MALCOLM AND THE RULE OF LAW: A STRUCTURED RECOLLECTION

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If this paper turns out to be a testimonial to Malcolm, then it will be merely incidental. Rather, this is more a reminder of our duty of fealty towards "the rule of law".[1]

I. *Biographical Introduction*

George Arthur Malcolm came to the Philippines in 1906 with a law degree from the University of Michigan to become an "American Colonial Careerist". In his own words: "It is possible that I am the only American who deliberately entered the American counterpart of what in other lands would be termed 'the colonial service' for a career."[2]

In 1912, he founded the College of Law of the University of the Philippines and became its first Dean, a position which he held for the next six years.[3] He expected the College of Law to produce graduates who would "become responsible for the destiny of the Republic". In fact, it is said "Dean Malcolm was a dreamer. He saw visions for our people. Where many of his countrymen saw the Filipinos as a conglomeration of semi-civilized tribes, he sensed with the eye of the prophet the rise of the first Malayan Republic. He was fully in sympathy with the Filipino struggle towards ultimate statehood. So he founded the College of Law."[4]

In 1917, President Wilson named him an Associate Justice of the Supreme Court of the Philippines.[5] "From June 13, 1917 to January 20, 1936, Malcolm was an organ of judicial thought, the mouthpiece of judicial temper."[6] In the more than three thousand opinions that he has written in his stay as a magistrate, he enunciated or established doctrines which to this day are cited by the bench in deciding cases, quoted by lawyers in their memoranda and briefs, and resorted to by law professors in expounding fundamental principles of Constitutional law. Like the decisions of Holmes and Cardozo, Malcolm's decisions are couched in a limpid, vigorous and often classic style.[7]

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1 The author considers this prologue necessary to put in proper perspective the reading of this paper.

2 MALCOLM, AMERICAN COLONIAL CAREERIST 7 (1951).

3 *Id.*, p. 8.

4 Abad Santos, *Orations and Response: Malcolm Memorial Service,* 36 PHIL. L.J. 414 (1961).

5 MALCOLM, *op. cit. supra,* note 2.

6 Padilla, *Malcolm in Private Law,* 25 PHIL. L. J. 460 (1950).

7 Francisco, *Justice George A. Malcolm,* 26 LAW J. 35 (1961)

He left the Court shortly after the inauguration of the Commonwealth of the Philippines in January, 1936 to join the staff of the United States High Commissioner to the Philippines. After four years, he left the Philippines to become Attorney General of Puerto Rico from 1940 to 1942.[8]

He returned to the Philippines in 1948 to become a Professorial Lecturer on Legal and Judicial Ethics of the College of Law of the University of the Philippines, a position which he held till 1949.[9]

On June 18, 1955, Republic Act No. 1386 was passed by the Third Congress of the Philippines. It was entitled Honorary Citizen Act — "An Act Adopting the Honorable George A. Malcolm as Son of the Philippines and Conferring Upon Him All the Rights, Privileges and Prerogatives of Philippine Citizenship." The law is quoted hereunder:

> Whereas, the Honorable George A. Malcolm devoted the most fruitful years of his life to the service of the People of the Philippines as Founder and Dean of the College of Law of the University of the Phliippines, as Associate Justice of the Supreme Court of the Philippines from 1917 to 1936, during which period he distinguished himself as the expounder of the fundamental law of the land, and as author of books on the laws and government of the Philippines; and
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> Whereas, it is the sense of the Congress of the Republic of the Philippines, representing the Filipino People, to give due recognition to such priceless services of the Honorable George A. Malcolm: Now, therefore,
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> Be it enacted by the Senate and House of Representatives of the Philippines in Congress Assembled:
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> Section 1. The Honorable George A. Malcolm, of Concord, Michigan, is hereby adopted as son of the Philippines and conferred all the rights, privileges and prerogatives of Philippines citizenship.
>
> Section 2. This Act shall take effect upon its approval.[10]

If this law be the ultimate honor that can be awarded to Dean Malcolm, whom Chief Justice Enrique M. Fernando considers a "jurist, civil libertarian, educator, exemplary public official, inspirer of the youth,"[11] then we have initial reason to assess and analyze his thoughts on "the rule of law" which admittedly is a mere part of his juristic philosophy. And on the occasion of the celebration of the 70th Anniversary of the University of the Philippines College of Law, a study of the founder's contribution to the idea of the rule of law acquires added significance. No intention is made to eulogize him though.

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[8] MALCOLM, *op. cit. supra*, note 2.
[9] MALCOLM, LEGAL AND JUDICIAL ETHICS, Preface (1949).
[10] Rep. Act No. 1386 (1955).
[11] Fernando, *Education for the Law and Training for Leadership in a Democratic Society*, Dedication, 25 PHIL. L. J. (1950). See also CABILDO, APPRAISALS: SKETCHES OF OUTSTANDING PERSONALITIES 75 (1953).

II. *Relevance of the Study*

The recent attempts to demonstrate the enforcement and presence of the rule of law in the Philippines during Martial Law cast doubt as to its adherence during that period and even in the present. Why be defensive?

In the paper submitted by Chief Justice Enrique Fernando to the World Peace Through Law Conference held in Washington, D.C. on October 12-17, 1975 entitled "The Rule of Law Under Martial Rule: The Philippine Experience," he said:

> If there be the feeling, and I am the first to admit that it is not unreasonable, that the introductory portion of this paper suffers from prolixity, permit me to remark that the Philippine situation is rather unique. What we have, in the language of President Marcos, is "constitutional authoritarianism." There is emphasis on the rule of authority, but there is no disregard of the limitations of the Constitution as found in the present and past charters. What is more, martial rule itself under the conditions therein set forth was itself recognized as a mode of coping with emergency conditions. There was need to my mind then, for a fuller understanding of the environmental forces, political, social and legal, that called for its imposition. It is my submission that a dispassionate appraisal of the Philippine experience yields to the conclusion of the observance of the traditional concept of the rule of law. The power the government exercises is traceable to its interpretation of the Constitution and applicable jural norms. There is no obstacle to its acts being challenged in court. It cannot be said, therefore, that under martial rule the Philippines has departed from its long standing tradition of adherence to the rule of law.[12]

President Ferdinand E. Marcos himself tries to justify the presence of the rule of law in the Philippines in this manner:

> Far from using military or summary executive measures to protect public rights or interests, the government repaired to the judiciary to vindicate itself. And to underscore our reliance on legal and judicial processes, I elevated the counsel for the government, the Solicitor General, to full cabinet rank.
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> For it has always been my contention that constitutionalism and the rule of law must prevail and circumscribe our program of reform. All government officials must be subject to law. The people must not be governed by the capricious whims, uncontrolled discretion, or arbitrary will of officials but by regularly enacted laws applicable to both the governors and the governed alike.[13]

As to the present, why are the persistent amendments to the 1973 Constitution necessary and made readily? Is this a realization that "the belief in legitimacy, like the penchant for transcendant metaphysics, is an

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[12] FERNANDO, THE RULE OF LAW UNDER MARTIAL RULE: THE PHILIPPINE EXPERIENCE, 13; For another defense of the presence of rule of law in the Philippines, see also Aad Santos, *The Rule of Law in a Changing Society*, 3 J. INTEG. BAR PHIL. 269 (1975).

[13] MARCOS, HUMAN RIGHTS AND THE RULE OF LAW 36-37 (1977).

ineradicable irrationality of the human experience"[14] and therefore has to be exploited?

On a general plane, criticisms are now levelled on "the rule of law", and this makes an examination of the concept necessary and significant.

> The modern era, presumably replacing the arbitrary rule of men with the objective, impartial rule of law, has not brought any fundamental change in the facts of unequal wealth and unequal power. What was done before — exploiting men and women, sending the young to war, putting troublesome people to dungeons — is still done, except that this no longer appears as the arbitrary action of the feudal lord or the king; it is now invested with the authority of neutral impersonal law. Indeed, because of this impersonality, it becomes possible to do far more injustice to people, with a stronger sanction of legitimacy. The rule of law can be more onerous than the divine right of the King because it was known that the King was really a man, and even in the middle ages it was accepted that the King could not violate natural law. A code of law is more easily deified than a flesh and blood monarch; in the modern era, the positive law takes on the character of natural law.[15]

A sharper and more realistic criticism is expressed thus:

> The idea of a system of law, to which we are asked to give general and undiscriminating support, disguises the difference among various categories of law. We are made aware of our constitutional rights, in the Bill of Rights and other provisions, from the earliest grades in school, with such fanfare and attention as to persuade us that these are the most important parts of the law; when we think of "respect for law" we are likely to think of these benign provisions of law which speak of rights and liberties. But we are told very little — so little as to escape our consciousness quickly — about the vast body of legislation which arranges the wealth of the nation: the tax laws, the appropriations bills, and the enormous structure of law which is designed to maintain the property system as is — and therefore the distribution of wealth as is.[16]

These doubts and criticisms compel a study and exposition of the proper concept of the rule of law. If it is "at most an ideal,"[17] we have to understand it to be able to advocate it — if that is all that can be done. For "it is imperative that we who are engaged in the ministry of law and justice reaffirm with greater fervour our fideltiy and adherence to what has now become a living concept of justice — the Rule of Law."[18]

The ultimate relevance of this paper then is that it is "a plea for the rule of law," understood in the formulation to be suggested later, and to be substantiated if possible by Justice George A. Malcolm's thinking on the various facets of the matter.

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[14] Wolf, *Violence and the Law* in WOLF, THE RULE OF LAW 72 (1971).
[15] Zinn, *The Conspiracy of Law* in WOLF, THE RULE OF LAW 17 (1971).
[16] *Id.* at 24.
[17] Cooperrider, *The Rule of Law and the Judicial Process* in MICHIGAN UNIVERSITY LAW SCHOOL POST-WAR THINKING ABOUT THE RULE OF LAW 513 (1961).
[18] Palma, *A Plea For The Rule of Law*, 3 J. INTEG. BAR PHIL. 180 (1975).

For in the words of Chief Justice Fernando:

> It is quite obvious that for me the old landmarks of the law are still there to serve as guides, that precedents do serve as factors for continuity and stability not to be ignored but also not to be slavishly obeyed. For in constitutional law more than in any other branch of juristic science, much depends on the immediacy and reality of the specific problems to be faced. Hence, it has been truly said in days of crises or emergency, that to stand still is to lose ground. Nonetheless, one has always to reckon with the imponderables and the intangibles, ever so often elusive to one's understanding and disheartening to one's deeply cherished convictions. For he has no choice but to comply as best he can with his duty to decide in accordance with legal norms with roots that go far deeper than his personal preferences and predilections. So it has to be.[19]

III. *Concept of "the Rule of Law"*

At this point, it is imperative that we present the various meanings attached to the concept "rule of law" so that in the end we can adopt a single working definition for this paper against which we shall compare or substantiate with Justice Malcolm's opinions.

Initially, "Constitutionalism" may be equated with the rule of law. The familiar distinction between government by laws and government by men can only be understood by this principle of constitutionality. Except for the divine sort of government which is above both law and lawlessness, Plato employs "the distinction of ruling with law or without law" to divide the various forms of government into two groups. "The principle of law and the absence of law will bisect them all," the Eleatic Stranger says in the *Statesmen*.[20]

In the ordinary meaning of law as an instrument of government, it is difficult to conceive of government by laws without men to make and administer them, or government by men who do not issue general directives which have the character of law. This difficulty is amplified by the statement —

> ... the expression "Rule of Law" is most outrageously elliptical, if it is anything more than metaphor. Law in itself cannot rule or control anything or anybody. Whatever it is, it is a causal factor in any event only because men refer to it as a guide to their conduct. It consists only of ideas, some of which are written down, others of which are not to be found any place in writing, but occur to the trained lawyer or the judge when he studies those which have been written down. Despite this, we habitually speak of the law doing this and the law doing that, as if it were a person or an active force. We speak of rules of law, legal rights and duties as if they were observable facts, as if they had an existence outside the minds of men. This thought pattern, which attempts to make a thing or a person out of a mere thought, easily leads to disillusion; for it is

[19] Concurring opinion of Justice Fernando, Aquino v. Commission on Elections, G.R. No. 40004, January 31, 1975, 62 SCRA 275, 315 (1975).

[20] I THE GREAT IDEAS: A SYNTOPICON OF GREAT BOOKS OF THE WESTERN WORLD 236 (1952) hereinafter referred to as THE GREAT IDEAS.

> quickly recognized that every event which is habitually ascribed to the law is actually the product of the mind, the will and the act of some identifiable human being. It may then be concluded that the importance of the law has been overemphasized. . . .[21]

Concededly, government always involves both laws and men. "But not all governments rest upon the supremacy of law, a supremacy which consists in the quality of all before the law and the predominance of regular law as opposed to arbitrary decision. Nor is all government based upon a law that regulates the officials of government as well as citizens, and determines the legality of official acts, legislative, judicial or executive. That law is, of course, the constitution."[22] This constitutionalism which is equated with the Rule of Law assumes different forms depending upon the constitutional order in question.

Locke makes a distinction between governing by "absolute arbitrary power" and governing by "settled standing laws". It is his contention that "whatever form the commonwealth is under, the ruling power ought to govern by declared and received laws, and not by extemporary dictates and undetermined resolutions, for then mankind will be in a far worse condition than in a state of nature... All the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws, that both the people may know their duty, and be safe and secure within the limits of the law, and the rulers too, kept within their due bounds."[23] As Locke states the distinction between government by laws and government by men, it seems to be identical with the distinction between constitutional and non-constitutional government. In the latter, an individual man invests himself with sovereignty and, as sovereign, puts himself above all human law, being both its source and the arbiter of its legality. Such government is absolute, for nothing limits the power the sovereign man exercises as a prerogative vested in his person. In constitutional government, men are not sovereigns but office-holders, having only a share of the sovereignty. They rule not through de facto power, but through the juridical power which is vested in the office they hold. That power is both created and limited by the law of the constitution which defines the various offices of government.[24] The direct object of the legal state is to confine discretion.[25]

Burin submits that "Constitutionalism is the sovereignty of the legislative power, coupled, however, with a self-limitation of that power requiring it to exercise its sovereignty only by law, plus all such arrangements as keep executive officials and judgments within legal bounds, i.e., limits on administrative and judicial discretion. Not more." He adds: "The bed-

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21 Cooperridier, *op. cit. supra,* note 17 at 507.
22 THE GREAT IDEAS, *op. cit. supra,* note 20.
23 *Ibid.;* See also LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT (1685).
24 *Id.* at 237
25 Hall, *Nulla Poena Sine Lege,* 47 YALE L. J. 181 (1937).

rock of the Rule of Law is the principle of the generality of law. Only if the law is general, addressing itself to an indeterminate number of persons and future situations, can the Rule of Law fulfill its primary, protective role of making calculable the incidence of governmental force. Only then is the individual assured of that essential minimum of personal security which consists in being able so to regulate his own conduct as to avoid exposing himself to suffering in body or goods at the hands of the state.[26] Thus, the maxim "no penalty without a law" presupposes generality.[27]

This definition of "rule of law" as equivalent to "constitutionalism", or "government by law", or "legal state" requires a differentiation of governmental functions. The claim that Montesquieu's separation of powers is indispensable to the Rule of Law has been part of the American "conventional wisdom" ever since John Adams linked the two notions in the Bill of Rights of the Massachusetts Constitution of 1780. The passage reads as follows:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial power shall never exercise the legislative and executive powers, or either of them; to the end of it may be a government of laws and not of men.[28]

While this formulation of the separation of powers doctrine stems clearly from Montesquieu, Adams' phrase "a government of laws and not of men," so Parrington relates,[29] was taken straight from James Harrington's "Oceana." There it is stated:

> It is plain that, where the law is made by one man, there it may be unmade by one man; so that the man is not governed by the law, but the law by the man, which amounts to the government of the man, and not of the law. Where as the law being not to be made but by the many, no man is governed by another, but by that only which is the common interest; by which means, this amounts to a government of laws, and not of men.[30]

Although logically, there is no contradiction between Rule of Law and absolutism, historically and psychologically, rule by law and the concentration in one hand of all public powers have been proven incompatible propositions. It should be noted that "the harsh fact of political life throughout recorded history is that while the impetus towards legitimacy may develop a regime into a constitutional government, the chances are also fair that it could develop into something else, and even worse, a

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[26] Burin, *The Theory of the Rule of Law and the Structure of the Constitutional State,* 15 AM. U. L. REV. 315 (1966).

[27] Hall, *op. cit. supra,* note 25 at 165-193.

[28] Burin, *op. cit. supra,* note 26 at 318.

[29] I PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT 319 (1930).

[30] HARRINGTON, THE ART OF LAWGIVING, PREFACE, OCEANA AND OTHER WORKS, 386; See also I MALCOLM: THE CONSTITUTIONAL LAW OF THE PHILIPPINE ISLANDS 229 (1920).

constitutional government may be transformed into an illiberal regime."[31] Under this separation of powers doctrine is subsumed the independence of the judiciary as a necessity to the rule of law; and also under this doctrine we can accept in a broad sense, Montesquieu's view of the fusion of the legislative and executive as the essence of tyranny.[32]

One of the impressions derived from the maintenance of a body of fixed legal rules which are not subject to arbitrary administration, is that on this basis rests the prestige and power of the administration of justice. "The law is impartial. It has no respect of persons. Just or unjust, wise or foolish, it is the same for all, and for this reason men readily submit to its arbitrament. In the application and enforcement of a fixed and predetermined rule, alike for all and not made for or regarding his own case alone, a man will willingly acquiesce."[33]

As a last feature of "the rule of law" as meaning a constitutional regime, it is stated that it does not deny the "emergency situation". It merely asserts that "a lawful government, although there may be no way of enforcing law against it, maintains its character only in as far as it acts through law and within the framework of the requirements which are implicit in the idea of government of law."[34]

Concomitant with the equivalence of the rule of law and constitutionalism is the idea that the government by laws is a mere historical necessity. This is supported by these reasons. Firstly, sociologically, modern constitutionalism can be defined as the ascendancy of the middle classes over the old monarchic-aristocratic ruling powers, followed by the gradual integration of the popular masses into the political order.[35] Secondly, on the emergence and development of law, it is also said that three stages are undergone: regime of fiat, regime of incomplete legality, and the constitutional regime.[36]

A second basic meaning attached to "the Rule of law" is that ascribed to A. V. Dicey, who popularized the term as it is used today. In his well-known work on "The Law of the Constitution" which first appeared in 1885, Dicey declared that since the Norman conquest, two features had characterized English political institutions. The first of these was the supremacy of the central government, and specifically in modern development, the supremacy of Parliament; the second was "the Rule of Law." To Dicey this second feature had three distinct facets: first, "that no man is punishable or can be lawfully made to suffer in body or goods except

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[31] FERNANDEZ & SISON, PHILIPPINE POLITICAL LAW: CASES AND MATERIALS 12 (1975).

[32] Burin, *op. cit. supra,* note 26 at 317.

[33] SALMOND, SCIENCE OF LEGAL METHOD, THE MODERN LEGAL PHILOSOPHY SERIES lxxxi (1921); See also Cooperrider, *op. cit. supra,* note 17 at 505.

[34] DICKENSON, MY PHILOSOPHY OF LAW 100-101 (1941).

[35] Burin, *op. cit. supra,* note 26 at 313.

[36] FERNANDEZ & SISON, *op. cit. supra,* note 31 at 17-18.

for a distinct breach of law etsablished in the ordinary legal number before the ordinary courts of the land." Therefore "the Rule of Law", according to Dicey, is "contrasted with every system of government based on the exercise by persons in authority by wide arbitrary, or discretionary powers of constraint." Second, the "rule of law" meant that every man was subject to the ordinary law of the land and came within the jurisdiction of the ordinary courts; therefore Dicey vigorously rejected the idea of a separate body of administrative law applied by special tribunals to the conduct of officials ilke the French *Conseil d'Etat.* Third, according to Dicey, the principles of English constitutional law, and especially the rights of individuals, were derived from judicial decisions and not from written constitutions.[37] This concept of the Rule of Law evidently reflects certain constitutional principles of 19th century Britain.[38] Chief Justice Fernando adopted Dicey's formulation in one of his papers — "Rule of Law Under Martial Rule: the Philippine Experience."[39]

A third meaning of the "Rule of Law" was made by apologists of the late Nazi and Fascist regimes. This meaning equates the "Rule of Law" merely with the existence of public order maintained through the systematized application or threat of force by a modern state. In this sense, the Rule of Law exists in every developed state, is not dependent upon any particular ideology, and applies no restraint on official action in relation to individual or groups.[40]

The fourth meaning of the "Rule of Law" is essentially procedural. The following succinct statement by Professor Harry Jones of the Columbia Law School provides a highly satisfactory summary:

> For want of a commonly understood American version of the rule of law, I will hazard my own understanding of the term's connotation in the legal order. The rule of law is a tradition of decision, a tradition embodying at least three indispensable elements: first, that every person whose interests will be affected by a judicial or administrative decision has the right to a meaningful day in court; second, that deciding officers shall be independent in the full sense, free from external direction by political and administrative superiors in the disposition of individual cases and inwardly free from the influence of personal gain and partisan or popular bias; and third, that day-to-day decisions shall be reasoned, rationally justified, in terms that take due account both of the demands of the particular situation. This enumeration does not purport to exhaust the meaning of the "rule of law", doubtless there are other essential attributes to be included in the term's full intention.[41]

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[37] DICEY, THE LAW OF THE CONSTITUTION 183-184 (6th ed. 1902); See also Harvey, *Rule of Law in Historical Perspective* in POST-WAR THINKING ABOUT THE RULE OF LAW 491-492 (1961) hereinafter referred to as Harvey.

[38] Harvey, *id.* at 493.

[39] FERNANDO, *op. cit. supra,* note 12 at 1.

[40] Harvey, *op. cit. supra,* note 37 at 491.

[41] Jones, *The Rule of Law and the Welfare State,* 58 COLUM. L. REV. 143, 145-146 (1958).

The fifth definition of "the Rule of Law" which represents a more pervasive effort to subject government and law to restraints of an axiology deriving its validity from human reason, nature or God, is the most ancient.[42] It was expressed in the thought of ancient Greece as asserted by Aristotle:

> He who commands that law should rule may thus be regarded as commanding that God and reason alone should rule; he who commands that a man should rule adds the character of the beast. Appetite has that character; and high spirit, too, perverts the holders of office, even when they are the best of men. Law may thus be defined as "Reason free from all passion".[43]

This definition acknowledges the fact that there are moral limitations on civil power.[44]

A sixth definition of "the rule of law" is seen in terms of the basic objectives served by the legal order and in turn the values treasured by our society. It is dynamic in character.

> An enlarged conception of national powers adequate to meet human needs at a time when the positive responsibilities and duties of government are receiving new emphasis, increased scrutiny of executive power in the interest of maintaining its subordination to the law-making power, and broadened protection of procedural rights, the freedoms of expression, and the freedom from discrimination — these are the vital elements conspicuous in the current processes of constitutional adjudication. Together they constitute the picture of the kind of society the Supreme Court envisages under our Constitution and which furnishes the values basic to the Rule of Law. It is a free and open society premised on democratic principles, concerned with the supremacy of the law-making power over the executive, committed to freedom and the dignity of the individual and his opportunity for development and expression, and at the same time, responsive to basic human needs.[45]

The last definition or formulation of the rule of law is that adopted on June 18, 1955 by noted jurists and lawyers from various climes and cultures as a declaration of what they believe to be the minimum safeguards to ensure the establishment of the "rule of law" — the *Act of Athens* formulation:

1. The State is subject to the law.
2. The Governments should respect the rights of the individual under the Rule of Law and provide effective means for their enforcement.
3. Judges should be guided by the Rule of Law, protect and enforce it without fear or favour and resist any encroachments by governments or political parties on their independence as judges.

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[42] Harvey, *op. cit. supra*, note 37 at 499.

[43] ARISTOTLE, POLITICS bk III, XVI, sec. 1 (Barker Trans. 1956).

[44] Rhyne, *Law Day — U.S.A. Emphasizing the Supremacy of Law*, 44 A.B.A.J. 313 (1958); Rhyne, *World Peace Through Law: The President's Annual Address*, 44 A.B.A.J. 937 (1958).

[45] Kauper, *The Supreme Court and the Rule of Law in* POST-WAR THINKING ABOUT THE RULE OF LAW 539 (1961).

> 4. Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is accorded a fair trial.[46]

This formulation was reaffirmed by the International Congress of Jurists in New Delhi in January 10, 1959.[47]

For our purpose, it is this last formulation that is taken as the operational definition of the concept "rule of law" for this paper. Its major subdivisions are maintained. This choice is made because despite the varying political structures, economic backgrounds, experiences and traditions in the countries represented in the International Congress of Jurists, they thought these to be the essentials to protect the individual from arbitrary government and to enable him to enjoy the dignity of men. It is not one man's unique definition — but a consensus of the many. While there might be no substantial distinction between "constitutionalism" as defined earlier, and the essence of this *Act of Athens* formulation, the latter defines in concrete terms what is meant of Rule of Law, and even emphasizes the positive duty of the government to respect the rights of the individual — political, social, and economic. The "law" referred to in our chosen formulation is not static but dynamic, close to what former Prime Minister Nehru of India calls the "Rule of Life."

IV. *Framework of Analysis of Malcolm's Insights on the Rule of Law*

It is against the main subdivisions of the Act of Athens formulation of the Rule of Law that we go over Malcolm's works. Can we organize Malcolm's thoughts under this rule of law formulation? To what extent was Malcolm's thinking a harbinger of the Act of Athens? On each main subdivision, which of his opinions were germane? Is Malcolm's idea of the rule of law as comprehensive and extensive as the *Act of Athens* formulation?

V. *Malcolm's Definition of "the Rule of Law"*

For a bird's eyeview of Malcolm's perception of the "rule of law" we turn to one of the books authored by him.[48] In capsule form his idea of the "rule of law" goes:

> A government of laws, and not of men — these words, which, as Rufus Choate so eloquently said, should be spared "in their very rust" as one "would spare the general English of the Bible", were placed in the Declaration of Rights of the Massachusetts Constitution of 1780 as the climax to emphatic negation against one department exercising the powers of

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[46] INTERNATIONAL COMMISSION OF JURISTS, EXECUTIVE ACTION AND THE RULE OF LAW 3 (1962); See also Palma, *op. cit. supra,* note 18 at 181-185.

[47] *Id.* at 4; Reprinted in J. INT'L COMM. JURISTS, Vol. 2, no. 1, pp. 7-18, (Spring-Summer 1959).

[48] I MALCOLM, CONSTITUTIONAL LAW OF THE PHILIPPINE ISLANDS 229-232 (1920).

another — "to the end it may be a government of laws, and not of men." Here is seen not merely the ultimate cause for the separation of the powers but an axiom of representative government, become part and parcel of it.

So long as the imperfection of mankind necessitate the overlordship of commands, obedience to laws must be compelled from all, if free institutions are to continue. No man — no set of men — no party — can wantonly be permitted to set the law at naught. The humblest citizen must realize that he is protected in his rights from the arbitrary will of the highest official. The most powerful man must realize that he has to bow before the majesty of the law. Even a judge of the most exalted court, Mr. Justice Carson has said, is not "above or beyond the law which it is his high office to administer".[49] Attorneys, especially, must even be fearless vindicators of individual rights.

The American government as "has often been observed, is a government of law, and not a government of men."[50]

Mr. Justice Matthews of the Supreme Court of the United States has well said:

When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights of life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those principles of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachussets Bill of Rights, the government of the Commonwealth 'may be a government of laws, and not of men.' For the very idea 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 fredom prevails, as being the essence of slavery itself.[51]

Mr. Justice Miller said in another case:

No man in the country is so high that he is above the law. No officer of the law may set the law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the

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[49] Alzua v. Johnson; 21 Phil. 308, 348 (1912).

[50] Brewer J. in Reagan v. Farmers' Loan and Trust Co. 154 U.S. 362, 38 L. ed. 1014, S. Ct. 1047 (1894).

[51] Yick Wo v. Hopkins 118 U.S. 356, 370, 30 L. ed. 220, 6 S. Ct. 1064 (1886).

> 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.[52]
>
> The government of the Philippine Islands, like its parent, the government of the United States, is a government of laws. In a case in which the court said that the primary question was, "shall the judiciary permit a government of men instead of a government of laws to be set-up in the Philippine Islands?" The emphatic answer was that "the courts will assist in retaining it as a government of laws, and not of men," that no official, however high, is above the law," and that "the Courts are the forum which functionates to safeguard individual liberty and to punish official transgressors.[53]
>
> Shall the government of the Philippine Islands continue as a government of men, or as a government of laws? If a government of men, whatever be decided as to its form, it will fall, as all such governments have fallen. If a government of laws, it is assured of our vital element of success. Let him who loves his country revere its laws, to the end that the Philippines may thrive as a free, happy, and prosperous country.

This general idea of the Rule of Law as rendered by Malcolm can be supplemented by what he said in another book which he co-authored with Maximo Kalaw in 1923:[54]

> Governments may also be divided into constitutional and despotic. A constitutional government is a government in which the power of the officials is limited by a set of rules or laws, called a constitution, agreed upon or freely acquiesced in by the people. It is, in the words of President Wilson, "a government with the consent of the governed." A despotic government is one in which the powers of those who rule are not limited by any constitutional understanding or agreement with the people. Normally, a democratic state must have a constitutional government. Sovereignty being in the people, the people themselves find it convenient to draft a constitution that defines the powers and limitations of those to whom they intrust the power of the government they are establishing.[55]

With this initial sampling of the idea of the Rule of Law from Justice Malcolm, we now turn into a juristic analysis of the relevant cases he penned.

VI. *The Thoughts of Malcolm on the Various Elements of the Rule of Law: A Juristic Analysis*

A. *The State Being Subject to the Law*

Chief Justice Enrique M. Fernando says that "... Justice Malcolm's insistence on the supremacy of law may be characterized as tenacious."[56]

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[52] U.S. v. Lee, 106 U.S. 196, 220, 27 L. ed. 171, 181, I S. Ct. 240 (1882).

[53] Villavicencio v. Lukban 39 Phil. 780, 787 (1919); See also U.S. v. Bull 15 Phil. 7 (1910).

[54] MALCOLM AND KALAW, PHILIPPINE GOVERNMENT: ITS DEVELOPMENT, ORGANIZATION AND FUNCTIONS 5-6 (1923).

[55] *Ibid.*

[56] Fernando, *Malcolm on Judicial Review: Its Relevance Under a Parliamentary Regime,* 49 PHIL. L. J. 438 (1974).

Malcolm has always insisted on the need for law to justify official action. This manifests 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*[57] when the Supreme Court denied the plea for liberty of an alien editor, who after being ordered deported by the Governor General, because 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:

> 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. 30s.) "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 duty of the courts to know the law, we must proceed in our search for those statutes which may authorize the deportation of aliens. 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 the 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 *Martia 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.

It was his conclusion that the Governor-General of the Philippine Islands does not have the power to expel aliens therefrom. He ended his dissent, thus:

> 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.[58]

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[57] Dissenting opinion of Justice Malcolm, 38 Phil. 41 (1918).
[58] 38 Phil. 138, 140, 156 (1919).

Justice Malcolm's *In re McCulloch Dick* dissent was a harbinger of the approach followed in *Villavicencio v. Lukban*,[59] still ranked after all these years as the landmark decision of *habeas corpus*.[60] Speaking in a manner reminiscent of Holmes, he said:

> 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 in this modern epoch of triumphant democracy, yet, after all, the cause presents no great difficulty if there is kept in the forefront of our minds the basic principle 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?[61]

In this case one hundred and seventy women, who had lived in the segregated district of women of ill repute in the city of Manila, were by orders of the mayor of the city of Manila and the chief of police of that city 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. Malcolm then comments:

> 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 depositing by duress these persons from Manila to another district 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 other citizens — to change their domicile from Manila to another locality. On the contrary, Philippine penal law specifically punishes our public officer who, not being expressly authorized by law or regulation, compels any person to change his residence.

He continued:

> Law defines power. Centuries ago Magna Carta 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 be 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 Carta, 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 functionate to safeguard individual liberty and to punish official transgressors. "The

[59] 39 Phil. 778 (1919).
[60] Fernando, *op. cit. supra*, note 57 at 436.
[61] 39 Phil. 780 (1919).

> law", said Justice Miller, delivering the opinion of the Supreme Court of the United States "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.' (*U.S. v. Lee* [1882], 106 U.S. 196, 220). "The very idea", said Justice Matthews of the same high tribunal in another case, "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.)[62]

Both of these previous cases cited, being *habeas corpus* cases, show the supremacy of individual liberties over arbitrary official action. It is likewise worth noting, however, that even where there was no showing of impairment of constitutional rights, Justice Malcolm was insistent that the highest public official — in one case, an actuation of the then Governor-General being put in issue — must even 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 Phliippines, no vague residuum of power should be left to lurk in any of the provisions of the Organic Law." In this case, "constitutionalism" was also emphasized. "It is beyond the power of any branch of the Government of the Philippine Islands to exercise its functions in any other way than that prescribed by the Organic Law or by local laws which conform to the Organic Law. The Governor-General must find his powers and duties in the fundamental law. An Act of the Philippine Legislature must comply with the grant from Congress. The jurisdiction of this court and other courts is derived from the constitutional provisions."[63]

In *Alejandrino v. Quezon,*[64] Justice Malcolm had occasion to reiterate his insistence that the various organs of government function in accordance with law. He said:

> It is beyond the power of any branch of the Government of the Philippine Islands to exercise its functions in any other way than that prescribed by the Organic Law or by local laws which conform to the Organic Law. This was, in effect, our holding in the comparatively recent case of *Concepcion v. Paredes* ([1921], 42 Phil. 599), when we had under particular consideration a legislative attempt to deprive the Chief Executive of his constitutional power of appointment. What was there announced is equally applicable to the instant proceedings.[65]

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[62] *Id.* at 785, 787.
[63] *Government of the Philippine Islands v. Springer,* 50 Phil. 291-292 (1927).
[64] 46 Phil. 83 (1924).
[65] *Id.* at 96-97.

Another means by which law confines the discretion of office holders in government is the allocation of the respective powers of the different branches by the constitution or organic law. The concept of the separation of powers of the different organs of government as a fundamental principle obtains through express division in the constitution. To the government, the Constitution operates as a charter.[66] It prescribes the mode of organization. It allocates functions and distributes power. Justice Malcolm dwells on this in a number of cases. In *Manila Electric Co. v. Pasay Transportation Co.*,[67] he said:

> 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. The Supreme Court and its members should not and cannot be required to exercise any power or to perform any trust or to assume any duty not pertaining to or connected with the administering of judicial functions.[68]

Alejandrino v. Quezon[69] can also be cited again:

> 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.[70]

In *Rubi v. Provincial Board of Mindoro*[71] which was a *habeas corpus* case brought by a cultural minority group against the provincial officials for their confinement in a local reservation allegedly against their will, the matter of separation of powers was also touched: "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."[72] In *Lorenzo v. Director of Health*,[73] Justice Malcolm stated:

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66 FERNANDEZ & SISON, I PHILIPPINE CONSTITUTIONAL LAW 54 (1977).
67 57 Phil. 600 (1933).
68 *Id.* at 605.
69 46 Phil. 83 (1924).
70 *Id.* at 88.
71 39 Phil. 660 (1919).
72 *Id.* at 719.
73 50 Phil. 595 (1927).

> In the case of a statute purporting to have been enacted in the interest of public health, all questions relating to the determination of matters of fact are for the Legislature. If there is a probable basis for sustaining the conclusion reached, its findings are not subject to judicial review. Debatable questions are for the Legislature to decide.[74]

This statement again conveys a limit to operation of the various branches of government vis-a-vis each other based on law.

B. *The Government's Obligation to Respect the Rights of the Individual Under the Rule of Law and Providing Effective Means for Their Enforcement*

It has been said that "as an Associate Justice of the Supreme Court, where he served for twenty years, Malcolm contributed in large measure to the building of Phliippine jurisprudence whereby freedom of speech, liberty of the press, due process of law, individual liberty and other basic rights have become part and parcel of our way of life."[75]

In *U.S. v. Bustos*,[76] the appeal presented the question of whether or not the defendants and appellants are guilty of a libel of a Justice of the Peace for signing affidavits charging him with malfeasance in office and asking for his removal when the Justice of the Peace was subsequently acquitted. As an uncompromising exponent and advocate of freedom of speech, he upheld that freedom here:

> The interest of society and the maintenance of good government demand a full discussion of public affairs. Complete liberty to comment on the conduct of public men is a scalpel in the case of free speech. The sharp incision of its probe relieves the abscesses of officialdom. Men in public life may suffer under a hostile and unjust accusation; the wound can be assuaged with the balm of a clear conscience. A public officer must not be too thin-skinned with reference to comment upon his official acts. Only this can the intelligence and dignity of the individual be exalted. Of course, criticism does not authorize defamation. Nevertheless, as the individual is less than the state, so must criticism be borne for the common good. Rising superior to any official or set of officials, to the Chief Executive, to the Legislature, to the Judiciary — to any or all the agencies of government — public opinion should be the constant source of liberty and democracy.
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> The guaranties of free speech and a free press include the right to criticize judicial conduct. The administration of the law is a matter of a vital public concern. Whether the law is wisely or badly enforced is, therefore, a fit subject for proper comment. If the people cannot criticize a justice of the peace or a judge the same as any other public office, public opinion will be effectively muzzled. Attempted terrorization of public opinion on the part of the judiciary would be a tyranny of the basest sort. The sword of Damocles in the hands of a judge does not hang suspended over the

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[74] *Id.* at 597.

[75] Ozaeta, *Orations and Response: Malcolm Memorial Service*, 36 PHIL. L. J. 421 (1961).

[76] 37 Phil. 731 (1918).

> individual who dares to assert his prerogative as a citizen and to stand up bravely before any official. On the contrary, it is a duty which everyone owes to society or to the State to assist in the investigation of any alleged misconduct. It is further the duty of all who know of any official dereliction on the part of the magistrate or the wrongful act of any public officer to bring the facts to the notice of those whose duty it is to inquire into and punish them. In the words of Mr. Justice Gaynor, who contributed so largely to the law of libel, "The people are not obliged to speak of the conduct of their officials in whispers or with bated breath in a free government, but only in a despotism." (Howard v. Barlow [1906], 113 App. Div. N.Y. 510)"[77]

In *U.S. v. Perfecto,*[78] Justice Malcolm held that an enlightened public opinion in the Philippines is a supreme need. He said:

> The motives of the management of *La Nacion* in publishing the article headed, "Employees of Bureau of Commerce and Industry Unjustly Exploited," have been explained by counsel in his able brief. He invites attention in the first place to the fact that *La Nacion* is the official organ of the Partido Democrata, which is the opposition party in the Philippines. Obviously, one of the plain duties of the minority party is to ferret out corruption in administration and to throw upon it the searchlight of public opinion....
>
> The development of an informed public opinion in the Philippines can certainly not be brought about by the constant prosecution of those citizens who have the courage to denounce the maladministration of public affairs. The time of prosecuting officers could be better served, in bringing to stern account the many who profit by the vices of the country, than by prosecution which amounts to persecution of the few who are helping to make, what the country so much needs, an enlightened public opinion. Accordingly, it is again for the appellate court to vindicate a defendant editor.[79]

On the right to due process of law, Justice Malcolm was outspoken in the following cases. In *Kwong Sing v. The City of Manila,*[80] the validity of a City of Manila Ordinance requiring receipts in duplicate in English and Spanish duly signed showing the kind and number of articles delivered by laundries and dyeing and clearing establishments, was at issue. He said:

> Chinese laundrymen are here the protestants. Their rights, however, are not less because they may be Chinese aliens. The life, liberty, or property of these persons cannot be taken without due process of law; they are entitled to the equal protection of the laws without regard to their race; and treaty rights, as effectuated between the United States and China, must be accorded them.[81]

In *Rubi v. The Provincial Board of Mindoro*[82] which we had already occasion to cite in this paper, Justice Malcolm expounds on his thinking about due process of law.

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[77] *Id.* at 739-742.
[78] 43 Phil. 225 (1922).
[79] *Id.* at 229, 232.
[80] 41 Phil. 103 (1920).
[81] *Id.* at 108.
[82] 39 Phil. 660 (1919).

> None of the rights of the citizen can be taken away except by due process of law. Daniel Webster, in the course of the argument in the *Dartmouth College Case* before the United States Supreme Court, since a classic in forensic literature, said that the meaning of "due process of law" is that "every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society." To constitute "due process of law" as has been often held, a judicial proceeding is not always necessary.
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> In some instances, even a hearing and notice are not requisite, a rule which is especially true where much must be left to the discretion of the administrative officers in applying a law to particular cases. (See McGehee, Due Process of Law, p. 371). Neither is due process a stationary and blind sentinel of liberty. "Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." (Hurtado v. California [1883] 110 U.S. 516) "Due Process of Law" means simply "first, that there shall be a law prescribed in harmony with the general powers of the legislative department of the Government; second, that this law shall be reasonable in its operation; third, that it shall be enforced according to the regular methods of procedure prescribed; and fourth, that it shall be applicable alike to all the citizens of the state or to all of a class." (*U.S. v. Ling Su Fan.* [1908] 10 Phil. 104, affirmed on appeal to the United States Supreme Court.) "What is due process of law depends on circumstances. It varies with the subject-matter and necessities of the situation. (*Moyer v. Peabody* (1909) 212 U.S. 82)[83]

In connection with his definition of due process of law in this case of *Rubi,* Justice Malcolm shares his thinking on liberty.

> One thought which runs through all these different conceptions of liberty is plainly apparent. It is this: "Liberty" as understood in democracies, is not license; it is "liberty regulated by law." Implied in the term is restraint by law for the good of the individual and for the greater good of the peace and order of society and the general well-being. No man can do exactly as he pleases. Every man must renounce unbridled license. The right of the individual is necessarily subject to reasonable restraint by general law for the common good. Whenever and wherever the natural rights of citizens would, if exercised without restraint, deprive other citizens of rights which are also and equally natural, such assumed rights must yield to the regulation of law. The liberty of the citizen may be restrained in the interest of the public health, or of the public order and safety, or otherwise within the proper scope of police power. (See *Hall v.* Geiger-Jones [1916], 242 U.S. 539; *Hardie Tynes Manufacturing Co. v. Cruz* [1914] 189 Ala. 66).[84]

In *Cornejo v. Gabriel,*[85] a suspended municipal president seeks by proceedings for mandamus to have the provincial officials be restrained from investigating him and to have him returned to office. Justice Malcolm again had opportunity to substantiate due process.

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[83] *Id.* at 706-707.
[84] *Ibid.*
[85] 41 Phil. 188 (1920).

> So much has been written on the subject of due process of law that it would be futile to enter into its intricate mazes. It is self-evident, however, that in ordinary cases to condemn without a hearing violates the due process of law clause of the American Constitution and of the Bill of Rights. It is for this reason we can well understand the logic of those who cling to this thought and to whom a contemplated violation of the Constitution is most repugnant. It is but fair, in ordinary cases, that a public official should not be removed or suspended without notice, charges, a trial, and an opportunity for explanation. But not permitting our judgment to be unduly swayed by sympathy for the petitioner's brave fight, and recalling again that the courts have ordinarily to give effect to legislative purposes, it is further only fair to mention certain exceptions to the due process of law rule, which would seem to include the instant case.[86]

In *Smith, Bell & Company v. Natividad,*[87] the question of due process again came in:

> We are inclined to the view that while Smith, Bell & Co., Ltd., a corporation having alien stockholders, is entitled to the protection afforded by the due process of law and equal protection of the laws clause of the Philippine Bill of Rights, nevertheless, Act No. 2761 of the Philippine Legislature, in denying to corporations such as Smith, Bell and Co., Ltd., the right to register vessels in coastwise trade, does not belong to that vicious species of class legislation which must always be condemned, but does fall within authorized exceptions, notably, within the purview of the police power, and so does not offend against the constitutional provision.[88]

Also noteworthy to substantiate Malcolm's ideas under the government's obligation to respect the rights of the individual under the rule of law are his "ponencias" dealing with the rights of persons involved in a litigation.

In *People v. Avanceña,*[89] Malcolm had occasion to speak on the rights of a person accused of a crime. He said:

> It is well known that the constitutional rights guaranteed to accused persons are of two classes, the first being those rights in which the State, that is the public, is interested as well as the accused and which, therefore, may not be waived by the accused, and the second being those rights in the nature of personal privileges which the accused may waive. It has often been decided by the United States Supreme Court and this Court that rights creating a personal privilege under constitutional or statutory authority may be renounced by the accused. In this category are the provisions against self-incrimination, for a speedy trial, providing for the confrontation of witnesses against double jeopardy, relating to unreasonable searches and seizures, providing for the enjoyment of the right to be represented by counsel, establishing the right to trial by jury in criminal cases, providing for a preliminary examination, and finally, the recognition

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[86] *Id.* at 193.
[87] 40 Phil. 136 (1919).
[88] *Id.* at 150.
[89] 42 O.G. 713.

> of the principle that a party charged with a crime has no natural or inalienable right to a postponement of the trial. (*U.S. v. Gill*, 1931, 55 Fed. 2d. S., 399; wherein the Federal cases are summarized; *U.S. v. Escalante*, 1917, 36 Phil. 743; *U.S. v. Anastacio*, 1906, 6 Phil. 413; *U.S. v. Ramirez*, 1919, 39 Phil. 738; *U.S. v. Marfori*, 1916, 35 Phil. 666; *U.S. v. Rota*, 1907, 9 Phil. 426). Moreover, in both *Diaz v. United States, supra*, and *People v. Francisco, supra*, it was held that an accused may waive his right to be present at the trial except at those stages where his presence is indispensable....
>
> With all that is said in the majority opinion about the sanctity of constitutional rights, I am in complete accord. Undoubtedly the greatest single blessing brought by the American administration to the Philippines has been the Magna Charta of human liberty. But the expression of beautiful theories should not blind us to stark realities. In the words of Chief Justice Waite in *Reynolds v. United States*, 1878, 98 U.S. 145, "The constitution does not guarantee an accused person against the legitimate consequences of his own lawful acts." Or as Judge Cooley, justly renowned for his erudition in constitutional law, puts it in his decision in *People v. Murray*, 1883, 52 Mich. 288, "this court cannot relieve a party from a criminal conviction because of his own voluntary action on the trial. * * * I shall always be ready to preserve in its integrity every constitutional right; but I do not understand that the Constitution is an instrument to play fast and loose with in criminal cases any more than in any other. * * *" In other words, the Organic Act and the statute guarantee to the accused the right to be present at every stage of the trial but this guaranty was never intended to include the right voluntarily to stay away from the trial although suitably informed and then by complaint of his own absence to take advantage thereof to secure a mistrial.[90]

In the case of *Villaflor v. Summers*[91] which involves the issue of the right against self-incrimination, Malcolm had this to say about the refusal of a woman defendant in an adultery case to submit her body to examination:

> Obviously a stirring plea can be made showing that under the due process of law clause of the Constitution every person has a natural and inherent right to the possession and control of his own body. It is extremely abhorrent to one's sense of decency and propriety to have to decide such inviolability of the person, particularly of a woman, can be invaded by exposure to another's gaze. As Mr. Justice Gray in *Union Pacific Railway Co. vs. Botsford* (1891), 141 U.S., 259, said, "to compel one, and especially, a woman, to lay bare the body, or to submit to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass." Conceded, and yet, as well suggested by the same court, even superior to the complete immunity of a person to be let alone is the interest which the public has in the orderly administration of justice. Unfortunately, all too frequently the modesty of witnesses is shocked by forcing them to answer, without any mental evasion, questions which are put to them; and such a tendency to degrade the witness in public estimation does not exempt him from the duty of disclosure. Between a sacrifice of the ascertainment of truth to personal considerations, between

[90] 42 O.G. 713.
[91] 41 Phil. 62 (1920).

> a disregard of the public welfare for refined notions of delicacy, law and justice cannot hesitate.
>
> Fully conscious that we are resolving a most extreme case in a sense, which on first impression is a shock to one's sensibilities, we must nevertheless enforce the constitutional provision in this jurisdiction in accord with the policy and reason thereof, undeterred by merely sentimental influences. Once again we lay down the rule that the constitutional guaranty, that no person shall be compelled in any criminal case to be a witness against himself, is limited to a prohibition against compulsory testimonial self-incrimination. The corollary to the proposition is that, an ocular inspection of the body of the accused is permissible.[92]

Justice Malcolm had also occasion to talk about the requisites for a valid search warrant in the case of *People v. Rubio*.[93] There he said:

> The point made in the first error was not originally pressed upon the trial court, and is plainly without merit. The requirements of the law were substantially, and even literally, complied with in this case. Appellant's contention that the search warrant was issued without the complaints or any witnesses having been examined, is untenable. The depositions speak for themselves. It is also contended that the application and the warrant did not particularly describe the things to be seized. The verified statements of the two internal revenue agents and the warrant issued by the Court of First Instance of Manila all describe the property sought to be seized as "fraudulent books, invoices and records." While it is true that the property to be seized under a warrant must be particularly described therein and no other property can be taken thereunder, yet the description is required to be specific only insofar as the circumstances will ordinarily allow. It has been held that, where, by the nature of the goods to be seized, their description must be rather general, it is not required that a technical description be given, as this would mean that no warrant could issue. Appellant has not shown that the internal revenue agents exceeded their powers under the warrant by seizing property other than that described in the warrant in question. The list of books, invoices, and records seized by said officers is the best evidence to show that they strictly obeyed the command of their warrant by seizing those things, and only those described in the search warrant.[94]

The right of the accused to a speedy and public trial was frequently asserted by Justice Malcolm. In the case of *Conde v. The Acting Provincial Fiscal of Tayabas*,[95] he said:

> We lay down the legal proposition that, where a prosecuting officer, without good cause, secures postponements of the trial of a defendant against his protest beyond a reasonable period of time, as in this instance for more than a year, the accused is entitled to relief by a proceeding in mandamus to compel a dismissal of the information, or if he be restrained of his liberty, by *habeas corpus* to obtain his freedom. (16 C.J. 439 *et seq.; In the matter of Ford,* 1911, 160 Cal. 334; *U.S. v. Fox,* 1880, 3 Montana, 513. See further our previous decision in *Conde v. the Judge of First*

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92 *Id.* at 69-70.
93 57 Phil. 384 (1932).
94 *Id.* at 389.
95 45 Phil. 650 (1924).

Instance, 14th Judicial District, and the Provincial Fiscal of Tayabas, No. 21236).[96]

In the case of *In re Impeachment of Flordeliza,*[97] Justice Malcolm remarked about the law's delay:

> The purpose of the Philippine legislature in placing section 129 of the Administrative Code and related provisions on the statute books is evident. With the judicial facts before it, the Legislature must have had in mind a forceful method reaching the dockets of the judges by which to spur them on to greater activity. This wise and salutary legislation is now for this Tribunal to vitalize by equally wise and salutary interpretation and enforcement.
>
> Much of the popular criticism of the courts which, it must be frankly admitted, is all too often justified, is based on the law's delay. Congested conditions of court dockets is deplorable and intolerable. It can have no other result than the loss of evidence, the abandonment of cases, and the denial and frequent defeat of justice. It lowers the standards of the courts, and brings them into disrepute.
>
> The statistics relating to the unsatisfactory condition of judicial business in the Philippines are a matter of public knowledge. Said the report of the Special Mission to the Philippines: "The judges in too many courts do not realize the necessity of reaching early and prompt decisions and are too ready to postpone hearings and trials." It is known also, that His Excellency, the Governor-General, and the Secretary of Justice, have given their attention to the subject, and have endeavored by all legitimate means to aid in cleaning up the court dockets. The members of the Supreme Court in an effort to do their part have cheerfully foregone vacations in order to catch up with accumulated legal business. But for the best results to attain, there must be judicial teamwork reaching from the capital to the most remote district, and from the highest to the lowest judicial officer.
>
> One of the proposed canons for a decalogue for the judiciary is this: "The judge must cultivate a capacity for quick decision. Habits of indecision must be sedulously overcome. He must not delay by slothfulness of the capital to the most remote district, and from the highest to the lowest our conformity.[98]

This message is reiterated in the case of *People v. Manguiat and Sangui*[99] Justice Malcolm said:

> Nearly eight years have elapsed since a young orphan girl who had been abducted and raped, and who had gone through harrowing experiences too terrible to describe, came to the courts asking for redress. And did she receive that prompt attention to which all complainants and litigants are entitled? Was there meted out that speedy and impartial justice which is one's by right? This is a glaring example of the breakdown of the administration of the law in the Philippines.[100]

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96 *Id.* at 652.
97 44 Phil. 608 (1923).
98 *Id.* at 615-616.
99 51 Phil. 406 (1928).
100 *Id.* at 408.

To cap our selection of Malcolm's decisions which deal with the second subdivision of our adopted formulation of the rule of law, we cite the case of *Ganaway v. Quillen*[101] where he held that no person shall be imprisoned for non-payment of a debt. He said:

> The "imprisonment for debt" which the framers of constitutions embodying this provisions doubtless had most prominently in mind was imprisonment upon process issuing in civil actions the object and sole purpose of which were the collection of debts. It was to remove the evils incident to the system of taking the debtor's person upon a *capias ad satisfaciendum* that this organic inhibition came primarily to be ordained. But the effect of its ordination has been to establish a public policy much broader in its influence upon legislation and operation upon judicial proceedings than would have sufficed for the eradication of the ills which attended upon the recovery, or attempted recovery, of debts by restraint of the debtor's person. This policy is inimical alike to the incarceration of a debtor as a means of coercing payment, and to his punishment by imprisonment for a failure to pay, at least when such failure results from inability.[102]

C. *The Duty of Judges to be Guided by the Rule of Law, and to Resist any Encroachments by the Government or Political Parties on Their Independence*

Justice Malcolm has been described as a person who "espoused most vigorously the cause of an independent and respectable judiciary. For him an independent judiciary forms the chore of a government set-up along democratic lines. He regards it as the real bulwark for constitutional liberties when these are threatened by scheming bureaucrats and despots in power."[103]

In the case of *Borromeo v. Mariano*,[104] Justice Malcolm asserted that Judges of First Instance are not appointed Judges of First Instance of the Philippine Islands but are appointed to definite judicial districts from which they cannot be transferred without his consent until they either resign, reach the age of retirement, or are removed through impeachment proceedings. His advocacy of an independent judiciary was couched in these classic terms:

> But, certainly, if a judge could be transferred from one district of the Philippine Islands to another, without his consent, it would require no great amount of imagination to conceive how this power could be used to discipline the judge or as an indirect means of removal. A judge, who had, by a decision, incurred the ill-will of an attorney or official, could, by the insistence of the disgruntled party, be removed from one district, demoted, and transferred to another district, at possibly a loss of salary, all without the consent of the judicial officer. The only recourse of the judicial officer who should devise to maintain his self-respect, would be to vacate the office and leave the service.

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101 42 Phil. 805 (1922).
102 *Id.* at 807.
103 Roman, *Malcolm in Public Law*, 25 PHIL. L. J. 453 (1950).
104 41 Phil. 322 1921).

Then in later portion of the decision, he continued:

> The judiciary is one of the co-ordinate branches of the Government. (*Forbes v. Chuoco Tiaco,* 16 Phil. 534; *United States v. Bull,* 15 Phil. 7). Its preservation in its integrity and effectiveness is necessary to the present form of Government.... It is clear... that each department is bound to preserve its own existence if it lives up to the duty imposed upon it as one of the coordinate branches of the government. Whatever a person or entity ought to do or must do in law, it has the power to do. This being true, the judiciary has the power to maintain its existence; and whatever is reasonably necessary to that end, courts may do or order done. But the right to live, if that is all there is of it, is a very small matter. The mere right to breathe does not satisfy ambition or produce results. Therefore, courts have not only the power to maintain their life, but they have also the power to make that existence effective for the purpose for which the judiciary was created. They can, by appropriate means, do all things necessary to preserve and maintain every quality needful to make the judiciary an effective institution of Government. Courts have, therefore, inherent power to preserve their integrity, maintain their dignity and to insure effectiveness in the administration of justice. This is clear; for, if the judiciary may be deprived of any one of its essential attributes, or if any one of them may be seriously weakened by the act of any person or official, then independence disappears and subordination begins. The power to interfere is the power to control, and the power to control is the power to abrogate. The sovereign power has given life to the judiciary and nothing less than the sovereign power can take it away or render it useless. The power to withhold from the courts anything really essential for the administration of justice is the power to control and ultimately to destroy the efficiency of the judiciary. Courts cannot, under their duty to their creator, the sovereign power, permit themselves to be subordinated to any person or official to which their creator did not itself subordinate them.
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> A stirring plea has been made by the learned representative of the Government for a decision which will work for the public welfare. We agree that, under the peculiar conditions existing in the Philippines, it is sometimes well for a judge not to remain indefinitely in a particular district. But it is a far cry from this premise to the use of a method not sanctioned by existing law and savoring of military discipline. Our conception of good judges has been, and is, of men who have a mastery of the principles of law, who discharge their duties in accordance with law, who are permitted to perform the duties of the office undeterred by outside influence, and who are independent and self-respecting human units in a judicial system equal and coordinate to the other two departments of government. We are pleased to think of judges as of the type of the erudite Coke who, three centuries ago, was removed from office because when asked "if in the future he would delay a case at the King's order," replied: "I will do what becomes me as a judge."[105]

Another vigorous reiteration of his zeal for a free and unfettered judiciary is the case of *Concepcion v. Paredes.*[106] There he condemned an attempt at lottery of judicial posts as an uncalled for usurpation of the

[105] *Id.* at 327-328.
[106] 42 Phil. 599 (1921).

legitimate power of appointment of the executive and a direct threat to such a responsibility which must always be a possession of the judiciary if the people's faith in their laws and government is to be maintained. He said:

> Deliberately considered solely as a question of constitutional law, and putting to one side all irrelevant questions of expediency and of motive, we conclude that the power of appointment and confirmation vested by the Organic Act in the Governor-General and the Philippine Senate is usurped by a lottery of judicial offices every five years. An independent and self-respecting judiciary must continue to exist in the Philippines. The orderly course of constitutional government must be maintained.[107]

In *Nicolas v. Alberto,*[108] the question at issue was the legal right of the Governor-General to transfer a justice of the peace of one municipality to another municipality, without the advice and consent of the Philippine Senate. Justice Malcolm held:

> A justice of the peace is placed in a certain municipality by the governor-general, with the advice and consent of the Philippine Senate. The justice of the peace in any other municipality receives his office from the same source. They serve during good behavior. The only method by which either of them can be gotten out of their positions is by removal. When a vacancy in the position of justice of the peace of any given municipality occurs, the vacant office can only be filled by appointment, that is, by the Governor-General, with the advice and consent of the Philippine Senate.
>
> The justice of the peace gets in by appointment. He gets out by removal. There is no halfway in or out method. A transfer of a justice of the peace outside of a municipality to which he was appointed is, in legal effect, a combined removal and oppointment. A forced transfer creates a permanent vacancy. One phase is the transfer which is tantamount to appointment. The removal does not need the consent of the Senate. The appointment does need that consent. What may not be done directly may not be permitted to be done indirectly...

Justice Malcolm adds

> A justice of the peace is a member of the judiciary. The humble occupant of the office of justice of the peace in the most remote and insignificant municipality is entitled to the same measure of respect as any member of the Supreme Court.[109]

Turning now to the essential function of the judiciary, Justice Malcolm declared the Supreme Court to be the guardian of the Constitution. He wrote the following in the case of *Government of the Philippine Islands v. Springer:*[110]

> To the government of the Philippine Islands has been delegated a large degree of autonomy, and the chief exponent of that autonomy in

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107 *Id.* at 607.
108 51 Phil. 370 (1928).
109 *Id.* at 376-377.
110 50 Phil. 259 (1927).

> domestic affairs is the Philippine Legislature. The Governor-General on the other hand is the head of the government and symbolizes American sovereignty. That under such a political system, lines of demarcation between the legislative and the executive departments are difficult to fix, and that attempted encroachments of one on the other way, occur, should not dissuade the Supreme Court, as the guardian of the Constitution from enforcing fundamental principles.[111]

In relation to the power of the Supreme Court, we reiterate *Alejandrino v. Quezon*[112] which we already cited when Justice Malcolm said:

> 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.[113]

But in the exercise of the power of judicial review, Malcolm also stressed the need for caution in its exercise. The matter was put by him in *Rubi v. Provincial Board of Mindoro:*[114]

> 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], 22 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 the 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 the other departments of Government.[115]

In making the courts as progressive and effective a force as other departments, Justice Malcolm makes this advise in the case of *Smith, Bell and Co. v. Natividad:*[116]

> 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. That way they can incline the scales of their decisions in favor of that solution which will most effectively promote the public policy.[117]

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111 *Id.* at 274.
112 46 Phil. 83 (1924).
113 *Id.* at 88.
114 39 Phil. 660 (1919).
115 *Id.* at 719.
116 40 Phil. 136 (1919).
117 *Id.* at 154.

That the courts should however, be adequately protected in the performance of their legitimate function has been the issue in one case penned by Justice Malcolm. In the case of *In re Lozano and Quevedo,*[118] he said:

> The editor and the reporter of a newspaper who published an inaccurate account of the investigation of a Judge of First Instance notwithstanding that the investigation was conducted behind closed doors, and notwithstanding a resolution of the Supreme Court which makes such proceedings confidential in nature, are guilty of contempt of court.
>
> The constitutional guaranty of freedom of speech and press must be protected in its fullest extent. But license or abuse of liberty of the press and of the citizen should not be confused with liberty in its true sense. As important as is the maintenance of an unmuzzled press and the free exercise of the rights of the citizen is the maintenance of the independence of the Judiciary.... The administration of justice and the freedom of the press, though separate and distinct, are equally sacred, and neither should be violated by the other. The right of legitimate publicity must be scrupulously recognized and care taken at all times to avoid impinging upon it. On the other hand, the courts must be permitted to proceed with the disposition of their business in an orderly manner free from outside interference obstructive of their constitutional functions.[119]

D. *The Obligation of Lawyers to Preserve the Independence of their Profession and to Assert the Rights of the Individual Under the Rule of Law*

Justice Malcolm in his book on *Legal and Judicial Ethics*[120] observed: "The Philippines do not need so-called lawyers who are mere parasites on society, who have no ethical standards, and who are a disgrace to a great and noble profession." He also mentions that "one point which is repeatedly emphasized and re-enforced in the ethical summary of an attorney's duties, is that an attorney is obliged to respect the law and defend the law. He should act and advise action only in accordance with the law and due process of law, and not in violation thereof." These statements of Justice Malcolm approximate the obligation of lawyers as rendered under subdivision four of our adopted formulation of the rule of law. Most of the cases penned by him involving lawyers' duties dealt with the ethics of law practice and the morality of a lawyer as a person. One case, though is noteworthy — that of *In Re Francisco.*[121] There he proclaimed in his dissent:

> To punish for direct contempt of the Supreme Court is a jurisdiction to be exercised with scrupulous care. The members of the court sit as prosecutors and as judges. Human sensitiveness to an attorney's unjust aspersions on judicial character may induce too drastic action. It may result in the long run in making of lawyers weak exponents of their client's causes. Respect for the courts can better be obtained by following a calm and impartial course from the bench than by an attempt to compel respect for the judiciary by castising a lawyer for a too vigorous

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118 54 Phil. 801 (1930).
119 *Id.* at 802-803, 807-808.
120 MALCOLM, LEGAL AND JUDICIAL ETHICS 5 (1949).
121 61 Phil. 724 (1935).

> or injudicious exposition of his side of a case. The Philippines needs lawyers of independent thought and courageous bearings, jealous of the interest of their clients and unafraid of any court, high or low, and the courts will do well tolerantly to overlook occasional intemperate language soon to be regretted by the lawyer, which affects in no way the outcome of a case.

He also declared:

> The lawyer possesses the privilege of standing up for his rights even in the face of a hostile court. He owes entire devotion to the interests of his client. His zeal when a case is lost, which he thinks should have been won, may induce intemperate outbursts. Courts will do well charitably to overlook professional improprieties of the moment induced by chagrin at losing a case.[122]

VII. *Conclusion*

For the purpose of setting-up the framework of this paper, we initially posed certain questions. All of them were directed at assessing the correspondence between Justice Malcolm's contributions to the idea of the rule of law, to that of the *Act of Athens* formulation of the concept which we chose to adopt for this paper. From the study of the decisions penned by him and his other pertinent writings made herein, the answer is definite — Malcolm's ideas on the rule of law approximates within certain limits the *Act of Athens* definition. Notable, however, is the lack of emphasis of his writings on the social and economic rights of men, considering that in his time, the safeguarding of civil and political rights was the mainstay of American influence in the Philippines.

The selection and categorization of the cited decisions made by Justice Malcolm to substantiate the four subdivisions of our rule of law concretization was purposeful. For all the best that Justice Malcolm is known for, particularly for his recognized competence in constitutional law, we organized his decisions and writings under a rule of law formulation, without of course claiming an absolute conformity of his thoughts with the *Act of Athens*. As stated at the outset of this paper, Justice Malcolm's contribution to the rule of law concept should serve as a reminder of our duty of fealty towards it.

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[122] *Id.* at 733-734, 731.