

# Malcolm in Public Law

## FOREWORD

The commencement of this humble work was under a consciousness that it can not by any means be regarded as an easy task. The juristic philosophy of a jurist who has written more than three thousand opinions in his eighteen years of stay as magistrate in the highest court of the land is a heavy order indeed measured and gauged by any standard. The added fact that the jurist has earned his niche in the Philippine hall of judicial fame, by his "Public Law" decisions will more or less clarify the vastness of the work which has confronted the writer from the outset.

But in undertaking it, the author has been guided by an overpowering desire to be able to approximate if not convey faithfully with his limited capacity, what he honestly believes were the principles which have been the fundamental bases of Mr. Justice Malcolm's adjudications and opinions in this branch of our law. In his desire to adhere to this pattern and apprehensive lest he drift away from the real philosophy expressed in the opinions of this eminent jurist, he has made an appendix essentially verbatim copies of portions of these decisions which he considers outstanding and relevant in each of the different fields of inquiry. He had picked out only the shortest quotable portions of such decisions in his desire for brevity. He had made his research confined to definite spheres of analysis. His citations then appear comparatively so much less in quantity. He had endeavored though to make up for such deficiency by picking only those which he believes are the most typical and representative opinions in each group. Aware he fully is, that a more compendious summation of cases and citation of passages would do better justice to the fame and eminence of the jurist as a writer in law. But he had purposely copied only definite portions of some of these decisions in order to be able to more concisely direct his references to the respective cases depended upon for support of his propositions in the corpus of his work. In other words, it was his desire for clarity and fixity of authority for his statements, which had impelled him to cut short his compilation in the appendix in the face of the ever-present temptation to lengthen it, offered by the remarkable opinions of the aforesaid magistrate.

## C O R P U S

Philosophy has been conveniently defined to be "a body of principles or general conceptions, underlying a given branch of learning".<sup>1</sup> And law declared to be "the last result of human wisdom acting upon human experience for the benefit of the public".<sup>2</sup> A deducible definition of legal philosophy can be ventured thus as the fundamental concepts of how public benefit or welfare is achieved by the application of human wisdom on human experience—embracing the ideals of how law operates or need operate for the attainment of its ends.

In this treatment of legal questions, Mr. Justice Malcolm has given ample proofs of his regard for law as one essentially of action and progress, with certain definite tendencies. He had consistently manifested a deep seated distrust for fixed notions and precepts as inflexible formulas by which man's deeds must be regimented and had minimized dogmaticism in law, as much as he had exhibited discriminative bias in favor of allowing the freest latitudes for individual thoughts and actions. In the latter case though, we note his tolerance to end where the orbit of the operation of the "clear and present danger" rule begins. Thus, it may safely be asserted without fear of successful contradiction that he conceived the rule of law in man's social life as essentially dynamic and fluid, giving it that adaptability to the changing needs of the times and the circumstances, amidst which it must of necessity operate.

In the leading case of *U.S. vs. Bustos*<sup>1</sup> he made a classic pronouncement of the scope of the freedom of speech and press, and assembly and petition and also demonstrated his personal interest in and solicitude for the maintenance of a widely privileged range of action for the citizenry. Despite the fact that the supposed libel was done against a judicial officer, he extended to the indicted the mantle of protection given them by the Bill of Rights, adding that:—

"attempted terrorization of public opinion on the part of the judiciary would be a tyranny of the basest sort."

He lauded the assertion of personal prerogatives against anybody who maybe minded to suppress rights that had been so assiduoualy guarded even by the Constitution itself. Public policy and the welfare of society were given as the basic considerations for the protection to be afforded a militant public opinion by the law and the courts.

The same liberal tendency of giving every intendment in favor of withholding a person's right to exercise the freedoms and rights gua-

<sup>1</sup> Appendix, page 1.

<sup>2</sup> Boswell—Life of Johnson.

<sup>1</sup> Webster International Dictionary.

ranted him by the Constitution was not confined to the interpretation of the libel law. He gave the same wide field of liberty to other personal actions in the exercise of such rights, aside from that of speech and expression. The sacredness of constitutional mandates became more marked with each judicial pronouncement from him.

But his zealous regard for personal liberties did not blind him to what he termed the dictates of public policy. The very same public policy which he had invoked as the basis for his decision in the *Bustos* case also served as the line for him definitive of any untoward tendencies. Liberalism and progressiveness impelled him to give as he did give due concessions within the most permissible extents for individual actions, but never had he lost sight of the other conflicting interests which in turn demanded that proper boundaries be given the former. Such liberalism was tempered by what he believed were the imperative needs of an orderly existence for all the composite elements in a society. While he afforded immunity to personal actions as far as permissible under the basic laws, he made the law concurrently operate as the harmonizing factor between the diverse needs of diverse social groups. And in this, he was only expounding the law as he believed it must be, working for the attainment of tranquility and the prevention of discord within the spheres where it applies. Perceptible, then in his juristic attitude was what Dean Pound elucidated on, as the idea of "social engineering"—"of giving the most complete security and effect to the whole scheme of human demands or desires, which have pressed or are pressing for recognition and securing, with the least sacrifice of the scheme as a whole, the least friction, the least waste."<sup>3</sup> Typical of his opinions along the aforesaid lines, in a case<sup>4</sup> of *Mangyans* in Mindoro. After enunciating the "chief elements of the guaranty" of personal liberty, he proceeded to evaluate the rights of such non-Christians in contra distinction with the rights of other people who may be affected by some of their habits. He then asserted that a respect for personal rights must in instances like that case, be subordinated to the more paramount needs of the group as a whole. The exigencies of the group as a unit were given by him their due recognition in cases where they demanded no other but subordination of personal freedom or other considerations. In a *habeas corpus* petition where the person's right to our body was diametrically approved to the demands of what he turned an "orderly administration of justice", he did not waver in deciding that sacrifices of personal considerations can be legally proper to fill the requisites of ascertaining the truth in various instances, and in so deciding, he incidentally set down a norm

<sup>3</sup> Roscoe Pound, *Fifty years of Jurisprudence*.

<sup>4</sup> *Rubi v. Mindoro*—see Appendix, page 6.

of action for judicial officers to follow where refined notions of delicacy may enter in tying at last to "penetrate the maze of law reports and disabusing one's mind of a too sensitive appreciation of the rights of accused persons." And he there found occasion to reecho his proposition that rigidity of rules must never be sanctioned where embarrassment to the administration of justice may follow as a consequence. For are not the penal laws enacted not to protect the guilty, but to protect the innocent? Another occasion where he again had to show how that temperance checks his progressiveness and prevents his being an ultraradical is the case of *In Re: Quevedo and Lozano*<sup>5</sup> wherein he placed the need for the maintenance of an independent and respected judiciary on a higher plane of importance while sanctioning the growth and preservation of an "unmuzzled press." He drew lines of distinctions, from what he termed "liberty in its true sense" and the licentious exercise by an individual of any of his personal rights—which latter must never be permitted to undermine the respect due from everybody to the justice-dispensing department of the government. In the relative conflict between the interest of the individual to be able to speak and write what he believes and the need for an impartial and incorruptible judiciary, he had thus struck a balance for the maintenance of a proper equilibrium which gives anybody enough elbow room for dissemination of his ideas and information, and at same time safeguarding the interests invaluable to the group as a whole. Anent the balancing and harmonizing of these discordant interests and needs in the group we discern the traces of social utilitarian school influences.

We should however guard against a hasty implication that the apparent influences of the sociological school of jurisprudence on his judicial pronouncements end there. Though a believer that judicial decisions must approximate a certain degree of certainly and predictability, he let not his views be chained to idolatrous reverence for precedents merely as precedents. Whenever he deemed it demanded by circumstances, he liberated his adjudications from blind adherence to precedents. He subordinated the sanctity of precedents to the need for courts to be "right"—a term which he however used in one case<sup>6</sup> with an appreciable shadow of inexactitude and vagueness. But the stress laid was undoubtedly along the same channel of sociology—the response to the needs of the social group must never be subordinated to unwarranted respect for and deference to case law and archaic legal postulates. And this assumption finds additional confirmation in his dissenting opinion in the case of *People vs. Borja*,<sup>7</sup> where he again

<sup>5</sup> 54 Phil., 801—see Appendix, page 4.

<sup>6</sup> Phil. Trust Co. v. Smith Bell 59 Phil., 30—see Appendix, page 7.

<sup>7</sup> 43 Phil., 618 Appendix, page 8.

sounded the plea that technicalities must not be over-emphasized, must not be accorded undue importance, especially in cases referring peculiarly to local Philippine conditions. Responsiveness to the dictates of the general welfare rather than adjudications purely a mental product of judges, who live "in monastic seclusion amidst dusty tomes and dusty records," was what he advocated as an effective measure for the promotion of the public policy. Evidently he was alluding to the tendency of some judicial adjudications to be predicted purely on legalistic points, tending in a way to confine judicial inquiry within the limits of statute and case books and disregarding sometimes even the consequences of such pronouncements on society's needs. And a striking illustration of the independence of our justice's mind is noteworthy where he warns against a misconception of the weight that should be accorded things being done in his own homeland. He was then just showing his realism and his preparedness to make the law as responsive as can be to the demands of the time and events. He refused to give weight to technicalities and preferred to emphasize what he termed the "humanitarian" rights of persons. Even the lucidity of his opinions in various cases show continually his deep aversion for whatever he sensed as an over-emphatic dependence on legal technicalities in winning suits. Signs are therefore clear of Mr. Justice Malcolm's antipathy to the notion soberly dubbed by Holmes, "the government of the living by the dead."<sup>3</sup> This later concept is with particular reference to the uncompromising attitude of some jurists to stick to the old and beaten paths of the law even in the face of progressive, nay radical upheavals in the field of human activity and endeavors. And this abhorrence on the part of our jurist becomes perfectly understandable, if we only recall to mind his strong dislike for any sterility in the law.

Another feature which claims the attention of anybody who ponders over the writings and decisions of this eminent jurist is the conspicuous part played by morals in swaying one way or another his settlements of judicial controversies. We should nevertheless not fall into the error of regarding such as a distinctive vantage of influence from philosophical jurists, because while this school looks at the ethical and moral bases of rules rather than at their sanctions, Mr. Justice Malcolm merely uses the persuasive force of morals in law, in arriving at his conclusions, without delimiting in any manner the full effectivity of their statutory sanctions. Morals thus play the dual role of inspiring legislation and at the time, being a persuasive force in the application of such legislative enactments to the actualities within their purview. While not with controlling authority, they influence in no small measure the actual application of the abstract legal rules to

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<sup>3</sup> Holmes, Oliver Wendell—Collected Legal Papers.

real, actual situations. Moralistic trends are conspicuous particularly in cases involving gambling and lotteries. In a prosecution<sup>9</sup> for the infraction of a jueteng ordinance, he made a dissertation on the effects, demoralizing, of gambling and their ruinous consequences on one's life in particular and abhorrent tendency on society in general. Lotteries, which he considered as having more harmful effects than ordinary gambling merited a more stringent attitude from him. To curve their spread, he even had to deny a claimed legitimate exercise of right of expression thru the press.<sup>10</sup> This is one instance where he had to desert his customary role of champion of personal liberty, in order to effectuate the harmony which he had advocated to be the real goal in any well-ordered society. Being evidently opposed to the divorce of morals from the law, he censured rather harshly acts which he believe went beyond the pale of good morals and adopted as regards to laws aimed at their minimizing, if not total extermination, the most straight interpretations of his from the bench. And such clarifies for posterity, the rationale of his vigorous opinions in condemnation of usury, which he once<sup>11</sup> termed "a virulent social cancer". Against the lender-usurer he applied the full punitive and coercive powers of the legislative enactments favoring for them whenever justifiably possibly, criminal prosecution to the limits. He aired a reiteration of such views of his in unmistakable language in another of his dissenting opinions.<sup>12</sup>

After having seen this tendency of his in other fields of judicial inquiry, can we not yet presume the attitude which he must take in case<sup>13</sup> dealing with ethics particularly in the profession which he, himself, has embraced? So consistently with such observations he followed the same strictness in requiring from members of the bar the deportment and character which perforce entitle them to be clothed with the authority of a judicial officer. Having escaped a criminal conviction for him, is not a sufficient guaranty of the character of an applicant for admission into the legal profession, which he regards as a privilege extendible only in the sound judicial discretion. To say that he was exacting in his desire for moral uprightness among his brethren in the profession would be to approximate the truth.

Mr. Justice Malcolm, whenever occasion arose, discussed rather extensively his notions of what is the proper role of the courts in the scheme of a society—of course through its functions as the interpreter of the sovereign will of the people as expressed in the organic laws and ordinary statutory enactments. Because he wants to avoid parti-

<sup>9</sup> U.S. v. Salaveria, 39 Phil., 102—see Appendix, page 9.

<sup>10</sup> El Debate v. Topacio, 44 Phil., 278—see Appendix, page 11.

<sup>11</sup> Go Chioco v. Martinez, 45 Phil., 256, Appendix, page 11.

<sup>12</sup> Go Chioco v. Martinez, supra.

<sup>13</sup> In Re: Rosario, 52 Phil., 399, 400.

cularly the encroachment of one department of the government upon the proper domain of another, he advocates plain application before a resort to interpretation or construction as a must role to be adhered to by judges. He would especially commend the speedy adjudication of cases and the taking of the necessary precautions to avoid clogging the court's dockets—from which we may safely infer that he ardently believes too, that justice is as good as denied when delayed. He deplored as intolerable the congestion of cases pending before courts and warned particularly the evils of such a situation in the judicial agencies of the nation. He decried the turtle-pace like administration of justice the more so in criminal actions, and specified private crimes<sup>14</sup> where the ill-fated victims at times have to endure years of patient waiting before they are accorded the redress, by the law, theirs. Whether from the viewpoint of such prosecuting offended parties or prosecuted inditees,<sup>15</sup> prolonged litigations entail the same unwholesome results. For is not a vindication by the courts of justice just as much as right of an innocent accused as a proper redress is of a meritorious plaintiff? Both of them are entitled to their lawful due, and one certainly cannot be treated with obvious partiality. Despite these injunctions, however, he admonished litigant-plaintiffs<sup>16</sup> to be ever-vigilant in the prosecution of their cases to keep watch over their prerogatives and to initiate action whenever the judge be inclined to move tardily. Appraising facts as they really are, he admitted that the duties of the court may at times be disagreeable,<sup>17</sup> but such according to him, must not be enough a force to deter and swerve the courts from their proper activity and functioning, as they had been created precisely to function at trying periods in the life of the state.

And this analysis of his views inevitably leads us to the discussion of the domain of law where he chose to write the more voluminous of his juristic pronouncements. Our constitutional law bears in almost all of its more salient aspects the imprint of the judicial acumen and learning of this jurist. He won fame and renown as a leading constitutionalist, no doubt due to the circumstance that his most prolific pronouncements from the bench concern this specific branch of law. The prowess of his judicial intellect in fact found its most fertile field of exposition in this branch of the public law—in the elucidation of its doctrines and the espousal of its principles. And such had been the debt which our judicial history owed this single jurist in the amplification of our political law, that to attempt a portrayal of his definite contributions thereto with such a limited piece

<sup>14</sup> *People v. Mangiat*, 51 Phil., 406.

<sup>15</sup> *Conde v. Judge of Court of First Instance*, 45 Phil., 173.

<sup>16</sup> See *Portillo v. Salvani*, *supra*.

<sup>17</sup> *People v. Cabrera*, 43 Phil., 82, Appendix, page 15.

of work may be just like trying the impossible. Nevertheless we can always allude to the more important and famous adjudications he had in this particular field.

The now famous case of *Alejandrino vs. Quezon* contains a succinct pronouncement of the theory of separation of powers underlying our governmental set-up, given by Mr. Justice Malcolm—and since repeatedly quoted by our Supreme Court in later cases to support its stand of judicial non-interference in legislative matters. In it, Mr. Justice Malcolm also boasted with in no mean degree the concept of judicial supremacy—emphasizing that it is the logical role of the courts to allocate constitutional boundaries whenever conflicts of jurisdiction ensue, thereby determining whether the respective constitutional spheres are transcended or not.

And supplemental discussion of the same concept can be perused with benefit in another famous case where the Supreme Court was divided almost by racial lines. This case of *Government of the Philippines vs. Springer* had no doubt great political implications, but even there, our justice was able to demonstrate the depth of his juristic logic. Predicating his opinion also on the theory of separation of powers, he proceeded in a clear, logical sequence to draw his conclusions even those who may differ with his views can not help but admit that he had logic on his side in that controversial issue. And in the process of that deduction, he again gave ruin to an exposition of the doctrine "too firmly imbedded in Philippine institutions to be debatable." Though he admitted that there is no such explicit provision in our Organic Law, he asserted that no other effect could be implied from the division of the government into three coordinate departments.

As a corollary to such theory of separation of powers, he espoused most vigorously the cause of an independent and respectable judiciary. For him an independent judiciary forms the chore of a governmental set-up along democratic lines. He regards it as the real bulwark for constitutional liberties when these are threatened by scheming bureaucrats and despots in power. Tracing its development in America in one of his most assertive opinions,<sup>18</sup> he quoted with enthusiastic approbation the imperative need for what Wilson called "a judiciary endowed with substantial and independent powers and sedure against all corrupting and perverting influences; sedure against the arbitrary authority of the administrative heads of the government." This must be so, else, what had been so sacredly intended in the framing of our constitution would be a mere dream-intranslated into reality. He led the crusade for the preservation of such an independent law-interpreting department of our government, which he called "one of the

<sup>18</sup> *Borromeo v. Mariano*, 41 Phil., 322, Appendix, page 22.

chief glories of the government and one of the most priceless heritages of the Filipino people." And for such a judiciary on which he pins his hopes of guarding the peoples' constitutional liberties, he gave out his conception of men to compose it, thus:

"Our conception of good judges has been and is of men who have a mastery of the principles of law, who discharge their duties in accordance with law, who are permitted to perform the duties of the office undeterred by outside influences, and who are independent and self-respecting units in a judicial system equal and coordinate to the other two departments of the government."

And another vigorous reiteration of his zeal for a free and unfettered judiciary is the case of *Concepcion vs. Paredes*<sup>19</sup>—where he rapped and condemned an attempt at lottery of judicial posts as an uncalled-for usurpation of the legitimate power of appointment of the executive and a direct threat to such a respectability which must always be a possession of the judiciary if the people's faith in their laws and government is to be maintained. Ever on the alert for any subterfuge that may undermine the security of tenure and independence of the judges, he minced no words in voicing his resentment at what he sensed was a threat to the maintenance of a judicial department, independent and capable of checking the two other coordinate departments.

Such a solicitude in him though, maybe conspicuous in its absence with regards to the other departments of the government. In one case where the municipal mayor was asking for mandamus to compel his reinstatement, he premised for denial of the petition or the justification that there is due process of law even in the absence of judicial proceedings. Therein he again gave a succinct restatement of the proper scope of the constitutional protection of due process of law and its manifold ramifications.

On a specific occasion,<sup>20</sup> Mr. Justice Malcolm adopted the definition of Bouvier's for jurisprudence as being "the science of law." Under the concept then, he made the assertion that here in the Philippines, there has been evolved and presently thriving a distinct legal system—which had emerged from the meeting of Anglo-American common law and Spanish civil law here and their adoption to our own native conditions. He therefore regards the Philippine legal system fundamentally an outspring from the interblending of these two greatest legal systems of the world today. Is it not then understandable why some decisions of the Supreme Court echo essentially common law principles?

<sup>19</sup> 42 Phil., 999.

<sup>20</sup> In Re: Shoop, 41 Phil., 213.

## CONCLUSION

Mr. Justice Malcolm resigned from the Supreme Court thirteen years ago. In that year, a major loss was suffered by the Philippine jurisprudence more notably in Political Law. It lost, with the cessation of the production from the pen of this acknowledged legal scholar, many more elucidating opinions which could have been reasonably expected had he continued in his former capacity. The pain of having lost his guiding hand, however, can be fully assuaged by the knowledge that there remain for us and for all who may want to refer to them, the products of his scholarly interest for at least eighteen years. They are there, preserved for posterity within the covers of our reports. In them it is true, Mr. Justice Malcolm enunciated principles applicable to the peculiar set of circumstances attending each case. Nevertheless, one must not jump to a hasty conclusion that those postulates have outlived their usefulness merely because they had been the product of applying the then laws to the given facts. Indubitable it is, that the world and things therein, are under a process of continual and incessant changes and fluctuations. But the legal propositions he had made had set patterns with a peculiar utility and adaptability. They are still good and will continue to be despite the effacing powers of time and change.

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