Freedom of Expression in the Philippine and American Constitutions

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I. CONSTITUTIONAL PROVISIONS

THE Philippine and American constitutions in almost identical language prohibits the passing of any law "abridging the freedom of speech, or of the press".[1] Freedom of expression is thus constitutionally safeguarded from abridgement by the government. A comparison will be here attempted of the scope of this constitutional right as delimited in judicial decisions, both Philippine and American, in the light of the problems to which it gives rise and the goals it is intended to serve.

What is meant by "speech" and "press"—Speech includes any form of oral utterance. Likewise the United States Supreme Court has decided as included in the category such acts as the display of a flag,[2] salute to the flag,[3] and peaceful picketing.[4] The Supreme Court of the Philippines had also decided that peaceful picketing is a form of constitutionally protected speech.[5] The press comprehends every sort of publication: books, periodicals, newspapers, pamphlets, leaflets, hand-bills.[6] The radio, as one of the mass media of communication, is likewise embraced.[7] Motion pictures, like news-

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[1] Section 1, Art. III, par. 8 of the Constitution of the Philippines provides: "No law shall be passed abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances." The first Amendment of the United States Constitution provides: "Congress shall make no law x x x abridging the freedom of speech or of the press x x x." This protection against abridgement by federal action has been extended to state action with the inclusion of freedom of speech and of the press in the "liberty" protected against state action under the Fourteenth Amendment, Gitlow v. New York, 268 U.S. 652 and Near v. Minnesota, 283 U.S. 697.

[2] Stromberg v. California, 283 U.S. 359.

[3] West Virginia State Board of Education v. Barnette, 319 U.S. 624; Taylor v. Mississippi, 319 U.S. 583.

[4] Thornhill v. Alabama, 310 U.S. 88.

[5] Mortera v. Canlubang Sugar Estate G. R. No. L-1340.

[6] Lovell v. City of Griffin, 303 U.S. 444.

[7] Cf. White, L. The American Radio; Santiago v. Far Eastern Broadcasting Co., 40 O. G. 4603.

papers and radio, are now deemed included in the press whose freedom is guaranteed.[8] It is not so as far as the Philippines is concerned.

II. SCOPE OF THE RIGHT

Freedom of speech and of the press, under Philippine and American judicial decisions, is the right to express and thereafter disseminate one's opinions on matters of public concern without previous restraint and without fear of subsequent punishment.[9] It is the constitutional embodiment of a policy in favor of a public discussion of all public questions.

Freedom of speech and of the press thus means something more than the right to approve existing political beliefs or economic arrangements, to applaud public officials and the measures they are taking, to take refuge in the existing climate of opinion on any matter of public consequence. So atrophied, the right becomes meaningless. The right belongs as well, if not more, for those who question, who do not conform, who differ. To paraphrase Justice Holmes, it is freedom for the thought that we hate, no less than for the thought that agrees with us.[10]. The right to criticize and to condemn is therefore within the constitutional protection. Nor need the criticism be couched in language informed, vitriolic, or even scurrilous.[11] For freedom of expression occupies a preferred position in the constitutional scheme. And that priority gives it a sanctity and a sanction not permitting of dubious intrusion.[12] Such is a fair summary of the pronouncements in the decisions, both Philippine and American, in recent years.

III. THE PROBLEM

Do the results as shown by what was actually decided bear out the assurance? Or is it rather that a critic of existing political, moral, or economic institutions still has a hard time at it, invariably running the risk of running afoul of the law? And should it be thus, is judicial performance equal to its profession? Would the public interest in the preservation and encouragement of freedom

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[8] United States v. Paramount Pictures, Inc., 92 Law ed. 882; Cf. Mutual Film Corp. v. Industrial Commission, 236 U.S. 230.

[9] Cf. U.S. v. Perfecto, 43 Phil. 58; Thornhill v. Alabama, 310 U.S. 88.

[10] Diss. op., Schwimmer v. United States, 279 U.S. 644. Cf. "We are more especially called upon to maintain the principles of free discussion in case of unpopular sentiments or persons as in no other case will any effort to maintain them be needed." Quoted in Chafee, Z., Free Speech in the United States, 4.

[11] U.S. v. Bustos, 37 Phil. 731, U.S. v. Perfecto, 43 Phil. 58; Baumgartner v. United States, 322 U.S. 665; Pennekamp v. Florida, 328 U.S. 33.

[12] Thomas v. Collins, 323 U.S. 516.

of expression outweigh the usually strong dislikes and preposessions against novel, unorthodox, and possibly even heretical opinions? Judged from its Supreme Court decisions, the balance sheet in the United States, from the 1930s, has been favorable to freedom of expression.[13] The line of decisions in the Philippines has been wavering and blurred throughout most of the period of American rule.[14] Recently, after independence, glimmerings of a wider scope to be accorded this constitutional guaranty may be discerned.[15]

IV. VALUES

A clarification of the value furthered by freedom of expression may result in a greater consistency of decisions favorable to it, whenever it is alleged to be in collision with other public interests likewise deserving of governmental protection. Freedom of speech and of the press may be utilized to maximize the values of respect, of power, and of enlightenment. A government in which the sharing of such values is limited to the dominant class cannot justify its claim to being considered democratic.

Respect—"The basic conception of democratic justice calls for reciprocity of respect among all persons in a given society. The scientific advances of our day in the study of man have clarified the fundamental craving of all men for respect; and they have described in detail the destructive processes that are stimulated when there is deficient deference. The preservation of democracy is obviously affected by the deference level in society, by the spread of attitudes of respect for the self and for others." [16] There is respect for all when each takes the other into consideration. In a democracy, the contribution that each may make to the stream of thought is not to be disregarded. To condemn a man to silence is to frustrate his personality. To deprive him of participation in the free interplay of ideas is to give him a feeling of futility. This is not to say that every man has something worthwhile to say. It only means that the opportunity for him to give expression to his thoughts should be considered as a right of which he may not ordinarily be deprived. That is the minimum recognition to his worth and value as a human personality. That is one index of the respect to which as a member of a democratic community he is entitled.

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[13] I Chafee, Z., Government and Mass Communication, 7.

[14] Cf. U.S. v. Bustos, 37 Phil. 731, U.S. v. Perfecto, 43 Phil. 58, and Sotto v. Ruiz, 41 Phil. 468 with People v. Perez, 45 Phil. 599; People v. Evangelista, 57 Phil. 354; People v. Feleo, 57 Phil. 451; People v. Nabong, 57 Phil. 455.

[15] Lino v. Fugoso, 43 O. G. 1214, con. op. and Primicias v. Fugoso, G. R. No. L-1800. But Cf. In re Subido, prom. Sept. 28, 1948.

[16] Lasswell, H., Democracy Through Public Opinion, 33.

Power—The ideal is for every adult citizen to be a participant in the power processes. There is more democracy as the ideal is translated into reality. This participation is directly manifested in the exercise of the right to vote for the adoption or amendment of the constitution and to elect public officials. Either right to be effective implies freedom of choice. There is no freedom of choice unless there is freedom of information and expression. Then and only then can the opposing parties make known their programs. If the voting is with reference to changes in the constitution, any person may, if he wishes, make known his views, or listen to the views of rival groups as to the desirability of the proposed changes. The chances for a better choice are greater. The same holds true when the election is one for public officials. Through freedom of expression, with its cognate rights of assembly and association, the rights of the contending parties to appeal for popular support and to get their slate of candidates elected are safeguarded. To a minority group especially freedom of expression is indispensable. Even with it, it may not make much of a showing. Without it, it is defeated from the start.

And after the elections, it is only through the force of public opinion that the government may be made responsive to the will of the people.[17] There is thus a need for a full discussion of public affairs for the maintenance of good government.[18] Informed and articulate, it is a restraint on misgovernment.[19] Without the liberty to comment upon the administration of government and the conduct of public men, then the power of those temporarily in control becomes unchecked.[20]

Enlightenment—Democracy more than any form of government needs enlightened citizens. It presupposes ability of the people to govern themselves. They make their own decisions. They need the information on which to act. And

> "* * * when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desires is better reached by a free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. * * *"[21]

The attainment of this objective would be frustrated unless there

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[17] Stromberg v. California, 283 U.S. 359; De Jonge v. Oregon, 299 U.S. 353.
[18] U.S. v. Bustos, 37 Phil. 731.
[19] Grosjean v. American Press Co., 297 U.S. 233.
[20] U.S. v. Perfecto, 43 Phil. 58.
[21] Holmes, diss., Abrams v. U.S., 250 U.S. 616.

be the widest possible dissemination of information from diverse and even antagonistic sources.[22] The expression of minority views on this account should be allowed not merely for the sake of the speaker but even more to give society an opportunity to listen and learn.[23] In no other way could vigorous enlightenment triumph over slothful ignorance.[24]

The role that freedom of speech and of the press plays in the maximization of the above values should not be lost sight of therefore when its exercise is sought to be restricted on the ground of its antagonism to other equally vital public interests as public safety and security, public peace and order and the protection of individual reputation, x x x public morals, and the administration of justice. In the balancing of interests, its claim should weigh heavily, should ordinarily preponderate.

V. FREEDOM FROM CENSORSHIP

The Supreme Court of the Philippines in deciding cases for libel on appeal where the defendants invoked the protection of the constitutional guaranty of freedom of press and of speech indentified it with the right to publish what one chooses without subjection to previous censorship by the government, subject to be held liable if the publication were found libelous.[25] That was the view of Blackstone.[26] There is support for it in American decisions.[27] As had already been stated, that is not all there is to freedom of the press and of speech. But it is essential for such freedom.

Censorship may assume many guises. The task of the courts is to be alert in discovering it however disguised and thereafter forbidding that particular manifestation. The baldest form is that of licensing publications. So it was in England prior to 1695.[28] Because of the unceasing opposition it had met, it was never renewed.

But censorship reappeared in another form. Taxes upon newspapers and advertisements was the new device to suppress comments and criticisms objectionable to the Crown. These rightfully called "taxes on knowledge" were likewise met with resistance, evasion, and agitation for repeal.[29] Before the First Amendment to the American Constitution became effective, Massachussets tried briefly

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[22] Associated Press v. United States, 326 U.S. 1.

[23] Cf. Mill on Liberty, p. 79; Fraenkel, Our Civil Liberties, p. 7; Whipple, L., Our Ancient Liberties, p. 12.

[24] Martin v. Struthers, 319 U.S. 141.

[25] U.S. v. Sedano, 14 Phil. 338; U.S. v. Sotto, 38 Phil. 666.

[26] 4 Blackstone, Comm. 151.

[27] Near v. Minnesota, 283 U.S. 697.

[28] Grosjean v. American Press Co., 297 U.S. 233.

[29] Grosjean v. American Press Co., 297 U.S. 233.

and unsuccessfully the same expedient of controlling the press.[30] It is in the light of such a historical background that the American Supreme Court in the case of Grosjean v. American Press Co.[31] considered the validity of a Louisiana Act passed in 1934 imposing a tax of two per cent on the gross receipts of any person, firm, association, or corporation engaged in the business of selling advertisements in any publication having a circulation of more than 20,000 copies per week. It annulled the Act on the ground that its plain purpose was to penalize the publishers and to limit the circulation of information. It disclaimed any intention to suggest however that the owners of newspapers are immune from the ordinary form of taxation, but the tax as laid belonged to that kind "with a long history of hostile misuse against the freedom of the press." [32]

Similarly the United States Supreme Court struck down a statute which classified as a nuisance "an obscene lewd, lascivious" or "a malicious, scandalous, and defamatory" newspaper, magazine or other periodical and provided that its publication could after proper hearing be permanently enjoined.[33] The newspaper the publication of which was sought to be enjoined in this case for being "malicious, scandalous, and defamatory" had been publishing articles charging in substance that a Jewish ganster was in control of gambling, bootlegging, and racketeering in Minneapolis, and that law enforcing officer and agencies were not energetically performing their duties. In holding that the statute, insofar as it authorized the proceedings in this action an infringement of the liberty of the press, the American Supreme Court stated:

> "The fact that for approximately one hundred and fifty years there had been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions." [34]

Moreover, the application of a Texas statute requiring previous registration before any labor union leader could solicit members for his organization to an official of a labor union who went to Texas

[30] Grosjean v. American Press Co., 297 U.S. 233.
[31] 297 U.S. 233.
[32] Grosjean v. American Press Co., 297 U.S. 233.
[33] Near v. Minnesota, 283 U.S. 697.
[34] Near v. Minnesota, 283 U.S. 697.

to address a mass meeting of workers, at the end of which he asked the audience to join the union, was considered by the American Supreme Court as "incompatible with the exercise of the rights of free speech and free assembly." [35] The Court gave its reason thus:

> "If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such restraining order. So long as no more is involved than the exercise of the rights of free speech and free assembly, it is immune to such a restriction." [36]

VI. FREEDOM OF CIRCULATION

Equally vital to the freedom of expression is freedom of circulation.[37] No judicial pronouncement except in a case of exclusion from the mails has been issued on this point by the Supreme Court of the Philippines. In the main, there has been no effort on the part of national or local authorities in the Philippines to interfere with the right of any person to publish what he wants and thereafter to circulate it. Interference, when it comes, usually takes the form of prosecution under the penal code for immoral, seditious, or libelous publications or punishment for contempt. In the United States its record for giving free play to the dissemination of opinion has been marred by the attempt of several communities to prevent by ordinances the propagation of the faith of the sect known as Jehovah's Witnesses. The Supreme Court of the United States has been steadfast in according it protection and thus enriching judicial literature on freedom of circulation. Thus an ordinance prohibiting the distribution either by hand or otherwise of circulars, handbooks, advertising, or literature of any kind without a permit from the City Manager, by virtue of which a member of Jehovah's Witnesses was convicted, was declared void on its face.[39] Equally objectionable was an ordinance prohibiting the canvassing, soliciting, or distributing of circulars or other matters without a written permission from the Chief of Police, constituting as it does a ban on the unlicensed communication of any views or the advocacy of any cause from door to door.[40] Nor may ordinances of the above character be validated by

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35 Thomas v. Collins, 323 U.S. 516.
36 Thomas v. Collins, 323 U.S. 516.
37 Cf. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value". (Ex parte Jackson, 96 U.S. 727.)
38 Sotto v. Ruiz, 41 Phil. 468, hereafter discussed.
39 Lovell v. City of Griffin, 303 U.S. 444.
40 Schneider v. Irvington, 308 U.S. 147.

the fact that the religious literature distributed contained an invitation to support the movement by purchasing books of the same nature published by the group [41] or by making cash contributions.[42] Similarly a license cannot be exacted for distribution of religious literature accompanied by an appeal for funds.[43] And while municipal corporations have the right to keep their streets clean and in good appearance, that cannot validate ordinances prohibiting distribution of hand-bills, circulars, pamphlets or other written or printed matter in the streets.[44] Likewise an ordinance making it unlawful for any person distributing handbills, circulars, or other advertisements to ring the door bells, sound the door knockers, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars, or other advertisements is unconstitutional.[45] It is the view of the American Supreme Court that discretion as to whether or not to allow such practice should be left to the will of the individual master of each household and not upon the determination of the community. Nor may the circulation of literature be conditioned upon the approval of an official or manager even if the town were owned by a corporation [46] or by the United States.[47]

The danger that control over the mails by postal authorities may nullify freedom of circulation has been sounded both by the Philippine and the American Supreme Courts.[48] The statement by the Supreme Court of the Philippines that the exclusion from the mails by the Director of Posts of written and printed matter and photographs of an obscene, lewd, lascivious, filthy, indecent, or libelous character should be accomplished in such a manner as not to interfere with the freedom of the press reflects the prevailing judicial view in the United States.

The distribution of purely advertising matter in the streets however may be restricted or even forbidden.[50]

VII. FREEDOM FROM LIABILITY

Freedom from previous restraint and freedom of circulation, valuable as they are, do not suffice to assure freedom of expression.

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[41] Jamison v. Texas, 318 U.S. 413.
[42] Largent v. Texas, 318 U.S. 418.
[43] Murdock v. Pennsylvania, 319 U.S. 103.
[44] Schneider v. Irvington, 308 U.S. 147.
[45] Martin v. Struthers, 319 U.S. 141.
[46] Marsh v. Alabama, 326 U.S. 501.
[47] Tucker v. Texas, 326 U.S. 517.
[48] Cf. Sotto v. Ruiz, 41 Phil. 468; Hannegan v. Esquire, 327 U.S. 146.
[49] Sotto v. Ruiz, 41 Phil. 468.
[50] Valentine v. Chrestensen, 316 U.S. 52.

There must likewise be freedom from liability. Not much reflection is needed to show why it should be thus. To allow a person to give expression to his sentiments and thereafter to punish him for it, is to stifle effectively freedom of the mind. While a few brave and hardy souls may run the risk of incurring the penalty, the rest are not likely to follow their example. They will be coerced into silence. For them freedom of expression would be a mockery. Immunity from liability there must be, therefore, to give meaning and substance to the constitutional guaranty.[51]

VIII. LIMITATIONS

It would be going too far to assert however that every utterance is deserving of constitutional protection. For obvious reasons, neither Philippine nor American courts have taken that untenable stand. Agreement there is that the policy underlying the constitutional guaranty is to allow the utmost latitude to public discussion of matters of public concern. But neither could there be any difference of opinion about the need to safeguard public morals, public peace, and public safety and security. Where there is collision then between any or all of the foregoing public interests and the public interest in the freedom of expression, an adjustment of the competing public interests is called for and restraints on utterances may be allowed.[52] There may be previous restraint, or if the offending opinion be given expression, liability for such expression may subsequently be imposed.

It may happen that the utterance itself gives rise to the evil that the government has a right to prevent. A publication libelous

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[51] Cf. "The freedom of the press consists in the right to publish the truth, with good motives and for justifiable ends, although said publication may be offensive to the Government, to the courts, or to individuals. * * * It is the particular duty of the people of the state to zealously maintain the right to express freely, either verbally or by publication, their honest convictions regarding the acts of public officials and the governing class. If the people of a free state should give up the right of free speech, if they are daunted by fear and threats, and abdicate their convictions, if the governing body of the state silence all the voices except those that extol their acts; if nothing relating to the conduct of the governing class can reach the people except that which will uphold the men in power, then we may well say "Good-by" to our liberties forever." (U.S. v. Perfecto, 43 Phil. 58.)

"Liberty of speech and of the press is the right to express one's thoughts upon any matter, including the right to do so with impunity." (People v. Dava, 40 O. G., 5th. Sup., 79.)

"The freedom of speech and of the press embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint and without fear of subsequent punishment." (Thornhill v. Alabama, 310 U.S. 88.)

[52] Cf. "The freedom of the press consists in the right to print and publish any statement whatever without subjection to the previous censorship of the government. It does not mean immunity from willful abuses of that freedom,

or obscene constitutes in itself the offense. The question is simply one of appraising whether the publication violates the accepted standard of what is libelous or obsecne. If the answer be in the affirmative, the propriety of the coercive power of the government coming into play can hardly be disputed. Insistence there must be however that the accepted standard of what is libelous or obscene being limited and precise enough to assure the widest possible protection to freedom of expression.

The clear and present danger rule—A different question arises if the utterance does not of itself constitute the evil sought to be avoided but may bring about its occurrence. It may endanger public safety and security. Expressions of opinion on political and economic questions intemperate and critical may foment rebellion and disorder within the country. In times of war, an attack on the motives for entering the war, a vigorous plea for peace at any price, criticism of war measures may give rise to defeatism and encourage disloyalty. In either case the state may have justification for curbing the expression of opinion. But if it were allowed to penalize the expression of every critical or adverse opinion, freedom of speech and of the press is gone. Where must the line be drawn between the permissible and forbidden?

The United States Supreme Court is now firmly committed to the view that not only must there be danger of a substantive evil occasioned by the questioned utterance but there must also be showing that it be a "clear and present danger," in the words of Justice Holmes.[53] The Philippine Supreme Court seems to be slowly coming

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which, if permitted to go unrebuked, would soon make the license of an unrestrained press even more odious to the people than would be the interference of government with the expression of opinion." (U.S. v. Sotto, 38 Phil. 666.)

"Liberty of speech and of the press is the right to express one's thoughts upon any matter, including the right to do so with impunity. However, this liberty turns into license when it gets out of bounds. The acknowledged limitations to this constitutional right are to be found in scurrilous libels against the Government, blasphemous language, and words tending to injure another's reputation." (People v. Dava, 40 O. G., 5th Sup. 79.)

"The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for, as Bagehot points out, once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest. Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom." Chafee, Z., Free Speech in the United States, p. 31.

[53] Justice Holmes in the case of Schenck v. United States, 249 U.S. 47, formulates the "clear and present danger" rule thus: "The question in every case is whether the words used are used in such circumstances and are of such

around to the same view.[54] Previously, in sedition cases coming before it, it had expressed preference for the "bad" or "dangerous tendency" doctrine.[55]

Both under the "clear and present danger" rule and the "bad" or "dangerous tendency" doctrine the justification for imposing limits on freedom of expression is the danger of a substantive evil arising as a result of the questioned utterance. They differ in that the "clear and present danger" rule requires that the danger be evident, impending, pressing, and imminent, while the "bad" or dangerous tendency" doctrine may be satisfied with a showing that the words used betray a tendency or probability of bringing about a substantive evil in some indefinite future.[56] The "clear and present danger" rule then penalizes expression only at those extreme limits where words merge into action. Before that stage is reached, as long as there is opportunity for the processes of reason to operate, for an appeal to persuasion to be made, limitation has no justification.[57]

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a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Cf. "* * * the 'clear and present danger' of the Schenck case has afforded practical guidance in a great variety of cases in which the scope of constitutional protection of freedom of expression was in issue. It has been utilized by either a majority or minority of this Court in passing upon the constitutionality of convictions under espionage acts, Schenck v. United States, *supra;* Abrams v. United States, 250 U.S. 616, 63 L. ed. 1173, 40 S. Ct. 17; under a criminal syndicalism act, Whitney v. California, 274 U.S. 357, 71 L. ed. 1095, 47 S. Ct. 641, *supra;* under an 'anti-insurrection' act, Herndon v. Lowry, 301 U.S. 242, 81 L. ed. 1066, 57 S. Ct. 732, *supra;* and for breach of the peace at common law, Cantwell v. Connecticut, 310 U.S. 296, 84 L. ed. 1213, 60 S. Ct. 900, 128 ALR 1352, *supra.* And very recently we have also suggested that 'clear and present danger' is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is 'destruction of life or property, or invasion of the right of privacy'. Thornhill v. Alabama, 310 U.S. 88 105, 84 L. ed. 1093, 1104, 60 S. Ct. 736. * * *" (Bridges v. California, 314 U.S. 252). It is to be noted that in the Bridges case, the clear and present danger rule was adopted in determining whether or not a publication during the pendency of a suit amounts to contempt.

[54] In Primicias v. Fugoso, G. R. No. L-1800, decided in November 1947, the Supreme Court of the Philippines issued a writ of mandamus to compel the respondent Mayor of the City of Manila to issue a permit to the petitioner, the General Campaign Manager of the allied opposition parties to hold a public meeting at a public plaza to express their grievances and denounce what they consider to be flagrant violations of the election law committed by the party in power. The Supreme Court dismissed as unwarranted and groundless the fear of the Mayor that an "indignation rally" as contemplated by the opposition parties will endanger and undermine public peace and order.

[55] See in this connection Emma Quisumbing's "a Study of the 'Clear and Present Danger' Rule as a Limitation of Freedom of Speech and of the Press, 22 Phil. Law Journal, 136-150, particularly pp. 140-142.

[56] Cf. Schenck v. United States, 249 U.S. 47; Bridges v. California, 314 U.S. 252 with Gitlow v. New York, 268 U.S. 652.

[57] Cf. concurring opinion of Brandeis, J., in Whitney v. California, 274 U.S. 357; Schneiderman v. United States, 320 U.S. 118.

Appraisal of *"clear and present danger" rule*—On the assumption that freedom of expression should mean what it says and should therefore be safeguarded from unwarranted and dubious intrusion, the "clear and present danger" rule provides the utmost amplitude and scope without impairing the conceded power of the state to preserve itself and guard against other substantive evils proper to repress. Not that the acceptance of the formula affords a complete solution to the problem. Even more crucial is its mode of application. To a judiciary timorous of change, hostile to criticism, the existence of a danger, present and imminent, may be conjured by words, which a judiciary of more hardy cast, less susceptible to hysteria and fear may let pass as immoderate and intemperate but nonetheless harmless and innocuous. And since a judiciary is not altogether free from the pressure of the climate of opinion, a people conscious of the values to be furthered by freedom of expression and alert to repel inroads made on it may strengthen and fortify the courage of judges bent on giving hospitable scope to the constitutional guaranty. That, of course, is the ideal. Now for the record.

IX. FREEDOM OF EXPRESSION AND PUBLIC SAFETY AND SECURITY

Seditious utterances during peacetime—While of late the Supreme Court of the Philippines has been showing signs of a more receptive attitude to the "clear and present danger" rule,[58] it has not always been thus. In cases involving seditious utterances, its avowed abhorrence for radical doctrines in politics and economics had led it to condemn as seditious in effect irrespective of the likelihood that their exposition and advocacy would create a clear and imminent danger. So the leaders of the then incipient Communist movement in the Philippines found out.

In the case of People v. Evangelista,[59] the basis for conviction was the circulation of pamphlets containing the constitution and bylaws of the Communist Party and the advocacy through speeches of the adoption of its ideas. In the case of People v. Feleo,[60] the Supreme Court found as seditious the words of the defendant who asked the constabulary soldiers present at a meeting of the Communist Party to imitate the French soldiers in battle by pointing their guns at their officers instead of at the people. It is manifest that under the "clear and present danger" rule, the conviction on

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[58] Cf. Lino v. Fugoso, 43 O. G. 1214; Primicias v. Fugoso, G. R. No. L-1800.
[59] 57 Phil. 254.
[60] 57 Phil. 451.

such evidence could not be sustained in either case. There was no showing of disturbance or breach of the peace, not even its likelihood.

Another case, People v. Nabong [61] is not as clear cut as the previous two. The defendant here is a lawyer. He spoke at a necrological service on the occasion of the death of a local Communist leader at Santa Rosa, Nueva Ecija. In the course of his address, the defendant criticized the members of the Constabulary, using words substantially to the following effect: "They committed a real abuse in seizing the flag. The members of the Constabulary are bad because they shoot even innocent women, as happened in Tayug. In view of this, we ought to be united to suppress that abuse. Overthrow the present government, and establish our own government, the government of the poor. Use your whip so that there may be marks on their sides." Again the defendant was convicted. In all three cases, the Supreme Court of the Philippines in its opinions relied explicitly on the "dangerous tendency" doctrine announced by the American Supreme Court in the Gitlow case,[62] decided six years after the Schenck case, where the American Supreme Court without overruling the "clear and present danger" rule limited its application to cases under the Congressional war statutes.[63] In the Nabong case, the words and the circumstances under which they were uttered may justify a conviction even under the "clear and present danger" rule.

Moreover the Supreme Court of the Philippines had previously demonstrated its sensitivity to any expression of discontent by any group however small or insignificant or indeed even by an individual. Perhaps it had to act thus considering that while the American regime had found acceptance with the overwhelming majority of the people, conditioned of course upon the promise that independence would be forthcoming, there was a small number of dissidents who were never reconciled to foreign rule and who were not averse to give tangible expression to such irreconcilability. This hypothesis seems to afford the most rational explanation for the holding of the Supreme Court in the case of People v. Perez.[64] Here in the course of a heated political discussion, the accused shouted that he was for "cutting the head" of the American Governor General "for having recommended a bad thing for the Filipinos, for he has killed our independence." These words uttered in the heat of excitement in a town about 300 miles from Manila, without anything to show that the

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61 57 Phil. 415.
62 268 U.S. 652.
63 Chafee, Z., Free Speech in the United States, 348.
64 45 Phil. 599

accused was really minded to carry into effect his vain threat, were considered by the Supreme Court as seditious. They could have been penalized under other more appropriate provisions of the penal laws, but the Supreme Court took a more serious view, saying,

> "* * * we nevertheless entertain the conviction that the courts should be the first to stamp out the embers of insurrection. The fugitive flame of disloyalty, lighted by an irresponsible individual, must be dealt with firmly before it endangers the general public peace." [65]

When the cases involving the Communist leaders came up for decision therefore, the Supreme Court of the Philippines had already a precedent upon which it could rely in sustaining their convictions by the lower courts independently of the ruling in the Gitlow case.

Just shortly before the Philippines became involved in World War II, the Court of Appeals, the next highest judicial body in the Philippines, demonstrated it followed on cases of this nature the same pattern of thought as the Supreme Court. In the case of People v. Dava,[66] it upheld the conviction of an editor of a Communist paper, who was himself a Communist, for encouraging his readers to disobey the National Defense Law in the guise of criticizing it. The criticism, so the Court of Appeals found, was "couched in language almost subversive since it tends to stir the hatred of the masses against the Government, by charging it with forcing the poor into an army intended to defend the capitalist and crush the proletariat." The language was not even subversive, only "almost subversive," yet the Court of Appeals had no hesitancy in affirming the conviction.

The Supreme Court of the Philippines may have the opportunity of considering the matter anew. Still forming part of the Revised Penal Code is a provision defining and penalizing "inciting to sedition" [67] which may be committed by any person or persons who shall utter

> "seditious words or speeches, write publish, or circulate scurrilous libels against the Government of the Republic of the Philippines, or any of the duly constituted authorities thereof, or which tend to disturb or obstruct any lawful officer in executing the functions of his office, or which tend to instigate other to cabal and meet together for unlawful purposes, or which suggest or incite rebellious conspiracies or riots, or which lead or tend to stir up the people against the lawful authorities or to disturb the peace of the community, the safety and order of the Government, or who shall knowingly conceal such evil practices."

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[65] 45 Phil. 599.
[66] 40 O. G., 5th Sup. 79.
[67] Art. 142, Revised Penal Code.

If the offense were limited to inciting others to commit the crime of sedition, the taint of unconstitutionality would be removed. But the provision, as the above excerpt shows, goes further. In case of a prosecution and conviction thereunder and an appeal to the Supreme Court, that Tribunal might if its recent decisions reflect accurately a more tolerant attitude towards unorthodox and even hostile opinions, apply the "clear and present danger" rule to cases of this nature. Not much of the above provision would be left if the Supreme Court were to do so. And that is as it should be if freedom of expression is to prevail.[68]

Seditious utterances likewise are punishable in many state jurisdictions in the United States and after 1940 by the Federal Government itself.[69] Previously there was the Sedition Act of 1798, punishing "any false, scandalous and malicious writing" against the government or either House of Congress or the President, "with intent to defame (them) * * *, or to bring them * * * into contempt or disrepute; or to excite against them * * * the hatred of the good people of the United States, or to stir up sedition."[70] This Act however expired by its own term after two years. The state sedition statutes whether called Anti-anarchy Acts or Criminal Syndicalism Statutes have one feature in common: the advocacy of overthrowing the government by force, violence, assassination, or other unlawful methods of terrorism was defined as criminal. In addition in the Criminal Syndicalism Statutes the use of any of the above means for accomplishing a change in industrial ownership or control was likewise included in the definition of the crime.[71]

The Alien Registration Act of 1940 adopts the scheme in the Anti-Anarchy Act and the Criminal Syndicalism Statutes making illegal the advocacy, abetting, advising, or teaching; the printing, publishing, editing, issuing, circulating, selling, or publicly displaying any written or printed matter advocating, abetting, advising, or teaching; and the organizing or helping to organize any society, group, or assembly of persons teaching or advocating or encouraging the overthrow of any government in the United States by force or violence.[72] Moreover, its Section 1 extends in peacetime the second clause of the Espionage Act of 1917, penalizing any person who,

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[68] See on this point, Padilla, A., Criminal Law, pp. 437-439.

[69] Cf. "Prosecutions for sedition was greatly detested by the men who brought about our Revolution. In spite of this, the crime has been revived by American legislation during the three periods of our history because of the fears associated with a time of serious strains and dissensions." I Chafee, Z., Government and Mass Communication, 369.

[70] 1 Statutes at Large 596 (1798).

[71] See on this point I Chafee, Government and Mass Communication, 371-374.

[72] This is now 18 United States Code (1944 Supplement), sec. 10.

"with intent to interfere with, impair, or influence (their) loyalty, morale or discipline," shall "advise, counsel, urge, or in any manner cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces," or distribute any written or printed matter with this effect.[73]

In cases under the State sedition statutes, the United States Supreme Court has applied the "clear and present danger" rule.[74] This was first explicitly enunciated in the case of Herndon v. Lowry.[75] The "dangerous tendency" doctrine announced in the Gitlow case,[76] involving the New York Anti-Anarchy Act, was flatly repudiated. Even before the Herndon case, the drift towards adopting for this class of cases the "clear and present danger" rule was already discernible[77] The Herndon case merely confirmed it.

It would thus appear that a more genuine protection is afforded under prevailing standard by the American Supreme Court to dissident opinion. Its characterization as seditious and therefore punishable arises only where it could be shown that there is a clear and manifest danger that it would bring about the turmoil and disorder, which sedition statutes are designed to prevent.

Disloyal utterances during wartime—The problem of drawing the line between the permissible and the forbidden expression becomes more intricate during wartime. And the fact that the present armed conflicts are total wars with the home front just as important as the fighting front, with the distinction between belligerent and non-belligerent status fast disappearing makes the solution more difficult. The armed forces must be welded into a unified, efficient machine. Production behind the lines must be kept at full pitch. Popular enthusiasm for victory must be maintained at the highest level. Morale more than ever before is indispensable to success, lack of it a sure prelude to defeat. But precisely it is this same aroused patriotism and ardor that may tend to warp sound judgment in the appraisal of opinion not in tune with the prevailing slogans, catchwords, and ringing speeches that fill the air. It may prove too

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[73] 18 United States Code (1944 Supplement), sec. 12.

[74] Cf. "The clear and present danger" test has been frequently applied in cases under this heading (Protection Against Internal Disorder and Interferences with the Operation of Government) and seems to work better here than for obscenity and other matters under the preceding heading." I Chafee, Z., Government and Mass Communication, p. 367.

[75] 301 U.S. 242 (1937)

[76] 268 U.S. 652 (1925).

[77] Cf. Brandeis, J., concurring opinion in Whitney v. California, 274 U.S. 357 (1927); Fiske v. Kansas, 274 U.S. 380 (1927); De Jonge v. Oregon, 299 U.S. 353 (1937).

much to expect calmness and serenity even from those called upon to pass on the right to free expression when the very life of the nation is deemed at stake. But at such times, perhaps more than at any other are such qualities at a premium if the constitutional right to freedom of expression is to mean anything.

In war as in peace, the Constitution guaranties freedom of speech and of the press.[78] Of course there are certain forms of expression that raise no constitutional problem. One has no constitutional right to disclose vital information to the enemy.[79] Neither is there a constitutional right to engage in fifth column activities to cause dissension, lower the will to resist, and ultimately assure defeat. Where words are so employed, and present the element of adherence to the enemy, treason is committed.[80] And during the period of enemy occupation, as the Philippines unfortunately experienced, speeches made on behalf of and to cause the people to transfer their allegiance to the occupying power by one who has adhered to the enemy cause likewise amount to treason.[81]

In all the above cases no constitutional problem arises. But what about the opinions of sincere pacifists opposed to the continuation of war. And that of persons who honestly believing in the disparate fighting capacity of the contending armies and impelled by highest humanitarian motives call for an end to hostilities to avoid further bloodshed. What of critical or adverse opinion against entry into the war, about the state of preparedness, against the measures taken to prosecute the war, about the fitness of the political and military leaders. Should they be allowed expression?

If due deference be paid to the constitutional guaranty of freedom of speech and of the press, the answer should be in the affirmative. But limits there must be. For the prosecution of the war to a successful conclusion is a matter of life and death for the state. It is a task of compelling urgency. Where the expression of opinion then imminently and gravely threatens the war effort, limitation is called for. Before that point is reached, freedom of expression must not be fettered. The welfare of the state demands it. Mistakes may thus be remedied. More vigorous efforts taken, measures implemented. And the psychological gain in assuring not only the discontented but the rest of the population that the government even during the critical period is responsive to the will of the governed is immense.

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[78] Ex parte Milligan, 4 Wall. 2.
[79] Cf. Art. 120, Revised Penal Code.
[80] Cf. Art. 114, Revised Penal Code.
[81] Cf. Art. 114, Revised Penal Code and People v. Sison P. C. 42, O. G. 748.

As a matter of fact, the "clear and present danger" rule was first enunciated by Justice Holmes in the case of Schenck v. United States [82] in connection with a prosecution under the American Espionage Act of 1917. The defendants in that case were charged with mailing circulars having the effect of inciting resistance to the draft.

The Philippines likewise has an Espionage Act, section 4 of which corresponds to the third section of Title I of United States Espionage Act of 1917.[83]. It penalizes the making or conveying of false reports or false statements with the intent to interfere with the operation or success of the armed forces, the causing or attempting to cause insubordination, disloyalty, mutiny or refusal of duty in the armed forces, and the obstructing the recruiting or enlistment service in the armed forces. Thus far, there has been no prosecution under the Espionage Act in the Philippines. If one were to reach the courts, the appropriate limitation would seem to be the "clear and present danger" test.

X. FREEDOM OF EXPRESSION AND PUBLIC PEACE

Certain forms of expression provoke public disorder. Here again, limitations may be imposed. The demands for public peace must be reconciled with freedom of expression. "Fighting words" or insulting epithets tend to incite an immediate breach of the peace. For this reason and because they play no essential role in the exposition of ideas and are of slight social value if at all, as a step to truth or for enlightenment on public questions, they are denied constitutional protection.[84] Likewise picketing is protected as free speech as long as there is no clear and present danger of destruction to life or property or other forms of breach of the peace.[85]

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[82] 249 U.S. 47. The "clear and present danger" rule was again applied in the Frohwerk case, 249 U.S. 204. But the conviction of the Socialist leader Debs, 249 U.S. 211, under the Espionage Act on the ground that he attempted to cause insubordination and obstruct recruiting because of a speech before a conviction of Socialists where he spoke of the war as the supreme curse of capitalism seems to be a departure from a correct application of the "clear and present danger" rule. Even harder to justify is the majority opinion in the Abrams case, 250 U.S. 616, where the defendants were convicted to long prison terms for publishing leaflets opposing American intervention in Soviet Russia, an opinion which provoked the magnificent dissent of Justice Holmes where he expressed his creed in a "free trade in ideas." Likewise the convictions in the Schaefer, 251 U.S. 468 and Pierce, 252 U.S. 239, cases, also under the Espionage Act, show that freedom of speech and of the press was not necessarily rendered secure by the enunciation of the "clear and present danger" rule.

[83] Com. Act No. 616.

[84] Chaplinsky v. New Hampshire, 315 U.S. 568.

[85] Mortera v. Canlubang Sugar Estate; Thornhill v. Alabama, 310 U.S. 88.

Libelous remarks—Libelous remarks [86] deserve a separate treatment. Appearing in cold print, the reaction to retaliate on the part of the victim may not be instantaneous. Strictly speaking, the "clear and present danger" test if applied may not suffice for the imposition of a penalty. There is however another aspect of the matter. Of themselves, libelous remarks constitute an aggression on the individual reputation of another. The enjoyment of a private reputation is as much a constitutional right as freedom of expression. The law recognizes the value of such reputation and holds liable anybody who libels it. Ordinarily therefore the imposition of a penalty for libel does not raise a constitutional question.[87]

Where the aggrieved party however is a public official or a candidate for public office, a rigorous application of the libel laws may defeat the public interest in the dissemination of information. The Supreme Court of the Philippines has not been lacking in awareness of this undesirable possibility. It had not closed its eyes to the likelihood of opposition men being singled out as defendants in libel cases. It fully realized that in a country like the Philippines without a long background in the possession and enjoyment of civil liberties, a too rigorous application of the libel laws would cripple the efforts of the minority in exposing what it considers acts of maladministration and in effect render nugatory for them freedom of expression. It had been alert to discover the motives behind the prosecution of editors of minority papers for libel.[88] It had frowned on the practice and rightly so.[89] Aptly it had stated:

> "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 prosecution officers could be better served, in bringing to stern account the many who profit by the vices of the country, than by prosecutions which amount 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 an appellate court to vindicate a defendant editor." [90]

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[86] "A libel is a public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause the dishonor, discredit or contempt of a natural or juridical person, or to blacken the memory of one who is dead." Art. 353, Revised Penal Code of the Philippines. See I Chafee, Z., Government and Mass Communications 77-78.

[87] Worcester v. Ocampo, 22 Phil. 42.

[88] U.S. v. Perfecto, 42 Phil. 113 and U.S. v. Perfecto, 43 Phil. 225.

[89] U.S. vs. Perfecto, 43 Phil. 225.

Criticism it had encouraged. For

> "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 an 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 thus can the intelligence and dignity of the individual be exalted." [90]

Short of defamation, criticism may be freely indulged in. And to the Supreme Court of the Philippines, defamation could take the form of falsely impeaching the motives of a public official, falsely attacking his honesty, blackening his virtue, or injuring his reputation. His policy and his acts however are fair target for all sorts of uncomplimentary opinion without the risk of a prosecution for libel.

The above policy of the Supreme Court of the Philippines has been implemented by its receptive attitude to well-known legal defenses to actions for libel: (1) fair and accurate report of a public proceeding [91] and (2) fair comment.[92] The Court of Appeals of the Philippines in the case of People v. Velasco,[93] explained why the doctrine of fair comment is of particular importance in the Philippines.

> "It is a defense to an action for libel or slander that the words complained of are fair comment on a matter of public interest. The reason for this is that freedom of speech is not only one of the radical rights of man, but is absolutely essential to the democratic rules under the aegis of which our Libel Law grew up, in which the people are supposed to sit in judgment upon all public affairs. Hence, the jealous vigilance with which the free play of open criticism upon all matters of public interest is safe-guarded. In the Philippines, where there is such a dearth of civic interest, it is twice as important that individual citizens should be encouraged by every legitimate means to take a hand in public affairs. There is therefore a special motive for insisting in this country and at this time upon the legal doctrine of fair comment."

As long as judicial response in the Philippines faithfully reflects the above principles, which after independence have acquired more relevance if the growth of minority parties is not to be stunted, the resort to libel prosecutions to ward off undesirable criticism will be a minimum and freedom of expression genuinely safeguarded.

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[90] U.S. v. Bustos, 37 Phil. 731.
[91] Art. 354, par. 2, Revised Penal Code.
[92] U.S. v. Sedano, 14 Phil. 338.
[93] 40 O. G. 3694.

XI. FREEDOM OF EXPRESSION AND PUBLIC MORALS

Publications offensive to morals are deserving of no constitutional protection. Freedom of expression is not infringed by prohibiting their distribution or sale or exhibition.[94] Here again the "clear and present danger" test is not appropriate. The publication does not merely create the danger of a substantive evil; it is the evil itself. The public interest in the maintenance of public morals brings it within that category. In case the matter reaches the courts, the question for determination is merely that of deciding whether the matter objected is or is not immoral or obscene.

The decision is not difficult where what is sought to be condemned consists in smutty or pornographic material. No question as to possible violation of the constitutional right is raised. It is different where the question involves a painting, a book, or a play. Freedom of expression includes freedom for the artist, the author, the playwright. An interest in the literature and the arts is a mark of a nation's glory. The cultural field certainly is not to be excluded from the domain of public concern. And conceivably the work of an artist or an author impelled by realism and undeterred by the orthodox or conventional form of expression may to prevailing community standards skirt, if it does not enter, the region of the indecent. What then?

The Philippine Supreme Court has had no occasion to pass directly on the question. But if it were to be guided by a roughly analogous situation it may not be lacking in sympathy for the honest artist or man of letters. It had previously adopted the view that the words "obscene" or "indecent" are themselves descriptive and that whether a picture is obscene or indecent must depend upon the circumstances of the case. A postcard therefore which merely depicts persons as they actually live without attempted presentation of the subjects in unusual posture or dress is not offensive to chastity.[95]

While it mentioned one test which some American courts had followed, namely, the tendency of the matter charged as obscene to deprave or corrupt those whose minds are open to such immoral influences and into whose hands it may fall, it refused to follow it. This test was first laid down in England by Lord Cockburn, and while it has had much influence, the better view rightly condemns it as unsatisfactory. In the words of Professor Chafee:

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[94] Art. 201, Revised Penal Code.
[95] People v. Kottinger, 45 Phil. 352.

> "It is just as if the law denied a driving license to an automobile owner whenever it was found that he might conceivably run into a careless pedestrian who darted in front of his car. Any painting or statue of an unclothed woman would be condemned by such a test because of its harmful effect upon pathological minds." [96]

There is more to be said in favor of the view announced by Judge Woolsey of the United District Court when he passed upon James Joyce's novel, *Ulysses*.[97] It places great weight on the author's sincerity. It does not limit itself to considering the possible harmfulness to the community for "tending to stir the sex impulses or to lead to sexually impure or lustful thoughts." *Likewise* in determining whether it has such a tendency, the judge is to have in mind not a young person but a "person with the average sex instincts."

The difficulty of the problem is thus evident. A standard which while protecting public morals would not unduly cramp artistic or literary freedom is not easily arrived at. The solution may lie in a greater sophistication as to what is literary or artistic, on the part of the community. For even an enlightened judiciary in this sphere may dare not be too far ahead of public opinion. It is the community standard of morality it is protecting. There must be tolerance then, if not sympathy with, literary or artistic experimentation to assure in this field the maximum of freedom of expression.

XII. FREEDOM OF EXPRESSION AND ADMINISTRATION OF JUSTICE

Certain utterances and publications may not only betray lack of respect for the judiciary but may also be conducive to an unfair administration of justice. To preserve judicial impartiality the power to punish for contempt has been wielded by judges to restrict expression of opinion concerning pending cases. Here again the public interest in the maintenance of respect for the judiciary and the impartial dispensing of justice must be harmonized with the public interest in freedom of expression. Should reliance be placed once more on the clear and present danger rule?

The Philippine Supreme Court does not seem to think so. Its zealous regard for the independence of the judiciary and the fair and orderly procedure of courts has resulted in the rule that newspaper publications tending to impede, obstruct, embarrass or influence the courts in administering justice in a pending suit or proceeding consti-

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[96] I Chafee, Z., Government and Mass Communication 202.
[97] 5 Fedd. Sup. 182.

tute criminal contempt which is summarily punished. It is otherwise though after the cause is ended.[98] It must, however, clearly appear that such publications do impede, interfere with, and embarrass the administration of justice before the author of the publications should be held for contempt.[99] So several decisions hold.

The Philippine Supreme Court punished for contempt the editor and the reporter of a newspaper who published an inaccurate account of the investigation of a Judge of First Instance notwithstanding the investigation was conducted behind closed doors, and notwithstanding a resolution of the Supreme Court which makes such proceedings confidential in nature.[100] Likewise the editor of a newspaper, a lawyer, who published a statement as to the filing of charges of malpractice against an attorney, with the notice that in subsequent issues the complete charges and the exhibits attached thereto would be published, notwithstanding the resolution of the Supreme Court considering proceedings looking to the suspension or disbarment of lawyers confidential in nature was punished for contempt of court.[101]

Premature disclosure of the outcome of pending cases has also been considered contempt of court. The editor of the newspaper "El Debate" who published an anticipatory and speculative article about a pending case, which purported to announce the result of the decision in a case before promulgation of the decision, was found guilty of contempt. Prior knowledge of the result, in a civil case, would permit parties to benefit themselves financially or to compromise cases to the detriment of parties not so well informed, and, in criminal cases, advance opinion would permit the accused to flee the jurisdiction of the court.[102] The editor of the newspaper "The Manila Post" who published an informative article which said that the celebrated Krivenko case had already been voted upon and decided by the Supreme Court, the vote being 8 — 3, 8 justices in favor of the constitutional prohibition and 3 against, was adjudged guilty of contempt of court. This information was supplied by a justice of the same Supreme Court. It was held that a case pending in the Supreme Court is considered decided only when it is registered, promulgated and published in the Office of the Clerk of Court and until then the result of the vote is regarded as a matter absolutely private and confidential. That the information was obtained here

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98 In re Lozano and Quevedo, 54 Phil. 801.
99 People v. Alarcon, 40 O. G. 3rd Supp., 294.
100 In re Lozano and Quevedo, 54 Phil. 801.
101 In re Abistado, 57 Phil. 668.
102 In re Torres, 55 Phil. 799.

from a justice was immaterial.[103]

Publications critical of the Philippine Supreme Court while a case is pending have invariably been condemned by it as tending to hinder the administration of justice and therefore punishable as contempt. In one case [104] Amzi B. Kelly was found guilty of contempt of the Supreme Court and was accordingly sentenced to imprisonment for a period of six months and to pay a fine of ₱1,000. He filed a motion in the Supreme Court for a rehearing. While the matter was thus pending, he wrote and caused to be published in a weekly newspaper a letter to the editor, in the following tenor: "I was very much amused at your cartoon displaying me at attacking a rock wall. The men against me are many but man, Don Vicente, is not made of rock but of mud; and it appears that some of the men who have been so arrogantly misusing imaginary judicial powers are made of a very poor quality of this substance. x x x Do not hesitate to condemn the individual whom I accused for criminal careless neglect of duty and then, cowardly shielding themselves behind contempt proceedings, imprisoned me in Bilibid. x x x" Because the said publication was made of and concerning a cause which was then and there pending before the Court and did tend directly in the opinion of the Court to affect and influence its action and bring the Court into contempt, he was made liable for contempt. In another case [105] a judge of the People's Court, who, after the promulgation of a 6—5 resolution by the Supreme Court reversing his decision but before the majority and written opinions had been promulgated, criticized the Supreme Court for allegedly "committing its biggest blunder" because it "robbed" the People's Court of its "inherent power" to decide cases for bail and asserted that the Supreme Court has no "intellectual leadership" but merely "sentimental leadership" was punished for contempt of court. Unfortunately for him the judge spoke too soon, according to the Supreme Court. The cause had not finally ended, not only because of the reservation of the majority to write and promulgate a more extended decision and of the dissenting members to deliver a written opinion, but also because it was still open to a motion for reconsideration.

So much for pending cases. Where the case is not pending, the case is different. Thus in the case of People vs. Alarcon [106] where an article quoting a denunciatory letter written by Luis Taruc to the

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[103] In re Subido, Resolution promulgated by the Supreme Court on September 28, 1948, Cf. dissenting opinion of Justice Tuazon.

[104] In re Kelly, 35 Phil. 951.

[105] In re Quirino, G. R. No. L-278, May 4, 1946.

[106] People v. Alarcon, 40 O. G. 3rd Supp., 294.

President to the effect that the "court and public officials exerted pressure" upon one of the bondsmen of fifty-two tenants accused of robbery committed in band to "withdraw his bail for them, and the fifty-two tenants were arrested again and put in jail" was published after appeal was perfected to the Court of Appeals, the Supreme Court held that the Court of First Instance may no longer find the columnist guilty of contempt. What is sought to be shielded against the influence of newspaper comments is the all-important duty of the court to administer justice in a decision of a pending case. There is no pending case to speak of when and once the court has come upon a decision and has lost control either to reconsider or amend it. Notice must be taken that the contempt here is addressed to the Court of First Instance. This case was not without a strong dissent. In a later case,[107] however, the editor of the "Manila Guardian" who in his editorial, published after the matter of the validity of the 1944 bar examinations had been disposed of and no question as to the result of said examinations was pending in the Supreme Court, asserted that the 1944 bar examinations had been held in a farcical manner was held guilty of contempt.

Another view of contemptuous publications which may be gaining support lately is that expressed by the present Chief Justice of the Supreme Court, Manuel V. Moran, in his dissenting opinion in the above-cited case of People v. Alarcon.[108] According to this view, "contempt by reason of publications relating to court and to court proceedings, are of two kinds". "A publication which tends to impede, obstruct, embarrass or influence the courts in administering justice in a pending suit or proceeding, constitutes criminal contempt which is summarily punishable by courts. A publication which tends to degrade the courts and to destroy public confidence in them or that which tends to bring them in any way into disrepute, constitutes likewise criminal contempt, and is equally punishable by courts. What is sought, in the first kind of contempt, to be shielded against the influence of newspaper comments, is the all-important duty of the courts to administer justice in the decision of a pending case. In the second kind of contempt, the punitive hand of justice is extended to vindicate the courts from any act or conduct calculated to bring them into disfavor or to destroy public confidence in them. In the first, there is no contempt where there is no action pending, as there is no decision which might in any way be influenced by the newspaper publication. In the second, the contempt exists, with

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[107] In re Brillantes, 42 O. G., No. 2, 59.

[108] People v. Alarcon, Dissenting Opinion, J. Moran, 40 O. G. 3rd Supp., 304.

or without a pending case, as what is sought to be protected is the court itself and its dignity. Courts would lose their utility if public confidence in them is destroyed". The above cited Brillantes case [109] seems to follow this view.

Could it be said that the above judicial utterances give sufficient protection to the rights of free speech and free press? Could it be said that the danger to the administration of justice was grave and impending? Was the danger manifest or immediate? It is regrettable that the above questions must be answered in the negative. Could it be that the Supreme Court is unduly sensitive to utterances and publications which tend to make it unpopular? Concern does not seem to be shown as to the seriousness and immediacy of the threat to the administration of justice. Attention does not appear to be focused on the clear and present danger to the administration of justice.

In the United States, however, the picture is different. Not that it has always been that way. The early cases did not consider punishments for this class of contempt within the constitutional protection.[110] It was not until 1941 that the Supreme Court has seen fit to bring them within the free speech and free press provisions of the Constitution. The social importance of a full discussion of public affairs was considered too great to permit immunity to the judiciary, particularly since judges are the final arbiters of the propriety of the comment about their own colleagues. The United States Supreme Court reached this conclusion in the cases of Harry Bridges and the *Los Angeles Times*,[111] stating that curtailments of expression to be justified at all must be in terms of some serious substantive evil which they are designed to avert. Here an editorial entitled "Probation for Gorillas" written pending the application of convicted persons for probation stating that the judge "will make a serious mistake if he grants probation" and appearing in a newspaper with a long-continued militant stand on labor questions and the publication of a telegram written by a labor leader to the Secretary of Labor characterizing a judge's decision as "outrageous", "the attempted enforcement of which would tie up the port of Los Angeles and the entire Pacific Coast" pending a motion for new trial were held not to amount to contempt of court as there was no clear and present danger that administration of justice would be

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109 In re Brillantes, 42 O. G., No. 2, 59.

110 Fraenkel, O., Our Civil Liberties, 74.

111 Bridges v. California, Times-Mirror Co. v. Superior Court, 314 U.S. 252 (1946).

obstructed. Thus the clear and present danger test served as the criterion.

To the same effect is the ruling in the Pennekamp case.[112] Criticism of judicial action already taken as expressed in two editorials accusing judges of extreme leniency towards the accused and a cartoon caricaturing a court by a robed compliant figure of a judge on the bench tossing aside formal charge to hand a document marked "Defendant dismissed", to a powerful figure close at his left arm and of an intentionally drawn criminal type with a futile individual labeled "Public Interest" at the right of the bench vainly protesting did not constitute contempt of court although cases were still pending on other points or might be revived by rehearings. Solidity of evidence required to make a showing of clear and present danger of disorderly and unfair administration of justice was lacking here.

Of late the ascendancy of freedom of expression has been further confirmed. In Craig vs. Harney [113] the publication while a motion for new trial was pending of newspaper articles which unfairly reported the facts of a civil case in which the jury had at first refused to conform to the judge's direction of a verdict for the plaintiff and stated that certain organizations are planning to submit petitions calling on the judge to grant a motion for a new trial, and an editorial criticizing in intemperate language the judge's conduct of the trial, calling it "high handed", a "travesty on justice", and as giving a service man a "raw deal" which properly "brought down the wrath of public opinion" upon the judge's head, and deploring the fact that the judge was a layman and not a "competent attorney", was held as not constituting such a serious and imminent threat to the ability of the court to give fair consideration to the motion as to be punishable as contempt of court.

Is it that the Philippine Supreme Court unlike the United States Supreme Court is not fully aware of the application of the clear and present danger rule to this class of cases? That it is fully cognizant of the inroads that the contempt power makes in the constitutional guarantee of freedom of the press may be discerned from its pronouncement in the case of In re Lozano and Quevedo: [114] "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 press and the courts have correlative rights and

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[112] Pennekamp v. State of Florida, 66 S. ct. 1029.
[113] Craig v. Harney, 331 U.S. 367.
[114] 54 Phil. 801.

duties and should cooperate to uphold the principles of the Constitution and laws, from which the former receives its prerogative and the latter its jurisdiction. The right of legitimate publicity must be scrupulously recognized and care taken at all times to avoid impinging upon it." There would seem to be thus the same scrupulous regard for the maintenance of the constitutional guarantee. But there must be too a "theoretical determinent" of the limit for free discussion. Standards of permissible comment must emerge which guaranty the courts against interference and allow fair play to the beneficent influence of open discussion. Ought it not to follow the United States Supreme Court and avow the propriety of the clear and present danger test? What is more important, should it be niggardly in its application? It cannot be overemphasized that freedom of expression should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.

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