COURTS AND THE PRESS AS PARTNERS FOR GOOD GOVERNMENT*

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Newspapers and other news media are entitled to our gratitude for keeping us informed of the world around us. I often think of the lonely radio station sending typhoon warnings to fishermen out in the sea and the small provincial newspaper giving farmers information about farms and news of local governments, as exemplifying the great role of civic journalism.

I think of those who, at risk to their lives, expose venalities in the lower levels of the government and those who, with courage, stand up to the village tyrants. No worse argument could have been made in behalf of the Right of Reply Bill than that it would stop the killing of these journalists. When I think of them I think of the role of media in general in our lives, and I thank God for them.

I thank God for the precious gift of freedoms that we enjoy today. Recently, the *Philippine Daily Inquirer* reminded us what it is like to lose the freedom of speech and of the press by putting out its Independence Day issue with a false cover showing the front page with heavy black lines blotting out the news.

The free flow of information is vital to the proper functioning of our government. That is why the press and other media of information are often the object of official restraint, whether by dictators out to seize state powers, or by democrats who seek to control the news in times of emergency in order to save the life of the nation. In effect, they acknowledge the power of the press and its influence in public life.

Others have paid encomium to the press in less unusual terms. For example, the British parliamentarian Edmund Burke pointed to "the fourth estate" yonder in the Reporters' Gallery of the Parliament as actually more influential than the Lords Spiritual, the Lords Temporal, and the Commons in the British system of peerage. From then on, members of the press have been referred to as the fourth estate, mainly through the efforts of the English writer Thomas Carlyle. For his part, Justice Potter Stewart, drawing attention to the words of the First Amendment to the U.S. Constitution, asserted that the press is an unofficial

"fourth branch" of the government, the primary purpose of which is to serve as an additional check on the legislative, executive, and judicial branches.[1]

The constitutional guarantee of press freedom is indeed remarkable. It is included in a list of individual rights, otherwise known as the Bill of Rights. These include the right of association, the freedom of religion and conscience, the right to due process and the equal protection of the laws, and the various rights in criminal proceedings, which are sometimes termed human rights. However more than being an individual right, the freedom of the press is also a guarantee of the rights of an institution or of a particular group of persons engaged in a particular profession. Thus the Constitution reads, "No law shall be passed abridging the freedom of speech, of expression, or of the press."[2]

What is there about the press that it should be mentioned among the guarantees of individual rights in our Constitution? To be sure, we got the phrase "the freedom of speech or of the press" from the First Amendment to the U.S. Constitution which embodies Blackstone's formulation that "the liberty of the press consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published."[3] Blackstone wrote against the background of the English Licensing Act of 1662, which required the submission of manuscripts for review or censorship by the Crown before they could be published, hence his emphasis on the prohibition of prior restraint as constituting the central meaning of press freedom. As the U.S. Supreme Court noted, "The struggle for the freedom of the press was primarily directed against the power of the licenser, ... [and] the prevention of that restraint was a leading purpose for the adoption of the [First Amendment]." Thus, liberty of the press in America signified in the beginning the right to publish "*without* a license what formerly could be published *only* with one."[4]

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[1] *Or of the Press*, 26 HAST. L.J. 631 (1975).

[2] CONST. art. III, § 4.

[3] 4 William Blackstone Commentaries on the Laws of England, *quoted in* GEOFFREY R.STONE ET AL., CONSTITUTIONAL LAW 1075 (1996).

[4] Lovell v. Griffin, 303 U.S. 444 (1938). *See also* Near v. Minnesota, 283 U.S. 697 (1931).

We do not have a similar history of prior restraint or licensing of the press in the Philippines. What there was during the Spanish regime was the total lack of freedom to criticize the government. For this reason, Rizal's great novels, *Noli Me Tangere* and *El Filibusterismo,* and his political writings had to be published in Europe during that period. Indeed, the Propaganda Movement in our history was a demand for press freedom, among other things.

For some time, the prohibition of prior restraint that licensing connotes was considered the principal evil against which the freedom of expression clause of our own Constitution is directed. We followed the Blackstonian definition of "the freedom of speech or of the press" as basically the absence of previous restraint subject to liability for punishment for violation of laws, such as those on libel and national security. As our Supreme Court held in an early case, "The freedom of the press consists in the right to print and publish any statement whatever without subjection to previous censorship of the government. It does not mean immunity from wilful abuses of that freedom."[5]

Later decisions have qualified the statement of this rule. The guarantee against prior restraint does not prohibit the government in times of war or other emergency from prohibiting the publication of matters of national security, such as the sailing dates of transports or the number and the location of troops.[6] I remember that portions of books on the last war by Carlos P. Romulo, which were published in America during the war, were ordered censored apparently because they were deemed a hindrance to the war efforts of the United States. On the other hand, recognition of the power of the government to enforce requirements of decency and national security does not authorize punishment of criticisms of government officials and policies as libel, unless the prosecution proves "actual malice," or as sedition or subversion, unless the publication creates a clear and present danger of substantive evils that the state has a right to prevent.

This is the meaning of "the freedom of speech and of the press" today. The change has been in emphasis rather than in the substance of the constitutional guarantee. Today, we say any system of censorship comes to a court with a very strong presumption of its invalidity,[7] while subsequent punishment must pass the test of strict scrutiny as to its validity and "actual malice" before it can be imposed. Only if a statement is shown to have been made with reckless disregard of whether

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[5] United States v. Sotto, G.R. No. 13990, 38 Phil. 666, Sep. 24, 1918. *See also* United States v. Sedano, G.R. No. 4998, 14 Phil. 33, Oct. 25, 1909.

[6] Near v. Minnesota, 283 U.S. 283 U.S. 697, 715-716 (1931).

[7] Social Weather Stations, Inc. v. COMELEC, G.R. No. 147571, 357 SCRA 496, May 5, 2001; Ayer Productions Pty, Ltd. v. Capulong, G.R. No. 82380, 160 SCRA 861, Apr. 29, 1988; New York Times v. United States, 403 U.S. 713 (1971); Bantam Books v. Sullivan, 372 U.S. 58 (1963).

it is true or not may such statement be punished.[8] On the other hand, in prosecutions for national security offenses, only if it shown that the speech or statement has created a grave and immediate danger to legitimate interests of the state[9] or it constitutes advocacy of the use of force or law violation and directed to inciting or producing imminent lawless action and is likely to produce such results may the speaker or the writer be held liable for his speech or statement.[10] Unless this requirement is satisfied by the state, the press stays protected by the constitutional provision.

Indeed, any law – and it is only Congress which can pass such a law – restricting freedom of speech or of the press is subject to strict scrutiny by the courts to see whether there is a compelling governmental interest to be served before it will be applied. It will be tested for overbreadth to make sure no more is suppressed than is necessary to protect legitimate interests of the state. It will be tested for clarity before it is enforced to make sure it is not so vague that even men of common understanding have to guess at its meaning or differ as to its application. In sum, restrictions on the right of speech and of the press are treated with greater strictness than those imposed on the freedom to make contracts.

So solicitous is the Constitution of the freedom of speech and of the press that some jurists and scholars hold it to be "absolute"[11] or to occupy a "preferred position"[12] in the pantheon of civil liberties. This is because freedom of speech and of the press, above all other liberties, is essential to self-government. To be sure, freedom of speech and of the press performs other functions as well, such as the search for truth and self-fulfilment, but it is valued above all other rights for its role in making self-government possible.

Self-government requires active participation by the people, and it is essential that they are fully informed. An inert and ill-informed people is a hindrance to such government. It is the function of the press to gather the news and to report it so that the people can decide questions of government wisely and decisively.

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[8] Vasquez v. Court of Appeals, G.R. No. 118971, 314 SCRA 460, Sep. 15, 1999, *citing* New York Times v. Sullivan, 376 U.S. 254 (1964).

[9] Abram v. United States, 250 U.S. 616 (1919); Bridges v. California, 314 U.S. 252 (1941); Cabansag v. Fernandez, G.R. No. 8974, 102 Phil. 152, Oct. 18, 1957.

[10] Brandenburg v. Ohio, 395 U.S. 444 (1969); Salonga v. Cruz Pano, G.R. No. 59524, 134 SCRA 438, Feb. 18, 1985.

[11] *See* Konigsberg v. State Bar of California, 366 U.S. 36 (Black, J., dissenting); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

[12] Kovacs v. Cooper, 336 U.S. 77 (1949); Social Weather Stations, Inc. v. COMELEC, G.R. No. 147571, 357 SCRA 496, May 5, 2001.

This is a task that the press is eminently qualified to perform. The press has access to sources of information which it cannot be compelled to disclose. Reporters are trained to ferret out the truth, to separate facts from fiction, and to report them objectively. No other organization can do this as well. For this reason, we look to the press and other media of communication to channel the news to the marketplace.

There are some who say that the marketplace of ideas[13] is an illusory one, because it in theory presupposes a *laissez-faire* of ideas when the fact is that even the economic market for goods does not work that way. It is not a *laissez-faire* of ideas that I mean to advance. I am not opposed to government regulation. I accept the necessity for such regulation for the purpose of making the marketplace a level playing field for the exchange of ideas.[14]

The metaphor of the "marketplace of ideas" is useful for conveying the thought that, unless ideas are given a chance to compete in the open market, their validity can never be tested in our search for political truth. That the strong may dominate the weak in the marketplace or that the market forces may be badly skewed in favor of one faction is a possibility, but that is not an inherent defect of the system, but only an imperfection, that can be corrected. For that matter, we may have many imperfect institutions, but that is not a reason for throwing them away. Instead, we try to correct their imperfections as we go on governing ourselves.

Courts have a common responsibility with the press to keep the marketplace of ideas free. We look to them to keep the lines of communications open and operating by removing any clog or obstruction in them. The clear-and present-danger test, the test of actual malice, the overbreadth and void-for-vagueness doctrines, chilling effect as basis for declaring a statute void, and many ideas that constitute a gloss on the text of the freedom of speech or of the press clause have been the distinctive contributions of the courts to good government.

Imagine then what a powerful combination for good the press and the courts can make. Between them they can keep the government clean. Between them, they can ensure that debate on public issues will be truly "uninhibited, robust, and wide open." Our quest should be for a responsible press and an independent judiciary. For as a great friend has pointed out, the Constitution may give us freedom from governmental censorship of the press, but it cannot

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[13] The metaphor "marketplace of ideas" is from Holmes, J. dissenting opinion in Abrams v. United States, 250 U.S. 616 (1919).

[14] *Compare* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 4-5 (1984).

guarantee to us a responsible press.[15] I may add that the Constitution may guarantee security of tenure, fixity of compensation, and fiscal autonomy to our judges, but it cannot guarantee to us an independent judiciary. The responsibility for achieving the ideals of a fearless, courageous, and responsible press, on the one hand, and a vigilant and independent judiciary, on the other, lies in large measure with the press and the judiciary.

Issues may arise – as they arose in the past – between the courts and the press. That's not to be wondered at, given two equals. There may even be occasions – as there were in the past – when in the performance of their functions the courts and the press may find themselves in a collision course. When that happens, I hope they will ponder what was said half a century ago by one who brought weighty learning to his calling, Felix Frankfurter. He said, "A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither one has primacy over the other; both are indispensable to a free society."

Not only that. The two are likewise indispensable to each other. Justice Frankfurter continued: "Freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. [On the other hand], one of the potent means for assuring judges their independence is a free press."

I am not suggesting that the relation of courts and the press should be a cozy one. Each should be able to point out the speck in the other's eye and in so doing perfect the other. What I am saying is that they should not regard each other as an adversary, each seeing the speck in the other's eye but not the plank in his. The relationship must be that of two proud institutions, respectful of each other's role in bringing about good government in our country. In a word, their relation must be that of two great partners.

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[15] Paul A. Freund, *The Judicial Process in Civil Liberties Cases*, 1975 U. ILL. L. F. 493 (1975).