A CRITICAL STUDY OF PRESS FREEDOM UNDER MARTIAL LAW: THE PHILIPPINE SETTING

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> Despotism can no more exist in a nation until the liberty of the press be destroyed, than the night can happen before the sun is set.
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> — COLTON

I. INTRODUCTION

A. *Conceptual Framework: Meaning and Scope*

Freedom of the press, as a constitutional right, is comprehended under the broader guarantee of freedom of expression. In its generic sense, it is defined as "the liberty to discuss publicly and truthfully all matters of public interest without prior censorship or subsequent punishment."[1] It signifies the freedom of a person to communicate with other members of the body politic. Individuals may ventilate their thoughts either in oral form or in writing and these are fully protected by the fundamental law under a provision which states: "No law shall be passed abridging the freedom of speech or of the press..."[2] The Constitution does not demand orthodoxy of political creed. With the advent of martial law, however, a problem was immediately posed: Could press freedom thrive, much less exist, under martial law? Could they co-exist?

Traditionally, the free press clause included only two constricted legal dimensions. "First, it prohibited only limited forms of interference with free expression. Strictly construed, it was designed to eliminate the threat of federal censorship, specifically censorship by means of licensing printed materials before they could be published. A second narrow factor was the technology of the times, which confined any concept of press to a narrow range of media: oral speech, newspapers, pamphlets, and books."[3]

Press freedom is a multi-faceted constitutional guarantee. It includes the freedom of access to information regarding matters of public interest as well as freedom of circulation.

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[1] Gonzales v. Commission on Elections, G.R. No. L-27833, April 18, 1969, 27 SCRA 835 (1969).

[2] CONST., art. IV, sec. 9.

[3] 60 GEO. L.J. 876 (1972). Cited by Justice Felix Q. Antonio, in a workpaper presented before the 8th Manila World Law Conference entitled "Mass Communications, Freedom of the Press and the Rights of Man".

It is now beyond cavil that comprehended within the concept of the "press" outside of printed publications (i.e., newspapers, magazines, periodicals, books, pamphlets) are such vehicles of communication as radio, television, and motion pictures. The term "press" includes "all the media and agencies that print, broadcast, or gather and transmit news and critical comment collectively."[4]

The scope of the press has not only increased tremendously; it has multiplied in proportion of that of all other agencies of expression. The family can still reach its own members, the schools only their appropriate generation; the churches only those who are disposed to attend; but the press including radio and film, can reach all, without limit of consanguinity or building space without delay or by your leave. It is, however, an open question, under the present authoritarian scheme, whether the quantitative impact of the contemporary media of mass communication does not create a qualitative change in the problem of an unchecked press in the light of the contemporary political realities.

For purposes of this study, freedom of the press will be treated not only as what the phrase of its face implies, but more importantly, the press will be examined as an institution under normal conditions and under times of emergency. This is in recognition of the fact that "the press is an institution of advanced civilization which had made possible the political unity of large states, and without its aid, the incipient order of mankind would not be conceivable."[5]

B. *General Significance of Press Freedom*

Every democratic nation today recognizes the value of freedom of the press. The exercise of this freedom lies at the foundation of free government by free men. This freedom rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. Public discussion is a necessary condition in a free society. Indeed, it is only through free debate and free exchange of ideas that the government can be responsive to the will of the people, and peaceful change is effected.[6] It is perhaps only through a clash of diversified concepts in the "marketplace of ideas" that working truths can be arrived at. The widest array of opinions and information must course through the channels of debate and discussion in arriving at solutions to social problems and sound public policy.

Whether the prime objective is the formulation of sound public policy, the citizens' fulfillment of their latent capabilities or the fulfilling of the

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[4] THE RANDOM HOUSE DICTIONARY (COLLEGE ED., 1968).

[5] HOCKING, FREEDOM OF THE PRESS, A FRAMEWORK OF PRINCIPLE 80 (1947).

[6] De Jonge v. Oregon, 299 U.S. 353, 81 L.Ed. 278, 284 (1937). Cited by Justice Antonio in his paper presented before the Manila World Law Conference, *op. cit., supra,* note 3.

thinker's duty to his thought, press freedom is held as crucial. A unanimity of jurists and lawyers have founded their cases for press freedom on both the social and the individual good. Philippine courts have backed press freedom on the ground that the media provides convenient forums through which ordinary citizens and pressure groups could exchange their views on current issues.

Holmes spoke of "the ultimate good desired [being] better reached by 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 [our] wishes safely can be carried out."[7] Justice Fernando points out that "(s)o atrophied, the right becomes meaningless. The right belongs as well, perhaps more so, for those *who question, who do not conform, who differ.*"[8]

The condition of a state can rarely be better measured than by the imperatives it seeks to impose. Every effort at suppression is, in fact, an attempt to limit the spread of valuable knowledge acquired from reflection or experience to the benefit of only a part of the community.

With its obvious importance and impact both on the individual and society, it is perhaps within our ken to see why on the whole the trend manifested in court decisions on free press is one of the utmost approval for the exercise of such vital or "preferred" right.

II. FREE PRESS UNDER DIFFERENT SOCIO-POLITICAL CONDITIONS

A. *Generic Considerations*

At the outset, it can be stated that there are two extreme views on the role of the press *vis-a-vis* public order and political or economic stability in a given political period.

First, there is the view that the free press clause embodied in the Bill of Rights is merely a peacetime document and consequently, freedom of the press may be ignored in war or emergency. This view has, however, been officially repudiated.[9] At the opposite pole is the belief of many agitators that the free press clause renders unconstitutional any act of the legislature without exception, that all press is free, and only action can be restrained or punished. This argument is viewed as equally untenable since the provisions of the Bill of Rights cannot be applied with absolute literalness but are subject to exceptions.[10]

Advocates of the pragmatic school of thought would put forth a distinction between actual and theoretical or covert advocacy of certain ideolo-

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[7] Abrams v. U.S., 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919), Holmes, J., dissenting.

[8] FERNANDO, THE BILL OF RIGHTS (1970)

[9] Report of the Attorney General of the United States 20 (1918).

[10] Robertson v. Baldwin, 165 U.S. 275, 281, 17 S.Ct. 326, 41 L.Ed. 715 (1897).

gies adverse to Western democracy. They argue, for example, that actual overt incitement to the overthrow of an established *de jure* government by force or violence, coupled by the language of incitement, is not freedom of expression. The theoretical advocacy of such overthrow, on the other hand is now considered such a freedom by some, but not by others for the reason that man as a thinking, planning animal does not act in an intellectual vacuum in things that affect him personally but usually he frames a tentative general plan of life modifiable as to the means actually applicable, but the ultimate end remains the same. This is one aspect of a person's freedom of thought which is still under the scope of the constitutional guarantees.

Thus, implicit in one's intellectual liberty is the right to dissent. One can differ, even object, one can express dissatisfaction within things as they are. There are times when one not only can but must. Such dissent may take the form of the most critical and the most disparaging remarks. They may give offense to those in authority, to those who wield power and influence. Nevertheless, they are entitled to constitutional protection.[11]

Even those who oppose a democratic form of government cannot be silenced. That is true especially in centers of learning. There may be doubts entertained by some as to the lawfulness of their exercising this right to dissent to the point of advocacy of such drastic change. Nor insofar as advocacy is concerned, may the exercise of such a right be confined only to those equipped in view of their scholarly pursuits with competence in political and other social sciences.[12]

B. *Press Freedom in Normal Times*

Since every state, even under normal conditions, is entitled to exercise its right of self-defense against protracted internal threats to its national security, the now-defunct Congress of the Philippines passed enactments to check any attempt to disturb the country's political equilibrium. All abuses of press freedom which could spawn national divisiveness, social disruptions and infringement of individual rights have been adequately checked by various statutes and ordinances.

Perhaps, the richest source of statutory limitations on press freedom is Act No. 3815, otherwise known as the Revised Penal Code. The said Act punishes any person who, without taking arms against the government, incites others to commit the crime of rebellion or insurrection "by means of speeches, proclamations, writings, emblems, banners, or other representations tending to the same ends."[13] Moreover, the law penalizes persons who incite others to the accomplishment of any of the acts which constitute sedition by means of writing, publishing, and circulating scurrilous libels

11 FERNANDO, *op. cit., supra,* note 8.

12 *Ibid.*

13 Article 138 of the Revised Penal Code. The crime is punishable with a penalty of *prision mayor* in its minimum period.

against the government or any of its duly constituted authorities thereof, which tend to disturb the public peace.[14]

This crime arising out of a breach of a statutory provision is best illustrated in the celebrated *Espuelas* case where the Court held that "writing which tend to overthrow or undermine the security of the government or to weaken the confidence of the people in the government are against the public peace, and are inimical not only because they are conducive to the destruction of the government itself." However, it is not inciting to sedition when it is not proved that the defendant incited the people to rise publicly and tumultuously in order to attain any of the ends of sedition.[15]

Likewise, the author of obscene literature, published with their knowledge and the editors publishing such matters shall be punished under Article 201 of Act No. 3815 with the penalty of *prision correccional* and a fine ranging from 200 to 2,000 pesos or both. It will be observed, however, that writing obscene literature *per se* is not punished but the author is liable if it is published with his knowledge.

Because the honor and reputation of citizens are cherished in a democratic society, the "gag law"[16] was formulated to penalize any reporter, editor, or manager of a newspaper daily or magazine who publishes facts connected with the private life of another and such facts are offensive to the honor and virtue of said person. As a consequence, newspaper reports on cases pertaining to adultery, divorce, issues about legitimacy of character, etc., will necessarily be barred from publication.

The important case of *Lopez v. Court of Appeals*[17] dealt with the possible negative effect of libel statutes on press freedom. It was shown in this 1970 case that there had appeared in the *This Week Magazine* of the Manila Chronicle the alleged commission of several murders in Batanes causing its inhabitants to live in terror and fear. It turned out upon investigation that the story was unfounded. The picture of former Mayor Fidel G. Cruz was inadvertently published in lieu of the health inspector Fidel Cruz, who was connected with a story about a murderer running loose on Cagayan Island. A suit was filed by Fidel G. Cruz for recovery of damages based on the alleged defamation of character. The Supreme Court held, thus: "No liability would be incurred if it could be demonstrated that it comes within the well-nigh all-embracing scope of freedom of the press. Included therein is the widest latitude of choice as to what items should see the light of day so long as they are relevant to a matter of public interest, the insistence on the requirement or to its truth yielding at times to unavoidable

[14] REV. PENAL CODE, art. 142.
[15] People v. Arrogante, 39 O.G. 1974.
[16] Article 357, Act No. 3815. This is germane to a person's right to privacy as guaranteed by the constitution and the Civil Code (Art. 26).
[17] G.R. No. L-26549, July 31, 1970, 34 SCRA 116 (1970).

inaccuracies attendant on newspapers and other publications. If no such showing could be plausibly made, however, it is difficult to resist the conclusion that there was in fact the commission of such quasi-delict."

However, under Republic Act No. 1477, a publisher, editor, columnist or reporter cannot be compelled to reveal the source of any news report or information unless the court or the legislature finds that such revelation is demanded by "the security of the State."[18]

The provision of law governing privileged communications is found in Article 354 of the Revised Penal Code. In order that the publication of a report of an official proceedings may be considered privileged, it must however appear that it is a fair and true report of official proceedings which are *not* confidential in nature or of a statement delivered in said proceeding or any other act performed by a public officer is the exercise of his functions; that is made in good faith and it is without comments or remarks.[19] It will be observed, however, that the public has a legitimate interest in matters of social significance. News concerning them may be yielded by state papers and documents. They should be made available to representatives of the press including all forms of mass media. It is not to be denied that there may be classified information involving national security. There would be justification then for secrecy in some cases, but the more limited they are the more meaningful is press freedom.[20]

In *U.S. v. Eguia & Lopez*,[21] the Court, pursuant to Article 355 of the Revised Penal Code had the occasion to convict an accused for threatening to publish in a weekly periodical certain letters, amorous in nature, written by a married woman and addressed by her to a man, not her husband, unless she paid ₱4,000 to them.

In the landmark case of *New York Times Co. v. Sullivan*,[22] the U.S. Supreme Court had the occasion to determine for the first time the extent to which the constitutional protection for speech and press limit the State's power to award damages in a libel action brought by a public official against critics of his official conduct. The Court through Justice Brennan, adopted this approach to such an issue: "In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of peace, obscenity, solicitation of illegal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. Thus,

[18] The phrase "interest of the State" in Rep. Act No. 53 (1946) has been changed to "security of the State" in Rep. Act No. 1477 (1956).

[19] Policarpio v. Manila Times Publishing Co., Inc., G.R. No. L-16027, May 30, 1962, 5 SCRA 148 (1962); Lopez v. Court of Appeals, *op. cit., supra*, note 17.

[20] FERNANDO, *op. cit., supra*, note 8.

[21] 38 Phil. 857 (1918).

[22] 376 U.S. 254, 84 S.Ct. 710, 95 A.L.R. 2d 1412, 11 L.Ed. 2d 686 (1964).

we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and it may well include vehement, caustic, and sometimes unpleasant sharp attacks on government and public officials. x x x *For liability to arise then without offending press freedom there is this test to meet: '... that the statement was made with "actual malice" — that is, with knowledge that it was false* or with reckless regard of whether it was false or not'."

The existence and foundation of the government is to be protected against seditious attack. Criticism against public officials, whether administrative, legislative, or judicial, is not subject to punishment as long as it is directed against their policies or acts of public nature. This type of criticism "relieves the abscesses of officialdom."[23]

The security of the State from foreign aggression requires certain lawful restrictions on freedom of the press. Under Section 10 of the Espionage Act (CA No. 616), printed materials such as blueprints showing installations classified as confidential information by the Philippine President pursuant to law is heavily penalized unless prior to publication, permission has been given or censorship of the material published has been made by proper authorities.

C. *Free Press in Times of Stress: Martial Law*

Under abnormal conditions, the courts and the legislature, when confronted with the proverbial problem of whether freedom should be preferred against authority, often tend to favor the latter since it cannot be gainsaid that the liberties of the people may be limited by the government during times of emergency, that is, whenever there is invasion, insurrection, rebellion. This rule is true although the danger is merely imminent.[24] In the face of the immediate and pre-emptory requirements of national security, freedom of the press may have suffered certain state impositions designed to thwart any possible attempt to utilize the Fourth Estate as an instrument of agitation and chaos.

It has been unanimously recognized in the precedent-setting case of *Abrams v. U.S.*[25] that the government's power to enact laws, the effect of which is to curtail free speech or press, is greater in times of war than in times of peace because war opens dangers that do not exist in other times.

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[23] U.S. v. Bustos, 37 Phil. 731 (1918); Worcester v. Ocampo, 22 Phil. 42 (1912); *People* v. Perez, 45 Phil. 599 (1923).

[24] Article IX, Sec. 12 of the Philippine Constitution provides that "(I)n case of invasion, insurrection, or rebellion or *imminent* danger thereof, when the public safety requires it, he (the Prime Minister) may suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law."

[25] *Op. cit., supra,* note 7.

As a war (or emergency) measure, a statute may be enacted punishing any one who publishes disloyal or abusive language about the constitution, the government, the army or its uniform.[26]

When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that its utterance will not be endured so long as men fight, and no court could regard them as protected by any constitutional right.[27] As pointed out by U.S. Chief Justice Hughes in the case of *Near v. Minnesota Ex Rel. Olson.*[28]

> Liberty of speech and of the press is x x x not an absolute right and the state may punish its abuse x x x. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.

Before martial law was proclaimed in the Philippines, the country was in a turbulent state. Its existence as a democracy was seriously imperilled. It became necessary to employ the measures authorized by the Constitution to stem the tide of disorder and anarchy to restore civil order. Apparently, martial law was proclaimed as a measure of self-defense to preserve the Republic and the fundamental rights of its citizens. The authorities found it necessary to enact a host of legislations in the form of presidential decrees in order to recast the social and political arrangements which provided the causes of social unrest.

When martial law was imposed, one of the first targets of the administration was mass media. The Government had to control mass media facilities "which had been used by the subversives to foment unrest and rebellion and destroy public faith in the government."[29] Hence, *Letter of Instruction No. 1* ordered the closure of all newspapers, magazines, radio and television facilities until further orders of the President. *General Order No. 2-A* ordered the mass arrest of leading journalists in print and electronic media.

Both steps were carried out not only in the Greater Manila area but also in the provinces and cities which had provincial or community papers and radio-television facilities. Staffers, columnists, and other personnel of national periodicals such as the Manila Chronicle, the Manila Times,

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[26] SINCO, PHILIPPINE POLITICAL LAW 654 (1962).

[27] Justice Holmes in Schenck v. U.S., 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919).

[28] 283 U.S. 697, 75 L.Ed. 1357, 1368 (1931).

[29] The Republic, pp. 1-15, July, 1977 (Letter of Juan Ponce Enrile, Secretary of National Defense dated June 14, 1977 in response to the statement made by Congressman Berkley Bedell on the floor of the U.S. House of Representatives during the debate on the Security Assistance Authorization Bill).

Philippines Free Press, Asia-Philippines Leader, Graphic and the Weekly Nation were not spared from the reformatory cudgel of the government.

Affected by Letter of Instruction No. 1 are the following kinds of media, summarized below:[30]

Greater Manila Area	*Number*
English Dailies	7
Pilipino Dailies	3
English-Pilipino Daily	1
English Weekly Magazines	11
Vernacular Weekly Magazines	8
Spanish Daily	1
Chinese Dailies	4
Business Publications	3
News Service	1
Television Stations	7
Provinces	
Community Papers	66
Radio Stations	292

To further insure the captivity of the press, the government resorted to censorship and press licensing. *Department Order No. 1* of the Secretary of Public Information decreed that "in all cases, materials for publication and broadcast x x x shall be cleared by the Department x x x (including) all foreign dispatches and cables" and that "any correspondent filing his dispatch shall be held accountable for any alteration that has been (previously) cleared." The above decree thus provided for prior censorship of all materials for publication and broadcast. This was supplemented by *Letter of Implementation No. 12* creating the Bureau of Standards for Mass Media.

Press licensing was enforced through *Presidential Decree No. 36* dated November 2, 1972 creating the Mass Media Council, co-chaired by the Defense and Press Secretaries.

> . . . so that no newspaper, magazine, periodical or publication of any kind, radio, television or telecommunications facility, station or network may so operate without obtaining from the Mass Media Council a certificate of authority to operate prior to actual operation. Such certificate of authority shall be duly signed by the President, and shall be in force for six months, renewable for another six months thereafter, unless otherwise terminated earlier.

With the enactment of Presidential Decree No. 36 the government acquired absolute control over the media — i.e., it could turn down the application to operate or terminate the license at anytime — with or without cause.

[30] Based on the Philippine Mass Media Directory 1971 prepared and released by the Philippine Press Institute of the University of the Philippines a year before the imposition of martial law, cited by Three Years of Martial Law (see note 2).

Any person(s) who would operate without the certificate of authority duly signed by the President provided under Pres. Decree No. 36 would be tried by a military tribunal by the terms of *General Order No. 12-C*, which had jurisdiction over the above exclusive of civil courts.

The Mass Media Council created by Pres. Decree No. 36 was later replaced by *Presidential Decree No. 191* dated May 11, 1973. Headed by the National Press Club of the Philippines, its members included media representatives "and such others as the President of the Philippines may designate." The MAC was charged with "the duty of passing upon applications of mass media for permission to operate so that (no form of mass media) may operate without first obtaining a Certificate of Authority to operate from the Media Advisory Council." But the Certificate of Authority would not become valid and effective "until approved by the President of the Philippines" and would be effective for six months "unless otherwise terminated earlier." In other words, the final say of whether to license or not still rested with the President and the government's power to revoke the license at any time remained.

The Media Advisory Council and the Bureau of Standards for Mass Media (authorized under Letter of Implementation No. 12) have now been abolished. In its stead, Presidential Decree No. 576 dated November 9, 1974 decreed the creation of two groups: a Broadcast Media Council and a Print Media Council.

Presidential Decree No. 576 was issued ostensibly "to allow mass media to operate without government intervention or supervision in policy determination and news dissemination activities."[31] Each group was authorized to organize and determine its composition and to lay down its rules, guidelines and policies including self-regulation and internal discipline within its own ranks.

The day-to-day job of discipline was left to the various organizations within its jurisdiction. For instance, the Publishers Association of the Philippines assumes major responsibility of setting up the broad guidelines that will facilitate self-government among print media. The Publisher must assume final and full responsibility for everything printed in his publication. The Council's (PCPM) task is to monitor the performance of all those falling within its purview by requiring members to submit to the Council copies of their publications or pictures of billboards (in case of outdoor advertisement). In advertising, the Council monitors all advertising copy under the editorial guidelines to be set by each association. The Council, however, will not concern itself with layouts, presentation, and other nuances of the advertising trade.[32] The PCPM has, however, set down certain "bounds to Press Freedom" namely:

[31] Section 1, Pres. Decree No. 576 (1974).
[32] Philippine Print Media Manual of Information & Directory '77, p. 5.

A. Libel and Defamation
B. Rules on "sub-judice" litigation
C. Obscenity and Bad Taste
D. Invasion of Privacy
E. National Security

In the application of discipline, the thrust is towards the Publisher/Outdoor Operator and not on the individual writer or practitioner inasmuch as full responsibility is placed upon the Publisher/Outdoor Operator by the Council. Sanctions include: (1) cancellation of registration certificate (which results in the cessation of publication or mass media activity); (2) suspension (which results in temporary cessation pending rectification of certain malpractices); (3) warning (which is a written admonishment to refrain from repetition of malpractice).[33]

III. JUDICIAL TESTS ON PRESS FREEDOM

Although the free press guarantee may seem sweeping and unequivocal, it is plain that the rights protected in this area are certainly not absolute, especially in a period of stress. The majority is obliged to safeguard and respect the rights of the minority, but it does not have to acquiesce to a "tyranny of the minority." Hence, to the Supreme Court has fallen the task of drawing a line between the individual's cherished right of freedom of expression and that of society to safeguard its body politic against excesses.

Not only *where* to draw that line, but *how* it shall be drawn of and *who* shall draw it are problems that call for timely solutions.

As of today, it is quite impossible as it would be unwise to speak of any definitive, current, exclusive "test" or "line" which would apply as a limitation to press freedom. Nevertheless, an attempt may be made to delineate the two or three major ones to which the Courts (both American and Philippine) have in fact resorted to, from time to time depending upon prevailing circumstances.

Since freedom of the press ranks higher than property in the hierarchy of constitutional rights, the norms for the regulation of expression place more strict constraints on state action. Jurisprudence has evolved several "tests" namely: the "clear and present danger" test; the "dangerous tendency" test and the "balancing of interests" test.

Perhaps, the best known among the three is the "clear and present danger" test authored in 1919 by Justice Holmes and Brandeis, more particularly the former in the classic case of *Shenck v. U.S.*[34] Mr. Justice Holmes explained his new line or test in the following memorable passages:

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[33] PCPM Memorandum No. 3, s .1975 (Nov. 20, 1974) to all Publishers/Outdoor Operators/Ad Agencies.

[34] *Op. cit., supra,* note 27.

> The question in every case is whether the words used in such circumstances are of such a nature as to create a clear and present danger that they will bring about the substantive ends that Congress has a right to prevent. It is a question of proximity and degree.

The bad or "dangerous tendency" test originated in the famous case of *Gitlow v. New York*.[35] Here, the Court's majority upheld Gitlow's conviction for having made verbal and written expression which tend to "corrupt public morals, incite to crime, and disturb the public peace." The Court in effect dodged the clear and present danger doctrine — perhaps watered it down by adopting the "bad tendency" test: that is, a bad tendency to bring about a danger — a "kill-the-serpent-in-the-egg" test. The Court thus effectively shifted the balance between the individual and the state in the latter's favor. In *People v. Perez*,[36] Justice Malcolm as *ponente* followed this test in stating that: "Criticism, no matter how severe, on the executive, the legislature, and the judiciary, is within the range of liberty of press, unless the intention and effect is seditious." Malcolm found in Perez's remarks "a seditious tendency which could trigger disaffection among the people and a state of feeling incompatible with the disposition to remain loyal to the government and obedient to the laws."

The "balancing of interests" test was explained in *Gonzales v. Commission on Elections* [37] where the Court cited the words of Professor Kauper, to wit:

> The theory of balance of interests . . . rests on the theory that it is the Court's function in the case before it when it finds public interests secured by legislation on the one hand and First Amendment freedom affected by it on the other, to balance the one against the other to arrive at a judgment where the greater weight shall be placed.

An example of the application of the "balancing of interests" test is found in Republic Act No. 4880 which among other things prohibits the too early nomination of political candidates and limits the period for partisan political activity. Its purpose is to prevent the debasement of the political process. The means used to achieve the purpose limit expression and associational action. In determining the validity of the law, free speech as a social value must be weighed against the political process as a social value.

In the advent of martial law, judicial decisions applying any of the aforesaid tests have been scarce. Freedom of the press under martial law has never been actually put to severe test in our courts. The case of *Francisco v. Media Advisory Council* [38] came close to this. The main issue in the said case centered on the authority of the respondent to impose restrictions on freedom of the press even under martial law.

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[35] 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925).
[36] 45 Phil. 5999 (1923).
[37] *Op. cit., supra*, note 1.
[38] G.R. No. L-37423, April 30, 1976, 70 SCRA 518 (1976).

The petitioner's publication, *Lawyers' Journal,* failed to register its publication as required by regulations under martial law. As a result, the Media Advisory Council refused to allow the August, 1973 issue of *Lawyers' Journal* to enjoy second class mailing privilege as it lacked the necessary permit. The petitioner argued that since 1934, the *Lawyers Journal* has become virtually an institution in the legal profession, that its contents are confined to judicial decisions, articles on the law, legal developments and legal personalities from the purely judicial angle and its readers are solely lawyers. Freedom of the press was the main argument of the petitioner, but because of the death of Vicente Francisco and the subsequent cessation of publication, the case became moot and academic. Thus, sadly enough, a ruling on the constitutional issue dissipated in thin air. It is tempting, if not convenient, to predict that the Supreme Court would apply the "balancing of interests" test when confronted with a problem under the present circumstances. The said rule is so broad that practically every test employed by the court in ascertaining the validity of every regulation affecting freedom of expression — whether designated as "clear and present danger" test or the "redeeming social value" test — involves a balancing of competing interests.[39]

However, considering that Philippine society under martial law is a "reform society under a crisis government"[40] with internal stability and national defense as its primordial concerns, it may be a sound prognostication that the Supreme Court would apply the more restrictive "dangerous tendency" doctrine in cases involving incitement to sedition. The curtailment, to a certain extent, of the freedom of the press, is the price that has to be paid in achieving socio-political transformation. It can be surmised that the Philippine Supreme Court will follow the judicial pattern set by the Vinson Court of the United States when it reserved the "clear and present danger" test and its imminent appendage for such areas as freedom of religion, racial discrimination, and criminal procedure standards, while employing a fairly consistent policy of applying the bad tendency test in "the delicate and contentious realm of the Communist threat and national security."[41]

The fairly recent case of *Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Co., Inc.,*[42] decided under martial law, reiterating the "clear and present danger" test as applied in *Gonzales v. Commission on Elections* could not be accurately relied upon in predicting the trend that the Court would pursue in deciding future cases filed under martial law calling for the application of judicial tests on the exercise of freedom of the press. Neither could we conclude that press freedom is still

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[39] Antonio, *op. cit., supra,* note 3.

[40] First uttered by President Ferdinand E. Marcos in a speech before the Kiwanis Club International, Cagayan de Oro, April 24, 1974.

[41] ABRAHAM, THE JUDICIARY 70 (1965).

[42] G.R. No. L-31195, June 5, 1973, 51 SCRA 189 (1973).

a preferred right under the present governmental scheme. In the first place, the *Philippine Blooming* case arose out of a mass demonstration at Malacañang against the alleged abuses of the Pasig police on March 4, 1969, or approximately three years before the proclamation of martial law. Necessarily therefore, the Court in applying the test took cognizance of the prevailing milieu at that time, and not the conditions which occurred thereafter. Although the Communist threat was gaining a firm foothold, nevertheless the situation then could still be regarded as normal inasmuch as the state of national emergency had not been properly proclaimed by the President until September 21, 1972.

But perhaps if brought to fore, the courts would invoke the role of police power in restricting abuse of press freedom, as it did in the case of *Primicias v. Fugoso* [43] where the Supreme Court explained that the State has the sovereign power to regulate the exercise of constitutional rights "to promote the health, morals, peace, education, good order or safety, and general welfare of the people."

IV. Free Press Under an Authoritarian Regime: An Assessment

The government has always stressed that the press under martial law is not subjected to government censorship, presidential decrees, general orders, and letters of instructions to the contrary notwithstanding.

Presidential Decree No. 576 has supposedly abolished prior censorship and the regulatory bodies are manned by media men themselves. This, the government argued, emancipated the press from its previously controlled status.

Assuming *arguendo* that indeed Presidential Decree No. 576 has abolished prior censorship, still, the absence of censorship does not mean much unless there be assurance that what is said or published does not entail subsequent liability. The freedom of the press would be nullified if a person were allowed to express his views only on the pain of being held accountable. That would be to stifle the expression of opinions which are repugnant or contrary to the current political, economic, or moral views. The right to dissent becomes non-existent.[44] The tragic problem is the tendency to immediately associate *any* form of covert or overt dissent with Communist subversion. The arrest of the 1976 staffers of *The Philippine Collegian* and some members of the clergy who were responsible for the printing and distribution of the *The Communicator* and the *Signs of the Times* illustrates this. The latter have been charged in the military tribunal for allegedly committing acts of subversion punishable under Presidential Decree No. 885, otherwise known as the Revised Anti-Subversion Act of 1976.

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[43] 80 Phil. 71 (1948).

[44] Fernando, The Constitution of the Philippines 594 (1974).

Before martial law was imposed in the Philippines, the structure of the media was immensely conducive to abuses. Unlike in most socialist countries in Europe, the Philippine media is largely owned and controlled by private individuals or corporations whose interests were ostensibly antagonistic to that of the persons in authority. From the standpoint of the government, this "irresponsible press" which has perpetuated the decadent politics that have been obstructive of economic development, must be dismantled and reorganized. The President succinctly commented, thus:

> The freedom of the press is sanctimoniously invoked whenever the work of media is criticized. But is its hospitality to the most spurious statements and the most outrageous allegations a fair step in improving the quality of political debate or keeping the people well-informed? Do media not promote the decadence of the masses by reducing the discussion of national issues to the level of entertainment? The usual excuse is the "low taste" of the masses, but pandering to exploiting it, assuming the judgment to be true, cannot deserve the abused name of public service.[45]

It would be worthwhile to note that media ownership today is more concentrated than before martial law.[46]

Aside from the privately-owner vehicles of communication, the government still has its own official organs of Public Information with its subordinate offices, namely, the National Media Production Center, the Bureau of Foreign and National Information, the Bureau of Broadcasts and other bureaus.

Among government periodicals are: Government Report, Philippines Today, Philippine Prospect and The Republic, for foreign and domestic consumption.

There is one government television channel (TV 4) and half a dozen radio stations operated by the Philippine Broadcasting Service and one station by the Voice of the Philippines, both government-owned.

In view of the above facts, it is therefore understandable why the Mass Media has almost become the government's exclusive machinery. The case of *Elizalde, et al. v. Gutierrez*,[47] a libel case, promulgated last April 29, 1977, which supposedly upheld freedom of the press, does not alter this observation. In the said case, the "Evening News" published a Philippine News Service dispatch on the testimony of Jaime Jose in a pending rape case where he identified Vincent Crisologo as one of his four companions on the night of the alleged rape of a former nightclub hostess. In restraining the Ilocos Sur CFI from taking any action on the libel case, except for dismissing it, the Supreme Court said that as early as sixty years ago, the High Court

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[45] MARCOS, TODAY'S REVOLUTION: DEMOCRACY 84 (1971).

[46] CIVIL LIBERTIES UNION OF THE PHILIPPINES, THE STATE OF THE NATION — THREE YEARS OF MARTIAL LAW 63-65 (1975).

[47] G.R. No. L-33615, April 22, 1977, 76 SCRA 448 (1977), citing the epochal Malcolm opinion in U.S. v. Bustos, *op. cit., supra*, note 23 at 740.

had initiated the principle that freedom of the press "is so sacred to the people of these islands and won at so dear a cost, [that it] should now be protected and carried forward as one would protect and preserve the covenant of liberty itself."

The Court, however, could not be considered, even impliedly, as having ruled that press freedom *under martial law* exists since the incidents involved in that case occurred long before martial law took place and more so because the Court made no specific mention to that effect.

CONCLUSION

The manifold restraints imposed on the press by the martial law regime have reached a high point. The press is now constrained more than ever to strike a precarious balance between principle and pragmatism in taking up sensitive issues. It is therefore not far-fetched to conclude that reconciliation between press freedom and an authoritarian regime is a remote *possibility*. The former is bound to yield to the more pressing problem of state security.

The reaction of the government on the abuse of press freedom is understandable. After all, the press before martial law assumed the role of a propaganda machinery to further the interests of certain "subversive" groups. It is conceded that the limitations resulting from the needs of national security are particularly important during a period of national emergency.

The stifling of press freedom under martial law may be a *sine qua non* to the task of saving Philippine democracy. But unduly prolonged, its "regulation" may lead to intellectual regimentation and may eventually open the door to excesses.

It is therefore salutary that the government should now remove restrictions on the freedom of the press including the repeal of all measures hampering information-dissemination on matters of public interest subject only to narrowly defined exceptions, with any refusal to provide such access or any unreasonable delay to be subject to summary review and enforcement by the judiciary on the merits with the burden of proof on the government. Ideally, therefore, the mass media must be free in its expression, open and accessible to the public which it serves.

For press freedom to be fully utilized, it is a prerequisite that there be no obstacle placed on access to information regarding matters of public interest as well as a recognition that the circulation of whatever printed matter or the dissemination by other forms of the mass media of their programs or activities be not interfered with.

This is not to conclude, however, that the press must be unbridled in its operation. Otherwise, an abusive press could easily cause social dislocation by the vast resources it controls. A moderate amount of government supervision, not complete control, is necessary to ensure that the press does not exceed its bounds. Responsibility of the press can be fostered by giving it more freedom to criticize and check the policies and actions of the other branches of government. We could neither tolerate a licentious press nor prefer it to be shackled.