THE DECRIMINALIZATION OF LIBEL IS NOT THE WAY[1]

Vicente V. Mendoza [2]

I deeply appreciate the opportunity to state my views on S.B. Nos. 5, 110, 223, 918, and 1403, all of which seek to decriminalize libel either by repealing the provision defining libel as a crime, or by removing the prison term and reducing the penalty for libel to a mere fine. With due recognition of the high purposes which motivated the filing of the bills -- which is to give scope to the constitutional right of expression -- I believe that the way to achieve these goals is not by decriminalizing libel but by making discussions of matters of public concern and criticisms of official conduct privileged, defeasible only by proof of actual malice. This proposal would reform the law with respect to political libel but preserve it with respect to private libel.

The reasons for this are the following.

First. Libel laws are generally regarded as valid exceptions to the constitutional guarantee of freedom of speech, of expression, and of the press. Those advocating the decriminalization of libel claim that there are only 17 states in the United States today which have criminal libel statutes, and that even in those states prosecutions for libel are rare as defamed persons prefer civil suits for damages.[3] The number of states sharply contrasts with the 42 states mentioned by the U.S. Supreme Court in a 1952 decision.[4] But these laws refer to statutes dealing with political, as distinguished from, private, libel. The reason for the decline in the use of criminal libel laws seems to be the fear that they can be used to silence government critics.

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[1] Statement of Former Justice Vicente V. Mendoza before the Senate Committee on Constitutional Amendments, Revision of Codes and Laws at the hearing on S.B. Nos. 5, 110, 223, 918, and 1403 held on February 27, 2008

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[3] Jun Bautista, *Decriminalizing Libel*, Sun Star (Feb. 6, 2008) <wwwsunstar.com.ph>, quoting the Reporters Committee for Freedom of the Press in the U.S.; cf. *Editor of Weekly Indicted for Libel in S. Carolina*, <http://nytimes.com/gstfullpage.ht?res>, quoting Dean Jerome Barron of the George Washington University Law School that the number of states with criminal libel statutes is 18.

[4] Beauharnais v. Illinois, 343 U.S. 250, 96 L.Ed 919 (1952).

But libel often takes the form of sharp personal attacks, and not to treat it as a crime any longer or not to punish it with imprisonment but only with a fine is extreme. It will be to overlook its universal odiousness. Indeed, libel, which goes by such name as calumny, obloquy, epithet, invective, ridicule, and similar other words of art in the lexicon of defamation, is not in any proper sense the communication of ideas protected by the Constitution. It is of the same category as the matters referred to by the U.S. Supreme Court as "the lewd, the obscene, the profane, the insulting or fighting words, those which by their very nature inflict injury and are of such slight social value as a step to truth that any benefit that might be derived from them is clearly outweighed by the social interest in order and morality." For this reason, their prevention and punishment have never been thought to raise any constitutional problem.[5]

Second. It is pointed out that libel laws were enacted in America during the colonial days to provide a peaceful method of settling private quarrels, because pamphleteering, in which the authors maliciously attacked their personal enemies, was common and frequently led to dueling and the consequent breach of the peace.[6] It is claimed that we do not have a similar history, and, by implication, we do not need a criminal libel statute. But our libel law, which is embodied in Arts. 353-364 of the Revised Penal Code, although derived from Act No. 277 of the American colonial government in the Philippines, has never been considered as a mere breach of the peace ordinance but a law for the protection and vindication of private reputation. Libel is in fact classified in the Penal Code as a "crime against honor," rather than as a "crime against the public order."

Third. Libel is a malum in se, that is to say, an offense that is inherently wrong, and not only so because it is prohibited by law (malum prohibitum). It is against the Biblical command "You shall not go about spreading slander among your kinsmen" (Lev. 19:16), and is based on its teaching that "a good name is better than good ointment." (Eccl. 7:1) To paraphrase Shakespeare, who steals my purse, steals rubbish, but he who filches my good name robs me of that which does not enrich him but the loss of which makes me poor indeed. [7]

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[5] *Chaplinsky v. New Hampshire*, 315 U.S. 568 , 571-572, 86 L.Ed. 1031 (1942).
[6] Neal Cruz, *Our Libel Should be Changed?*, Philippine Daily Inquirer (Jan. 28, 2008).
[7] Shakespeare, Othello:

> *Good name in a man and woman, dear my lord*
> *Is the immediate jewels of their souls;*
> *Who steals my purse, steals trash, 'tis something, nothing;*
> *'Twas mine, 'tis his and has been slave to thousands;*
> *But he that filches from me my good name*
> *Robs me of that which not enriches him,*
> *And makes me poor indeed.* [7]
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> (III, iii, 153)

Libel is called character assassination, and, like the other assassination, its perpetration disturbs the public order. It is thus properly the concern of the criminal law, which is to preserve public order and decency and to protect the citizen from what is offensive or injurious.[8] It is wrong to suggest that libel, as a crime, does not represent "legitimate penological interests" and that it is merely a "private offense that can be effectively vindicated by existing civil remedies." [9]

Fourth. The reduction of the penalty for libel to a mere fine may pave the way for the ruination of character, while leaving those who are defamed no effective remedy as civil suits for damages are costly, what with increase in filing fees and the need to hire counsel.

Moreover, fine as the sole penalty for libel is inconsistent with the system of penalties in the Revised Penal Code in which penalties are graduated according to degrees and divided into periods to allow for their individualization according to circumstances (aggravating, mitigating or no attending circumstances), and the degree of participation of the accused (whether as principal, accomplice or accessory).

If the bills under consideration are passed, libel would be the only crime punishable by a fine as a single penalty, whereas, at present it is classified as a "common penalty" and prescribed either in conjunction with principal penalties or as an alternative to them. If it is made a principal penalty, attending circumstances cannot be appreciated and the accused cannot claim the benefit of the Indeterminate Sentence Law, which provides for the release of the convict from prison after service of the minimum term. What is more, sentencing can become arbitrary, since a judge can fix the fine ranging all the way from P200 to P6,000, or whatever amount may be provided for fine.

Fifth. Freedom of expression can be protected without decriminalizing libel. This can be done by amending Arts. 354 and 361 of the Revised Penal Code in order to set forth the following fundamental principles based on the jurisprudence on free speech of our Supreme Court and that of the United States.[10]

First, discussions of matters of public concern and criticisms of official conduct should be considered privileged. They should not be presumed to be

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[8] PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965), 2-7. (The criminal law is concerned with moral principles.).

[9] Jun Bautista, *supra* note 1.

[10] United States v. Bustos, 37 Phil. 731 (1918); Mercado v. Court of First Instance, 116 SCRA 93 (1982); New York Times v. Sullivan, 378 U.S. 754, L.Ed.2d 686 (1964); Garrison v. Louisiana, 379 U.S. 64, 13 L.Ed.2d 125 (1964).

malicious even though they are defamatory, and the defendant should not be held liable unless it is shown that he acted with actual malice.[11]

Second, the burden of showing that the defendant acted with malice should be on the prosecution which must prove (1) that the matter or imputation is false and (2) that the defendant has acted with knowledge of the falsity of the matter in question or with reckless disregard of whether it was false or not.[12]

Third, while the defendant may prove the truth of the matter charged as libelous, he should not be required to do so. If the defendant proves the truth of his imputation he should be acquitted, but if he does not, no adverse implication should be drawn from his failure or refusal to prove the truth of what he has said.

What these proposals amount to is to carve out of the presumption that every defamatory imputation is malicious a new category of privileged matters and to make truth a complete defense for such matters. These would vitalize freedom of speech and of the press without impairing the right to a good reputation and privacy which are equally fundamental.

These proposals may be embodied in the Revised Penal Code by amending Arts. 354 and 361 as follows:

> ART. 354. *Requirement of Publicity AND MALICE.* -- Every defamatory imputation PUBLICLY MADE is presumed to be malicious, even if it be true, if no good intention and justifiable motive for making it be shown, except in the following cases.

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[11] In *United States v Bustos*, 37 Phil. 731 (1918), it was held: "Public policy, the welfare of society, and the orderly administration of the government have demanded the protection of public opinion. The inevitable and incontestable result has been the development and adoption of the doctrine of privilege. Privilege is classified as either absolute or qualified. [A]s to qualified privilege, it is, as the words suggest, a prima facie privilege which may be lost by proof of malice."

[12] In *United States v Bustos, supra*, it was stated: "The onus of proving malice lies on the plaintiff. Falsehood and the absence of probable cause will amount to proof of malice." In the same vein, in *New York Times v Sullivan*, 376 U.S. 754, 11 L.Ed.2d 686 (1964), it was held: "[T]he First Amendment guarantees have consistently refused to recognize an exception for any test of truth, and especially not one that puts the burden of proving truth on the speaker. Erroneous statement is inevitable in free debate and [must] be protected if the freedoms of expression are to have the "breathing space" that they "need [to] survive." [Injury] to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. [I]f neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two is no less inadequate. The constitutional guarantees require a federal rule that prohibits a public official from recovering damages for defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

1. A private communication made by any person to another in the performance of any legal, moral or social duty; [and]

2. A fair and true report made in good faith, without comments or remarks, of judicial, legislative or other official proceedings which are not confidential in nature, or of any statement, report, or speech delivered in said proceedings, or of any other act performed by public officers in the exercise of their functions; AND

3. ANY DISCUSSION OF ANY MATTER OF PUBLIC CONCERN OR CRITICISM OF OFFFICIAL CONDUCT OR THE CONDUCT OF PUBLIC FIGURES, UNLESS SUCH MATTER IS SHOWN BY THE PROSECUTION TO BE FALSE OR TO HAVE BEEN MADE BY THE DEFENDANT KNOWING ITS FALSITY OR WITH RECKLESS DISREGARD OF WHETHER IT IS TRUE OR NOT.

ART. 361. *Proof of the Truth.*—In every criminal prosecution for libel, the truth OF THE IMPUTATION OF THE ACTS OR OMISSION CONSTITUTING THE CRIME may be given in evidence to the court and if it appears that the matter charged as libelous is true, and, moreover, that it was published with good motives and justifiable ends the defendant shall be acquitted.

Proof of the truth of an imputation of an act or omission WHETHER OR not constituting a crime [shall not be admitted unless the imputation is] IF made against Government employees with respect to facts related to the discharge of their official duties MAY BE GIVEN BY THE DEFENDANT TO REBUT EVIDENCE THAT THE DEFAMATORY IMPUTATION WAS MADE BY HIM WITH ACTUAL MALICE.

In sum, what needs to be done is not to decriminalize libel by reducing its penalty to a fine, much less by abolishing libel as a crime because of concerns for freedom of speech and of the press. What needs to be done is to develop a different standard from that applied to ordinary private libel to be applied to political libel. In the realm of political libel, against the risk of occasional error or even falsehood, measure for measure, we should stake our fortunes in doubtful

PHILIPPINE LAW JOURNAL

UNIVERSITY COLLEGE OF LAW OF THE PHILIPPINES 1911

EMERGING PARADIGMS

VOLUME 82 JUNE 2008 NO. 4

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ISSN 0031-7721

PHILIPPINE LAW JOURNAL
Published by the College of Law, University of the Philippines
Diliman, Quezon City, Philippines

VOLUME 82 | JUNE 2008 | NO. 4

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