THE WRIT OF LIBERTY UNDER MARTIAL LAW: MALCOLM ON HABEAS CORPUS REVISITED*

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The third Malcolm lecture, it may be recalled, was on that famed jurist's enduring contributions to the law on *habeas corpus*.[1] The significant role that was his in making it truly effective as a safeguard of liberty was discussed in terms of his landmark opinions, starting with *Villavicencio v. Lukban*.[2] No jurist had placed greater stress on the need for a statute or an ordinance to justify a public official in depriving a person of his physical freedom. It was likewise he who was responsible for the adoption of the doctrine that the finality of a judgment in a criminal case is no bar to a *habeas corpus* petition if there be a showing of a denial of constitutional rights.[3] No wonder that in *Gumabon v. Director of Prisons*[4] it could be truly set forth: "A full awareness of the potentialities of the writ of *habeas corpus* in the defense of liberty with its limitations may be detected in the opinions of former Chief Justices Arellano, Avanceña, Abad Santos, Paras, Bengzon, and the present Chief Justice. It fell to Justice Malcolm's lot, however, to emphasize quite a few times the breadth of its amplitude and of its reach."[5] The lecture was delivered on Law Day, September 19, 1972. Two days later, Proclamation No. 1081 was signed.

We have since that time been under martial law. It is not inappropriate then, almost three years having elapsed, if we inquire into the availability of this remedy under the present order of things. That is our topic for today.

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*This is an edited version of the extemporaneous sixth Malcolm lecture delivered on July 16, 1975.

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[1] *Cf. The Enduring Contributions of Justice Malcolm to the Law on Habeas Corpus*, 47 PHIL. L. J. 417 (1972).

[2] 39 Phil. 778 (1918).

[3] The third Malcolm lecture also dwelt on the significant role he played in stressing the availability of the writ to secure release after the completion of the service of sentence and to regain liberty for illegal contempt convictions whether by the courts or the legislative bodies.

[4] G.R. No. L-30026, January 30, 1971, 37 SCRA 420 (1971).

[5] *Ibid.*, 423-424.

1. *The Malcolm approach: stress on the rule of law*

It is to be viewed in the light of Justice Malcolm's insistence on the rule of law, faithfully adhered to during his long years of service in the Supreme Court, but nowhere better expressed than in the opening paragraph of his epochal opinion in *Villavicencio v. Lukban*:[6] "The annals of juridical history fail to reveal a case quite as remarkable as the one which this application for habeas corpus submits for decision. While hardly to be expected to be met with in this modern epoch of triumphant democracy, yet, after all, the cause presents no greater difficulty if there is kept in the forefront of our minds the basic principles of popular government, and if we give expression to the paramount purpose for which the courts, as an independent power of such a government, were constituted. The primary question is — Shall the judiciary permit a government of men instead of a government of laws to be set up in the Philippine Islands?"[7] It is from that basic concept that he found no difficulty in granting the writ of habeas corpus prayed for by petitioners, inmates of houses of ill-repute, who were taken against their will to Davao by order of the respondent Mayor Lukban of Manila, acting according to Justice Malcolm, "for the best of all reasons to exterminate vice,"[8] but without the support of any statute or ordinance as the source of his authority. In line with his basic juristic philosophy, Justice Malcolm would insist on the rule of law.

It is from that fundamental premise that I propose to explore the subject of whether or not with a declaration of martial law, the privilege of the writ of habeas corpus is deemed automatically suspended.[9] It would, of course, remove doubts if in addition to martial law being instituted, there is an explicit declaration of the suspension of the privilege of the writ of liberty.

2. *Prevailing doctrine: automatic suspension of the privilege as to persons falling within terms of the proclamation*

As to the present state of the law on the subject, the recent case of *Aquino v. Ponce Enrile*[10] is most illuminating. The Supreme Court

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[6] 39 Phil. 780 (1919).

[7] *Ibid.*, 780.

[8] *Ibid.*

[9] The provision on the subject under the present Constitution reads: "The Prime Minister shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the writ of *habeas corpus*, or place the Philippines or any part thereof under martial law." The language used in the 1935 Constitution was identical except that it was the President empowered to take such action. *Cf.* 1935 CONST., art. VII, sec. 10, par. 2.

[10] G.R. No. L-35546, September 17, 1974, 59 SCRA 183 (1974).

decided against the release of petitioner Aquino, a member of the defunct Philippine Senate under detention since September 23, 1972 and thus upheld the validity of the proclamation of martial law. While it may be said that Chief Justice Makalintal spoke for the Court, there is this qualification: "At the outset a word of clarification is in order. This is not the decision of the Court in the sense that a decision represents a consensus of the required majority of its members not only on the judgment itself but also on the rationalization of the issues and the conclusions arrived at. On the final result the vote is practically unanimous; this is a statement of my individual opinion as well as a summary of the voting on the major issues."[11]

This is his summary of the thinking of the Court on the question of whether the proclamation of martial law is necessarily accompanied by the loss of the privilege of the writ of *habeas corpus*. Thus: "It need only be added that, to my mind, implicit in a state of martial law is the suspension of the said privilege with respect to persons arrested or detained for acts related to the basic objective of the proclamation, which is to suppress invasion, insurrection, or rebellion, or to safeguard public safety against imminent danger thereof. The preservation of society and national survival take precedence. On this particular point, that is, that the proclamation of martial law automatically suspends the privilege of the writ as to the persons referred to, the Court is practically unanimous. Justice Fernando, however, says that to him that is still an open question; and Justice Muñoz Palma qualifiedly dissents from the majority in her separate opinion, but for the reasons she discusses therein votes for the dismissal of the petitions."[12]

Justices Makasiar, Esguerra, Fernandez, Muñoz Palma, and Aquino signed the opinion of the Chief Justice. There was on the part of both Justices Fernandez and Muñoz Palma an elaboration of their views, the former in agreement and the latter in dissent as to why a state of martial law entails the suspension of the privilege of the writ. Justice Fernandez in his separate opinion would put the matter thus: "The proclamation of martial law is conditioned on the occurrence of the gravest contingencies. The exercise of a more absolute power necessarily includes the lesser power especially where it is needed to make the first power effective. 'The suspension enables the executive, without interference from the courts or the law, to arrest and imprison persons against whom no legal crime can be proved, but who may, nevertheless, be effectively engaged in forming the rebellion or inviting the invasion, to the imminent danger of the public safety.' (Barcelona v. Baker, 5 Phil. 87, 112). It would negate

[11] *Ibid.*, 233-234.
[12] *Ibid.*, 242-243.

the effectivity of martial law if detainees could go to the courts and ask for release under the same grounds and following the same procedures obtaining in normal times. The President in the dispositive paragraph of Proclamation No. 1081 ordered that all persons presently detained or others who may thereafter be similarly detained for the crimes of insurrection and rebellion and all other crimes and offenses committed in furtherance or on the occasion or in connection therewith shall be kept under detention until otherwise ordered released by him or his duly designated representative. Under General Order No. 2-A, the President ordered the arrest and taking into custody of certain individuals. General Order No. 2-A directs that these arrested individuals will be held in custody until otherwise ordered by the President or his duly designated representative. These general orders clearly show that the President was precluding court examination into these specified arrests and court orders directing release of detained individuals."[13]

In an exhaustive separate opinion as to the historical antecedents and the implications of martial law, Justice Castro categorically affirmed that the proclamation of martial law carried with it the suspension of the privilege in these words: "It is thus evident that suspension of the *privilege* of the writ of *habeas corpus* is *unavoidably subsumed* in a declaration of martial law, since one basic objective of martial rule is to neutralize effectively by arrest and continued detention (and possibly trial at the proper and opportune time) — those who are reasonably believed to be in complicity or are *particeps criminis* in the insurrection or rebellion. That this is so and should be so is ineluctable; to deny this postulate is to negate the very fundament of martial law: the preservation of society and the survival of the state."[14]

Justice Barredo, whose concurring opinion was by far the most extensive, entertained no doubts either: "The next issue to consider is that which refers to the arrest and the continued detention and other restraints of the liberties of petitioners, and their main contention in this respect is that the proclamation of martial law does not carry with it the suspension of the privilege of the writ of *habeas corpus,* hence petitioners are entitled to immediate release from their constraints. We do not believe such contention needs extended exposition or elaboration in order to be overruled. The primary and fundamental purpose of martial law is to maintain order and to insure the success of the battle against the enemy by the most expeditious and efficient means without loss of time and with the minimum of effort. This is self-evident. The arrest and detention of those contributing to the disorder and especially of those helping or other-

[13] *Ibid.*, 612-613.
[14] *Ibid.*, 275-276.

wise giving aid and comfort to the enemy are indispensable, if martial law is to mean anything at all. This is but logical. To fight the enemy, to maintain order amidst riotous chaos and military operations, and to see to it that the ordinary constitutional processes for the prosecution of law-breakers (sic) are three functions that cannot humanly be undertaken at the same time by the same authorities with any fair hope of success in any of them. To quote from Malcolm and Laurel, 'Martial law and the privilege of that writ (of habeas corpus) are wholly incompatible with each other.' (Malcolm and Laurel, Philippine Constitutional Law, p. 210). It simply is not too much for the state to expect the people to tolerate or suffer inconveniences and deprivations in the national interest, principally the security and integrity of the country."[15]

Justice Antonio gave expression to a similar point of view in his scholarly concurrence in this wise: "It should be important to note that as a consequence of the proclamation of martial law, the privilege of the writ of *habeas corpus* has been impliedly suspended. Authoritative writers on the subject view the suspension of the writ of *habeas corpus* as an incident, but an important incident of a declaration of martial law.*** Evidently, according to Judge Smalley, there could not be any privilege of the writ of *habeas corpus* under martial law (*In re Field,* 9 *Fed. Cas.* 1 [1962]). The evident purpose of the suspension of the writ is to enable the executive, as a precautionary measure, to detain without interference persons suspected of harboring designs harmful to public safety (*Ex Parte Zimmerman,* 32 Fed. 2nd 442, 446)."[16]

a. *Dissenting view*

There is this vigorous and forthright dissent from Justice Muñoz Palma: "Contrary to respondent's claim the proclamation of martial law in the country did not carry with it the automatic suspension of the privilege of the writ of *habeas corpus* for these reasons: *First* from the very nature of the writ of *habeas corpus* which as stressed in the early portion of this Opinion is a 'writ of liberty' and the 'most important and most immediately available safeguard of that liberty', the privilege of the writ *cannot be* suspended by mere *implication.* The Bill of Rights (Art. III, Sec. 1(14), 1935 Constitution, Art. IV, Sec. 15, 1973 Constitution) categorically states that the privilege of the writ of *habeas corpus* shall *not* be suspended *except* for causes therein specified, and the proclamation of martial law is not one of those enumerated. Second, the so-called Commander-in-Chief clause, either under Art. VII, Sec. 10(2), 1935 Constitution, or Art. IX, Sec. 12, 1973 Constitution, provides specifically for three different modes of executive action in times of emergency, and one

[15] *Ibid.,* 424.
[16] *Ibid.,* 500-501.

mode does not necessarily encompass the other, *viz* (a) calling out the armed forces to prevent or suppress lawlessness, etc., (b) suspension of the privilege of the writ of habeas corpus, and (c) placing the country or a part thereof under martial law. In the latter two instances even if the causes for the executive action are the same, still the exigencies of the situation may warrant the suspension of the privilege of the writ but not a proclamation of martial law and *vice versa. Third,* there can be an automatic suspension of the privilege of the writ when with the declaration of martial law, there is a total collapse of the civil authorities, the civil courts are closed and a military government takes over, in which event the privilege of the writ is necessarily suspended for the simple reason that there is no court to issue the writ; that however, is not the case with us at present because the martial law proclaimed by the President upholds the supremacy of the civil over the military authority and the courts are open to issue the writ."[17] Justice Teehankee, no doubt because the emphasis in his separate opinion is his strong dissent arising from the failure of the Court to grant the motion for withdrawal by Senator Diokno filed in another *habeas corpus* application, decided jointly with that of Senator Aquino, did not have much to say on the subject. There is this relevant excerpt though: "It should also be considered that it is conceded that even though the privilege of the writ of habeas corpus has been suspended it is suspended only as to certain specific crimes and the 'answer and return' of the respondents who hold the petitioner under detention is not conclusive upon the courts which may receive evidence and determine as held in *Lansang* (and as also provided in the Anti-Subversion Act [Republic Act 1700] whether a petitioner has been *in fact* apprehended and detained arbitrarily *or* 'on reasonable belief' that he has 'participated in the crime of insurrection or rebellion' or other related offenses as may be enumerated in the proclamation suspending the privilege of the writ."[18]

3. *The stand of the lecturer: as to persons not included in the proclamation, no suspension of the privilege; and as to those covered, writ still available for certain purposes*

There is reference in the opinion of Chief Justice Makalintal to the effect that in my opinion the question of the proclamation of martial law as automatically suspending the privilege of the writ is still "open."[19] So it is, but a qualification is indicated in the interest of accuracy. As to persons not included in the proclamation, I would submit that there is no suspension of the privilege. As to those covered, the writ may be availed of for certain purposes. It is in that sense that in my view, such an issue

[17] *Ibid.*, 646-647.
[18] *Ibid.*, 317-318.
[19] *Ibid.*, 243.

is not a closed matter. It would follow that to a great extent there is adherence to the dissent of Justice Muñoz Palma.

On this point, my concurring and dissenting opinion starts with a reiteration of what I consider this basic concept: "Nor does the fact that at the time of the filing of these petitions martial law had been declared, call for a different conclusion. There is of course imparted to the matter a higher degree of complexity. For it cannot be gainsaid that the reasonable assumption is that the President exercised such an awesome power, one granted admittedly to cope with an emergency or crisis situation, because in his judgment the situation as thus revealed to him left him with no choice. What the President did attested to an executive determination of the existence of the conditions that called for such a move. There was, in his opinion, an insurrection or rebellion of such magnitude that public safety did require placing the country under martial law. That decision was his to make; it is not for the judiciary. The assessment thus made, for all the sympathetic consideration it is entitled to, is not, however, impressed with finality. This Court has a limited sphere of authority. That, for me, is the teaching of Lansang. The judicial role is difficult, but it is unavoidable. The writ of liberty has been invoked by petitioners. They must be heard, and we must rule on their petitions."[20]

On a more specific plane, my concurring and dissenting opinion continues: "There are relevant questions that still remain to be answered. Does not the proclamation of martial law carry with it the suspension of the privilege of the writ of habeas corpus? If so, should not the principle above enunciated be subject to further refinement? I am not too certain that the first query necessarily calls for an affirmative answer. Preventive detention is of course allowable. Individuals who are linked with invasion or rebellion may pose a danger to the public safety. There is nothing inherently unreasonable in their being confined. Moreover, where it is the President himself, as in the case of these petitioners, who personally directed that they be taken in, it is not easy to impute arbitrariness. It may happen though that officers of lesser stature not impressed with the high sense of responsibility would utilize the situation to cause the apprehension of persons without sufficient justification. Certainly it would be, to my mind, to sanction oppressive acts if the validity of such detention cannot be inquired into through habeas corpus. It is more than just desirable therefore that if such be the intent, there be a specific decree concerning the suspension of the writ of habeas corpus. Even then, however, such proclamations could be challenged. If vitiated by constitutional infirmity, the release may be ordered. Even if it were otherwise, the applicant may not be among those as to whom the privilege of the

[20] *Ibid.*, 285-286.

writ has been suspended. It is pertinent to note in this connection that Proclamation No. 1081 specifically states 'that all persons presently detained, as well as all others who may hereafter be similarly detained for the crimes of insurrection or rebellion, and all other crimes and offenses committed in furtherance or on the occasion thereof, or incident thereto, or in connection therewith, for crimes against national security and the law of nations, crimes against the fundamental laws of the State, crimes against public order, crimes involving usurpation of authority, rank, title and improper use of names, uniforms and insignia, crimes committed by public officers, and for such other crimes as will be enumerated in Orders of any violation of any decree, order or regulation promulgated by me personally or promulgated upon my direction shall be kept under detention until otherwise ordered released by me or by my duly designated representative.' The implication appears to be that unless the individual detained is included among those to whom any of the above crimes or offenses may be imputed, he is entitled to judicial protection. Lastly, the question of whether or not there is warrant for the view that martial law is at an end may be deemed proper not only in the light of radically altered conditions but also because of certain executive acts clearly incompatible with its continued existence. Under such circumstances, an element of a justifiable controversy may be discerned."[21]

The matter was pursued further in this vein: "As of the present then, even on the view that the courts may declare that the crisis conditions have ended and public safety does not require the continuance of martial law, there is not enough evidence to warrant such a judicial declaration. This is not to deny that in an appropriate case with the proper parties, and, in the language of Justice Laurel, with such issue being the very *lis mota,* they may be compelled to assume such an awesome responsibility. A sense of realism as well as sound juristic theory would place such delicate task on the shoulders of this Tribunal, the only constitutional court. So I would read Rutter v. Esteban. There, while the Moratorium Act was at first assumed to be valid, with this Court in such suit being persuaded that its 'continued operation and enforcement' under circumstances that developed later, became 'unreasonable and oppressive,' and should not be prolonged a minute longer, * * * '[it was] declared null and void and without effect.' It goes without saying that before it should take such a step, extreme care should be taken lest the maintenance of public peace and order, the primary duty of the Executive, be attended with extreme difficulty. It is likewise essential that the evidence of public safety no longer requiring martial law be of the clearest and most satisfactory char-

[21] *Ibid.,* 288-290.

acter. It cannot be too strongly stressed that while liberty is a prime objective and the judiciary is charged with the duty of safeguarding it, on a matter of such gravity during periods of emergency, the executive appraisal of the situation is deserving of the utmost credence. It suffices to recall the stress laid by Chief Justice Concepcion in Lansang that its function 'merely to *check* — not to *supplant*' the latter. The allocation of authority in the Constitution made by the people themselves to the three departments of government must be respected. There is to be no intrusion by any one into the sphere that belongs to another. Precisely because of such fundamental postulate in those cases, and there may be such, but perhaps rather rare, it could amount to judicial abdication if no inquiry were deemed permissible and the question considered political."[22] Nor did my appraisal of the question stop there: "The last point is, while the detention of petitioners could have been validly ordered, as dictated by the very proclamation itself, if it continued for an unreasonable length of time, then his release may be sought in a habeas corpus proceeding. This contention is not devoid of plausibility. Even in times of stress, it cannot just be assumed that the indefinite restraint of certain individuals as a preventive measure is unavoidable. It is not to be denied that where such a state of affairs could be traced to the wishes of the President himself, it carries with it the presumption of validity. The test is again arbitrariness as defined in Lansang. It may happen that the continued confinement may be at the instance merely of a military official, in which case there is more leeway for judicial scrutiny."[23]

5. *The essential character of the writ for a regime of law*

It may be to tread on familiar ground, but it is not amiss to refer briefly to the well-nigh indispensable character of the writ of habeas corpus for a regime of law. As correctly pointed out by Justice Malcolm in *Villavicencio v. Lukban*,[24] it "was devised and exists as a speedy and effectual remedy to relieve persons from unlawful restraint, and as the best and only sufficient defense of personal freedom."[25] A few pages further in his opinion, he had occasion to reiterate such a thought in this wise: "The essential object and purpose of the writ of habeas corpus is to inquire into all manner of involuntary restraint as distinguished from voluntary, and to relieve a person therefrom if such restraint is illegal. Any restraint which will preclude freedom of action is sufficient."[26] To such a basic postulate, there has been since then a commitment by the Supreme Court.

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[22] *Ibid.*, 296-297.
[23] *Ibid.*, 297-298.
[24] 39 Phil. 778 (1919).
[25] *Ibid.*, 788.
[26] *Ibid.*, 790.

Not too long ago, in *Gumabon v. Director of Prisons*,[27] it was stressed: "Its latitudinarian scope to assure that illegality of restraint and detention be avoided is one of the truisms of the law. It is not known as the writ of liberty for nothing. The writ imposes on judges the grave responsibility of ascertaining whether there is any legal justification for a deprivation of physical freedom. Unless there be such a showing, the confinement must thereby cease. * * * Any deviation from the legal norms calls for the termination of the imprisonment,"[28] What is more, such eminent commentators as Chafee, Cooley, Willoughby, Burdick, and Fraenkel were cited to lend emphasis to its service in the cause of liberty.[29]

It is easily understandable why the writ occupies such a high estate in our constitutional system. With the absorption in the Philippines of basic concepts of American public law, arising from the United States assuming the role of sovereign in 1898, her status as an unincorporated territory lasting until 1935, the fundamental guarantees safeguarding the liberty of the subject of which *habeas corpus* is one of the most essential, became embedded in our jurisprudence. Reference to the masterly opinion of Justice Brennan in *Fay v. Noia*,[30] decided barely ten years ago, is illuminating. Thus: "We do well to bear in mind the extraordinary prestige of the Great Writ, habeas corpus ad subjiciedum, in Anglo-American Jurisprudence: 'the most celebrated writ in English law.' 3 Blackstone Commentaries 129. It is 'a writ antecedent to statute, and throwing its root deep into the genius of our common law * * *. It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I.' Secretary of State for *Home Affairs v. O'Brien* [1932] AC 603, 609 (HL). Received into our own law in the colonial period, given explicit recognition in the Federal Constitution, Art. I, Sec. 9, cl. 2, incorporated in the first grant of federal court jurisdiction, Act of September 24, 1789, c 20, sec. 14, 1 Stat 81, 82, habeas corpus was earlier confirmed by Chief Justice John Marshall to be a 'great constitutional privilege.' Ex parte Bollman and Swartout (US), 4 Cranch 75, 95, 2 L ed 554, 561. Only two Terms ago this Court had occasion to reaffirm the high place of the writ in our jurisprudence: 'We repeat what has been so truly said of the federal writ: "there is no higher duty than to maintain it unimpaired," Bowen v. Johnston, 306 US 19, 26, 83

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[27] G.R. No. L-30026, January 30, 1971, 37 SCRA 420 (1971).

[28] *Ibid.*, 423.

[29] *Cf.* Chafee, *The Most Important Human Right in the Constitution*, 32 BOSTON UNIV. L. REV. 143 (1947); 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8TH ED., 709 (1927); 3 WILLOUGHBY ON THE CONSTITUTION 1612 (1929); BURDICK, THE LAW OF THE AMERICAN CONSTITUTION 27 (1922); and FRAENKEL, OUR CIVIL LIBERTIES 6 (1944).

[30] 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed. 2d 837 (1963).

L ed 455, 461, 59 S Ct 442 (1939), and unsuspended, save only in the cases specified in our Constitution.' Smith v. Bennett, 365 US 708, 713, 6 L ed 2d 39, 43, 81 S Ct 895."[31] There is this further: "These are not extravagant expressions. Behind them may be discerned the unceasing contest between personal liberty and government oppression. It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today. Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office."[32]

An even more recent American Supreme Court decision, *Preiser v. Rodriguez*,[33] handed down a little over two years ago, the opinion being penned by Justice Stewart, illustrates the extensive reach of this writ even after conviction. Thus: "The original view of a habeas corpus attack upon detention under a judicial order was a limited one. The relevant inquiry was confined to determining simply whether or not the committing court had been possessed of jurisdiction. * * * But, over the years, the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction. * * * Thus, whether the petitioner's challenge to his custody is that the statute under which he stands convicted is unconstitutional, as in Ex parte Siebold, 100 US 371; that he has been imprisoned prior to trial on account of a defective indictment against him, as in Ex parte Royall, 117 US 241 * * *; that he is unlawfully confined in the wrong institution, as in In re Bonner, 151 US 242 * * *; and Humphrey v. Cady, 405 US 504 * * *; that he was denied his constitutional rights at trial, as in Johnson v. Zerbst, 304 US 458; that his guilty plea was invalid, as in Von Moltke v. Gilles, 32 US 708 * * *; that he is being unlawfully detained by the Executive or the military, as in Parishi v. Davidson, 405 US 34 * * *; or that his parole was unlawfully revoked, causing him to be reincarcerated

[31] *Ibid.*, 399-400.
[32] *Ibid.*, 400-402.
[33] 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed. 2d 439 (1973).

in prison, as in Morrissey v. Brewer, 408 US 471, * * * — in each case his grievance is that he is being unlawfully subjected to physical restraint, and in each case habeas corpus has been accepted as the specific instrument to obtain release from such confinement."[34]

To pursue the matter further and with English authorities in mind, Dicey may be cited. According to his classic, *The Law of the Constitution*:[35] "The essence of the whole transaction is that the court can by the writ of habeas corpus cause any person who is imprisoned to be actually brought before the court and obtain knowledge of the reason why he is imprisoned; and then having him before the court, either then and there set him free or else see that he is dealt with in whatever way the law requires, as, for example, brought speedily to trial. The writ can be issued on the application either of the prisoner himself or of any person on his behalf, or (supposing the prisoner cannot act) then on the application of any person who believes him to be unlawfully imprisoned. It is issued by the High Court, or during vacation by any judge thereof; and the court or a judge should and will always cause it to be issued on being satisfied by affidavit that there is reason to suppose a prisoner to be wrongfully deprived of his liberty. You cannot say with strictness that the writ is issued 'as a matter of course,' for some ground must be shown for supposing that a case of illegal imprisonment exists. But the writ is granted 'as a matter of right,' — that is to say, the court will always issue it if *prima facie* ground is shown for supposing that the person on whose behalf it is asked for is unlawfully deprived of his liberty. The writ or order of the court can be addressed to any person whatsoever, be he an official or a private individual, who has, or is supposed to have, another in his custody. Any disobedience to the writ exposes the offender to summary punishment for contempt of court, and also in many cases to heavy penalties recoverable by the party aggrieved. To put the matter, therefore, in the most general terms, the case stands thus. The High Court of Justice possesses, as the tribunals which make up the High Court used to possess, the power by means of the writ of habeas corpus to cause any person who is alleged to be kept in unlawful confinement to be brought before the court. The court can then inquire into the reason why he is confined, and can, should it see fit, set him then and there at liberty. This power moreover is one which the court always will exercise whenever ground is shown by any applicant whatever for the belief that any man in England is unlawfully deprived of his liberty."[36] Then there is this excerpt from Heuston's brief *opus*:[37] "It must be emphasized that the primary purpose of

[34] *Ibid.*, 485-486.
[35] 10th ed., (1962).
[36] *Ibid.*, 215-216.
[37] ESSAYS IN CONSTITUTIONAL LAW (1964).

the writ is and was to inquire into the legality of the detention. The question is whether the cause given for the detention is sufficient in law: it may be proved to be sufficient and the applicant for the writ is thereupon instantly entitled to his release. * * * We may here observe how wrong it is to think that the powers of detention without trial granted to the executive by the Emergency Powers Act, 1939, were equivalent to 'suspending the habeas corpus Acts,' as was sometimes alleged. For the writ of habeas corpus was not touched in any way by this Act: it was fully available to any person to question the legality of his detention; all that had been done was that by the Emergency Powers Act and the Defense Regulations made thereunder the area of lawful detention had been greatly widened. But if the application for the writ is successful, and it has been shown that the cause of detention is illegal, the writ will be enforced against the executive so far as the court can do so. We have already seen the remarkable example of this in *Wolfe Tone's* case (1798). Further examples of the issue of the writ may be given. It has been used to free slaves: *Sommersett's* case; to question extradition proceedings: *De Denko v. Home Secretary;* to question the imprisonment of persons by order of the House of Commons: *The Case of the Sheriff of Middlesex;* and to release a young lady who had been committed by the Vice-Chancellor of Cambridge University to a local prison known as the Spinning House for 'walking in the streets with a member of the University': *Ex p. Daisy Hopkins.*"[38]

6. *The writ itself never suspended*

It is not to be lost sight of either that the writ of *habeas corpus* itself is never suspended, but only the privilege of the writ. The Constitution is quite explicit on the matter. It states: "The privilege of the writ of *habeas corpus* shall not be suspended except in cases of invasion, insurrection, rebellion or imminent danger thereof, when the public safety requires it."[39] Its suspension then does not preclude the courts from issuing the writ itself when appropriately invoked by parties as to whom the privilege subsists. On at least three occasions, it was suspended in this jurisdiction. The first occurred on January 31, 1905 when, in an Executive Order, No. 6 of the then Governor General Luke E. Wright,

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[38] *Ibid.*, 108-109. Wolfe Tone is reported in 27 St. Tr. 614; Sommersett in 20 St. Tr. 1 (1772); De Denko in A. C. 654 (1959); The Sheriff of Middlesex in 11 A and E 273 (1840) and Daisy Hopkins in 61 L.J.Q.B. 240 (1891).

[39] CONST., art. IV, sec. 15. The 1935 Constitution was more restrictive, as imminent danger was not one of the grounds, and there are further limitations as to place and as to time, as shown by the last clause, "whenever during such period the necessity for such suspension shall exist." 1935 CONST., art. III, sec 1, par. 14. In the clause empowering the President to suspend the privilege of the writ, one of the grounds is "imminent danger of invasion, insurrection or rebellion," 1935 CONST., are. VII, sec. 10, par. 2. Under the present Constitution, it is the Prime Minister who has that power. *Cf.* Art IX, sec. 12.

the privilege of the writ was suspended in the provinces of Cavite and Batangas.[40] The next time was on October 22, 1950, when the then President Elpidio Quirino issued Proclamation No. 210 suspending the privilege of the writ.[41] The last occasion was on August 21, 1971, when President Ferdinand E. Marcos issued Proclamation No. 889.[42] It was therein provided that the privilege of the writ of *habeas corpus* was suspended "for the persons presently detained, as well as others who may be hereafter similarly detained for the crimes of insurrection or rebellion, and all other crimes and offenses committed by them in furtherance or on the occasion thereof, or incident thereto, or in connection therewith."[43] Subsequently, on August 30, 1971, there was a modification as to the persons included in the suspension by referring to those "presently detained as well as all others who may be hereafter similarly detained for the crimes of insurrection or rebellion and other overt acts committed by them in furtherance thereof."[44]

To restate the cardinal principle: The suspension of the privilege is not a bar to the invocation of this writ by a party not thereby affected. The language of the leading *Ex parte Milligan* decision[45] cannot be any clearer. Thus: "The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the Court decides whether the party applying is denied the right of proceeding any further with it."[46] Due note was taken in the recent case of *Smith v. Bennett*[47] of the power to suspend the privilege, but placed in the context of its value in the cause of freedom. As put by Justice Clark: "Ever since the Magna Charta, man's greatest right — personal liberty — has been guaranteed, and the procedures of the Habeas Corpus Act of 1679 gave to every Englishman a prompt and effective remedy for testing the legality of his imprisonment. Considered by the Founders as the highest safeguard of liberty, it was

[40] Barcelon v. Baker, 5 Phil. 87 (1905). It should not escape attention that the last paragraph of Executive Order No. 6 reads: "In the interest of public safety, it is hereby ordered that the writ of *habeas corpus* is from this date suspended in the Provinces of Cavite and Batangas." It cannot be construed as suspending the writ itself for in Section 5 of the Philippine Bill of 1902 there is this specific limitation: "That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President or by the Governor, with the approval of the Philippine Commission, wherever during such period the necessity for such suspension shall exist."

[41] Montenegro v. Castañeda, G.R. No. L-4221, August 30, 1952, 91 Phil. 882 (1952).

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

[43] *Ibid.*, 455.

[44] *Ibid.*, 462.

[45] 4 Wall. 2, 18 L.Ed. 281 (1866).

[46] *Ibid.*, 131-132.

[47] 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed. 2d 39 (1961).

written into the Constitution of the United States that its 'privilege * * * shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.' Art. I, Sec. 9. Its principle is embedded in the fundamental law of 47 of our States. It has long been available in the federal courts to indigent prisoners of both the State and Federal Governments to test the validity of their detention. Over the centuries it has been the common law world's 'freedom writ' by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free. We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired,' Bowen v. Johnton, 306 US 19, 26, 83 L ed 455, 461, 59 S Ct 442 (1939), and unsuspended, save only in the cases specified in our Constitution."[48] That is insofar as the Federal Constitution of the United States is concerned. The 1876 Constitution of Texas has a similar provision. Thus: "The writ of habeas corpus is a writ of right, and shall never be suspended. The legislature shall enact laws to render the remedy speedy and effectual."[49] In four States, Alabama, Arizona, North Carolina and West Virginia, the fundamental law provides that the privilege of the writ of *habeas corpus* shall not be suspended.[50] The states of Missouri and Oklahoma are even more emphatic in this respect. As to Missouri: "That the privilege of the writ of habeas corpus shall never be suspended."[51] As to Oklahoma: "The privilege of the writ of habeas corpus shall never be suspended by the authorities of this state."[52]

In keeping with such a fundamental constitutional principle, the Supreme Court thus ruled in Aquino, to quote anew from the language of Chief Justice Makalintal, that what is suspended is the "privilege with respect to persons arrested or detained for acts related to the basic objective of the proclamation, which is to suppress invasion, insurrection, or rebellion, or to safeguard public safety against imminent danger thereof. The preservation of society and national survival take precedence."[53] There is no suspension of the writ itself. Whenever a case of unlawful deprivation of freedom presents itself and the petitioner is not included among those as to whom the privilege is suspended, he can avail himself of this writ of liberty. Thus, to speak of *habeas corpus* petitions in the Second Division of the Supreme Court from the date of its creation on November

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[48] *Ibid.*, 712-713.

[49] Art. I, sec. 12.

[50] *Cf.* ALABAMA CONST., art. I, sec. 17, ARIZONA CONST., art. II, sec. 14; NORTH CAROLINA CONST., art. I, sec. 21 and WEST VIRGINIA CONST., art III, sec. 4.

[51] Art. I, sec. 12.

[52] Art. I, sec 10.

[53] Aquino v. Enrile, G.R. No. L-35546, September 17, 1974, 59 SCRA 183, 242 (1974).

26, 1973, starting from *Formoso v. Lao*,[54] there were thirty-nine filed. The last writ was issued in *Olaes v. Olaez*,[55] only this morning.

7. *Petitions for habeas corpus during period of martial rule classified*

A classification of the petitions for *habeas corpus* during the period of martial rule may now be attempted. To repeat, no question arises where the party applying or the person in whose behalf it is made is not among those as to whom the privilege has been suspended. In general, they may fall under either of two main categories. One exists where no connection with the military is discernible. It is quite obvious that the regime of martial law is of no moment in such cases. It suffices that there is illegal restraint, a detention for causes other than those recognized by law. The party respondent may be a public official or a private citizen. Whoever he may be, he is called upon to produce the person deprived of freedom in court and to justify, if he can, such custody. The other instance, of more serious concern is traceable to an order of the armed forces. What is of significance is that the individual who suffers a loss of liberty is outside of the terms of the proclamation of martial law. Nonetheless, for reasons best known to the defense establishment, it is deemed proper to detain him. Under such circumstances, because there is no suspension of the privilege as to him, resort to *habeas corpus* is clearly appropriate.

8. *Petitions for habeas corpus where no connection with the military shown*

It does happen, with or without the existence of martial rule, that a person, especially a minor, may be kept away from the party who has the right to his custody under the law. Thus the Supreme Court has been appealed to in quite a number of applications of one parent seeking to wrest from the other the custody of a child[56] or of the spouses with the same objective against a third party.[57] There is one where the respondent was the grandmother.[58] There is still another where the parent sought the return of a minor daughter allegedly held under confinement by those named individuals, one of whom as it turned out from the return to the petition was the man with whom she eloped and whom she married.[59] Petitions of this character are usually referred either to a Juvenile and

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[54] G.R. No. L-37850.

[55] G.R. No. L-40942.

[56] *Cf.* Formoso v. Reyes Lao, G.R. No. L-38750; Mangubat v. Duque Pulanan, G.R. No. L-38065; Bumatay v. Uytiaco, G.R. No. L-38073; Gomez-Sotelo v. Sotelo, G.R. No. L-38098; Macapagal-Gabriel v. Gabriel, G.R. No. L-38473; Caducio v. Caducio, G.R. No. L-38584; Sychinggiok v. Sychinggiok, G.R. No. L-38601.

[57] *Cf.* Caimoy v. Lacap, G.R. No. L-38580 and Abdun v. Abdun, G.R. No. L-38671.

[58] Malonda v. Macaraig, G.R. No. L-38389.

[59] Dizon v. Mijares, G.R. No. L-40838.

Domestic Relations tribunal or a court of first instance at the place where the minor was alleged to be taken.

The respondents in this category of applications for the writ may be public officials but not connected with the military. In one case, the detention for a week was alleged by petitioners without any valid complaint or information and without a warrant of arrest.[60] In another, the existence of a warrant was admitted, but it was claimed that there was no examination under oath of the complainant or any of his witnesses.[61] In a third, the grievance set forth was confinement after the promulgation of the decision but before judgment had become final.[62] So it was likewise when the writ was invoked by a party denied bail on the erroneous assumption that the decision had become executory even after the appeal had been perfected.[63] There was a petition challenging the validity of an order penalizing a party for contempt.[64] Some Justices of the Court of Appeals were named respondents by a former stenographer who was ordered detained for his stubborn refusal to transcribe his notes.[65] There was likewise an application directed against the Commissioner of Immigration by an alien subject to deportation but still under custody because of the inability to have him sent to his former place of residence.[66]

9. *Petitions for habeas corpus where respondent is a military official*

There is certainly a greater significance attached to a *habeas corpus* application when the respondent is a military official. Even with the announced policy by the President to limit cases of preventive detention only when a connection with the insurrection is shown, still the probabilities are that its implementation, especially in places far from Manila, may result in the oppressive exercise of state authority. The remedy usually availed of in case of such abuses is likely to be supplied by the Executive Department. Nonetheless, the regime of liberty, which martial rule is not intended to supplant but precisely to protect against internal disorder and subversion, could also be assured by a report to the judiciary. This writ is, therefore, even more of the essence. Nor could there be the least objection to the jurisdiction of the court if the petitioner is not included among those as to whom the privilege of the writ had been suspended under Martial Law Proclamation. Through it, instances of illegal and unwarranted confinement may be reduced to the minimum.

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[60] Velasquez v. Aldana, G.R. No. L-38131.

[61] Buico, Comillas, Bautista and Mastajo v. Hon. Gibson Araula, G.R. No. L-38409.

[62] Tecson v. Hon. Rafael Sison, G.R. No. L-39020.

[63] Pamplona v. Hon. Emilio Lanzonas.

[64] Gabun v. Fuentes, UDK-1994.

[65] Aclaracion v. Hon. Magno Gatmaitan.

[66] Go Bon Do v. Hon. Edmundo Reyes, G.R. No. L-38246.

Guillermo v. Alip[67] was one of the earliest applications, filed after martial law. The matter was referred to a court of first instance. It thereafter reported to the Supreme Court that after hearing the petition, the release of the person detained was ordered. Thus the invocation of the writ proved fruitful. The same thing may be said of *Cruz v. Montoya.*[68] Relying on the Constitution, which as pointed out in his petition, "safeguards and enshrines individual freedoms,"[69] Hermogenes Cruz would seek release from his detention in the Constabulary stockade in Camp Vicente Lim, Laguna, under the command of respondent General Alfredo Montoya. His principal allegation was that there was no legal basis for his confinement, there being therefore a denial or deprivation of personal liberty. The petition was filed on December 12, 1974, and on December 13, the Court issued the writ returnable to it not later than December 16, 1974. There was therein a justification for the detention " 'on the basis of sworn complaints that he is engaged in illegal activities which not only delude, defraud, and victimize innocent and poor farmers into believing they would easily acquire title to valuable lands but are of such a nature and attract so many people as to compound critical land problems and cause serious social unrest inimical to the objectives of martial law; * * *.' "[70] The Supreme Court first heard the case on December 16, 1974 with petitioner being produced in compliance with the aforesaid writ and with his counsel moving in open court that he be granted up to Thursday, December 19, 1974 within which to file the reply to the writ. The application was set for hearing anew on December 20, 1974. The reply was a reiteration of his innocence of any crime, pointing out that all he did was to recruit members for an organization, one of the principal objectives of which is the promotion of the Green Revolution program of the administration. The hearing on December 20, 1974 resulted in this resolution: " 'When this case was called for hearing this morning, Atty. Orlando S. Ruiz appeared for the petitioner, while Solicitor General Estelito P. Mendoza, assisted by Assistant Solicitors General Hugo E. Gutierrez and Vicente V. Mondoza, appeared for the respondents. The Solicitor General manifested that he had conferred with counsel for petitioner and had proposed that during the holiday season, petitioner would be given a pass so that he could spend Christmas Day until the 27th of December and New Year's Day until January 2, 1975 in his residence and that thereafter within the first week of January 1975, respondents would either file charges or definitely release petitioner. * * *.' "[71] Thereafter there was a manifestation

[67] G.R. No. L-39761.
[68] G.R. No. L-39823, February 25, 1975, 62 SCRA 543 (1975).
[69] *Ibid.*, 543.
[70] *Ibid.*, 544.
[71] *Ibid.*, 545.

by the Solicitor General that there had been formal charges for estafa filed before the Municipal Court of Antipolo, Rizal, with the warrant having been issued for the arrest of petitioner. The petitioner was given an opportunity to comment on such pleading which likewise sought the dismissal of the petition in view of the charges for estafa having been filed and a warrant for his arrest having been issued. Petitioner was not heard from, the clear implication being that there was no inaccuracy in the manifestation of the Solicitor General. Accordingly, in the opinion of the Court it was set forth: "It would appear therefore that the writ had served its purpose and whatever illegality might have originally infected his detention had been cured. In that sense, his petition has become academic. What is undeniable is that the ordinary civil process of the law is now being followed. The grievance complained of therefore no longer exists. What is more, there is adherence to the basic aim and intent that inform this great writ of liberty which, in the apt language of Justice Malcolm in the landmark case of Villavicencio v. Lukban, "is to inquire into all manner of involuntary restraint as distinguished from voluntary, and to relieve a person therefrom if such restraint is illegal. Any restraint which will preclude freedom of action is sufficient.' This it could accomplish, for as so emphatically stressed by Justice Holmes, it 'cuts through all forms and goes to the very tissue of the structure.' "[72]

An even clearer case of the effectiveness of this great writ of liberty is *Reyes v. Ramos*[73] where right after the hearing, the restraint on liberty was terminated as it was predicated on the alleged commission of estafa which is an offense cognizable by civil courts. *Herrera v. Ponce Enrile*[74] likewise ended on a happy note for petitioner. The illegality imputed to the detention of petitioner was her having circulated four documents, two of which are copies of manifestos on the forthcoming referendum and the third and the fourth pamphlets on the Mindanao troubled situation as well as reproductions of letters written by Archbishop Sin of Manila and other members of the clergy. The petition was filed on February 21, 1975, and on the very same day, "a resolution came from [the Supreme] Court worded thus: 'Considering the allegations of the petition for habeas corpus, the Court Resolved: Let a writ of *habeas corpus* issue, returnable to this

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[72] *Ibid.*, 546. Villavicencio v. Lukban, decided in 1919, is reported in 39 Phil. 778. The excerpt from Justice Holmes comes from Frank v. Mangum, 237 U.S. 309, 346, 35 S.Ct. 582, 59 L.Ed. 969 (1915).

[73] G.R. No. L-40027. The respondent named is the head of the Philippine Constabulary and entrusted with the enforcement of martial law. He was not, however, the detaining officer.

[74] G.R. No. L-40181, February 25, 1975, 62 SCRA 547 (1975). The principal respondent named is the Secretary of National Defense. General Fidel Ramos of the Philippine Constabulary was likewise included. The person actually detaining was the Commanding Officer of the Women's Detention Center in Camp Crame.

Court not later than Monday, February 24, 1975. The respondents are hereby required to file an answer to the petition for *habeas corpus* not later than the aforesaid date and not to move to dismiss the petition. This case is hereby set for hearing on Tuesday, February 25, 1975, at 9:30 a.m.' The writ itself was likewise issued."[75] In the return submitted on February 24, 1975, the emphasis was on her having been released from detention, the contention being that the case therefore had been rendered moot and academic. The concluding paragraph of the special and affirmative defenses interposed reads thus: " 'Upon review of the acts which led to the petitioner's valid arrest and temporary detention and taking into account the spirit behind the amendments embodied in General Order No. 51-A which may, during the free debate period, overlook at least these acts of petitioner in the desire to encourage the people to manifest their true will, it was decided to release the petitioner from custody, which release has, in fact, been effected.' "[76] It was, therefore, the conclusion of the Court: "With the above manifestation, it being shown that respondents had in fact released Trinidad Herrera, this petition for habeas corpus has become moot and academic. No further action need be taken by this Court therefore, as she is no longer under detention."[77] Thus it cannot be denied that the application for the writ was instrumental in securing her liberty.

Then there were two petitions, *Patron v. Commanding Officer*[78] and *Duque v. Vinarao,*[79] which were withdrawn apparently on the belief of the party detained that the military could be persuaded to act favorably on their pleas to be released. There is relevance to this excerpt from the opinion in the latter case: "On February 3, 1975, when the case was called for hearing, petitioner and respondents were duly represented. There was on the part of the Solicitor General, on behalf of respondents, an urgent motion for its transfer, and the case was reset for Wednesday, February 5, 1975. Accordingly, on that day, the matter was duly heard. It was stressed in the hearing, in a remark by Justice Barredo, that in all detention cases by the military, there must be 'specific charges that might be related to national security, otherwise, the protection of freedom will be meaningless.' It was likewise made clear to respondents that even

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[75] *Ibid.*, 549.

[76] *Ibid.*, 550-551.

[77] The cases in support of the above conclusion follow: Tan Me Nio v. Collector of Customs, 34 Phil. 944 (1916); Zagala v. Ilustre, 48 Phil. 282 (1925); Gonzales v. Viola, 61 Phil. 824 (1935); Lino v. Fugoso, 77 Phil. 993 (1947); Camasura v. Provost Marshall, 78 Phil. 142 (1947); Vivo v. Morfe, G.R. No. L-24510, December 18, 1967, 21 SCRA 1309 (1967); Aquino v. Enrile, L-35546, September 17, 1974, 59 SCRA 183 (1974).

[78] G.R. No. L-37083, May 30, 1974, 57 SCRA 229 (1974).

[79] G.R. No. L-40060, March 21, 1975, 63 SCRA 206 (1975).

where the matter is within the competence of military tribunals, on a showing that there is a violation of constitutional rights, the jurisdiction may be deemed as having been ousted. There was, however, a manifestation first made orally and then set forth in writing by petitioner: '[Petitioner], through counsel and to this Honorable Tribunal, respectfully gives notice of his desire to withdraw the above-entitled petition for *habeas corpus,* which was filed because he was then being detained only for vagrancy and prostitution (Article 202, RPC).' "[80] That leaves unaccounted for one other application, *Lasam v. Ponce Enrile,*[81] which is still pending at this date.

10. *Petitions from or on behalf of persons as to whom privilege of the writ has been suspended*

There is still a third category of petitions for *habeas corpus* that are not only allowable but justifiable even when martial law has been declared. Such applications may be filed by or on behalf of individuals as to whom the privilege of the writ has been suspended. Nor is this, I would submit, to contradict the dictum of Chief Justice Makalintal in *Aquino, Jr. v. Ponce Enrile*[82] that "implicit in a state of martial law is the suspension of said privilege with respect to persons arrested or detained for acts related to the basic objective of the proclamation, which is to suppress invasion, insurrection, or rebellion, or to safeguard public safety against imminent danger thereof."[83] As was mentioned earlier, my acceptance of such a view is qualified. A regime of martial rule does not for me go so far as to amount to an automatic denial of the right to this great writ of liberty, even as to such persons as may be detained because of their actual or presumed connection with an insurrection, rebellion, or invasion. For one thing, the validity of the declaration of martial law may itself be tested by resort to this remedy. That is what did occur in connection with Proclamation No. 1081. It is a matter of history that on the very day it was made public, September 23, 1972, two petitions for *habeas corpus* were filed.[84] Two days later, there was docketed a third one.[85] The writs were issued immediately, returnable not later than the afternoon of September 25, 1972, and a hearing was held the next morning. The other petitions that came during the week necessitated another hearing on September 29, 1972. The objective was to assail the constitutionality of such Proclamation. It was not achieved. The ruling of the

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[80] *Ibid.*, 208-209.

[81] G.R. No. L-40181. Here again the respondent named is the Secretary of National Defense.

[82] G.R. No. L-35546, September 17, 1974, 59 SCRA 183 (1974).

[83] *Ibid.*, 242-243.

[84] L-35538, Roces v. Ponce Enrile and L-35539, Diokno v. Ponce Enrile.

[85] L-35540, Soliven v. Ponce Enrile.

Court, as previously indicated, was adverse. Nonetheless, the filing of such petitions did serve a purpose. It rendered clear beyond doubt that even those preventively detained as to whom there was a suspension of the privilege are not precluded from seeking a declaration of invalidity of the institution of martial law by applications for *habeas corpus*.

This approach is followed in more detail in my concurring and dissenting opinion in *Aquino*.[86] There was, after the opening paragraph, a restatement of the importance of this remedy in these words: "We have to pass on habeas corpus petitions. The great writ of liberty is involved. Rightfully, it is latitudinarian in scope. It is wide-ranging and all-embracing in its reach. It can dig deep into the facts to assure that there be no toleration of illegal restraint. Detention must be for a cause recognized by law. The writ imposes on the judiciary the grave responsibility of ascertaining whether a deprivation of physical freedom is warranted. The party who is keeping a person in custody has to produce him in court as soon as possible. What is more, he must justify the action taken. Only if it can be demonstrated that there has been no violation of one's right to liberty will he be absolved from responsibility. Failing that, the confinement must thereby cease."[87]

The "decisive issue," as therein pointed out, is that "of liberty not only because of the nature of the petitions, but also because that is the mandate of the Constitution."[88] Further along this line: "That is its philosophy. It is a regime of liberty to which our people are so deeply and firmly committed. The fate of the individual petitioners hangs in the balance. That is of great concern. What is at stake, however, is more than that — much more. There is a paramount public interest involved. The momentous question is how far in times of stress fidelity can be manifested to the claims of liberty. So it is ordained by the Constitution, and it is the highest law. It must be obeyed. Nor does it make a crucial difference, to my mind, that martial law exists. It may call for a more cautious approach. The simplicity of constitutional fundamentalism may not suffice for the complex problems of the day. Still the duty remains to assure that the supremacy of the Constitution is upheld. Whether in good times or bad, it must be accorded the utmost respect and deference. That is what constitutionalism connotes. It is its distinctive characteristic. Greater restraints may of course be imposed. Detention, to cite the obvious example, is not ruled out under martial law, but even the very proclamation thereof is dependent on public safety making it imperative. The powers, rather expansive, perhaps at times even latitudinarian, allowable

[86] 59 SCRA 183 (1974).
[87] *Ibid.*, 283.
[88] *Ibid.*, 287.

the administration under its aegis, with the consequent diminution of the sphere of liberty, are justified only under the assumption that thereby the beleaguered state is in a better position to protect, defend and preserve itself. They are hardly impressed with the element of permanence. They cannot endure longer than the emergency that called for the Executive having to make use of this extraordinary prerogative. When it is a thing of the past, martial law must be at an end. It has no more reason for being. If its proclamation is open to objection, or its continuance no longer warranted, there is all the more reason, to follow Laski, to respect the traditional limitation of legal authority that freedom demands. With these *habeas corpus* petitions precisely rendering peremptory action by this Court, there is the opportunity for the assessment of liberty considered in concrete social context. With full appreciation then of the complexities of this era of turmoil and disquiet, it can hopefully contribute to the delineation of constitutional boundaries. It may even be able to demonstrate that law can be timeless and yet timely."[89]

Nor did the opinion stop there: "Preventive detention is of course allowable. Individuals who are linked with invasion or rebellion may pose a danger to the public safety. There is nothing inherently unreasonable in their being confined. Moreover, where it is the President himself, as in the case of these petitioners, who personally directed that they be taken in, it is not easy to impute arbitrariness. It may happen though that officers of lesser stature not impressed with the high sense of responsibility would utilize the situation to cause the apprehension of persons without sufficient justification. Certainly it would be, to my mind, to sanction oppressive acts if the validity of such detention cannot be inquired into through *habeas corpus* petitions."[90]

It is likewise my submission that even if the validity of the proclamation is sustained and the doubt is removed as to such individuals having been deprived of the privilege of the writ, still if their preventive detention after an extended period of time may assume a punitive aspect, they may again invoke the writ with the end in view of making out a case of unconstitutional application as to them of such martial law proclamation. If successful, they may be able to regain their liberty. What is more, they may be able to show that circumstances have so changed that the continuance of martial law itself may be tainted with a degree of arbitrariness. Even then, the executive determination is of course impressed with the greatest weight, and ordinary deference must be shown. Nonetheless, and this to my mind is crucial, such an opportunity should not be denied petitioners and *habeas corpus* is the appropriate remedy, the bar of the alleged

[89] *Ibid.*, 287-288.
[90] *Ibid.*, 289-290.

suspension of the privilege as to the persons detained being unavailing under the circumstances.

By way of a conclusion

It is about time that this long, even rambling, discourse should end. To an accusation of an undue prolixity, all I can say is that in view of the implications arising from an application for *habeas corpus* during a regime of martial rule, a detailed discussion was unavoidable. To recognize the problem then is to acknowledge its perplexities. It occurred to me thus to take note of judicial decisions, whether from this jurisdiction or abroad, as well as comparable constitutional provisions, that may prove relevant to this momentous question. It led me to the conclusion that even if there be recognition of the premise that the declaration of martial law results in automatic suspension of the privilege of the writ, for so indeed the Supreme Court did rule, it does not follow that petitions for *habeas corpus* are automatically ruled out. Far from it. So I would submit.

Moreover, nothing is more in keeping with the basic juristic philosophy of Justice Malcolm than to approach the subject from that standpoint. That is to adhere to the fundamental postulate that he so emphatically stressed in his landmark opinion in *Villavicencio v. Lukban*[91] that this writ "was devised and exists as a speedy and effectual remedy to relieve persons from unlawful restraint and as the best and only sufficient defense of personal freedom."[92] No jurist, it only remains to be added, had manifested greater fidelity to the basic concept of liberty. Nor is it to physical freedom alone that he was committed. No one valued more highly intellectual liberty. For him that government is ideal that does not stifle the human spirit but gives it room for expression and creativity, even in times of disquietude. During such period, however, it is the fear of being taken into custody that is truly bothersome. With this remedy thus always available in the event of misuse of governmental power, there could be assurance that rights declared in words would not be lost in reality. Always for him then there was that robust concern for the welfare of every human being. Never did he hesitate to temper legal learning with idealism. Thus he did avoid applying traditional concepts with doctrinaire rigidity. His was a realistic common sense illumined by a genuine passion for justice. I dare say that we do not misrepresent his true essence as a jurist if I assert that it was not for him to be blind to the light of reason which the clouds of a troubled period might obscure. Thus nothing is more evident than that his classic formulation of the significance of the writ of *habeas corpus* still serves a highly useful purpose even during martial rule, if not precisely because of it.

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[91] 39 Phil, 778 (1919).
[92] *Ibid.*, 788-789.