MALCOLM ON JUDICIAL REVIEW: ITS RELEVANCE UNDER A PARLIAMENTARY REGIME*

ENRIQUE M. FERNANDO**

The contribution of Justice Malcolm to the literature of contitutional law was immense. Often he had the opportunity to speak for the Supreme Court on issues of constitutional dimensions. It was to be expected then that he had to deal with the basic question of judicial review. His thoughts were given utterance in opinions notable for mastery of the subject and elegance of expressions. It is not difficult to discern a pattern that disclosed his juristic philosophy. It was dominant prior to the 1935 Constitution. Its influence continued even after. Now that we have adopted a modified parliamentary system which has reaffirmed the power of courts to pass on the validity of legislative and executive acts, how does it fare? That is the inquiry to which I propose to devote a little time and attention.[1]

1. *Judicial review an accepted feature of modern constitutions*

The function of judicial review is of a distinctively American cast. It does not obtain in Great Britain. Professor de Smith, in a recent work on what he referred to as the New British Commonwealth, which originally included Australia, Canada, Union of South Africa, New Zealand but with Pakistan, Ghana, Cyprus, Tanganyika and Malaysia now added, could, however, assert that among "the characteristic features of modern Commonwealth constitutions are the limitation of parliamentary sovereignty, guarantees of fundamental human rights, [and] judicial review of the constitutionality of legislation, * * *."[2] The Judiciary in India[3] and Japan[4] is

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** *Associcte Justice,* Supreme Court of the Philippines; *Holder,* George A. Malcolm Professor of Constitutional Law Chair, College of Law, University of the Philippines.

[1] The first Malcolm lecture — delivered by Professor Florentino P. Feliciano, then the holder of the Malcolm chair — was on the *Functions of Judicial Review and the Doctrine of Political Questions. Cf.* 39 PHIL. L. J. 444 (1966).

[2] DE SMITH, THE NEW COMMONWEALTH AND ITS CONSTITUTIONS 77 (1964).

[3] *Cf.* INDIA CONST., Art. 32 (1949).

[4] *Cf.* JAPAN CONST., Art. 81 (1946).

vested with this power. West Germany has a Federal Constitutional Court which passes on the interpretation of its Basic Law.[5] So it is in Italy with its Constitutional Court which decides controversies, concerning the legitimacy of laws.[6]

2. *Judicial review retained under the present Constitution*

It must have been apparent to the 1971 Constitutional Convention that the current trend is to recognize the worth and significance of judicial review under a parliamentary system. There was therefore no doubt or hesitancy entertained in retaining such a function under the present Constitution. The framers could not be unaware that as far back as 1935 in the valedictory address of Claro M. Recto before the 1934-1935 Constitutional Convention, he spoke of the trust reposed in the judiciary in these words: "It is one of the paradoxes of democracy that the people at times place more confidence in instrumentalities of the State other than those directly chosen by them for the exercise of their sovereignty."[7]

a. *Philippine experience of judicial review*

The delegates to the 1971 Constitutional Convention were similarly minded. It could very well be that our experience under the 1935 Constitution attested to the validity of such an observation. In the period before the Japanese Occupation in 1942, the Supreme Court was called upon to rule on a dispute between two constitutional agencies, the National Assembly and the then Electoral Commission,[8] on the reorganization of the judiciary;[9] and on the extent of the supervisory power over local governments.[10] After liberation, controversies more momentous in their implications for the welfare of the country were taken to the Supreme Court for resolution. It again had its hands full of cases decisive in their impact on the political and economic future of the Philippines. The presence of the American Army in the Philippines introduced added complications. Instances of its none-too-tender regard for the liberties of individuals were called, in appropriate cases, to the attention of the Supreme Court.[11] The legality of proceedings against those Filipinos who

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[5] *Cf.* Federal Republic of Germany, BASIC LAW, Arts. 92 and 93 (1949).

[6] *Cf.* ITALY CONST., Art. 134 (1947).

[7] 7 S. LAUREL, PROCEEDINGS OF THE PHILIPPINE CONSTITUTIONAL CONVENTION (1934-1935), Appendix L, 800.

[8] Angara v. Electoral Commission, 63 Phil. 139 (1936).

[9] Zandueta v. De la Costa, 66 Phil. 615 (1938).

[10] Planas v. Gil, 67 Phil. 62 (1939) and Villena v. Secretary of the Interior, 67 Phil. 451 (1939).

[11] Raquiza v. Bradford, 75 Phil. 50 (1945); Tubb v. Griess, 78 Phil. 249 (1947).

worked with the Japanese with such intensity and enthusiasm as to qualify their collaboration as treasonable was dumped on its lap.[12] Thereafter came cases of equal significance. Among them may be mentioned those involving the suspension of three Senators allegedly owing their election to terroristic activities of certain radical groups;[13] the sufficiency of the votes on the parity rights amendment to constitute a valid proposal, with three Senators and eight Representatives still under suspension and thus unable to participate;[14] the near-crisis brought about by well-nigh one-half of the senators refusing to attend sessions after the incumbent Senate President was ousted by declaring the office vacant at a time when according to them there was no quorum;[15] the exercise by at least two Presidents[16] of the power to legislate under the Emergency Powers Act even after the return of normalcy with Congress actually in operation;[17] the independence of the Commission on Elections from the Executive[18] and the scope of its authority to assure free and honest elections;[19] the validity of the suspension of the privilege of the writ of habeas corpus, under President Quirino[20] and then President Marcos;[21] the availability of the right to bail during the period of such suspension;[22] the effect of there being a lone Senator from the opposition thus tilting the balance in favor of the majority party in the Electoral Tribunal;[23] the limits that should be placed on Presidential authority over local governments;[24] the legality of midnight appointments, whether during the closing days of the Garcia[25] or the Macapagal[26] administration; the restrictions placed on political parties as well as civic groups to nominate candidates for the 1971 Constitutional Convention[27] as well as the limits on the freedom of expression of candidates to such body;[28] and the piece-meal submission of proposals to amend the 1935 Constitution for ratification.[29]

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[12] Laurel v. Misa, 77 Phil. 856 (1947).

[13] Vera v. Avelino, 77 Phil. 192 (1946).

[14] Mabanag v. Lopez Vito, 78 Phil. 1 (1947).

[15] Avelino v. Cuenco, 83 Phil 17 (1949).

[16] President Roxas and President Quirino.

[17] Araneta v. Dinglasan, 84 Phil. 368 (1949) and Rodriguez v. Gella, 92 Phil. 603 (1953).

[18] Nacionalista Party v. Angelo Bautista, 85 Phil. 101 (1949).

[19] Nacionalista Party v. Commission on Elections, 85 Phil. 149 (1949).

[20] Montenegro v. Castañeda, 91 Phil. 882 (1952).

[21] Lansang v. Garcia, G.R. No. L-33964, December 11, 1971, 42 SCRA 448 (1971).

[22] Nava v. Gatmaitan, 90 Phil. 172 (1951).

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

[24] Hebron v. Reyes, 104 Phil. 175 (1958).

[25] Aytona v. Castillo, G.R. No. L-19313, January 19, 1962, 4 SCRA 1 (1962).

[26] Guevara v. Inocentes, G.R. No. L-25577, March 15, 1966, 16 SCRA 379 (1966).

[27] Imbong v. Ferrer, G.R. No. L-32432, September 11, 1970, 35 SCRA 28 (1970).

[28] Badoy v. Comelec, G.R. No L-32546, October 17, 1970, 35 SCRA 285 (1970).

[29] Tolentino v. Comelec, G.R. No. L-34150, October 16, 1971, 41 SCRA 702 (1971).

3. *Continuation of judicial review under parliamentarism assures fundamental character of Constitution*

It was not then as if the Convention were starting on a blank slate. It was well aware of how deeply ingrained in our legal system is the institution of judicial review. It was not disposed to ignore the voice of experience. It was well-advised not to do so. For government, if viewed as a science, involves problems and difficulties formidable in character. If the technique of leadership by which it is carried out is looked upon as an art, it is quite baffling and complex. There is need for caution and prudence, not the duty but the necessity, to paraphrase Holmes, to keep continuity with the past, to adhere to what has been insofar as it has not led us astray or involved us in events we now consider deplorable or unfortunate. Let there be no misunderstanding. There is here no thought of idolatrous respect for history. What is merely stressed is that sticking to the traditional ways of doing things and achieving objectives, if found satisfactory, is a counsel of wisdom.

It is not solely the teaching of history to which deference was paid by the Constitutional Convention. The essence of constitutionalism which postulates a law fundamental in character argues strongly for the function of judicial review. That is so whether the form of government adopted is presidential or parliamentary. Juridically viewed, the need may be greater in the latter case. For with the fusion of the legislative and executive departments, the doubt may be entertained whether the limitations of the Constitution would be scrupulously respected where the policy-formulating branch is, through an agency of its own creation, entrusted with the enforcement thereof. It must be remembered that a constitution to be worthy of its name must lay down boundaries beyond which lies forbidden territory for state action. As McIlwain puts it, "Constitutionalism has one essential quality: it is a legal limitation on government, it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law."[30] It is, to borrow Lindsay's language, identified with "the belief that governments must be subject to law, that any other kind of government is a tyranny with no sanction behind it but bare force."[31] Friedrich views the matter similarly. For him, constitutionalism is "a system of effective regularized restraints upon

[30] MCILWAIN, CONSTITUTIONALISM, ANCIENT AND MODERN 21-22 (1947). Earlier in that work, McIlwain referred to what Paine considered as the essential element of constitutionalism, *viz*, that a constitution is antecedent to government, that it defines the authority which the people commit to its government, and in so doing thereby limits it, and that any exercise of authority beyond these limits is an exercise of power without right. At 9.

[31] 1 LINDSAY, THE MODERN DEMOCRATIC STATE 52 (1947).

a legally organized government."[32] Neuman speaks of it in terms of "limited, restrained government."[33] Such expressions of opinion, from the legal standpoint, are impeccable. It is essential then that only when there is legal warrant for official action should it be undertaken. Where power is not granted, its exercise is beyond the pale. Even when conferred, it must be confined within the boundaries that circumscribe its sphere. Not only what may be done but how it is to be accomplished is a matter of constitutional significance. This is where judicial review comes in. A quotation from Cardozo is relevant. Thus: "The utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise. The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible to those who must run the race and keep the faith."[34]

4. *Malcolm on judicial power*

It would not be inappropriate before Justice Malcolm's juristic theory on judicial review that his concept of judicial power be inquired into. It was given expression in *Manila Electric Co. v. Pasay Transportation Co.*,[35] a 1932 decision. Thus: "The Supreme Court of the Philippine Islands represents one of the three divisions of power in our government. It is judicial power and judicial power only which is exercised by the Supreme Court. Just as the Supreme Court, as the guardian of constitutional rights, should not sanction usurpations by any other department of the government, so should it as strictly confine its own sphere of influence to the powers expressly or by implication conferred on it by the Organic Act."[36]

5. *Malcolm on judicial review*

Justice Malcolm served in the Supreme Court from 1917 to 1936 when the then organic legislation in force was the Philippine Autonomy Act or the Jones Law. There was no mention therein of the Supreme Court exercising the power of judicial review. Nor was it necessary. At the time the United States acquired the Philippines from Spain at the end of the nineteenth century, one of the principles of American

[32] Friedrich in CONSTITUTIONS AND CONSTITUTIONAL TRENDS 32 (1951).
[33] Neuman in *Ibid.*, 176.
[34] CARDOZO, THE NATURE OF JUDICIAL PROCESS 93-94 (1921).
[35] 57 Phil. 600 (1932).
[36] *Ibid.*, 605.

constitutional law binding on the territorial government established by her in the Philippines was this same concept of judicial review. It was natural for American lawyers, who were admitted to practice in the Philippines, to challenge the validity of statutes or executive orders, whenever the interests of their clients so demanded. The Filipino justices and judges, who with their American brethren manned the courts, were soon made aware that the power to pass on the constitutionality of statutes, executive orders, and ordinances was part of their judicial function. The Filipino lawyers vied with the American members of the bar in raising such questions whenever appropriate. The American practice therefore of resorting to courts through lawsuits to set aside determinations made by either the executive or legislative branches of the government became a part of the accepted constitutional doctrines in the Philippines early in the period of American sovereignty.

It was not until March 22, 1907 that the Supreme Court set aside an act of the legislative branch in *Casanovas v. Hord.*[37] As early as February 14, 1902, however, in the case of *In re Prautch,*[38] it dismissed as untenable the objection that there was an impairment of contractual obligation. A year later, on March 16, 1903, in *United States v. Dorr,*[39] it firmly rejected the assertion that the judgment of the lower court did not grant jury trial as provided by the American Constitution. Likewise in a disbarment proceeding in 1904, *In re Montagne,*[40] the plea by respondent attorney that he was denied due process of law met with no sympathetic response. Various other cases could be cited to show the readiness with which counsel would seize upon an alleged infringement of constitutional right and call upon the Supreme Court to nullify the action assailed. While prior to 1935 the Philippines had no constitution, the invocation of a supreme or higher law was made possible by the application in the Philippines of certain fundamental rights in the American Constitution applicable wherever American sovereignty reigned[41] and the existence of organic laws for the Philippines, which defined and limited the powers of the governmental agencies therein established.[42] There was thus sufficient basis for the exercise by the judiciary of the power of judicial review.

Prior to Justice Malcolm's incumbency, the principles governing the mechanics and standards of judicial review were far from systematized.

[37] 8 Phil. 125 (1907).
[38] 1 Phil. 132 (1902).
[39] 2 Phil. 269 (1903).
[40] 4 Phil. 1 (1904).
[41] United States v. Bull, 15 Phil. 7 (1910); Downes v. Bidwell, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (1901).
[42] Concepcion v. Paredes, 42 Phil. 599 (1921).

In quite a few of his more notable opinions, the *when* and the *how* of its exercise received clarification.

a. *When judicial review may be exercised*

He had occasion in *Yu Cong Eng v. Trinidad*[43] to express his view as to under what circumstances an original action for prohibition in the Supreme Court may be availed of to test the validity of a statute. Thus: "Before passing to our principal task, it is necessary to say something about the preliminary point of jurisdiction argued by counsel, relating to the propriety of the constitutional question being decided in original proceedings in prohibition. * * * As before held by this court, and by the Federal courts, equity has power, to be exercised in proper cases, to restrain criminal prosecutions under unconstitutional statutes, and to grant preliminary injunctions where the constitutionality of a given penal law is doubtful and fairly debatable, and permanent injunctions where the laws are held invalid. * * * A more complicated question arises, with reference to what stage of a threatened criminal prosecution, an accused person shall have the right to test the validity of a criminal statute by means of original proceedings presented in the appellate court. We believe the correct principle was announced in *Cadwallader-Gibson Lumber Co. v. Del Rosario* ([1913], 26 Phil., 192). In other words, as a general rule, the question of constitutionality must be raised in the lower court and that court must be given an opportunity to pass upon the question before it may be presented to the appellate court for resolution. Yet occasionally, under a recently enacted statute affecting numerous persons and extensive property rights, liable to give rise to a multiplicity of actions and numerous prosecutions, it is proper, right at the threshold of a prosecution, to have the validity of a given law determined in the interest of the accused and of the public, so as to permit of the orderly administration of justice. * * * Inasmuch as the property and personal rights of nearly twelve thousand merchants are affected by these proceedings, and inasmuch as Act No. 2972 is a new law not yet interpreted by the courts, in the interest of the public welfare and for the advancement of public policy, we have determined to overrule the defense of want of jurisdiction in order that we may decide the main issue. We have here an extraordinary situation which calls for a relaxation of the general Rule."[44]

Of the four requisites then, which according to Justice Laurel in *People v. Vera*,[45] should exist for this power to come into play, Justice

[43] 47 Phil. 385 (1925). The Philippine Supreme Court decision was appealed to the United States Supreme Court, which reversed it in Yu Cong Eng v. Trinidad, 271 U.S. 500, 46 S.Ct. 619, 70 L.Ed. 1059 (1926), the opinion being penned by the then Chief Justice Taft.

[44] *Ibid.*, 388-390.

[45] 65 Phil. 56 (1937).

Malcolm mentioned two, the raising of the question at the earliest opportunity and its being the very *lis mota,* thus imperatively calling for a decision on the issue of validity. It is of interest to note that it was precisely the Malcolm opinion in *Yu Cong Eng* that was the basis in *Vera* for the Supreme Court allowing the parties to test in a prohibition suit filed with it the constitutionality of the Probation Act.[46] The other two requisites, namely, the existence of a case or controversy and the institution thereof by the proper party were implicit in the pronouncements of Justice Malcolm.

b. *How power to be exercised*

Justice Malcolm's acknowledged pre-eminence in the field of constitutional law led him to lay stress on the need for caution in the exercise of the power of judicial review. Even if the Supreme Court was left with no choice but to pass upon the delicate issue of constitutionality, he would be reluctant to find fault with what was done by either or both the political branches. So the matter was put by him in *Rubi v. Provincial Board of Mindoro:*[47] "Most cautiously should the power of this court to overrule the judgment of the Philippine Legislature, a coordinate branch, be exercised. The whole tendency of the best considered cases is toward non-interference on the part of the courts whenever political ideas are the moving consideration. Justice Holmes, in one of the aphorisms for which he is justly famous, said that 'constitutional law, like other mortal contrivances, has to take some chances.' (Blinn v. Nelson [1911], 222 U.S., 1.) If in the final decision of the many grave questions which this case presents the court must take 'a chance,' it should be, with a view to upholding the law, with a view to the effectuation of the general governmental policy, and with a view to the court's performing its duty in no narrow and bigoted sense, but with that broad conception which will make the courts as progressive and effective a force as are the other departments of Government."[48]

He was even more explicit in a later decision, *Lorenzo v. Director of Health:*[49] "Section 1058 of the Administrative Code was enacted by the legislative body in the legitimate exercise of the police power which extends to the preservation of the public health. It was placed on the statute books in recognition of leprosy as a grave health problem. The methods provided for the control of leprosy plainly constitute due process of law. The assumption must be that if evidence was required to establish the necessity for the law, that it was before the Legislature when the act was passed. In the case of a statute purporting to have been enacted

[46] Act No. 4221 (1935).
[47] 39 Phil. 660 (1919).
[48] *Ibid.,* 719.
[49] 50 Phil. 595 (1927).

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."[50]

There was a sense of realism, so apparent in his opinion in *Manila Trading and Supply Co. v. Reyes,*[51] in this formulation of how in actual fact justices decide the way they do: "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 doubts should be resolved in its favor."[52] So he had announced earlier in the cited case of *Yu Cong Eng v. Trinidad:*[53] "The presumption is always in favor of constitutionality. As the United States Supreme Court in the case of Philippine origin said: '* * * The function of the legislature is primary, its exercise fortified by presumption of right and legality, and is not to be interfered with lightly, nor by any judicial conception of its wisdom or propriety. * * *' (Weems v. United States [1910], 217 U.S., 349). This presumption is especially strong in the case of statutes enacted to promote a public purpose, such as statutes relating to taxation. To doubt is to sustain."[54]

c. *Malcolm on political questions*

It is not to be forgotten that Justice Malcolm in the *Manila Electric* decision made clear that the judiciary was to confine itself within its sphere. That is the basis for the political question doctrine. *Alejandrino v. Quezon*[55] was the vehicle for his view on the subject. There petitioner, Jose Alejandrino, an appointive Senator under the Philippine Autonomy Act was meted out a suspension of one year for assaulting another member of the Senate. He instituted this mandamus proceeding, the principal respondent being the then Senate President, Manuel L. Quezon. He did not succeed. As pointed out by Justice Malcolm in his opinion: "In order that an obvious angle to the case may not subsequently embarrass us, we desire first of all to say that looking through the form of the action to the substance, that is, in effect, a suit instituted by one member of the Philippine Senate against the Philippine Senate and certain of its official employees. May the Supreme Court of the Philippine Islands by mandamus and injunction annul the suspension of Senator Alejandrino and

[50] *Ibid.*, 597.
[51] 62 Phil. 461 (1935).
[52] *Ibid.*, 471.
[53] 47 Phil. 385 (1925).
[54] *Ibid.*, 414.
[55] 46 Phil. 83 (1924).

compel the Philippine Senate to reinstate him in his official position? Without, therefore, at this time discussing any of the other interesting questions which have been raised and argued, we proceed at once to resolve the issue here suggested. There are certain basic principles which lie at the foundation of the Government of the Philippine Islands, which are familiar to students of public law. It is here only necessary to recall that under our system of government, each of the three departments is distinct and not directly subject to the control of another department. The power to control is the power to abrogate and the power to abrogate is the power to usurp. Each department may, nevertheless, indirectly restrain the others. It is peculiarly the duty of the judiciary to say what the law is, to enforce the Constitution, and to decide whether the proper constitutional sphere of a department has been transcended. The courts must determine the validity of legislative enactments as well as the legality of all private and official acts. To this extent, do the courts restrain the other departments."[56] Further: "With these sound premises in mind, we are not at all surprised to find the general rule of mandamus to be, that the writ will not lie from one branch of the government to a coordinate branch, for the very obvious reason that neither is inferior to the other. Mandamus will not lie against the legislative body, its members, or its officers, to compel the performance of duties purely legislative in their character which therefore pertain to their legislative functions and over which they have exclusive control. The courts cannot dictate action in this respect without a gross usurpation of power. So it has been held that where a member has been expelled by the legislative body, the courts have no power, irrespective of whether the expulsion was right or wrong, to issue a mandate to compel his reinstatement."[57]

The vitality of such a doctrine was demonstrated by the fact that in another leading case on the subject, *Vera v. Avelino*,[58] just shortly after the Philippines became a state, Alejandrino was the main reliance. The Supreme Court, through the then Justice, later Chief Justice, Bengzon, in ruling that it could not act on a petition by three suspended Senators for the annulment of such resolution of suspension and reinstating them, explained why: "Way back in 1924, Senator Jose Alejandrino assaulted a fellow-member in the Philippine Senate. That body, after investigation, adopted a resolution, suspending him from office for one year. He applied here for mandamus and injunction to nullify the suspension and to require his colleagues to reinstate him. This court believed that suspension was legally wrong, because, as senator appointed by the Governor-General, he could not be disciplined by the Philippine Senate; but it denied the

[56] *Ibid.*, 88.
[57] *Ibid.*, 88-89.
[58] 77 Phil. 192 (1946).

prayer for relief, mainly upon the theory of the separation of the three powers, Executive, Legislative and Judicial."[59] Further: "Now, under the principles enunciated in the *Alejandrino* case, may this petition be entertained? The answer must naturally be in the negative. Granting that the postponement of the administration of the oath amounts to suspension of the petitioners from their office, and conceding *arguendo* that such suspension is beyond the power of the respondents, who in effect are and acted as the Philippine Senate (Alejandrino v. Quezon, 46 Phil., 83, 88), this petition should be denied. As was explained in the *Alejandrino* case, we could not order one branch of the Legislature to reinstate a member thereof. To do so would be to establish judicial predominance, and to upset the classic pattern of checks and balances wisely woven into our institutional setup."[60]

6. *Malcolm's insistence on the need for law to justify official action*

Of greater significance in the appraisal of Justice Malcolm's concept of judicial review is his insistence that no public official from the highest to the lowest has the power to act unless there be a constitutional or statutory grant. This is especially the case, where individual rights are involved. That was to manifest fealty to the rule of law. The first opportunity he had to express his views came in a habeas corpus proceeding, *In re McCulloch Dick*[61] where the Supreme Court denied the plea for liberty of an alien editor, who after being ordered deported by the Governor-General, as his presence in the Philippines was considered a menace to the peace and safety, was kept under detention preparatory to his expulsion. Justice Malcolm dissented. He explained why: "The Government of the Philippine Islands is essentially a Government of laws and not of men. The policy of the law is against the placing of unlimited power anywhere. All officers from the highest to the lowest and in all branches of the Government are subordinate to the law. A judge, equally with any official of the other departments, it has been said, 'is not above or beyond the law, which it is his high office to administer.' (Alzua and Arnalot v. Johnson [1912], 21 Phil., 308.) 'The law,' Justice Miller said in (U.S. v. Lee ([1882], 106 U.S., 196), 'is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.' Having no doubt that both the executive and the legislative departments of the Philippine Government are just as anxious as we are to maintain the supremacy of the law, and it being the peculiar

[59] *Ibid.*, 200.
[60] *Ibid.*, 204-205.
[61] 38 Phil. 41 (1918).

duty of the courts to know the law, we must proceed in our search for those statutes which may authorize the deportation of aliens."[62] Further: "We conclude that it is for the court to determine if the Governor-General has the power to expel aliens. If it be found that Governor-General does possess this power by reason of any law, then the exercise of it is an official act and beyond the interference of the courts. '*Whenever a statute* gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts.' (Per Story, J., in Martin v. Mott [1827], 12 Wheat., 19, 31.) But if it be found that there is no law authorizing the Governor-General to deport aliens, then any attempt of the Governor-General to undertake to do so would not be an official act, and it would be the resultant duty of the courts through the great writ of habeas corpus to protect the petitioner."[63] It was his conclusion "that the Governor-General of the Philippine Islands does not have the power to expel aliens therefrom."[64] He ended his dissent on this note: "On an exhaustive consideration of argument and authorities, and on a new investigation of the questions at issue, it has finally come to be my opinion that the Supreme Court has jurisdiction of this action, and that the Governor-General of the Philippine Islands is not authorized to expel aliens therefrom. Accordingly the petitioner should be released from custody."[65] What was even more notable in this dissent was that he reversed his position as a previous government counsel and adopted a stand much more in keeping with the rule of law.

Justice Malcolm's *In re McCulloch* dissent was a harbinger of the approach followed in *Villavicencio v. Lukban,*[66] still ranked after all these years as the landmark decision on habeas corpus. In that case, the Supreme Court declared that the action taken by the then respondent Mayor of the City of Manila deporting some one hundred seventy women of ill repute to Davao was void for lack of authority. In the language of the opinion of Justice Malcolm: "One fact, and one fact only, need be recalled — these one hundred and seventy women were isolated from society, and then at night, without their consent and without any opportunity to consult with friends or to defend their rights, were forcibly hustled on board steamers for transportation to regions unknown. Despite the feeble attempt to prove that the women left voluntarily and gladly, that such was not the case is shown by the mere fact that the pretence of the police and the constabulary was deemed necessary and that these officers of the law

[62] *Ibid.,* 138.
[63] *Ibid.,* 140-141.
[64] *Ibid.,* 155.
[65] *Ibid.,* 156.
[66] 39 Phil. 778 (1919).

chose the shades of night to cloak their secret and stealthy act. Indeed, this is a fact impossible to refute and practically admitted by the respondents."[67] Further: "With this situation, a court would next expect to resolve the question — By authority of what law did the Mayor and the Chief of Police presume to act in deporting by duress these persons from Manila to another distant locality within the Philippine Islands? * * * Even when the health authorities compel vaccination, or establish a quarantine, or place a leprous person in the Culion leper colony, it is done pursuant to some law or order. But one can search in vain for any law, order, or regulation, which even hints at the right of the Mayor of the City of Manila or the Chief of Police of that city to force citizens of the Philippine Islands — and these women despite their being in a sense lepers of society are nevertheless not chattels but Philippine citizens protected by the same constitutional guaranties as are other citizens — to change their domicile from Manila to another locality. On the contrary, Philippine penal law specifically punishes any public officer who, not being expressly authorized by law or regulation, compels any person to change his residence."[68] This portion of his opinion ended on this note: "Law defines power. Centuries ago Magna Charta decreed that — 'No freeman shall be taken, or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed, or exiled, or in any other wise destroyed; nor will he pass upon him nor condemn him, but by lawful judgment of his peers or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.' (Magna Charta, 9 Hen., 111, 1225, Cap. 29: 1 Eng. Stat. at Large, 7.) No official, no matter how high, is above the law. The courts are the forum which [function] to safeguard individual liberty and to punish official transgressors. * * * 'The very idea,' said Justice Matthews of the same high tribunal * * * 'that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.' (Yick Wo v. Hopkins [1886], 118 U.S. 356, 370.) All this explains the motive in issuing the writ of habeas corpus, and makes clear why we said in the very beginning that the primary question was whether the courts should permit a government of men or a government of laws to be established in the Philippine Islands."[69]

It is likewise worth noting that even where there was no showing of impairment of constitutional rights, Justice Malcolm was insistent that the highest public official — in *Government of the Philippine Islands*

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[67] *Ibid.*
[68] *Ibid.*, 785-786.
[69] *Ibid.*, 786-787.

v. *Springer*,[70] an actuation of the then Governor-General being put in issue — must ever observe the rule of law. Thus: "The Governor-General since the approval of the last Organic Act has had no prerogative powers. His powers are so clearly and distinctly stated that there ought to be no doubt as to what they are. Like the Legislature and the judiciary, like the most inconspicuous employee, the Governor-General must find warrant for his every act in the law. At this stage of political development in the Philippines, no vague residuum of power should be left to lurk in any of the provisions of the Organic Law."[71]

7. *Justice Malcolm's approach where justification for official action based on legislative acts or executive orders*

It is no exaggeration to state then that Justice Malcolm's insistence on the supremacy of law may be characterized as tenacious. One is reminded of its classic formulation by that noted English author, Dicey, in his well-known work on The Law of the Constitution. This was how he defined it: "We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint."[72] Then: "We mean in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[73] Lastly: "There remains yet a third and a different sense in which the 'rule of law' or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution."[74] The stress that Justice Malcolm laid on the existence of power before any public official could act and thus affect private rights

[70] 50 Phil. 259. (1927).
[71] *Ibid.*, 291-292.
[72] DICEY, THE LAW OF THE CONSTITUTION, 188 (10th ed., 1962).
[73] *Ibid.*, 193.
[74] *Ibid.*, 195-196.

may be viewed as epitomizing all three aspects, with the only difference that as to the third, the judicial decisions in this jurisdiction as ordained must be firmly rooted in the Constitution, an infringement of which suffices to demonstrate that the action challenged did not meet the test of legality as set forth in the fundamental law.

It is quite obvious then, with the Constitution being fundamental in character, that not every act, legislative or executive in form, can meet the test of validity. The crucial question is how relevant is Justice Malcolm's philosophy of judicial review under the modified parliamentary system provided for in the present Constitution.

a. *The implications of parliamentarism*

The National Assembly now, as was the Congress before, and the Prime Minister under the present Constitution, the successor to the Presidential prerogatives, are entrusted with the task of governance. They are in control of policy-formulation and policy-implementation. In a very sense, theirs is the responsibility for the active conduct of state affairs. Nonetheless the high dignity of such positions does not in any way militate against the fundamental postulate that they do not possess rights; they exercise power. As was put in a recent decision: "The government itself is merely an agency through which the will of the state is expressed and enforced. Its offices therefore are likewise agents entrusted with the responsibility of discharging its functions. As such there is no presumption that they are empowered to act. There must be a delegation of such authority, either express or implied. In the absence of a valid grant, they are devoid of power, what they do suffers from a fatal infirmity. That principle cannot be sufficiently stressed. In the appropriate language of Chief Justice Hughes: 'It must be conceded that departmental zeal may not be permitted to outrun the authority conferred by statute.' Neither the high dignity of the office nor the righteousness of the motive then is an acceptable substitute. Otherwise the rule of law becomes a myth."[75]

It bears repeating that the very concept of judicial review is nothing if not an insistence that where the Constitution speaks, it must be listened to. For legislative and executive alike, and certainly for the judiciary too, its voice must be heeded. They must pay close attention lest they perform acts not authorized or, even if allowed, in a manner contrary to what it commands. It is the supreme law and must be obeyed. It imposes restraints, and they must not be ignored. So the rule of law, with the Constitution at the apex, commands.

The obvious advantage claimed for parliamentarism, it is worth recalling, is the unity of purpose and of execution with the fusion of legis-

[75] Villegas v. Subido, G.R. No. L-26534, November 28, 1969, 30 SCRA 498 (1969).

lative and executive powers. That may well be the starting point in the discharge of the function of judicial review. This is especially so as the government the times demand with their host of problems is called upon to expand its operations. It is unavoidable for it to enlarge its boundaries of competence. It now occupies areas before considered as beyond its sphere. The scope of permissible state action has thus to be enlarged. It is indispensable that it be so if social and economic rights, the enhancement of welfare as an aspect of human dignity, are to be translated into reality. If judicial review were to be an obstacle, it can lose public esteem and favor. It cannot be lost sight of that precisely the strength of the judiciary lies in the confidence of the people. It could be then that inflexible adherence to constitutional norms restrictively construed may be productive of disappointment and disillusionment. It could result, to follow the formulation of Professor Black, that the stress may be on the legitimating rather than the checking aspect of judicial review. As long, however, as there is plausible warrant in the fundamental law, there could be no valid objection to such eventuality.

There is, however, this *caveat*. It would be to my mind, calamitous, if the traditional civil rights, especially intellectual liberty, were not to be accorded the deference to which they are entitled. The institution of a modified parliamentary system cannot justify the elimination of constitutional barriers against possible invasion of the human personality. Freedom of the mind in terms of speech and press, of assembly, and of association occupies a primacy in our scheme of values. This is not to deny that such constitutional rights are not absolutes. Limits under appropriate circumstances may be imposed on them. That can be done, as recognized in both the 1935 and the present Constitutions, under the clear and present danger concept. If faithfully adhered to, the occasion for permissible restraint is not likely to arise often. Even then, moreover, the intrusion on such cherished freedoms is minimal. Where physical liberty is concerned, there is more leeway afforded to governmental measures that may result in curtailment. As man lives in society, public welfare may demand that certain acts be regulated, even prohibited. The test is the rational basis for what otherwise would be an encroachment on one's freedom.

The excerpts previously quoted from Justice Malcolm's opinion in *Rubi v. Provincial Board*[76] about the need for caution in the exercise of the power of judicial review and from his *ponencia* in *Lorenzo v. Director of Health*[77] as to the sufficiency of a probable basis for sustaining a conclusion reached by a coordinate branch, the courts not sitting to resolve

[76] 39 Phil. 660 (1919).
[77] 50 Phil. 595 (1927).

the merits of conflicting theories, to ward off any challenge as to the validity of the measure thus assailed appear to be made to order for a parliamentary system. It would detract from the effectiveness of the unity that characterizes the joint legislative-executive response to public problems if the Supreme Court would utilize the function of judicial review in a spirit of hostility, or even only lack of sympathy. The intendment of the present Constitution would thus be best served by adherence to the Malcolm approach. Reference may likewise be made to his words in still another case, *Smith, Bell and Co. v. Natividad.*[78] As aptly put by him: "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 constitutionality of the law and without good and strong reasons, courts should not attempt to nullify the action of the Legislature."[79] Thus is emphasized how the sympathetic attitude advocated by Justice Malcolm is in accordance with the basic postulate of a parliamentary system with its recognition of the primacy of the legislative branch in the field of policy.

It does not follow, however, that where it concerned intellectual liberty, Justice Malcolm was prepared to accord the same deference to legislative and executive determination. There was no specific instance where it could be said that he made manifest that such was his stand. One of his landmark decisions, *United States v. Bustos,*[80] could be so interpreted. It dealt with a prosecution and libel allegedly arising from a complaint filed with the Executive Secretary against a justice of the peace imputing acts of malfeasance. In the course of acquitting the accused on the ground that it was a privileged communication, Justice Malcolm stressed the importance of press freedom along with the cognate rights of freedom of assembly and of petition. After stating "that the time is ripe thus to clear up certain misapprehensions on the subject and to place these basic rights."[81] In their proper perspective, he noted that even during the period of Spanish rule, the Filipino patriots like Rizal and Mabini fought for and demanded liberty of the press with the latter likewise advocating freedom of association. After which he referred to what he called "the period of American-Filipino cooperative effort."[82] Thus: "The Constitution of the United States and the State constitutions

[78] 40 Phil. 136 (1919).
[79] *Ibid.*, 154.
[80] 37 Phil. 731 (1918).
[81] *Ibid.*, 739.
[82] *Ibid.*, 740.

guarantee the right of freedom of speech and press and the right of assembly and petition. We are therefore, not surprised to find President McKinley in that Magna Charta of Philippine Liberty, the Instruction to the Second Philippine Commission, of April 7, 1900, laying down the inviolable rule 'That no law shall be passed abridging the freedom of speech or of the press or the rights of the people to peaceably assemble and petition the Government for a redress of grievances.' The Philippine Bill, the Act of Congress of July 1, 1902, and the Jones Law, the Act of Congress of August 29, 1916, in the nature of organic acts for the Philippines, continued this guaranty. The words quoted are not unfamiliar to students of Constitutional Law, for they are the counterpart of the first amendment to the Constitution of the United States, which the American people demanded before giving their approval to the Constitution."[83] The Constitution of 1935 as well as the present Charter makes use of similar language. It is in that light that the Supreme Court lately had occasion to refer to such constitutional rights as "preferred freedoms."[84] As thus viewed, it cannot admit of doubt that where the question raised is their alleged invasion, the judiciary should display greater vigilance in assuring observance of the constitutional mandates. This is an area of the law where there is the least compulsion on the courts to accept uncritically the conclusion reached by either of the two branches of the government. Here again, the Malcolm approach has much to recommend itself.

By way of conclusion

In the light of the foregoing, it can be truly said that even when parliamentarism as provided for in the Constitution is fully implemented, the views on judicial review enunciated by Justice Malcolm are still impressed with relevance. This judicial function, it has been stated time and time again, is both awesome and delicate, especially so where what is subject to a court test is an action of a coordinate body. In the case of a statute under a parliamentary government, it is not only the action of one of the branches but of both that is challenged. The very concept of interdepartmental courtesy and comity precludes any cavalier attitude and the easy acceptance of any imputation of fault or defect in the measure assailed. Even if it be an actuation of the Prime Minister that is subjected to that crucial test, the same principle applies. It is not only because he is vested with broad and extensive powers, it is also due to his being the leader of the National Assembly. The judiciary then must be duly mindful of all the circumstances that would incline the scales of decision in favor of upholding its validity. The standard of utmost caution

[83] *Ibid.*
[84] *Cf.* Vera v. Arca, G.R. No. L-25721, May 26, 1969, 28 SCRA 351 (1969).

advocated by Justice Malcolm thus retains its pertinence under a parliamentary system. At the same time, it should not be lost sight of either that where the preferred freedoms of the mind are concerned, his evaluation of the high estate it occupies in our constitutional scheme was valid then and is equally so now. Thus, when the suit before the Court involves any of such constitutional rights as free speech, free press, freedom of assembly and of petition and freedom of association, the presumption of validity for the actuation of any of the branches of the government is hardly decisive. They are preferred freedoms.

The message is clear. We can continue to study with profit the opinions of Justice Malcolm, so impressive not only for their scholarship, their grasp of the realities of what is entailed by constitutional adjudication, and their enduring worth and quality. We owe so much to him, and I am glad to have the opportunity of giving due acknowledgment to his luminous vision, insight, and expertise.