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Brief background to contemporary practice on free expression in the Philippines

The Philippines is known for its freewheeling press in a region where governments continue to repress political opinion and expression. It has a constitution guaranteeing the freedom of speech and of expression through provisions drawn from the American constitution and jurisprudence. It is a signatory and party to the International Covenant on Civil and Political Rights and is the only Southeast Asian country that has ratified the ICCPR's Additional Protocol I allowing the Individual Complaints mechanism of the UN Human Rights Committee.

Yet it is a country that has to grapple with its own share of unhappy ironies. While it continues, if sometimes in a haphazard fashion, a tradition of American-style journalism, it is one of the most dangerous places in the world for journalists to work in, with many journalists being gunned down in the line of duty.

And despite a recent view of the UN Human Rights Committee in the case of *Adonis v. Republic of the Philippines* (2010, a case litigated by Centerlaw) in which the UN body held that Philippine criminal libel is inconsistent with the country's obligations under Art. 19 of the ICCPR, in 2014, the Philippine Supreme Court, in a constitutional challenge - the *Disini* case, en banc, G.R. No. 20335, 11 February 2014¹ - to the new Philippine Cybercrime law, upheld the constitutionality of both traditional libel and cyber libel (with the latter imposing heavier penalties than the former). It however said there is no intermediary liability in libel.

At the same time it expanded protections under the *public figure* doctrine, holding that in the case of public figures complaining of defamation, they must hurdle an expanded actual malice test in which even the gross or extreme negligence by journalists is not actual malice.

¹ A case in which Centerlaw was also one of the petitioners.

The same Decision also declared as unconstitutional (a) website “take down” or “blocking” powers given to the justice department; and (b) real-time traffic data collection without the benefit of a court.

With the prosecution for cyber libel having been deemed constitutional by the Supreme Court, the trend that emerges is that it is being used by politicians and corporations to challenge the contrarian discourses of journalists, bloggers, and human rights defenders –and even of ordinary citizens.

I. Important Court Decisions on Free Expression in the Philippines in 2015

Jill M. Tormis v. Judge Mienardo M. Paredes, Second Division, A.M. No. RTJ-13-2366, February 4, 2015

In this administrative proceeding, the complainant charged Judge Paredes with grave misconduct. Jill was a student of Judge Paredes in Political Law Review during the first semester of school year 2010-2011 at the Southwestern University College of Law, Cebu City. She complained that sometime in August 2010, in his class discussions, Judge Paredes named her mother, Judge Rosabella Tormis (Judge Tormis), then Presiding Judge of Branch 4, Municipal Trial Court in Cities (MTCC), Cebu City, as one of the judges involved in a slew of marriage scams in Cebu City. Judge Paredes also mentioned in his class that Judge Tormis was abusive of her position as a judge, corrupt, and ignorant of the law.

In one session, Judge Paredes was even said to have included in his discussion Francis Mondragon Tormis (Francis), son of Judge Tormis, stating that he was a "court-noted addict." She was absent from class at that time, but one of her classmates who were present, Rhoda L. Litang (Rhoda), informed her about it. To avoid humiliation in school, Jill decided to drop the class under Judge Paredes and transfer to another law school in Tacloban City.

One of the defenses made by the Respondent judge is that his right to free expression extends to the classroom, which cannot be curtailed. However, the Supreme Court said that the New Code of Judicial Conduct for the Philippine Judiciary, which urges members of the Judiciary to be models of propriety at all times, presents a reasonable limit to a judge’s free expression. Section 6, of Canon 4, states that “[j]udges, like any other citizen, are entitled to freedom of expression, belief, association and assembly, but in exercising such rights, they shall always conduct themselves in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.”

In addition, the High Court found that Judge Paredes violated the *sub judice* rule, as at the time of the controversy, the case of Judge Tormis was still being investigated. The Court thus said: "The subjudice rule restricts comments and disclosures pertaining to the judicial proceedings in order to avoid prejudging the issue, influencing the court, or obstructing the administration of justice." The rationale for the rule, according to the Supreme Court is that "it is a traditional conviction of civilized society everywhere that courts and juries, in the decision of issues of fact and law should be immune from every extraneous influence; that facts should be decided upon evidence produced in court; and that the determination of such facts should be uninfluenced by bias, prejudice or sympathies." As this was Judge Paredes' first offense, he was merely admonished by the High Court.

Diocese of Bacolod v. Commission on Elections, en banc, G.R. No. 205728, January 21, 2015

The Commission on Elections threatened the Diocese of Bacolod for posting in the premises of its cathedral a banner calling on Catholics not to vote for candidates in the elections who are anti-life and to vote for those who follow the Catholic Church's social teachings.

The Supreme Court said the "impending threat of criminal litigation is enough to curtail petitioners' speech," following the High Court's landmark ruling in *Chavez v. Gonzales*, where it said that even mere press statements of government officials threatening criminal litigation on those who only wish to express their political views is already tantamount to prior restraint.

"Political speech enjoys preferred protection within our constitutional order," the court said, speaking through the majority opinion writer, Justice Leonen.

Saying that the case is of first impression involving as it does the issue of whether the right of suffrage includes the right of freedom of expression, the High Court said the Comelec has no legal basis for regulating or restricting the right to political expression of private citizens. Such a protected freedom of expression is not limited to vocal means but extends to a wide continuum of expression, even to silence. Thus, this relevant excerpt from the ruling:

Communication is an essential outcome of protected speech. Communication exists when "(1) a speaker, seeking to signal others, uses conventional actions because he or she reasonably believes that such actions will be taken by the audience in the manner intended; and (2) the audience so takes the actions." "[I]n communicative action[,] the hearer may

respond to the claims by . . . either accepting the speech act's claims or opposing them with criticism or requests for justification."

Speech is not limited to vocal communication. "[C]onduct is treated as a form of speech sometimes referred to as 'symbolic speech[,]'" such that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, the 'communicative element' of the conduct may be 'sufficient to bring into play the [right to freedom of expression].'"

The right to freedom of expression, thus, applies to the entire continuum of speech from utterances made to conduct enacted, and even to inaction itself as a symbolic manner of communication.

In *Ebralinag v. The Division Superintendent of Schools of Cebu*, students who were members of the religious sect Jehovah's Witnesses were to be expelled from school for refusing to salute the flag, sing the national anthem, and recite the patriotic pledge. In his concurring opinion, Justice Cruz discussed how the salute is a symbolic manner of communication and a valid form of expression. He adds that freedom of speech includes even the right to be silent:

Freedom of speech includes the right to be silent. Aptly has it been said that the Bill of Rights that guarantees to the individual the liberty to utter what is in his mind also guarantees to him the liberty not to utter what is not in his mind. The salute is a symbolic manner of communication that conveys its message as clearly as the written or spoken word. As a valid form of expression, it cannot be compelled any more than it can be prohibited in the face of valid religious objections like those raised in this petition. To impose it on the petitioners is to deny them the right not to speak when their religion bids them to be silent. This coercion of conscience has no place in the free society.

The Court also rejected Comelec's claim that it has the right to regulate the use by the Diocese of large tarpaulins for the purpose. Even this, according to the High Court, is off-limits to the Commission, for the following reasons:

First, this relates to the right of the people to participate in public affairs, including the right to criticize government actions.

Second, free speech should be encouraged under the concept of a market place of ideas.

Third, free speech involves self-expression that enhances human dignity, as "a means of assuring individual self-fulfillment."

Fourth, expression is a marker for group identity, through which “voluntary associations perform [an] important democratic role [in providing] forums for the development of civil skills, for deliberation, and for the formation of identity and community spirit[,] [and] are largely immune from [any] governmental interference.”

Fifth, the Bill of Rights, free speech included, is supposed to "protect individuals and minorities against majoritarian abuses perpetrated through [the] framework [of democratic governance].”

It said that what the Commission wanted it not content-neutral regulation but one that went to the heart of substance. As such it comes with the heavy presumption of unconstitutionality, which it was not able to overcome.

The High Court also reiterated the traditional distinction between political speech and mere commercial speech – the latter being no more than one on a commercial transaction – and held that the tarpaulins of the Diocese, without doubt, are protected political speech.

In the case of the Diocese, it being a private entity not running for an elective office or a political party, its speech is entitled to constitutional protection, not administrative regulation as to time, manner and place: “Regulation of speech in the context of electoral campaigns made by persons who are not candidates or who do not speak as members of a political party which are, taken as a whole, principally advocacies of a social issue that the public must consider during elections is unconstitutional. Such regulation is inconsistent with the guarantee of according the fullest possible range of opinions coming from the electorate including those that can catalyze candid, uninhibited, and robust debate in the criteria for the choice of a candidate.”

1-UNITED TRANSPORT COALITION (1-UTAK) v. Commission on Elections, en banc, G.R. No. 206020, April 14, 2015.

This case extends further the freedoms available to private entities in the expression of their views during an electoral exercise. In the Diocese of Bacolod case, the petitioner was a Roman Catholic entity; here it is a party-list organization representing public utility operators, drivers and owners. The suit challenged key provisions of the Fair Elections Act (RA 9006), which granted the Commission on Elections to power to regulate postings of election paraphernalia in public places and conveyances.

It assailed the following resolution of the Comelec (Resolution No. 9615) pursuant to the Act:

SEC. 7. Prohibited Forms of Election Propaganda.– During the campaign period, it is unlawful:

x x x x

(f) To post, display or exhibit any election campaign or propaganda material outside of authorized common poster areas, in public places, or in private properties without the consent of the owner thereof.

(g) Public places referred to in the previous subsection (f) include any of the following:

x x x x

5. Public utility vehicles such as buses, jeepneys, trains, taxi cabs, ferries, pedicabs and tricycles, whether motorized or not;

6. Within the premises of public transport terminals, such as bus terminals, airports, seaports, docks, piers, train stations, and the like.

The violation of items [5 and 6] under subsection (g) shall be a cause for the revocation of the public utility franchise and will make the owner and/or operator of the transportation service and/or terminal liable for an election offense under Section 9 of Republic Act No. 9006 as implemented by Section 18 (n) of these Rules.

First, the High Court ruled that “Section 7(g) items (5) and (6) of Resolution No. 9615 are not within the constitutionally delegated power of the COMELEC to supervise or regulate the franchise or permit to operate of transportation utilities. The posting of election campaign material on vehicles used for public transport or on transport terminals is not only a form of political expression, but also an act of ownership – it has nothing to do with the franchise or permit to operate the PUV or transport terminal.”

Second, it held that there is no substantial interest on the part of the government to regulate the free speech of owners of PUVs and transport terminals, pursuant to the *O’Brien Test*. “The incidental restriction on freedom of expression,” said the High Court, “is no greater than is essential to the furtherance of that interest. There is absolutely no necessity to restrict the right of the owners of PUVs and transport terminals to free speech to further the governmental interest. While ensuring equality of time, space, and opportunity to candidates is an important and substantial governmental interest and is essential to the conduct of an orderly election, this lofty aim may be achieved sans any intrusion on the fundamental right of expression.”

Third, the Supreme Court also rejected the Comelec’s captive-audience argument, which states that when a listener cannot, as a practical matter, escape from intrusive speech, the speech can be restricted, and thus recognizes that “a listener has a right not to be exposed to an unwanted message in circumstances in which the communication cannot be avoided. “

Instead, the High Court ruled that:

“A regulation based on the captive-audience doctrine is in the guise of censorship, which undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others. Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home or the degree of captivity makes it either impossible or impractical for the unwilling viewer or auditor to avoid exposure.”

Finally, the High Court also said that the regulation violates the equal protection clause as the Comelec cannot present a convincing justification for why it allows private vehicles to post election paraphernalia while it prohibits operators of PUVs and owners of terminals from doing so.

It ruled that there is no substantial distinction between owners of PUVs and transport terminals and owners of private vehicles and other properties. “As already explained, the ownership of PUVs and transport terminals, though made available for use by the public, remains private. If owners of private vehicles and other properties are allowed to express their political ideas and opinion by posting election campaign materials on their properties, there is no cogent reason to deny the same preferred right to owners of PUVs and transport terminals. In terms of ownership, the distinction between owners of PUVs and transport terminals and owners of private vehicles and properties is merely superficial. Superficial differences do not make for a valid classification.”

People of the Philippines v. Carlos Celdran, CA CR No. 36170 , Jan. 22, 2015 (Centerlaw case)

Manila’s famous tour guide and artist protested against Catholic church polices on population growth in the middle of an ecumenical mass at the grand old Manila Cathedral. At a time when the controversial Reproductive Health Law was just in its inception in the Philippine Congress, Celdran entered the Manila Cathedral clad in a black suit and bowler hat, holding a placard which read “DAMASO” written on it – a word and a name that evokes a variety of reactions among Filipinos who know Philippine history back when the country was under Spanish Rule, when Crown and Cross where one and the same, for all intents and purposes.

He was charged and then convicted by Metropolitan Trial Court for the crime of “Offending Religious Feelings,” a felony that has remained in the Philippine criminal statute books since Spanish colonization and even after the declaration of Philippine independence, as well as the ratification of the 1987 Philippine Constitution.

Celdran appealed the case to the Court of Appeals, but his conviction was affirmed by the appellate court on January 22, 2015. It is now pending before the Supreme Court through a Petition for Review.

Key issues raised in the Supreme Court by Celdran's lawyers (Centerlaw was asked to enter its appearance as collaborating counsel for Celdran when the case was taken on appeal to the Court of Appeals):

First, the *ratio legis* behind the legal provision under which Celdran was convicted, Art. 133 of the Revised Penal Code, no longer exists and is no longer applicable today. A close examination of Art. 133 of the Revised Penal Code and its history readily reveal that it is a *lese majeste* law, one that punishes an act against the king as "deity incarnate."

To explain, the whole title of the *Codigo Penal* of which Art. 133 of the Revised Penal Code is an archaic remnant, was entitled Crimes against Religious Worship. Acts made in violation of these provisions of the *Codigo Penal* were considered an offense against the Spanish crown, as they offend the church or clergy. Such was the case due to the church-state union existing at the time of the *Codigo Penal*.

Fast forward to present day, church-state union no longer exists, the title Crimes against Religious Worship is no longer found in the Revised Penal Code. Hence, the *raison d'etre* of what is now known as "Offending Religious Feelings" no longer hold water. The case is now pending before the Supreme Court, after the Court of Appeals affirmed the conviction of Celdran on 22 January 2015.

Second, undoubtedly, the application of Art. 133 of the Revised Penal Code in this case creates a free speech issue; thus, under applicable Philippine jurisprudence the presumption of constitutionality does not apply to the penal provision.

As held in *Ople v. Torre*, when the when the integrity of a fundamental right is at stake, it will give the challenged law a stricter scrutiny, and that in case of doubt, the Court will lean towards a stance that will not put in danger the rights protected by the Constitution, to wit:

....And we now hold that when the integrity of a fundamental right is at stake, this court will give the challenged law, administrative order, rule or regulation a stricter scrutiny. . This approach is demanded by the 1987 Constitution whose entire matrix is designed to protect human rights and to prevent authoritarianism. In case of doubt, the least we can do is to lean towards the stance that will not put in danger the rights protected by the Constitution."

Additionally, the Supreme Court has ruled in *Ermita-Malate Hotel and Motel Operators Association, Inc. v. City Mayor*,² that the standard for the validity of governmental acts is 'much more rigorous' if the liberty involved were freedom of the mind or the person, to wit:

...What may be stressed sufficiently is that if the liberty involved were freedom of the mind or the person, the standard for the validity of governmental acts is much more rigorous and exacting, but where the liberty curtailed affects at the most rights of property, the permissible scope of regulatory measure is wider.

Art 133 of the RPC prescribes the penalty of imprisonment – a deprivation of liberty – for acts which offend religious feelings. When fundamental rights are involved, a law may only be sustained if there is a legitimate state interest that can justify its retention in our statute books. Since there no longer exists any state responsibility to protect the church as a result of the absolute rejection of establishment of religion and the union of church and state, there is complete absence of any legitimate state interest, which could sustain Art 133 of the RPC.

Third, while the application of Art. 133 of the RPC against petitioner altogether violates freedom of expression in the form of expressive conduct, prosecution and conviction under such provision constitutes a violation of the Philippine Government's obligation under the International Covenant on Civil and Political Rights.

Inasmuch as Art. 133 of the RPC imposes the penalty of imprisonment upon a person convicted of an offense, it therefore appears as a severe restriction of free expression. This squarely violates Art. 19 (2) of the ICCPR, which obligates a state party to protect and uphold free expression:

"2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

General Comment No 34 of the United Nations Human Rights Commission (UNHRC) further explains that Article 19 may be subject to certain exceptions:

This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even

² G.R. No. L-24693, July 31, 1967.

expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.

These restrictions include respect for the rights or reputations of others (Article 19(3)(a)), the protection of national security or of public order (*ordre public*), and of public health or morals (Article 19(3)(b)). However, according to the UNHRC, when a State party may not impose restrictions on the exercise of freedom of expression that put in jeopardy the right itself.

Article 19 (3) of the ICCPR sets out a three-pronged test for valid restrictions to free expression:

- a. The restriction must be provided by law;
- b. The restriction must be for a ground found in Article 19(3)(a) or (b) of the ICCPR as discussed in the preceding paragraph;
- c. The restriction must adhere strictly to the tests of necessity and proportionality.

Examining Art. 133 of the RPC, it is readily apparent that the provision fails all criteria set forth in Art. 19 of the ICCPR. First, the restriction of petitioner's speech unnecessarily and improperly entangles the state with a purely religious concern in a highly subjective manner. Surely, no restriction in the form of a *lese majeste* rule exists in present day.

Also, the imposition of imprisonment as penalty is a wantonly backward step from what expressive conduct is meant to enhance – a free and robust discussion of public issues in a democratic state and an open society. The imposition of imprisonment on expressive conduct recalls by analogy the view of the UN Human Rights Committee in the Centerlaw case *Adonis v. Republic of the Philippines*, in which the Committee held that criminal libel is incompatible with Philippine obligations under Art. 19 of the ICCPR to promote and protect free expression.

As a State party to the ICCPR, the Philippines has bound itself to fulfill the obligations under the Covenant. The duties and obligations found under the Covenant and the Optional Protocol are State obligations that form part of the "law of the land." By signing up to the Optional Protocol, the Philippines also recognized the competence of the UNHRC to issue Views on the right of free expression under Art. 19 of the ICCPR. Therefore by the force of the Constitution, both the Covenant and the Optional Protocol to the Covenant are "valid and effective" under the doctrine of transformation and form part of domestic law. However even under the doctrine of incorporation these obligations continue to be valid and subsisting, as they form part of customary international law.

One of the generally accepted principles of international law is *pacta sunt servanda*.

State parties must comply with their treaty obligations in good faith. The Philippines has to comply with its treaty obligations under the ICCPR in good faith, and at least take steps to fulfill these obligations. In addition, under the doctrine of incorporation, the principle of *pacta sunt servanda* forms part of municipal law and is binding and obligatory upon the Philippines as a state party to the ICCPR.

What the ICCPR requires is for the Philippine Government to “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” and to “to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” One such right is the right to free speech and expression.

Art. 133 of the RPC, as applied in this case, would cause the Philippine Government to renege in its duty “to respect and to ensure” the right of petitioner to free speech and expression. Prosecution and conviction under Art. 133 of the RPC will be tantamount to a derogation of the Philippine Government’s duty under the ICCPR “to give effect to the rights recognized in the present Covenant.”

The Philippines therefore has the obligation to carry out the obligations under the Covenant as interpreted and decided by the UNHRC, itself an organ created under the Covenant, which is a duly ratified treaty.

Lagman et al., v. Brillantes et al., Former Sixth Division, CA G.R. SP No. 00003-WHD, 3 September 2015 (Centerlaw case)

This case is a petition filed under one of the new writs crafted by the Philippine Supreme Court to protect the constitutional rights of citizens, in particular, the right to privacy. It was filed by members of election watchdogs following threats by the top Commission on Elections officer that they will be placed under surveillance for being election saboteurs – for being “noisy” critics of the tack his agency has taken in the automation of the Philippine election system.

The *habeas data* rule, in general, is designed to protect by means of judicial complaint the image, privacy, honor, information, and freedom of information of an individual. It is meant to provide a forum to enforce ones right to the truth and to informational privacy, **thus safeguarding the constitutional guarantees of a person’s right to life, liberty and security against abuse** in this age of information technology.

The Petitioners claim the repeated public threats posed by the Commission on Elections official already violate their right to the security of their person and poses a “chilling effect” on their constitutional right to free expression, as they see the threats as a

means to silence their criticisms of what they see as a terribly flawed election automation plan government has been carrying out.

Moreover, the vagueness with which the threats of surveillance were made is precisely what makes them particularly pernicious, because as has been said in jurisprudence, “the value of the Sword of Damocles is that it hangs – not that it drops.” This is because “for every person who tests]the limits of the statute, many more will choose the cautious path and not speak at all.”

Such threats have “chilling effect” on the exercise of Petitioners’ rights, these being declarations with ambiguous legal reach that breaches the zone of protection accorded to the citizen by the Bill of Rights. To the extent that the pronouncements are vague, it might have an in terrorem effect and deter persons from engaging in protected activities. For, as has been oft-ruled, “an unclear law, that is, a law that does not draw bright lines, might regulate, or appear to regulate, more than is necessary, and thus deter or chill persons from engaging in protected activities.”

The Petition draws and extends the application of an earlier landmark ruling of the Supreme Court in *Chavez v. Gonzales*, a case that dealt with the question of whether media may broadcast a recording purportedly made by military intelligence agencies of a mobile phone conversation between President Gloria Macapagal-Arroyo and a member of the Commission on Elections, Virgilio Garcillano to cheat in the 2004 presidential elections (an incident in Philippine contemporary politics that has gone down in history as the *Hello Garci Scandal*).

First brought to the Supreme Court, which accepted the case, it was remanded to the Court of Appeals for reception of evidence. In late February this year, it has been taken back to the Supreme Court for a review on appeal after the Court of Appeals dismissed the petition.

In its Decision, the Court of Appeals made meticulous excerpts of the transcripts of the cross-examination by the State of the Petitioners’s witnesses to prove that the latter actually had not come unto any actual physical harm or surveillance or prosecution because of alleged acts of sabotage. Thus, it made this conclusion:

After a review of the evidence, we are convinced that the truth of the foregoing Statements in the Return cannot be doubted. In fine, Petitioners had failed to prove by substantial evidence that the COMELEC or any of the respondents had taken an active role to subject all or any of them under surveillance tending to compromise their right to privacy in life, liberty or security.

The witnesses for the petitioners had even confirmed that they have not been subjected to any form of harassment or surveillance, nor do they have

any knowledge or information about possible intelligence gathering by the COMELEC and individual respondents.

This however, ignored judicial admissions made by the Comelec chief, on cross-examination, by which Respondent Brillantes himself confirmed all the statements attributed to him by the media in which he called petitioners “poll saboteurs” and issued threats against them. He also admitted that he had placed petitioners under surveillance by the Commission’s intelligence agents.

The Court of Appeals also failed to consider that the threats are by themselves, violations of petitioners’ right to be secure in their persons; indeed, states cannot ignore known threats to the right of privacy and security of persons under their jurisdiction, just because such threats have yet to be carried out.

II. Cases to Watch Out for in 2016

Rappler v. Andres Bautista, Philippine Supreme Court (en banc), G.R. No. 222702, April 5, 2016

As the Philippines braces for its national elections on May 9, 2016, the Commission on Elections (Comelec) organized with various media outfits a series of debates involving presidential and vice presidential candidates.

However, a Memorandum of Agreement signed between the Comelec chief Andres Bautista and media organizations (which included print, broadcast and online news media) granted broadcast rights only to the country’s largest commercial television companies and their hand-picked partners.

]Thus the MOA denied coverage and live audio and video streaming rights to online news organizations. One of the online outfits, Rappler, brought a suit against the Comelec on February 19, 2016 against the Comelec chief, alleging that Mr. Bautista discriminated against online news agencies and violated their rights to equal protection when he instituted an iron-clad provision in the questioned MOA that broadcast rights are limited only to the top broadcast organizations and their partners.

Rappler also questioned a provision of the MOA that only allowed a maximum of two minutes of excerpt from the debates they have produced to be used for news reporting or fair use by other media or entities as allowed by the copyright law, unless a longer excerpt is consented to by the lead network for that session of the debates. In a 14-0 vote (one justice was on leave) during its summer session on April 5, the Philippine Supreme Court granted Rappler’s petition to stop Mr. Bautista from restricting online access to the debates, saying that the debates may now be “shown or

live streamed unaltered in petitioner's and other websites subject to the copyright condition that the source is clearly indicated.”

Interpreting the MOA broadly, the High Court said that it should be read as recognizing “the public function of the debates and the need for the widest possible dissemination of the debates.”

“The political nature of the national debates and the public's interest in the wide availability of the information for the voters' education certainly justify allowing the debates to be shown or streamed in other websites for wider dissemination, in accordance with the MOA,” according to the High Court’s opinion, written by Associate Justice Antonio Carpio.

The High Court further said that the Comelec’s restrictions on online coverage constituted prior restraint.

“The freedom of the press to report and disseminate the live audio of the debates...can no longer be infringed or subject to prior restraint,” it said. “Such freedom of the press to report and disseminate the live audio of debates is now protected and guaranteed” under the Constitution.

The Supreme Court however left intact the provision on news reporting and fair use. The Supreme Court said that order takes effect immediately, given the time constraints, as there are only two more debates left on schedule, namely the vice presidential debate on Sunday, April 10, and the third and final presidential debate on April 24.

Citystate Savings Bank v. The Sunday Punch, Special 7th Division, CA GR SP No. 139194 (Centerlaw case)

On the August 25-31, 2013 issue of the *Sunday Punch* (Volume 57, No. 8) the article entitled “METER USED OWNED BY CITY – Citystate Bank’s electric bills charged to City Hall” appeared on the front page. According to government officials interviewed by the newspaper, the electric consumption of the bank is included in the total billing of the Dagupan City government for the month of June in the amount of P3.9 million which the city already paid in full.

The Sunday Punch is a weekly based in Dagupan City that, in the course of his nearly 50 years of existence, had racked a collection of awards for excellence in community journalism. The bank – a subsidiary of a corporation earlier involved in the controversial purchase of a building owned by the city government – did not take kindly to the article and filed a libel suit, denying the allegations. The bank sued the entire staff of the newsweekly, for the article, which appeared in both the print and online editions of the newspaper.

The Public Prosecutor found probable cause to file a complaint for libel in court under Art. 355 of the Revised Penal code, in early 2014. However, on motion from the Accused Sunday Punch staff – Ermin F. Garcia, Jr., Marifi Jara, Jun Velasco, Jesus A. Garcia, Jr., Johanne R. Macob, Julie Ann Arrogante, Jocelyn F. dela Cruz, and Virgilio Biagtan – the judge handling the case, Hon. Rolando G. Mislang of Branch 167 of the Pasig City Regional Trial Court, dismissed the case on August 27, 2014.

The Order, ruling in Respondents' favor, held that there was no malice in the subject articles, such that a reasonably discreet and prudent person would find it difficult to charge the accused for libel. Subsequently, the Court also denied the Motion for Reconsideration submitted to it by the bank, ruling thus on 9 December 2014:

The articles being privileged, proof of actual malice is required which the private complainant failed to prove vis-à-vis the alleged respective participation of the accused and/or proof of actual malice committed by them either individually or collectively.

Thus, a key issue in this case is whether a bank can be said to be susceptible to the *public figure* defense, and therefore to the requirement of actual malice.

The Bank also claims the *Sunday Punch* publication was malicious because it was erroneous.

Centerlaw has also asked the Court of Appeals to dismiss on procedural ground the case – a petition for certiorari – for being a remedy in error, considering that under the Rules, the proper remedy should have been an appeal. Citystate's difficulty is that it has not been able to obtain the conformity of the Office of the Solicitor General – required under Philippine Rules of Criminal Procedure – to file an appeal;

Under current jurisprudence, assuming that CityState Savings's charges that what *Sunday Punch* published about the electricity bill issue is in error, under the rule in *Borjal* and *Guingging*, it is immaterial that the reportage happens to be mistaken, **as long as it might reasonably be inferred from the facts as established.** Thus:

Even assuming that the contents of the articles are false, mere error, inaccuracy or even falsity alone does not prove actual malice. Errors or misstatements are inevitable in any scheme of truly free expression and debate. Consistent with good faith and reasonable care, the press should not be held to account, to a point of suppression, for honest mistakes or imperfections in the choice of language. There must be some room for misstatement of fact as well as for misjudgment. Only by giving them much leeway and tolerance can they courageously and effectively function as critical agencies in our democracy.

In fact, under the most recent jurisprudence of the Supreme Court discussing the elements of actual malice, there is no way probable cause could be found against Private Respondents. In order to resolve this issue, a discussion of what actual malice consists of is in point. The Supreme Court, in the 2014 case of *Disini vs. Executive Secretary*, further expounded on what constitutes actual malice in this wise:

There is “actual malice” or malice in fact when the offender makes the defamatory statement with the knowledge that it is false or with reckless disregard of whether it was false or not. **The reckless disregard standard used here requires a high degree of awareness of probable falsity. There must be sufficient evidence to permit the conclusion that the accused in fact entertained serious doubts as to the truth of the statement he published. Gross or even extreme negligence is not sufficient to establish actual malice.** [Emphasis supplied, in-text citations omitted].

Indeed, even assuming *arguendo* that the assailed articles written in a **grossly negligent** manner, according to *Disini*, such will not suffice as basis for a finding of actual malice. There being no actual malice in the allegedly libelous articles, there is no libel, as an essential element of libel is missing in these articles.

Indeed, this case is of first impression, as it seeks an answer to the question whether or not a bank is a public figure in contemplation of law and jurisprudence and therefore, subject to the actual malice test in libel/defamation suits.

Tordesillas et al., v. Puno et al., CA-G.R. CV No. 91428 (pending before the Supreme Court , a Centerlaw case)

This Petition for Review on appeal pending before the Supreme Court arose from what is now known as the November 29, 2007 Manila Pen siege, when scores of journalists covering the Magdalos and their allies who had holed up in the hotel to call for the resignation from office of Mrs. Gloria Macapagal-Arroyo were arrested by police, purportedly for violations of lawful orders. Subsequently, top officials of the government – including Defendants-Appellees in the instant case – issued a chorus of statements warning that similar conduct by media in similar situations will be similarly dealt with.

In this case of first impression, the assailed Orders of the Court have legalized the arrest, detention, and prior restraint of the journalists covering the Manila Peninsula siege. The Orders also declared as sacrosanct the police line and held to be a violation of Art. 151

of the Revised Penal Code any attempt by members of the press to cross it to inform the public about a matter of public interest.

In this case, Plaintiffs-Appellants *do not argue that at all times in all places and in all circumstances, the press have an absolute freedom to make their case before their public*, but that the press should be allowed to go unfettered as far as possible, given the preferred status of the ideals of freedom they express and embody under a democratic state.

Under constitutional law and international law, the State has a positive duty to ensure and that limits to such freedom cannot be applied like a straight-jacket under the circumstances obtaining in this case, where the questioned public pronouncements of Defendants-Appellees – whether in the veiled threats made through press statements or in the Advisory issued by the Secretary of Justice – if not invalidated, or otherwise restrained and prohibited, pose hazards to the freedom of the press of a dimension not confronted in this country since the ouster of the late strongman Ferdinand Marcos in 1986.

In particular, the Supreme Court’s landmark rulings in *David v. Arroyo* (a Centerlaw case) and more recently, *Chavez v. Gonzales* underscore the need for judicial activism against such subterfuges designed to “skirt the Constitutional safeguards for the citizens’ civil liberties” in the name of *raison d’état*. In the first case, the Supreme Court held that,

[i]t is that officious functionary of the repressive government who tells the citizen that he may speak only if allowed to do so, and no more and no less than what he is permitted to say on pain of punishment should he be so rash as to disobey. Undoubtedly, the *The Daily Tribune* was subjected to these arbitrary intrusions because of its anti-government sentiments. This Court cannot tolerate the blatant disregard of a constitutional right even if it involves the most defiant of our citizens. Freedom to comment on public affairs is essential to the vitality of a representative democracy. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. The motto should always be *obsta prince*.

In the second case, the High Court addressed the unconstitutionality of press statements issued by a top official of government warning media of criminal consequences, saying that these cannot stand constitutional scrutiny, for the reason that: “[a]ny act done, such as a speech uttered, for and on behalf of the government in an official capacity is covered by the rule on prior restraint.”

The acts of Defendants-Appellees – from their collective threats issued against journalists to the Advisory of the Secretary of Justice – unless these are held to be

unconstitutional and enjoined for being an exercise of plain censorship or of prior restraint, hang like the proverbial Sword of Damocles. This is because agents of the state can invoke at any time these pronouncements against any member of the press.

Such threats have a “chilling effect” on the exercise of Plaintiffs-Appellants’ rights, these being declarations with ambiguous legal reach that breaches the zone of protection accorded to the citizen by the Bill of Rights. To the extent that the law is vague, it might have an *in terrorem* effect and deter persons from engaging in protected activities.

Indeed, the reaction of government to the Manila Peninsula standoff sparked by the Magdalo group and their supporters only set in bold relief how a government can take to absurd lengths measures it believes are necessary for political survival. Yet it does so only at the expense of hard-won constitutional rights and liberties. It is in times such as this that the forces of history appoint the courts to royal position as arbiters of freedom. They only abdicate from this sacred duty at the cost of the very freedom that, in the very first place makes our democratic way of life possible.

Locsin v. Jesusa Paquibot, Criminal Case No. 32637, Baguio City Regional Trial Court Branch 1 (A Centerlaw case)

On May 18, 2016, a Regional Trial Court in Baguio City will hand down its judgment in a criminal libel case that a journalism professor had filed against the editor of the campus newspaper. This case arose from a parody published by the campus paper on the professor's views of student protests against government educational policies. Essentially, the journalism professor claims parody is not protected speech and even presented an expert witness -- a colleague in the journalism department -- to support her position.

The facts of the case are simple, and clear: In July 2011, a column commenting on campus issues was published in the Opinion section of *The Outcrop*, the student publication of the University of the Philippines Baguio campus.

The column, titled *Mahadera and friends Edishaun*, contained only blind items, but one of the professors in the Department of Communication, Private Complainant Maria Rina Locsin-Afable, took umbrage at one of the blind items in the column.

Although the column mentioned neither names nor colleges, Locsin-Afable said her co-faculty and students recognized her as one of those referred to in the blind item.

In particular, Locsin-Afable found offensive an item that talked about someone who wanted “maximum silence” and was described as a hybrid of two mythological creatures, a Philippine mythological creature called *kapre* and a white lady.

Locsin-Afable claimed the column referred to an incident in July, in which she berated students who, while rallying, had passed by her classroom and asked her students to join. When a campus photojournalist, later identified as Hazel Joy Altamarino, took her picture as she was shouting at the demonstrators, Locsin-Afable demanded that the pictures be deleted. Surrounded by Locsin-Afable and her students, the young photojournalist eventually gave in and deleted the pictures. Neither the rally nor the forced deletion of the pictures were mentioned in the column, but Locsin-Afable insisted that the blind column item referred to her and was an offshoot of that incident.

After the column came out, complainant Locsin-Afable wrote a letter to the editor-in-chief, demanding a public apology. The editorial board issued a letter of apology to Locsin-Afable on September 8, 2011, expressing, on behalf of the entire staff of *The Outcrop*, their apologies for any emotional distress the column could have caused complainant Locsin-Afable.

Of course, the history of satire in the Philippines is a history of dissent. Since the Spanish era Filipinos have used their quick wit and incisive humor to speak truth to power, one of the notable examples of which was Marcelo H. Del Pilar's *Dasalan at Tocsohan*, in which he openly mocked the friars as he detailed their sins against the people.

In the darkest days of martial law, when former Senator Benigno 'Ninoy' Aquino was assassinated, the University of the Philippines' student paper, the *Philippine Collegian*, came out with a *Philippine Comedian*. The lampoon issue was an example of Filipino humor at its wittiest, and darkest, as it dared to publish what mainstream media dared not print. Only a campus newspaper dared to publish the jokes that Filipinos told to explain what the authorities could not: how an assassin penetrated the tight airport security to shoot dead the dictator's most vocal critic as he went down the airplane steps, surrounded by elite airport security (he used a pogo stick); and how the assassin came to be wearing underwear labeled with his name, through which he was eventually identified (his other underwear had the days of the week written on them). Indeed, satire is part of Philippine journalism, and of journalism as practiced all over the world; it is one of the many forms in which the media speaks truth to power.

The facts of the case will show that it is about a campus paper that dared to speak truth to power, and complainant – the wife of a former Cabinet member, and the daughter of a former owner and editor of a prominent national broadsheet -- took umbrage at the tone and the words used in the publication.

The offending article was a blind item column in the student paper, *The Outcrop* that carried commentaries on the issues of the day. The alleged libel, in fact, can be found in the description of a person who was insisting on total silence. This may be the first time that a trial court has been asked to rule on the existence of the constitutional right to parody.

Moreover, under the *Disini* case It must be pointed out that even gross negligence is not the actual malice required by the Court for a libel to be actionable. In *Disini*, the Supreme Court said:

There is "actual malice" or malice in fact when the offender makes the defamatory statement with the knowledge that it is false or with reckless disregard of whether it was false or not. The reckless disregard standard used here requires a high degree of awareness of probable falsity. There must be sufficient evidence to permit the conclusion that the accused in fact entertained serious doubts as to the truth of the statement he published. Gross or even extreme negligence is not sufficient to establish actual malice.

But precisely, pieces of satire or parody do not even deal with facts or pieces of information; in satire, factual assertions are irrelevant, precisely because satire or parody is an irreverent, if humorous, take on issues of the day.

A parodical piece plays fast and loose with facts because it is not about factual assertions but about truths that are larger than life. It should be immediately obvious that the allegedly libelous article is not a news reportage – which deals with facts, facts and facts – but is a column belonging to the Opinion page of the student publication.

III. Emerging Trends in Philippine Jurisprudence on Free Expression

Courts continue to recognize the broader protections to free expression in the political sphere, as in the case of political speech in the context of an electoral exercise. At the same time, they continue to observe traditional limitations on free expression, as in the case of the *sub judice* rule and criminal libel. Another case that promises to be precedent setting confronts for the first time the question of whether journalists can cross the police line to report on a developing story without incurring any criminal liability for it. Nevertheless, in the case of criminal libel the ruling in the *Disini* case, the High Court does offer a safe haven as far as criticisms of or reportage on official conduct is concerned, by setting a high evidentiary bar for actual malice under the public figure doctrine;

Still and all, following the decision by the Supreme Court in 2014 in *Disini* to uphold the constitutionality of both traditional libel and cyber libel, defamation suits against activists and human rights defenders by corporations involved in the crosshairs of public controversy appear to be in the upswing; in particular, those involving cyber libel; for one, cyber libel carries a heavier penalty than traditional libel, which also has the rather unfortunate effect of removing an accused in one such case from applying for the benefits of probation if convicted, under Philippine criminal procedures. Two recent

cases pending at the level of the Office of the City Prosecutor and in which Centerlaw is involved as counsel for the Respondents illustrate this point:

Benguet Nickel Mines v. Benito Molino, Office of the Prosecutor of the City of Manila, NPS Docket no. XV-07-INV-15J- 95745 (February 2016)

Dr. Benito Molino, a medical doctor and human rights defender, sent a series of emails to various government officials and members of the media in connection with an environmental catastrophe in his hometown in Zabales province following a typhoon. He charged in his emails, among other things, that the typhoon destroyed mining ponds operated by the Benguet Nickel Mines Corporation, inundating the town and its many farmlands with toxic sludge. The mining company filed a cyber libel suit, claiming that his allegations are untrue.

This case is of first impression as to the question of venue: lawyers for the mining firm claim that because many of the addresses have offices in Manila, there is a presumption that the emails were first read there. The case also raises the issue of whether or not a mining firm, by virtue of its operations and the concessions given to it by the government, is a public figure in the contemplation of law and jurisprudence, and therefore opposable with the public figure defense and the expanded actual malice test as ruled in the *Disini* case.

Pimentel v. Ninez-Cacho Oliveros, Office of the City Prosecutor of Pasay City, NPS Docket No. XV-03-INV-14F-0537 (July 2014)

A Philippine Senator, Antonio Trillanes IV filed a libel suit against the Tribune newspaper (the same newspaper in the landmark *David v. Arroyo* case) over the latter's reportage on the simmering PDAF pork barrel scandal. Trillanes charged that the Tribune's reportage linking him to the scandal – which has rocked the Philippine political firmament because of the involvement of many legislators from both the Upper House and the Lower House – is both malicious and erroneous. Trillanes filed complaints for both traditional libel and cyber libel in this proceeding, as the allegedly offending article saw the light of day in both the print and online editions of the newspaper. This is despite the Supreme Court's holding in *Disini* that it can only be done at the risk of violating the constitutional prohibition against double jeopardy, to wit:

There should be no question that if the published material on print, said to be libelous, is again posted online or vice versa, that identical material cannot be the subject of two separate libels. The two offenses, one a violation of Article 353 of the Revised Penal Code and the other a violation of Section 4(c)(4) of R.A. 10175 involve essentially the same elements and are in fact one and the same offense. Indeed, the OSG itself claims that online libel under Section 4(c)(4) is not a new crime but is one already punished under Article 353. Section 4(c)(4) merely establishes the computer

system as another means of publication. **Charging the offender under both laws would be a blatant violation of the proscription against double jeopardy** (emphasis supplied).

In any case, a conscientious public prosecutor should dismiss the case, under the Supreme Court's ruling in *Disini*.

IV. The Emergence of Regional and/or Global Norms on Free Expression

In the regional level: what is interesting to note is that the Association of Southeast Asian (ASEAN) Nation Human Rights Declaration echoes the language of Art. 19 of the ICCPR when it says that: [e]very person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person's choice."

Formally, protections exist, therefore. But the practice is different. In Myanmar, despite the election into office of the opposition, repression of free expression is observed to its extreme lengths. Take the case of the Burmese poet Aung Saungkha, who is on trial for writing metaphorically that the image of the President of Myanmar, is tattooed on his penis, to the disgust of his wife.

Or of Srarapop-Korn-A-Rut, a Thai poet imprisoned by the Thai Junta for his blog posts about the King of Thailand (Centerlaw represents him in a petition filed with the UN Working Group on Arbitrary Detention).

In Singapore, the blogger Roy Ngerng has been sentenced by the court to pay US \$ 100,000 in general damages and US \$ 50,000 in aggravated damages for a series of blog posts he posted against the Singaporean PM about alleged corruption (the Court decision here though, addresses extensively the defenses raised: the public figure defense in the context of democratic deliberation and the chilling effect of litigations of such nature to free speech in general, which were raised by both Centerlaw and the International Committee of Jurists in their respective *amicus* briefs submitted to Court. It can be reasonably inferred that compared to other cases involving top Singaporean officials, the award for damages here may very well be significantly lower than usual. In that sense, it may represent an advance).

In Malaysia, the Malaysian Insider, a leading online publication, has just folded up, ostensibly because of government pressure. The slightest criticism of government can also send one to prosecution for sedition. Vietnam routinely imprisons dissidents at the slightest excuse. As in Myanmar, Thailand and Malaysia, in Vietnam lawyers defending human rights defenders often become targets of prosecution as well.

Thus, in the regional level, only the Philippines shows some bright spots in jurisprudence on free expression, despite the continuing criminalization of libel in the country, and the killing of journalists with impunity.