THE SUPREME COURT AND THE CONSTITUTION: THE FUNCTION OF JUDICIAL REVIEW*

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It is my pleasant task to welcome you to this symposium.

The subject--the role of the Supreme Court in the discharge of the functions of judicial review to assure its supremacy of the Constitution--is, at all times, of great interest and concern. It is of even greater interest and concern now.

The notion has gained currency especially in the business community that there is an undue participation of the judiciary in economic affairs, better left to the policy determination of the political branches, the executive and the legislative departments.

Such an impression is not limited to Supreme Court decisions affecting the national economy. There are others equally considered as not in conformity with the fundamental *principle of separation of powers.*

Thus the focus of our attention this afternoon is on the scope and limits of the awesome and delicate power of judicial review.

We are fortunate that in this objective and scholarly inquiry, we shall hear from distinguished and learned participants drawn from the judiciary, the bar, and the academe. Retired Justice Irene Cortes is from both the judiciary and the academe; Attorney Ricardo Romulo from the bar; and Regent Emerenciana Y. Arcellana and Professors Perfecto V. Fernandez and Carmelo V. Sison from the academe.

May I say likewise that this year, unlike previous occasions, there will not be the usual Malcolm lecture on constitutional law. Instead, this College and the Malcolm Trust Funds decided to hold this symposium.

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A few words on this all-important function under our constitutional system may not be amiss. "It is emphatically the province and duty of the judicial department to say what the law is." So intoned Chief Justice Marshall in the landmark case of Marbury v. Madison.[1] Thus the judiciary, with the final say being the exclusive prerogative of the Supreme Court, under the separation of powers concept, bears the major responsibility of safeguarding the rule of law.

It is a fundamental postulate that the constitution is the supreme law. The Supreme Court is the final arbiter of the legality of acts performed by the other branches of the government. While not "architects of policy," the justices, as aptly put by Frankfurter,[2] can "nullify the policy" of the political departments if found in contravention of the fundamental law.

Of late, there has been keener realization of the fact that the Supreme Court does not merely check the coordinate branches, but also by its approval, stamps with legitimacy the action taken. Hence, judicial review has both checking and legitimating aspects. Its exercise necessarily calls for the resolution of the constitutional issues raised. The decision the Supreme Court renders in such a case gives meaning to a provision or provisions of the constitution deemed applicable. The doctrine then announced may ripen into precedent, which may be relied upon in future cases of similar nature. Unless modified or overruled, such doctrine continues to speak with authority.

There is just more than a kernel of truth to this aphorism of Chief Justice Hughes, spoken prior to his service on the bench: "We are under a Constitution, but the Constitution is what the judges say it is ..."[3] That is quoted in a book written by the then Attorney General, later Justice Robert H. Jackson of the United States Supreme Court.

Then came this observation by the author: "The Constitution nowhere provides that it shall be what the judges say it is. How, then, did it come about that the statement not only could be made but could become

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[1] 1 Cranch 137 (1803).

[2] FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT, 25-26 (1938).

[3] JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY, 4 (1941).

current as the most understandable and comprehensive summary of American constitutional law."[4]

As for Philippine constitutional law, would such a statement hold true? As thus put, the answers certainly may differ. Such a question however is worthy of your serious consideration.

I am far from suggesting that an affirmative answer is indicated. Justices of the Supreme Court are not free to roam at will in the legal terrain and come out with any interpretation that they fancy. The provisions of Constitution precludes such arbitrariness.

If specific, a literal construction may suffice. Even then, as did happen in a leading Philippine case, the Supreme Court held that the spirit, not the text of the provision is controlling. The decisive consideration is which interpretation would best promote the objective of that *particular* provision.[5]

It is a different matter if the provisions were nonspecific. If cast in broad language, it justifies diverse interpretations. Extrinsic aids to construction–like the records of a constitutional convention, appeal to history, consideration of the effects on the body politic of a particular meaning--may be resorted to. Hence the discretion, while wide is not unconfined.

Nonetheless, it is clear that there is support for the Hughes aphorism that "the constitution is what the judges say it is." There must be though this *caveat:* A judge is not free to be arbitrary.

The validity of this observation is reinforced by the recognition that a constitution–to follow Pound's formulation–is more likely to contain *principles* and *standards* rather than specific *rules*. An obvious example is a bill of rights. To Madison has been attributed the saying that such rights consist of "glittering generalities pregnant with uncertainty."

Hence the relevance of an objective inquiry into a justice's approach to constitutional issues. This symposium thus is impressed with significance.

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[4]*Id.*

[5]Cf. Tañada v. Cuenco, 103 Phil. 1051 (1957).

It is doubly significant in that the students of this College have the opportunity to acknowledge at least once a year the debt that this law school owes its founder, the late Justice George A. Malcolm.

In 1911, barely after five years from his arrival to our shores, he was able to establish this institution. He was not the first Dean. From its beginning though, he was the major influence.

In another six years, in 1917 to be precise, he was at the ripe old age of thirty-six appointed as Associate Justice of the Supreme Court. He served until January 1936.

He was the outstanding constitutionalist of the Supreme Court for almost two decades during the incumbency of such distinguished luminaries as Chief Justices Cayetano Arellano, Victorino Mapa, Manuel Araullo and Ramon Avancena.

This College was one of the great loves of his life next only to his gracious lady, Lucille Malcolm, who passed away a few years ago. Justice Malcolm himself was able to attend our fiftieth anniversary in 1961. He died later that year. He was also with us in the silver anniversary in 1936 and the fortieth anniversary in 1951.

Now as to the Malcolm approach. He left no doubt on the matter. He was quite explicit. Near the close of his term, in 1935, he spoke for the Supreme Court thus: "Most constitutional issues are determined by the court's approach to them. The proper approach in cases of this character should be to resolve all presumptions in favor of the validity of an act in the absence of a clear conflict between it and the constitution. All should be resolved in its favor."[6]

This was an affirmation of a view held as far back as 1919 in another leading case. Thus: "Surely, the members of the judiciary are not expected to live apart from active life, in monastic seclusion amidst dusty tomes and ancient records, but, as keen spectators of passing events and alive to the dictates of the general–the national–welfare, can incline the scales of their decisions in favor of that solution which will most effectively promote the public policy. All the presumption is in favor of the

[6] Manila Trading and Supply Co. v. Reyes, 62 Phil. 461 (1935).

constitutionality of the law and without good and strong reasons, courts should not attempt to mullify the action of the Legislature."[7]

His consistency was revealed in this excerpt from a 1927 decision. For Justice Malcolm, "a statute purporting to have been enacted in the interest of public health, all questions relating to the determination of matters of fact are for the Legislature. If there is a probable basis for sustaining the conclusion reached, its findings are not subject to judicial review. Debatable questions are for the Legislature to decide. The courts do not sit to resolve the merits of conflicting theories."[8] As in the two above cases, he was *ponente.*

It could thus be said in terms of the judicial restraint/activist approach, he could be identified with the former. This is quite understandable as the judiciary should be on the side of police power measures to ensure the well-being and welfare of the people, especially those who belong to the lower income groups. Legislative measures that promote their health as well as those that lessen the burden of their existence deserve full judicial encouragement and support.

Where civil liberties are concerned, however, Justice Malcolm proved to be one of the most dedicated defenders of freedom. His creed was one of judicial activism. Two cases may be cited.

The first is *Villavicencio v. Lukban,*[9] which vitalized the writ of habeas corpus as a speedy and efficacious remedy against any restraint or detention illegal in character. His exordium on the indispensability of the rule of law for any constitutional regime was valid then--and even more valid now.

Then there is *United States v. Bustos.*[10] It imposed the rigid requirement on the judiciary to test libel actions in terms of its effect on press freedom. It was decided by the Philippine Supreme Court as far back as March 8, 1918. A doctrine analogous in character was not announced by the United States Supreme Court until 1954 in *New York Times Co. v. Sullivan.* That was thirty-six years later.

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[7]40 Phil. 154 (1919).

[8]Lorenzo v. Director of Health, 50 Phil. 595, 598 (1927).

[9]39 Phil. 778 (1919).

[10]37 Phil. (1918).

It can be truly said that Justice Malcolm's life "stands as an eloquent affirmation of the goals of constitutionalism, a rejection of the tendency that at times afflicts some elements among us to forget or ignore that it signifies liberty with order, the only regime that assures each and every one, the humblest no less than the most exalted, the decencies of civilized existence."[11]

[11]376 U.S. 254.