be my colleague?" There was a good deal of ribbing afterward, and my class gave me the undeserved appellation, "colleague of Professor Fernando."

But the fates have a way of smiling upon our cares and our concerns. Later in my professional life, Justice Fernando and I came to know each other better, and in the late sixties, we became colleagues on the UP Law faculty. That was the beginning of a long and treasured friendship with him.

I was later to appear before the Supreme Court, on which he was sitting by that time, to argue cases for the government as a member of the Solicitor General's staff. Then, when I was appointed Associate Justice of the Court of Appeals, he proudly administered the oath of office to me. When I finally made it to the Supreme Court, however, he had retired as Chief Justice. That is my regret in life.

Nonetheless, the relation of student and teacher continued as he would often drop by my chambers in the Court for conversations. Those long afternoon conversations were for me a vital source of the oral history of this country's constitutional tradition and development, something I could not have gotten from reading the reports of decided cases.

I miss those informal talks with him and his reminiscences. However, I draw comfort from the fact that like Blas Ople, Nick Joaquin, and Arturo M. Tolentino, all of whom departed from the national scene this year, Enrique M. Fernando is now a part of our national heritage. His life poignantly reminds us that though much is given and much is taken, yet much abides.

Our final words, therefore, must be Tennyson's joyous words of hope:

Most can raise the flower now,
For all have got the seed.²⁰

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²⁰ Alfred, Lord Tennyson, *The Flower*, in *A VICTORIAN ANTHOLOGY* (Edmund Clarence Stedman ed., 1895).

"Once in a golden hour
I cast to earth a seed.
Up there came a flower,
The people said, a weed.

To and fro they went
Thro' my garden bower,
And muttering discontent
Cursed me and my flower.

Then it grew so tall
It wore a crown of light,
But thieves from o'er the wall
Stole the seed by night.

Sow'd it far and wide
By every town and tower,
Till all the people cried,
"Splendid is the flower!"

Read my little fable:
He that runs may read.
Most can raise the flowers now,
For all have got the seed.

And some are pretty enough,
And some are poor indeed;
And now again the people
Call it but a weed."