PROTEST ACTIONS AND THE LAW: IMPERATIVES OF A DEMOCRACY

ANGEL M. ESGUERRA III*
NOEL V. SAN PABLO*

Let every man make known what kind of government would command his respect and that will be one step toward obtaining it.
—THOREAU [1]

INTRODUCTION

In recent times, ever since the lifting of Martial Law in our country,[2] and more especially since the assassination of former Senator Benigno Aquino, Jr. on August 21, 1983, our nation has been witness to many protest actions and mass rallies. Streets littered with confetti and flooded with thousands of people chanting slogans, bearing banners, and shouting protests are by now familiar scenes. Common sights also are uniformed men armed with truncheons, firetrucks with water cannons, and other 'riot control' devices. At no other time in our nation's history has there been so expressive an involvement by so many people in exercising their right to peaceably assemble. Unlike the mass actions of the early '70s, most of which were characteristically violent, today, these rallies and marches are peacefully conducted. More and more people have organized themselves into 'cause-oriented' groups to more effectively voice their opinions in the manner which expressly falls under the Constitution's protective mantle.

At times, there comes a point where there is a confrontation, and those who exercise the right are challenged by those who seek to enforce the law. Unfortunately, confrontation sometimes leads to hostilities, inevitably resulting in casualties which is indeed, a high price to pay for the

* Fourth year student, College of Law, University of the Philippines.

NOTE: Although written before the tumultuous events of February 1986, this article has only increased in significance. During that month, huge rallies to protest election fraud were held without permits; but the sheer size of the assembled public made The Public Assembly Act of 1985 practically irrelevant. The authors could not have foreseen that peaceable public assemblies originally intended as means to petition the government would bring down the government in a manner that has been characterized as "revolutionary." The success of "people power," however, spawned countless smaller demonstrations and rallies, and raised in some minds the specter of anarchy and mob rule. Hence, it has become imperative to re-examine the delicate balance between the protection of the right of assembly and the maintenance of order and peace.

1 Thoreau, *On the Duty of Civil Disobedience*, in WALDEN AND OTHER SELECTED ESSAYS 223 (1960).

2 Proc. No. 2045 (1981), 77 O.G. 441 (January, 1981).

depleted coffers of this nation's already overburdened conscience. Still, violence in protest actions is the exception and not the rule, and between these undercurrents of conflict between seemingly opposite sides, where the strength of one constitutional precept is tested against the other, there lies a middle ground where the freedom of assembly meets with the Rule of Law.

At the outset, it should be made clear that while both constitutional principles are impressed with moral considerations, their relationship and points of interaction are best discussed from a legal perspective, with special emphasis on the treatment accorded by jurisprudence on the matter of the people's right to peaceable assembly.

HISTORICAL BACKGROUND

The people's right of assembly is embodied in the Bill of Rights of our fundamental law, which specifically provides that:

> 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.[3]

This constitutional provision has been copied verbatim from the Commonwealth Constitution,[4] which in turn, was lifted from the First Amendment of the Constitution of the United States. The right of assembly is, however, of ancient origin. Its first written manifestation can be traced back to the Magna Carta of England, Chapter 61 of which provides in part:

> "That if we, our justiciary, our bailiffs, or any of our officers shall, in any circumstances have failed in the performance of them toward any person, or shall have broken through any of these articles of peace and security, and the offense be notified to four barons chosen out of the five and twenty before mentioned, the said four barons shall repair to us, our justiciary, if we are out of the realm, and laying open grievance, shall petition to have it redressed without delay."[5]

As can be clearly understood from the above cited provision, what was extended protection and recognized as a fundamental right of the people was their right to petition the government for a redress of grievances and not specifically the right to peaceably assemble. It would seem that the right of assembly grew only as a necessary adjunct to the right of the people to petition for redress of grievances. As observed by one author, "The right of assembly was historically conceived merely as an incident or aid to the right of petition, as if the Amendment (First Amendment) had read 'the right of the people peaceably to assemble in order to petition the Government for redess of grievances.' "[6]

---

[3] CONST. art. IV, sec. 9.
[4] CONST. (1935), art. III, sec. 8.
[5] SMITH, *The Development of the Right to Assembly — A Current Socio-Legal Investigation*, 9 WM. & MARY L. REV. 359, 361 (1967).
[6] L. PFEFFER, THE LIBERTIES OF AN AMERICAN 29 (1956).

A brief review of ancient English laws regulating this right of petition supports this observation. The right of assembly was recognized only in a negative way by statutes punishing illegal assemblies. Thus in 1412, there was already a law dealing exclusively with unlawful assemblies which was reinforced by an Act of Henry in 1414.[7] But the first comprehensive regulation of unlawful assemblies where the laws of Mary in 1553 and Elizabeth in 1558.[8] These enabled justices of the peace to disperse a group or assembly if in their opinion it was or could lead to an unlawful gathering. During the reign of George I, an 'Act for Preventing Tumults and Riotious Assemblies, and For More Speedy and Effectual Punishing of Rioters' was passed, which law penalized persons who, as an assembly, failed to disperse after an hour after reading this proclamation.[9]

While it has been shown that the right of assembly only came about as an offshoot of the right to petition for redress of grievances, today, however, it is universally recognized as an independent right as important as free speech and a free press in a democratic society. Thus, it has been said that the right of assembly and petition is complementary to the freedoms of speech and of the press and is just as fundamental.[10] Nor is the right of assembly and petition misplaced in the constitutional scheme. Article IV Section 9 of the Constitution literally protects three things: the freedom of speech, the freedom of the press, and the right of assembly. All three are modes of expression protected not because of the substance contained therein or its contents, but because of the form used in the exercise of the right to express one's thoughts. As Justice Rutledge said in *Thomas v. Collins,* "it was not by accident or coincidence that the rights to freedom of speech and of the press were coupled in a single guarantee with the rights of the people peaceably to assemble and to petition the government for redress of grievances. All these rights, while not identical, are inseparable."[11]

RELEVANCE AS A POLITICAL RIGHT

So as to be removed from the danger of dealing with the abstract, it is best to give a working definition of the 'right to peaceably assemble and petition' and determine the extent of the protection given it under our fundamental law. It has been observed that the scope of the right has never been defined.[12] But in an attempt to give a definition, the Supreme Court held in one case that an assembly is to be understood to mean a right on the part of the citizens to meet peaceably for consultation in respect to

---

[7] SMITH, *supra* note 5, at 363.
[8] *Id.*
[9] *Id.*
[10] V. SINCO, PHILIPPINE POLITICAL LAW 667 (1962).
[11] 323 U.S. 516 (1945), *cited in* Reyes v. Bagatsing, G.R. No. 65366, November 9, 1983, 125 S.C.R.A. 553, 561 (1983).
[12] Comment, *Regulation of White House Demonstrations,* 119 U. PA. L. REV. 668, 678 (1971).

public affairs and petition should be taken to mean that any person or group of persons can apply, without fear of penalty, to the appropriate branch or office of the government for redress of grievances.[13] It would seem that there is much to be desired in considering this definition by the Supreme Court, which is at best, a simplified restatement of the constitutional provision. In fact, the definition given raises more questions. What, for example, do the words 'public affairs' and 'consultation' cover?

A more comprehensive definition is offered by the recently passed Public Assembly Act of 1985.[14] The law defines a public assembly as "any rally, demonstration, march, parade, procession, or any other form of mass or concerted action held in a public place for the purpose of presenting a lawful cause; or expressing an opinion to the general public on any particular issue; or protesting or influencing any state of affairs whether political, economic or social; or petitioning the government for redress of grievances."[15] This definition is liberal in the sense that it allows for flexibility in considering what conduct falls under the ambit of the constitutional protection. Also, such protection is not limited to the expression of political issues but covers the expression of opinions on any issue so long as it is not violative of existing laws (e.g., Art. 146 of the Revised Penal Code punishing illegal assemblies). The law has thus made clear that any peaceful meeting or gathering by any persons for the lawful purpose of discussing public matters and of presenting petitions to the proper authorities is entitled to the protection of the law.

The importance of the right of assembly and petition cannot be overemphasized. It is entitled to be accorded the utmost deference and respect by all but most especially by those who are quick to judge that certain gatherings are illegal and disperse the participants thereof under the pretext of enforcing the law when they should be reminded that they have also sworn to defend the Constitution which explicitly recognizes the right of assembly. No less than the Supreme Court has said that, "In the hierarchy of civil liberties, the rights of free expression and of assembly occupy a preferred position" and that "such priority gives these liberties the sanctity and sanction not permitting dubious intrusions."[16]

According to one authority, the right is important because "Public issues are better resolved after an exchange of views among citizens meeting with each other for the purpose. The public meeting is an effective forum for the ventilation of ideas affecting the common welfare. The size of these gatherings is an often dependable gauge of the people's support, or lack of

---

[13] U.S. v. Bustos, 37 Phil. 371 (1918), *cited in* 1 TAÑADA & FERNANDO, CONSTITUTION OF THE PHILIPPINES 398 (1952).

[14] B.P. Blg. 880 (1985). The legislative bill was enacted into law by approval of the President on October 22, 1985.

[15] *Id.*, sec. 3(a).

[16] Thomas v. Collins, U.S. 516, 530 (1945), *cited in* Gonzales v. Comelec, G.R. No. 27833, April 18, 1969, 27 S.C.R.A. 835, 895 (1969) and PBM Employees Organization v. PBM Co., Inc., G.R. No. 31195, June 5, 1973, 51 S.C.R.A. 189, 202 (1973).

it, for particular causes or candidates, and a barometer also of the political climate in general."[17] But again, it was the Supreme Court which gave a more convincing rationale for the respect due the right of assembly. In *Reyes v. Bagatsing*, it was stated by the Court that, "... if the peaceful means of communication cannot be availed of, resort to non-peaceful means may be the only alternative. Nor is this the sole reason for the expression of dissent. It means more than just the right to be heard of the person who feels aggrieved or who is dissatisfied with things as they are. Its value may lie in the fact that there may be something worth hearing from the dissenter. That is to ensure a true ferment of ideas."[18]

The people's right to peaceably assemble for the free expression of their ideas is one of the fundamental pillars of a democratic society and its relevance to our growth as a free nation and as a nation of free men can not be gainsaid. The State recognizes this vital role of the people's right of assembly and the best evidence for this is the Constitutional provision itself. The Public Assembly Act also provides that this particular form of expression is essential to the "strength and stability of the State."[19] Of course, recognition by the State is quite different from giving effect to such recognition and as will presently be discussed, the importance of this right can be measured only by its effectivity in obtaining the intended results.

The right of assembly plays an important role in securing participation by the people in political decision making. Its ultimate goal is, of course, to make the government responsive to the will of the people. It is therefore one of several ways to put ino concrete form the principle of 'sovereignty residing in the people.' This is also why mass participation is always called for in the conduct of the assembly. As earlier pointed out, the number of participants would be a good basis for determining what the sentiments of the people are and whether such assembly reflects the people's sentiments in the first place.

There can only be responsiveness if the government is made aware and is not indifferent to the clamor for changes. Decidedly, the means proven to be effective to attract the desired attention is the exercise of the right of assembly conducted in great numbers. A large assembly makes a lot of 'noise' which nobody can choose to ignore. It attracts the attention of not only the government, to whom almost always the petition is addressed, but also the rest of the nation, and not surprisingly, it even touches the curiosity of foreign countries, most especially those who have direct interests in the country. Also, an assembly is more compelling and without such right, there is no chance for dissenting views and for critical opinions to be expressed in a manner more vigorous than that which would have resulted

17 I. CRUZ, CONSTITUTIONAL LAW 187 (1981).
18 G.R. No. 65366, November 9, 1983, 125 S.C.R.A. 553, 562 (1983).
19 B.P. Blg. 880 (1985), sec. 2.

had the protesters used the written word.[20] This is the big advantage of the freedom of assembly over the other freedoms of expression (i.e., freedom of speech and of the press). The characteristic large attendance and participation of the citizenry in such assemblies evinces a unity of purpose and this tends to produce some effect on the public mind by the spectacle of union and numbers.[21]

But no matter how great the size of the assembly, it would be of no avail if the authorities can simply choose to ignore it. If the Government refuses to at least listen to the petition presented, the effect would be the same as if there had been no Constitutional provision. The Supreme Court has warned that the constitutional right would certainly be 'emasculated' if the government's response would be one of indifference.[22] It is submitted, therefore, that the government cannot choose to ignore the petition presented or the assembly itself. The constitutional guarantee not only protects the right of assembly but should be understood also as mandating that the government should at least listen and seriously consider the petitions presented and where meritorious, should be acted upon promptly and in the manner dictated by the circumstances. Otherwise, the undesirable situation when the government would simply ignore the assembly, averted to earlier, would be the reality, thereby rendering inutile the constitutional guaranty.

REGULATION AND NOT PROHIBITION

The people's right to peaceably assembly, like other constitutional rights, is not absolute. It is necessarily subject to the police power of the State and the latter's right to defend itself, which is always paramount. Everyone with the exception of anarchists, will agree that the State through its government, has the right to regulate public assemblies and even suppress them when its very existence is threatened, so long as the State's government still holds the people's mandate and confidence and, such drastic action is necessary in the execution of its responsibilities as the duly constituted authority. What the Constitution seeks to prevent is the outright prohibition of public assemblies. But from the words used in the provision, it can be implied therefrom that the State reserves the power to regulate the conduct of such assemblies. As stated succinctly by one constitutional authority:

> "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions and the beliefs to express may address a group at any public place and at any time. The Constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel

---

[20] 1 TAÑADA & FERNANDO, CONSTITUTION OF THE PHILIPPINES 399 (1952).

[21] Primicias v. Fugoso, 80 Phil. 71 (1948).

[22] Bartolome v. De Borja, Adm. Matter No. 1096, May 31, 1976, 71 S.C.R.A. 153, 163 (1976), *citing* Tobias v. Ericta, Adm. Case No. 242-1, July 29, 1972, 46 S.C.R.A. 83 (1972).

> on the streets is a clear example of government responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection."[23]

Likewise, in this jurisdiction, the Supreme Court in *Primicias v. Fugoso,* stated that, "It is a settled principle growing out of the nature of well-ordered civil societies that the exercise of those rights (of assembly and petition) is not absolute for it may be so regulated that it shall not be injurious to the equal enjoyment of others having equal rights, nor injurious to the rights of society."[24] Social necessity is indeed a valid justification for the regulation of activity held on the streets and other public places.

Government regulation most often takes the form of an ordinance or law requiring prior notice to the law enforcement authorities of a planned assembly. Often, the law requires a permit as a condition precedent for the holding of a public assembly. In instances when under the guise of regulation, there is actually prohibition, unconstitutionality exists and the reviewing court must hold the regulatory measure invalid. If the amount of governmental control were to be placed in a continuum (no control at one end and full control at the other), necessarily then, it is for the courts, when reviewing every ordinance or law which regulates public assemblies, to determine that point where regulation becomes prohibition. When the amount of control goes beyond this point, there is an abridgement of the right of assembly which is exactly what the Constitution prohibits. Otherwise, 'law and order' would be an abused cover-all phrase for invoking the government's power to repress militant protest. It is at this point where the government seeks to define and punish crimes of advocacy that the issue of freedom of expression of the individual is drawn.[25]

Ideally, it is only when the assemblies create public disturbances or operate as a nuisance, that the law should interfere. But as it is, regulation by the law operates from the start when it requires the organizers of an assembly to obtain a permit from the local authorities to hold the proposed assembly. It has been observed that the constitutional provision is a prohibition against prior restraint.[26] Strictly speaking, the requirement of securing a permit is an act of prior restraint because it is a limitation to the exercise of the right, imposed even before the conduct of the assembly. But, in reason, such a requirement is not by itself objectionable as it is a necessary aspect of regulation which the Constitution allows. The constitutional prohibition against prior restraint would only be violated when the

---

[23] GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1049 (1975). This doctrine had been enunciated by the U.S. Supreme Court in Cox v. New Hampshire, 312 U.S. 569 (1941) and Cox v. Louisiana, 379 U.S. 536 (1965).

[24] Primicias v. Fugoso, 80 Phil. 71, 75 (1948).

[25] E. NEWMAN, CIVIL LIBERTY AND CIVIL RIGHTS 17 (1970).

[26] J. BERNAS, THE 1973 PHILIPPINE CONSTITUTION 53 (1981).

authorities vested with the power to grant or deny the permit sought should exercise such power in a manner so unreasonable as to amount to censorship of the right to peaceably assemble. The right, therefore, is utterly dependent on the local authorities exercising their discretion in a reasonable manner.[27] The Supreme Court has emphasized that although the licensing authority is vested with discretion in determining whether or not a permit should be granted, such discretion is not unfettered and an appraisal of all the relevant circumstances should be made in granting or denying the permit.[28]

One thing must be pointed out: the licensing authority is almost always part of the administration against whom the petition or the rally is to be addressed. And naturally, the ruling power would not likely view with approval the expression of adverse opinion and this consideration would encourage the licensing authority to look for loopholes in the application on which it could base a denial of the permit. Another criticism against the requirement of permits as a condition for the conduct of a public assembly is that it presents a danger, not entirely remote, of a denial of the equal protection of the law as it leaves much opportunity for discrimination in the granting of permits. To illustrate, there has been no celebrated instance when a licensing authority denied or even required the procurement of a permit for the conduct of the Independence Day Parade which is organized every year by the national government. In contrast, judicial records are replete with cases wherein permits sought by anti-administration groups for the holding of an assembly have been denied by the local authorities for unconvincing reasons. The argument that government-sponsored assemblies are always peaceful finds no force when it is considered that such assemblies are as likely to be 'infiltrated by subversive elements' (the most common reason for denying rally permits of anti-administration groups) as any other assembly. As for traffic considerations experience has shown that these government-sponsored assemblies cause as much and even more confusion than other assemblies. There is thus no valid reason for the difference in treatment accorded to government rallies and anti-government rallies. But discrimination, though often unnoticed, does exist and is an attendant evil in the present state of implementation of the permit system.

While the rules governing the conduct of public assemblies in the form of statute lie within the legislative power of the local government units, the power to grant or deny a permit is almost always vested in the local chief executive. Such discretionary power, as earlier pointed out, is not absolute and must conform to the test of reasonableness so as not to amount to prior restraint. An example of such local regulation is section 1119 of the Manila Ordinances which provides in part that the "streets

[27] H. STREET, FREEDOM, THE INDIVIDUAL AND THE LAW 68 (1982).
[28] Reyes v. Bagatsing, G.R. No. 65366, November 9, 1983, 125 S.C.R.A. 553, 568 (1983).

and public places of the City shall be kept free and clear for the use of the public provided htat the holding of any meeting or assembly thereon is prohibited unless the necessary permit from the Mayor is secured."[29] The Supreme Court in the aforementioned *Primicias* case, construed this Manila ordinance to mean that it did not vest on the Mayor the power to refuse to grant the permit, but only the power to determine or specify the streets or public places where the meeting may be held.[30] By this decision, which was largely based on the American case of *Cox v. New Hampshire*,[31] the Court has laid down the guideline that the effective application of the constitutional freedom of assembly prohibits any denial of a permit except for justified reasons which satisfy the standard set by the law, and that the permit requested should be automatically granted should there be no objections relative to the time, place, and manner of the conduct of the assembly. But the Supreme Court seems to have mistakenly adopted the U.S. jurisprudence on the matter without making distinctions as to its application in the Philippine setting. For example, it is a point in fact that the licensing authority, in acting on an application for a permit, considers not only the time, place and manner of the proposed assembly but also considers the entities under whose auspices it is being organized. In *Evangelista v. Earnshaw*,[32] the Supreme Court upheld the denial of the Manila Mayor of the request of the Communist Party of the Philippines (not yet an outlawed organization at that time) for a permit to conduct an assembly. This is a clear departure from the *De Jonge v. Oregon*[33] doctrine that it is the purpose for which the assembly is held and not as to the auspices under which it was held that should be considered in deciding whether or not to grant the permit.

This auspices test can be dangerous and unduly limits the lawful exercise of the right of assembly. It is not too far-fetched to think that any organization that may speak for reforms may be branded by the authorities as being subversive and thereafter any application for a permit by such organization for the holding of an assembly may be automatically denied without consideration that its purposes may be completely valid and within the right of assembly which should be protected. The courts, most especially, should be vigilant and swift in acting on these cases. A denial of a permit based on what would amount to second-guessing by the licensing authority as to the object of the proposed assembly is clearly invalid as an act of prior restraint frowned upon by the Constitution.

---

[29] Compilation of the Ordinances of the City of Manila 727 (1960).

[30] Primicias v. Fugoso, 80 Phil. 71, 77 (1948). The Court in this case granted the petition for mandamus to compel the Mayor of Manila to grant the permit for the conduct of an assembly at Plaza Miranda.

[31] 312 U.S. 569 (1941). The U.S. Supreme Court said that the "licensing authorities are strictly limited, in the issuance of licenses, to a consideration of the time, place, and manner of the parade or procession, with a view of conserving the public convenience. . . ."

[32] 57 Phil. 255 (1932).

[33] 299 U.S. 353 (1936).

The soundness of the *Primicias* doctrine that the licensing authority may set limits on the assembly with respect to the time, place and manner of its conduct is not beyond challenge. As had alreday been pointed out, the effectiveness of a public assembly is measured by the favorable response of the government. Such response may be influenced more by public opinion and this may be obtained by holding the assembly in such a manner and at a time and place that would be the most visible and attract the most number of people. If the licensing authority is given unrestrained discretion in deciding that the assembly should be held elsewhere than where proposed or at a different time, would this not be tantamount to a suppression of the right? The Supreme Court, which had occasion to rule on this very matter in *Navarro v. Villegas*,[34] upheld the denial of a permit, brushing aside as without merit the petitioner's contentions that for the complete enjoyment of the right of assembly, it may be necessary that a particular public place be used for purposes of greater publicity and effectiveness (the appplication was for the use of Plaza Miranda). But this decision should be taken only in the light of its attendant circumstances. It would seem that the rash of violent demonstrations at that time was the main factor for the denial. In other cases, it may very well be that the arguments submitted by petitioner are impressed with merit, that is, allowing the licensing authority to change the time, place and manner of the assembly would render illusory the purposes for which the assembly is to be held.

On the other hand, it can be argued that the conduct of an assembly at such a time and place would cause undue traffic congestion or some other confusion that will inconvenience the community at large. In the end, it is a question of balancing the interests between two oppposite considerations. Whether the preferred right of assembly should be accorded more importance than society's immediate interests, or vice-versa, would depend on the circumstances of each case. Nevertheless, there must always be a warning guide to the licensing authorities that any change in the proposed time and place of assembly should be reasonable and justified by the circumstances present and should be made in good faith. It is gratifying to note that the Public Assembly Act requires that should circumstances be present warranting a denial or modification of a permit application, the Mayor, as the licensing authority, is required to immediately inform the applicant who has a right to be heard on the matter and even contest the Mayor's decision in the courts.[35] Of great importance is the fact that the law also provides sanctions and specifically punishes with imprisonment the arbitrary and unjustified denial or modification of the permit.[36]

Another suggestion in the matter of regulation is that the licensing authority should not put great weight to past disorders erupting in previous

[34] G.R. No. 31687, February 26, 1970, 31 S.C.R.A. 731 (1970).
[35] B.P. Blg. 880 (1985), sec. 6 (c) and (e).
[36] B.P. Blg. 880 (1985), sec. 14 (b) in relation to sec. 13 (b).

assemblies of a permit applicant in considering whether to grant or deny the permit sought. A denial of a permit based on previous disorders has been held by the US Supreme Court as invalid, being a prior restraint; more especially so when there are already existing appropriate public remedies to protect the peace and order situation should the assembly once again result in disorder and violence.[37] It would be quite unfair and would be an injustice to deny a permit on such grounds. If ever, such a denial must be based more on the existing probability that disorder would again ensue if the permit is granted and only when the 'clear and present danger' test as laid down by the law has been satisfied.

Neither can the licensing authority apply to the courts for the issuance of a restraining order to prevent an applicant whose permit has been denied by the former from holding a public rally, following the American ruling in *Carroll v. The President and Commissioners of Princess Anne.*[38] The proper remedy for the authorities would be to prosecute the offenders for violation of the law and peacefully disperse the assembly illegally conducted.

Under the Public Assembly Act, the grant of a permit carries with it certain responsibilities imposed on the participants of the assembly, particularly on its organizers and leaders. Such persons are charged by the law with the duty of taking all reasonable measures to ensure the peaceful conduct of the assembly, including policing their own ranks to prevent infiltrators from disrupting the assembly.[39] Should violence and disorder occur, this would constitute grounds for the assembly's dispersal, notwithstanding the validity of its permit. But the leaders are not held directly accountable for the acts of violence perpetuated by particular individuals, whether or not such individuals are participants in the assembly. The liability for the breach of the peace rests on the persons creating the public disorder and only the guilty parties will be prosecuted accordingly.[40] Nor is the fact of violence and disorder always sufficient reason to disperse the assembly. Under the law, importantly, it has been made clear by express provision that, "isolated acts or incidents of disorder or breach of the peace during the public assembly shall not constitute a ground for dispersal."[41] It is only when the violence pervades the assembly that the authorities may order the peaceful dispersal thereof and only by following the procedure established by law. The right of the authorities to order the dispersal of an assembly set in a background of violence or "singed in the context of

---

[37] Kunz v. New York, 340 U.S. 290 (1951). *See also* GUNTHER, *supra* note 23, at 1026.

[38] 393 U.S. 175 (1968).

[39] B.P. Blg. 880 (1985), sec. 8. *See also* the concurring opinion of Justice Teehankee in Reyes v. Bagatsing, G.R. No. 65366, November 9, 1983, 125 S.C.R.A. 553, 574 (1983).

[40] V. SINCO, *supra* note 10, at 668. This principle was reiterated by the Philippine Supreme Court in Reyes v. Bagatsing.

[41] B.P. Blg. 880 (1985), sec. 11 (e).

violence" is well recognized because the employment of violence is illegal and divests the assembly of the constitutional protection.[42]

MAXIMUM TOLERANCE

One area in the governmental regulation of the exercise of the right of assembly that deserves closer attention is the so-called doctrine of 'maximum tolerance.' This rule has been laid down as the guideline to be followed by law enforcement agents in their treatment of rally participants. Under the law, maximum tolerance has been defined as, "the highest degree of restraint that the military, police and other peace-keeping authorities shall observe during a public assembly or in the dispersal of the same."[43]

This precept is praiseworthy as it is an attempt at setting limits on law enforcement authorities to respect the valid and constitutional exercise of the right of assembly before they can disperse the same. But this doctrine is not without its criticisms. In the first place, what the law has laid down is hardly an adequate definition of what maximum tolerance is and should be. The definition given is vague and the law has set no standards to guide both enforcers and rally participants as to when the tolerance is at its maximum. Obviously, the rule is meant to apply according to the circumstances of each case. But this means that the determination of whether or not the law enforcers have reached their maximum tolerance is vested almost always on one man — that is, on the officer commanding the unit. Should such officer decide that the assembly can no longer be tolerated and orders its dispersal, is this not vesting too much discretionary power on one man to put an end to the exercise of a constitutionally preferred right? The worst part of this is that the rally participants cannot challenge the decision made. Of course the rallyists may resort to the courts should there be abuse of discretion on the part of the commanding officer and when the circumstances did not justify the dispersal of the assembly. But at the crucial moment during the time of assembly, the organizers and participants thereof cannot question such a decision which will result in rendering ineffective the purposes for which the assembly was held at such time. Also, common sense suggests that the court will be highly unlikely to override the view taken by the police on the spot. Again, as earlier pointed out, the right of assembly would be dependent on the authorities exercising their discretion in a reasonable manner. [44]

Another objection to this rule of maximum tolerance is that experience has shown that when the circumstances really demand the exercise of such maximum tolerance, it is seldom observed. For example, during the dispersal of an assembly, which the law mandates to be done peacefully, violence by

[42] Dissenting opinion of Justice Makasiar in People v. De la Rosa, G.R. No. 33606, May 16, 1983, 122 S.C.R.A. 147, 205 (1983).
[43] B.P. Blg. 880 (1985), sec. 3 (c).
[44] H. STREET, *supra* note 27.

truncheon-wielding policemen and military personnel almost always occurs. Maximum tolerance precludes the use of violence unless absolutely necessary to repel other violence. If such a need for self-defense arises, the police should remember to exercise maximum tolerance and thereby minimize injuries on both sides. During the dispersal of an assembly, the resulting violence, even if made under color of law enforcement, is no different from any other violence and is just as condemnable.

Still another criticism against maximum tolerance is that while it sets limits on police action during an assembly, it also sets limits on the exercise of such right. This observation is just a resulting corollary to the doctrine as enunciated in the law. If the police authorities are enjoined from intervening in the assembly to the extent of having to exercise maximum tolerance, then the participants and rallyists can conduct their assembly only to the extent that it would not exceed the limits of the maximum tolerance of the police authorities. This is objectionable as an unreasonable limitation on the exercise of the constitutional right especially when those who would exercise their right would be in no position to determine at what point and when the police would have had reached their maximum level of tolerance. Also, such a limitation is unnecessary since there are already appropriate sanctions that can be made to apply should the participants of the assembly go beyond that which the constitution protect.

The limitation imposed by the observance of maximum tolerance may very well be a step in the right direction. But its definition as provided for in the law can still be improved. For instance, while it would seem appropriate to consider maximum tolerance as 'the highest degree of restraint', the exact meaning of the 'highest degree of restraint' at any given point is dependent on the particular circumstances surrounding the conduct of an assembly. The failure of the law in providing for sufficient standards to guide its application leaves the door open for abuse on the part of the law enforcement agents — the persons for whom the rule of maximum tolerance was specifically intended. What could be done to remove this objection is to apply the 'clear and present danger' test in determining whether or not there is basis for the conclusion that maximum tolerance had already been observed. Not only would the police observe such maximum tolerance required of them, but also, they cannot disperse or otherwise interfere in the assembly unless there is a showing of a clear and imminent danger that they have a duty of preventing. The requirements set by this additional rule would decrease the chances for abuse in the use of discretion in the handling of public assemblies by the police authorities. Also, should a judicial controversy arise, the courts, in exercising their power of review, would find it easier to determine whether or not there was a clear and present danger justifying police action rather than determining whether or not the police exercise maximum tolerance. These combined rules of maximum tolerance and clear and present danger would effectively restrain

police authorities from interrupting the assembly unless necessary and would be a better safeguard for the people's right.

ON CIVIL DISOBEDIENCE

Many people would equate participation in mass actions and rallies as a form of civil disobedience. This is not necessarily so, and there is a difference between the lawful exercise of one's right of assembly and that which would constitute civil disobedience. Undeniably, however, there are instances when the two overlap and it is in this area that the most confusion arises. There is therefore a need for a brief and clarificatory discussion on the matter.

One author has defined civil disobedience as, "that voluntary or willful disregard or violation of a plainly valid law, ordinance, court order, rule, regulation or the manner of implementation and execution thereof, usually in a non-violent manner, considered by the civil disobedient as indifferent or unjust and for which violation, the disobedient is more than willing to accept and take the concomitant penalty the law attaches therefor."[45] The definition given is comprehensive, but it is, at one point, inaccurate because civil disobedience is not limited to the violation of only 'plainly valid' laws, but also concerns the violation of laws which are unjust and invalid in the eyes of the disobedient. As a matter of fact, it is this latter class of invalid laws that are most oftenly made the subject of civil disobedience.

It is clear that civil disobedience to a law should be deliberate and openly conducted in full view of the public. It is also clear that those who would violate the law are equally prepared to suffer the punishment for such transgression. Another author discusses the nature of civil disobedience as selective as it does not entail disobedience to all laws and that it is purposive, being directed at some injustice the law allows.[46] And as stated by the same writer, and this is what makes civil disobedience similar to the right of assembly, civil disobedience involves the amelioration of present conditions through the mechanism of law, not apart from law.[47] Both civil disobedience and the exercise of the right of assembly concern preservation under the existing legal system. Both are mediums of protest within the framework of existing government. Civil disobedience, like the right of assembly, is done not for want of respect for lawful authority, but in recognition of a shortcoming in the legal system that can be remedied through peaceful means. Paraphrasing what the great civil disobedience proponent Gandhi once said, civil disobedience is done not because of disrespect for the law but in obedience to a higher law of our being, the

[45] Chavez, *Civil Disobedience and the Rule of Law*, 44 PHIL. L.J. 764, 766 (1969).
[46] *Id., citing* Puner, *Civil Disobedience: An Analysis and Rationale*, 42 N.Y.U.L. REV. 651 (1968).
[47] *Id.*, at 767.

voice of conscience.[48] Similarly, the right of assembly is a peaceful means by which the voice of the people's conscience is expressed to bring to the attention of the authorities of the need for changes in the matter of governance.

But the right of assembly does not automatically form part and parcel of civil disobedience. Significantly, the right of peaceful assembly and petition for redress of grievances is a constitutionally protected right. Civil disobedience is not so protected. There is no constitutional right of civil disobedience to a valid law. The controversy arises when the law violated is palpably an invalid one. For example, if a request for a permit for the conduct of an assembly is denied by the licensing authority, the denial having been unreasonable, the act of the rallyists who proceed with the assembly notwithstanding the denial of the permit, would constitute civil disobedience in a strict sense. But it can be argued that since the denial was unreasonable and unjustifiable and therefore, invalid as against the right of assembly, then the disobedience is entitled to the same constitutional protection. If the licensing procedure which allows an official to discriminate on prohibited grounds is not valid, the question as to whether the person discriminated against can proceed without one should be answered in the affirmative.[49]

In contrast, if the denial of the permit was based on valid grounds, the conduct of the assembly would be illegal and constitutes civil disobedience punishable in accordance with the law. In the first illustration, it can be reasoned out that the conduct of the assembly even without the required permit does not constitute civil disobedience at all since there is no violation of a law because the order of denial violated is a nullity as it is unconstitutional in the first place. One author warns that "to consider this kind of assertion of constitutional rights as civil disobedience is extremely dangerous because it lumps lawful with lawless conduct and gives the erroneous impression that both are permissible."[50]

Consider this third situation. What if the denial of the permit was reasonable and based on valid grounds but the assembly was conducted anyway because the rallyists think the denial was unjust. This is a clear instance of civil disobedience, but are not the rallyists entitled to protection and undeserving of punishment even if they turn out to be wrong, since they had a sincere belief in the unreasonableness of the denial? Unfortunately, the legal determination of this question is left to the courts after the event, but the moral question must be faced by the rallyists in advance, before the conduct of the assembly. In this third situation, the line between what is civil disobedience and what is an exercise of the right of assembly

---

48 L. FISCHER, GANDHI: HIS LIFE AND MESSAGE FOR THE WORLD 58 (1954).

49 E. NEWMAN, *supra* note 25, at 16.

50 COX, *Direct Action, Civil Disobedience, and the Constitution* in CIVIL RIGHTS, THE CONSTITUTION AND THE COURTS 9 (1967).

has altogether disappeared and the same act can fall within the ambit of either one or both. It is submitted that considering that the freedom of assembly is a preferred right and meriting the highest respect, the controversy should be resolved in favor of the rallyists and the constitutional protection should be extended to them. In the first place, the participants of the illegal assembly cannot be faulted as they sincerely believed that the denial of the permit was unjust. They conducted the assembly not for the mere sake of violating the law and the order of denial, but because of their conviction that they have a right to hold such an assembly. Although the presence of good faith is a matter of proof and would vary on a case to case basis, the courts, in ruling over this matter, should be more liberal in upholding the constitutional guarantee of protection extended to the lawful exercise of the right of assembly. The reason for this, as had already been discussed, is to maximize the opportunities for the people in making the government responsive to their needs.

THE TESTS APPLIED

The uncompromising language of Article IV Section 9 of the Constitution would seem to indicate the absolute nature of the freedoms of speech and the press and the right of assembly. Our Supreme Court has gone so far as to place these freedoms on this plane:

> "The rights of free expression, free assembly and petition, are not only civil rights but also political rights essential to man's enjoyment of his life, to his happiness and to his full and complete fulfillment.[51]

Nevertheless, the Court had always been conscious of the fact that the maintenance of peace and order was one responsibility which the State had above and beyond the right and freedoms in the written Constitution. Hence, it was recognized that there was this unwritten and inherent faculty of the State — through its Government — to exercise the power of regulation, its police power. The Court thus found a legal wedge in the seemingly absolute constitutional clause: the freedom of speech and of the press and the right of assembly were absolute as to the contents thereof but the time, manner and place of their exercise can be regulated.[52]

One author has put it in this wise:

> "What the Constitution forbids is not the abridgement of speech, press, etc., for in fact... the government does abridge a diverse variety of expressions of speech and press in times of peace... and war. The Constitution rather denies the government the constitutional power to abridge the freedom of these expressions. It is the judicial definition of constitutional freedom which is controlling.[53]

---

[51] PBM Employees Organization v. PBM Co., Inc., G.R. No. 31195, June 5, 1973, 51 S.C.R.A. 189, 201 (1973).

[52] *The Constitutionality of the Requirement to Give Notice Before Marching,* 118 U. PA. L. REV. 270 (1969).

[53] Constanzo, *Public Protest and Civil Disobedience: Moral and Legal Considerations,* 13 LOYOLA L. REV. 21, 25 (1971).

This hair-splitting distinction is possible because of the vagueness of the terms, 'freedom of speech' and 'freedom of the press.' These phrases of the Constitution are wide open to judicial interpretation. What these freedoms entail is really a matter for the courts to decide.[54] And as for the right of assembly, the courts, as already discussed, have decided that this right does not include the disruption of peace and order.[55]

Having discussed the supreme importance of the right of assembly and then allowing for its regulation by the State, it was inevitable for the Court to encounter situations where it would be pressed to adopt a definite criterion with which to judge the constitutionality of a regulation or the permissibility of an exercise of the freedoms and the right. This judicial search for a definite criteria has led to the evolution of three 'tests': 1) the Dangerous Tendency Rule; 2) the Clear and Present Danger Test; and 3) the Balancing of Interests Test.[56]

According to one writer, the Constitutional provision has two basic prohibitions: a) prior restraint, and b) subsequent punishment; and he has opined that the tests are applicable only to cases of subsequent punishment where a person invoking the protection guaranteed by the Constitution is put to trial for the violation of an ordinance or statute governing the same.[57]

The writers of this paper feel that this is not altogether too accurate a view. The constitutionality of a regulation (or the permissibility of an exercise of the right) may be put to issue before the right is actually exercised by an action for mandamus when, for example, an application for a rally permit is denied — as in *Primicias v. Fugoso*[58] and in *Evangelista v. Earnshaw*,[59] with different results reached by the Court. Or the regulation may be challenged after the right had been exercised in a trial for a violation of an ordinance or a statute when, shall we say, the defendant did not bother to apply for a permit or simply ignored the ordinance or statute requiring one. Regulation is still regulation whether it takes the form of prior restraint or subsequent punishment, i.e., whether it is applied before or after the exercise of the right. Either way — or time — the tests of constitutionality or permissibility are applicable.

The three tests evolved, of course, from cases involving the right of assembly as well as cases involving the freedoms of speech and of the press. The three tests are all applicable and have been used at one time or another, to all three forms of expression guaranteed by the Constitution. The choice of tests will, of course, depend upon the peculiar circumstances of each

---

54 *Id.*

55 *See* GUNTHER, *supra* note 23.

56 J. BERNAS, *supra* note 26, at 55. *See also* Justice Castro's separate opinion in Gonazles v. Comelec, G.R. No. 27833, April 18, 1969, 27 S.C.R.A. 835 (1969).

57 J. BERNAS, supra note 26.

58 80 Phil. 71 (1948).

59 57 Phil. 255 (1932). The Supreme Court in this case denied the petition for mandamus.

case but it is generally agreed that whether the case involves the freedom of speech, of the press, or of the right of assembly, there is a choice among the tests, all three of them, "since the right of assembly and petition is equally as fundamental as freedom of expression, the standards for allowable regulation of speech and press are also used for assembly and petition."[60]

The Dangerous Tendency Rule

Of doubtful applicability to cases involving the right of assembly is the Dangerous Tendency Rule. Our Supreme Court citing *Gitlow v. New York*,[61] defined the rule thus:

> "If the words uttered create a dangerous tendency which the State has a right to prevent, then such words are punishable; it is sufficient if the natural tendency and probable effect of the utterance be to bring about the substantive evil which the legislative body seeks to prevent."[62]

Under this rule, "a person could be punished for his ideas even if they only tended to create the evil sought to be prevented, a mere tendency toward the evil was enough."[63] This Rule was usually applied to cases involving the freedom of speech and as late as 1956, Justice Concepcion was to remark in his dissent in *De La Cruz v. Ela* that the Supreme Court had shown, in cases past, its preference for the Rule.[64]

As defined by our Court and as paraphrased by commentators, the Rule can be a source of concern for those who would uphold the primacy of the constitutional freedoms. By its emphasis on mere 'tendency,' the Rule is less stringent on what the government is required to show before regulation is allowed. Less stringent, that is, than what the Clear and Present Danger Test would require under like circumstances. Indeed, it has been said that, "as a result of the adoption of this Rule, a number of persons were convicted for expressing views against the government even if they did not really endanger the public order."[65]

The Rule is the earliest of the three tests for constitutionality and although some would have it that it has since been superseded by the Clear and Present Danger Test,[66] the Dangerous Tendency Rule is still applicable under certain conditions. First, the Clear and Present Danger Test is not a direct substitute for the Dangerous Tendency Rule — each is applied under a different set of circumstances. This can be deduced from

---

60 J. BERNAS, *supra* note 26, at 60.
61 268 U.S. 652 (1925).
62 Cabansag v. Fernandez, 102 Phil. 152 (1957).
63 I. CRUZ, *supra* note 17, at 179.
64 99 Phil. 346 (1956). See also Justice Castro's separate opinion in Gonzales v. Comelec, G.R. No. 27833, April 18, 1969, 27 S.C.R.A. 835 (1969).
65 I. CRUZ, *supra* note 17, at 180.
66 See Justice Castro's separate opinion in Gonzales v. Comelec, G.R. No. 27833, April 10, 1969, 27 S.C.R.A. 835 (1969).

the case wherefrom most authorities derive the definition of the Rule: *Gitlow v. New York.* That case was decided by a Court fully aware of the alternatives for the test of constitutionality since it was decided after the formulation of the Clear and Present Danger test in *Schenck v. U.S.*[67] The rejection of this latter test in *Gitlow* was justified by the fact that, "the question in such cases (as this) is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil without reference to the language itself. . . ."[68]

Thus, it would seem that where the statute or the ordinance punishes the very language of the expression, the Dangerous Tendency Rule, not the Clear and Present Danger Test, is applicable. The determinative factor would seem to be whether the ordinance or statute makes reference to the language itself. If it makes no such reference, then the latter Test is applicable; if it does make such a reference, then the Rule is applied. The problem with such a distinction is that the Clear and Present Danger Test is used whenever the regulatory statute is aimed at the contents of the speech, at the very language itself.[69] Obviously, 'referring to' and 'aiming at' the language may have a distinction too fine to observe.

Another application of the Rule is that it has been used in most cases involving contempt of the Supreme Court.[70]

But in several cases,[71] it (the Rule) was applied in enforcing Article 142 of the Revised Penal Code (Act 3815) punishing the crime of 'Inciting to Sedition'. So it seems that when the legislature has decided — through law — that a certain type of speech or writing is punishable, the courts will not interfere, and will apply the Rule rather than ask for a higher standard such as the Clear and Present Danger Test.

The Clear and Present Danger Test

Justice Holmes, writing for a unanimous Court in *Schenck v. U.S.,* originally formulated the Clear and Present Danger Test of permissible restriction in this wise: "The question in every case is whether the words are used in such circumstances and are of such 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."[72]

Our Supreme Court, in *Gonzales v. Comelec,* further explained the Test thus:

---

[67] 294 U.S. 47 (1919).
[68] Gitlow v. New York, 268 U.S. 652 (1925).
[69] *The Constitutionality of the Requirement to Give Notice Before Marching,* 118 U. PA. L. REV. 270 (1969).
[70] J. BERNAS, *supra* note 26, at 58.
[71] People v. Nabong, 57 Phil. 455 (1932) and Espuelas v. People, 90 Phil. 524 (1951).
[72] 249 U.S. 47 (1919).

> "The danger must not only be clear but also present. The term clear seems to point to a casual connection with the danger of substantive evil arising from the utterance questioned. Present refers to the time element. It is used to be identified with imminent and immediate danger. The danger must not only be probable but very likely inevitable.[73]

Compared to the Dangerous Tendency Rule, the Clear and Present Danger Test requires a higher degree of urgency on the part of the government to regulate the freedoms of expression and the right of assembly. It sets a higher standard for permissible restriction and consequently, gives more weight to the freedoms and the right protected by the Constitution. The difference between the two tests had been said to be just a matter of degree.[74]

This test has been labeled as 'the most libertarian' of the three tests of constitutionality since it requires that the danger created by the exercise of the right of assembly must be clear, present, and traceable to the ideas expressed.[75] Unless this nexus is established, the individual may not be held accountable.

The distinction drawn between the Dangerous Tendency Rule and the Clear and Present Danger Test in the *Gitlow* case was again emphasized in *Whitney v. California*[76] where Justices Holmes and Brandeis would concur — but only in the result. The two justices opined that, "Even though the legislature had designated certain speech as criminal, this could not prevent the defendant from showing there was no danger that the substantive evil would be brought about."[77] They insisted that the Clear and Present Danger Test be applied whether the statute punished speech itself or the same punished certain acts the evidence of which was the speech or utterances. Under this rationale, the Government cannot convict an accused on mere utterance of the punishable speech alone; his utterances must have been made under circumstances where there is a clear and present danger of a substantive evil which the State has a right to prevent. The person who speaks out against the Government before an assembly cannot be prevented from speaking or punished merely because he advocates, say, an armed uprising; the State must prove that by his speech, the crowd before him would have started an armed uprising right there and then.

The formulator of the Test would brook no distinction. Only a clear and present danger can justify restrictions on the right of assembly or freedom of expression. This rationale has since been unpheld[78] and has

---

[73] G.R. No. 27833, April 18, 1969, 27 S.C.R.A. 835 (1969).

[74] J. BERNAS, *supra* note 26, at 55; Justice Castro's separate opinion in Gonzales v. Comelec, G.R. No. 27833, April 18, 1969, 27 S.C.R.A. 835 (1969).

[75] I. CRUZ, *supra* note 17, at 180.

[76] 274 U.S. 357 (1927).

[77] *Id.*

[78] Dennis v. United States, 341 U.S. 494 (1951).

been adopted by our Supreme Court in deciding recent cases.[79] And more importantly, our legislature has also incorporated this Test in the recently passed Public Assembly Act of 1985.[80]

The Balancing of Interests Test

The last and latest 'developed' test of permissible restriction is the Balancing of Interests Test. Its basis was supposed to have been laid down in *American Communication Asso. v. Douds* where the Court ruled that:

> "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of the two conflicting intrests demands the greater protection under the particular circumstances presented. x x x We must, therefore, undertake the 'delicate and difficult task' x x x to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights x x x."[81]

But is this not exactly the same situation which gave rise to the two tests of permissible restriction herein already mentioned? A 'particular conduct' is regulated and there is an apparent abridgement of the freedom of expression. Certainly, the courts must weigh the arguments for and against such regulation. Certainly, the task is delicate and difficult. Is not the court weighing arguments for and against the questioned regulation when it is utilizing either the Dangerous Tendency Rule or the Clear and Present Danger Test?

Even the theory upon which this Balancing of Interests Test is supposed to rest is but a mere restatement of the justification for the government regulation of the freedom of expression and the right of assembly.

> "It rests on the theory that it is the Court's function in the case before it when it finds public interests served by legislation on the one hand and First Amendment freedoms affected by it on the other, to balance the one against the other and to arrive at a judgment where the greater weight shall be placed. If on balance it appears that the public interests served by restrictive legislation is of such a character that it outweighs the abridgement of the freedom, then the Court will find the legislation valid. In short, the balance of interests theory rests on the basis that constitutional freedoms are not absolute, not even those stated in the First Amendment, and that they may be abridged to some extent to serve appropriate and important interests."[82]

It is therefore clear that there is a balancing of interests when the Clear and Present Danger Test is applied. This is so because where the

---

[79] Reyes v. Bagatsing, G.R. No. 65366, November 9, 1983, 125 S.C.R.A. 553 (1983); Ruiz v. Gordon, G.R. No. 65696, December 19, 1983, 126 S.C.R.A. 233 (1983).

[80] B.P. Blg. 880 (1985), sec. 6 (a).

[81] 339 U.S. 384 (1950).

[82] J. BERNAS, *supra* note 26, at 57.

Dangerous Tendency Rule and the Clear and Present Danger Test lay down a standard, the Balancing of Interests Test suggests a method — for which a standard is still necessary. The interest of the government in keeping peace and order must be weighed against the interest of the State in allowing avenues open for peaceful change. Jurisprudence has come up with two standards by which to judge government regulation. These are the weights our judiciary has, at one time or another, assigned the constitutional freedoms of speech and press and the right of assembly. The Clear and Present Danger Test is just one form of the Balancing of Interests Tests.[83] The courts have been balancing interests long before the *Douds* ruling was enunciated.

It is not here being argued that the Balancing of Interests Test is ineffectual. Certainly, it has its uses, but it must be pointed out that it presents no novel approach in testing regulatory measures nor is it a strict substitute for any of the two earlier tests. Its main use is for situations where the freedoms of expression and the right of assembly are not directly set against the values for which police power was designed to protect. In *Duods,* the statute involved was one which required labor union officers to subscribe to a non-communist affidavit before their union could avail of the benefits of a labor law.[84]

But the proponents of the Balancing of Interests Test seem to be arguing for the obvious; the inapplicability of the Dangerous Tendency Rule and the Clear and Present Danger Test to situations where interests other than public peace and order are set against the interests of free expression. They seem to have missed that the two earlier tests are standards used for a balancing process. That a different set of interests requires a different set of standards does not need argument. That the courts, when faced with a case involving the right of assembly, must balance conflicting interests needs no further emphasis. What must be decided is what weigh should be given to expression on the one hand and regulation on the other. The choice is apparently limited to either the Dangerous Tendency Rule or the Clear and Present Danger Test.

Some Problem Areas

One of the gray areas wherein questions are raised as to the proper exercise of the right of assembly is when the assembly is held within private property. Under the law, which governs 'public' assemblies, mention is made of assemblies conducted in private premises but only to the effect that no permit from a licensing authority is needed.[85] The law only states what has been already expressed by the Supreme Court in a number

[83] *The Constitutionality of the Requirement to Give Notice Before Marching,* 118 U. Pa. L. Rev. 270, 275 (1969).

[84] 339 U.S. 384 (1950).

[85] B.P. Blg. 880 (1985), sec. 4.

of cases wherein it said that only the consent of the owner or the one entitled to the legal possession of the property is required for those who propose to conduct an assembly in private property.[86]

Few opportunities have been presented where the courts have discussed this matter and it was only fairly recently when assemblies were conducted in private premises. As had already been pointed out, the very nature of an assembly dictates that it should be made 'public' as much as possible so as to be effective. This could be one reason why assemblies in private properties have not been common and only lately has there been resort to such practice. Besides this, it is also difficult to find an area large enough to accommodate the expected number of participants in the assembly. It is also difficult to find an owner of the desired private property who would be willing to have an assembly conducted on his property especially when such assembly would be, in all probability, critical of the administration. Nonetheless, assuming that the owner's consent had been obtained, the obvious question is whether or not such an assembly can still be the subject of government regulation. An affirmative answer seems indicated, considering that the right of assembly is not absolute wherever conducted. But the authorities are limited in what they could regulate as they have less reason to interfere on reasons of public interests and convenience. If for example, the assembly participants would need to pass on public thoroughfares in order to reach the private property where the assembly is to be held, the authorities may require a permit for the march but only for reasons of public convenience and safety and ensuring the smooth flow of traffic. The law allows the local chief executive to reroute traffic or designate the route to be taken by the rallyists if they would use public roads for an appreciable length of time.[87] What constitutes an 'appreciable length of time' is not clear as the law is silent on the matter. But it is clear that the permit requirement should not be used to harass or even prevent the rallyists from converging on the property where the assembly is to be held.

Another question is whether or not police officers are entitled to attend an assembly held on private property. Although the police authorities may reason that they also have a duty to extend protection to assembly participants, their presence within the private property would be inadvisable. There can be no denying the fact that the presence of police officers or other law enforcement unit has the tendency of creating an atmosphere of conflict and tension between them and the rallyists which should be avoided as far as possible. There is, of course, no reason to prevent a few police officers to be stationed within the immediate vicinity

[86] Reyes v. Bagatsing, G.R. No. 65366, November 9, 1983, 125 S.C.R.A. 553, 569 (1983); Justice Concepcion's concurring opinion in Ruiz v. Gordon, G.R. No. 65695, December 19, 1983, 126 S.C.R.A. 233 (1983); and Malabanan v. Ramento, G.R. No. 62270, May 31, 1984, 129 S.C.R.A. 359 (1984).

[87] B.P. Blg. 880 (1985), sec. 7.

of the place where the assembly is held so long as they stay at a discreet distance. In England, it has been held in one case that a police officer is entitled to be present at a meeting held on private premises if he has reasonable grounds for believing that seditious speeches will be made and/or that a breach of the peace will take place, or when there exists a real possibility or even when any offense is imminent or is likely to be committed.[88] This rule may be adopted in this jurisdiction with the modification that the Clear and Present Danger Test be applied to determine whether there are circumstances justifying the presence of a police officer on the private property itself. As a point of interest, contrast should be made regarding permit requirements for public assemblies in England. As one author expressed, "Englishmen have no right to hold a public meeting anywhere: even if they begin to hold such on their own premises, they will presumably need town and county planning permission from local authority for this change in the use of the land."[89]

Another informative point is that, under the law, no permit is required for assemblies conducted in government owned and operated educational institutions which are governed by its own regulations.[90] But special attention should be given to mass actions and assemblies conducted within school premises. Campus grounds have often been the site of demonstrations and assemblies participated in not only by students but also by faculty members and non-academic personnel of the institution. If the school is a privately owned institution, the general rule applies and only the consent of the school authorities is needed for the conduct of the assembly or other mass action. But the power of the school authorities to grant or withhold such consent is limited, distinguishing school owners from other property owners who have an absolute right with regard to the giving of their consent. In *Malabanan v. Ramento*,[91] the Supreme Court held that while assemblies in school premises need the attendant permission of school authorities, such officials are devoid of the power to deny such request for permission or consent arbitrarily or unreasonably. In granting their permission, it is recognized that school authorities may set conditions as to the time and place of the assembly to avoid the disruption of classes or stoppage of work of the non-academic personnel. The Supreme Court, however, warned that even if there be violations of the terms of the permit granted, the penalty imposed by the school authorities on the offenders should not be disproportionate to the offense.[92]

---

[88] Thomas v. Sawkins, 2 K.B. 249 (1935) *discussed in* KIER & LAWSON, CASES IN CONSTITUTIONAL LAW 184 (1979).

[89] H. STREET, *supra* note 27, at 55.

[90] B.P. Blg. 880 (1985), sec. 4.

[91] G.R. No. 62270, May 31, 1984, 129 S.C.R.A. 359, 372 (1984).

[92] *Id.* at 366. In this case, the Court set aside the penalty of a one-year suspension imposed by the Ministry of Education, Culture and Sports and school authorities upon several students considered by the Court as too harsh in relation to the students' offense of conducting the assembly outside of the time and place indicated in the permit granted.

Another problem area that has not been the subject of too much discussion is the participation of aliens in mass assemblies. In recent times, amongst the crowd of marchers and rallyists, it is common to see a handful of aliens, not only observing but participating in the assembly. Although we consider the right of assembly and petition for redress of grievances as political rights and that such rights are attributes of citizenship, there can be no serious objection to alien participation in mass assemblies, so long as such participation is in lawful exercise of one's rights. The Constitutional guarantee is not effective only for Philippine nationals but also for foreigners who might be residing or temporarily stationed here. The law impliedly recognizes this right being available to non-Filipinos when it requires that, "a permit be obtained by *any person* or persons organizing the conduct of an assembly."[93] Truth to tell, no one can claim a monopoly of dissent and the constitutional right of assembly is not limited by nationalities.

One interesting case brought before the Supreme Court is *Alonto v. Ponce Enrile,* a habeas corpus case dismissed by the Court for being moot and academic since the petitioner was released from custody.[94] In this case, the petitioner was a Filipino Muslim who, together with others including some Iranians, was arrested and detained for an alleged illegal assembly at the Quirino Grandstand which assembly was conducted without the requisite Mayor's permit.[95] The case presented several interesting points of discussion, especially regarding the Iranians' participation in the illegal assembly, but unfortunately, it was dismissed without the Court going into its merits. The assembly was not addressed to the Philippine government but was an expression of support for the Iranians' stand against President Carter of the United States.[96]

An innovation introduced by the Public Assembly Act of 1985 is the requirement for local governments to establish 'freedom parks' within their jurisdiction where assemblies and other mass actions may be conducted without any need for a permit.[97] Necessarily, the provision requiring the establishment of these freedom parks should not be interpreted to mean that public assemblies will only be allowed in these designated areas. If this was the intention, why for does the law require permits for public assemblies to be conducted in public places?[98] There is no danger that this provision in the law might be used as a means of setting additional limits to the right of assembly. There might be speculation to the effect that the licensing authority has now an additional ground for denying a permit or modifying it by the simple argument that the rally or assembly

[93] B.P. Blg. 880 (1985), sec. 4.
[94] G.R. No. 54095, July 25, 1980, 98 S.C.R.A. 798 (1980).
[95] Alonto v. Ponce Enrile, G.R. No. 54095, July 25, 1980, 98 S.C.R.A. 798 (1980).
[96] *Id.*
[97] B.P. Blg. 880 (1985), sec. 15 in relation with sec. 7.
[98] *Id.*, sec. 4.

could properly be conducted in the freedom parks. In allaying these fears, it is well to remember the dictum enunciated in *Schneider v. Irvington,* that the right of assembly cannot be abridged on the plea that it might be exercised in some other place than where proposed by its organizers.[99] Evidently, the purpose of this provision for the establishment of these freedom parks is to provide the people with at least one forum wherein they could exercise their right of assembly even without the burden of securing a permit.

Another matter that has great bearing on the proper exercise of the people's right of assembly is the peace and order situation in the locality where the proposed assembly is to be held. The peace and order situation varies in the different regions of the country — it is bad in some areas and even worsening still in others. Should an assembly be organized in such areas, the licensing authority must weigh carefully the circumstances present in the locality and use the utmost discretion in denying or granting the permit requested. The clear and present danger test and the doctrine of maximum tolerance should be strictly applied and observed. Above every other consideration, there is the imperative for the licensing authority to act in good faith in acting on the application for a permit. The law should not be misused to unreasonably restrain what would otherwise be a lawful exercise of the right to peaceable assembly. The peace and order situation may dictate more caution and consideration in granting the permit but it does not allow for arbitrary denial unless the circumstances so warrant. Even then, the applicant for the rally permit must be informed and heard on the matter as provided for by the law.[100]

CONCLUSION

The enactment of the Public Assembly Act into law last October 22, 1985 was prompted by two recent public assemblies which have resulted in violence, death and injury to scores of people. The first of these was the tragic Escalante massacre on September 20, presently still under investigation, and the other was the rally conducted last October 21, where a bloody clash between police and rallyists left two persons dead and several others injured.[101] The law seeks purposely to prevent the future occurrence of these unfortunate incidents and although the law has its flaws, as had already been discussed, it is generally sound and could, if properly implemented, set the stage for a new era for the people's exercise of their right of assembly and petition. For example, the provision of the law which prohibits the carriage of firearms by the law enforcers who are required also to be in the proper uniform (discouraging the presence of plain-clothes police and military personnel),[102] is a big step in trying to prevent the

[99] 308 U.S. 147, 163 (1939).
[100] B.P. Blg. 880 (1985), sec. sec. 6 (c).
[101] *Malaya,* October 22, 1985, at 1, col. 2.
[102] B.P. Blg. 880 (1985), sec. 10 (a) and (b).

outbreak of violence between the law enforcers and the rallyists or at least minimize the kind of injuries that can be sustained should such violence occur.

At the beginning of this paper, mention was made of the fact that violence in public assemblies had been the exception and not the rule. The Public Assembly Act was passed precisely with the objective of ensuring that violence stays the exception. In a manner of speaking, the law is a compromise between the people's right of assembly and the State's exercise of its regulatory powers and it may very well be the 'middle ground' where the right of assembly meets with the Rule of Law — where the balance is struck between the right of legitimate protest and the State's duty to protect its interests as well as those of the rest of society. The far-reaching effects of the law on the right of assembly cannot be foretold but the existence of the law itself is an affirmation of the importance of this right in our legal system, and if anything, the law should be interpreted to favor the primacy of the right unless there are circumstances that really justify the suppression of the exercise of such right. One must realize that, almost always, the assembly conducted is in response to something considered by the rallyists as objectionable and which deserves serious consideration on the part of the government. The right provides for the Constitutional means to bring to the attention of the authorities some things that adversely affect some segments of society. This constitutional organism that furnishes the means by which resistance may be systematically and peaceably made on the part of the ruled to the oppression and abuse of power on the part of the rulers is 'the first and indispensable step toward forming a constitutional government'.[103] A similar exhortation has been expressed in the landmark case of *Cruikshank* where the Court emphatically stated that, "The very idea of government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for redress of grievances."[104]

At this time when it seems that the nation is facing a political identity crisis (among others), the fundamental political and civil rights of the people should be allowed fulfillment if only to assist in our growth and development as a free and democratic society. Undeniably, the Rule of Law has its place in a democratic system as it is responsible for the administration of justice. On the other hand, the role of the right of assembly can never be discounted as it is responsible for initiating changes in a society beleaguered with problems and needful for reforms. In this way, the right of assembly becomes the indispensable means by which democracy in our nation is strengthened and given substance. Indeed, there is truth in the aphorism that there can be no democracy when there is no dissent.

——oOo——

103 CALHOUN, *The Concurrent Majority*, in 7 BRITANNICA GREAT BOOKS 281 (1963).
104 92 U.S. 542, 552 (1875).