

Third Study Commission Questionnaire 2022 Israel

For 2022, the Third Study Commission, which focuses on Criminal Law, decided to study “Restrictions by the criminal law of the freedom of speech.”

In order to facilitate discussion and to assist us in learning from colleagues, we ask that each country answers the following questions:

- 1. Does your country protect freedom of speech and, if so, how? Please refer to legislation, including any applicable bill of rights or charter of rights or human rights code, as examples, and/or jurisprudence (court decisions) as an overall picture.**

Article III, Section 4, of the 1987 Constitution of the Philippines provides:

Section 4. No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.

In the case of *Chavez v. Gonzales*,¹ the Supreme Court, through then Chief Justice Renato Puno, recognized that the cognate rights provided in the above-cited provision, copied almost verbatim from the First Amendment of the United States Bill of Rights, were considered the necessary consequence of republican institutions and the complement of free speech. The case of *The Diocese of Bacolod v. Commission on Elections*² elucidated the inclusion of the word “expression” in addition to the freedom of speech and of the press provided in the U.S. Constitution. This is so because the word “expression” is more expansive, having a wider scope which refer to means of expression other than speech. This *Diocese* case cited *Ebralinag v. the Division Superintendent of Schools of Cebu*³ which recognized that the right to freedom of expression 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 *Chavez*, the Department of Justice (DOJ) Secretary Gonzales, along with the National Telecommunications Commission, issued official statements warning that those airing the alleged wiretapped conversation between then President Arroyo and a high-ranking official of the Commission on Election could be held liable under the Anti-Wiretapping Act. These issuances were nullified by the Supreme Court as they curtail freedom of the press, which is inextricably woven into the right to free speech and free expression. In *Diocese of Bacolod*, the petitioner was sustained by the Supreme Court after it was

¹ G.R. No. 168338, 15 February 2008.

² G.R. No. 205728, 21 January 2015.

³ G.R. No. 95770, 01 March 1993.

warned by the Commission of Election of being charged with election offense should it fail to remove the two (2) tarpaulins, approximately six feet (6') by ten feet (10") in size, within a private compound posted on the front walls of the cathedral within public view. It was held the while the tarpaulins may influence the success or failure of the named candidates and political parties, this did not necessarily mean it is an election propaganda as the same was not paid or posted "in return for consideration" by any candidate, political party, or a party-list group. The case of *Ebralinag* upheld the student-members of the religious sect Jehovah's Witnesses from being expelled after they refused to salute the Philippine flag, sing the national anthem, and recite the patriotic pledge. In a concurring opinion, Justice Isagani Cruz discussed how the salute is a symbolic manner of communication that conveys its message as clearly as the written or spoken word. He likewise wrote that "Freedom of speech includes the right to be silent."

2. Does your country criminalize hate speech and, if so, how? Please refer to legislation and/or jurisprudence as an overall picture.

Yes. The Revised Penal Code (RPC), which is enacted in the 1930s, defines crimes and imposes penalties thereof.

Article 358 of the RPC penalizes **Slander or Oral Defamation**, if it is of a serious and insulting nature, from at least 4 months and 1 day to 6 months (*arresto mayor* in its maximum period), to at most a period of 6 months and 1 day to 2 years and 4 months (*prisión correccional* in its minimum period). If the slanderous speech is not of serious nature, the penalty imposed is a prison term of 1 day to 30 days (*arresto menor*) or a fine not exceeding Twenty thousand pesos (₱20,000).

In the case of *Villanueva v. People*,⁴ the Supreme Court defined Slander or Oral defamation as libel committed by oral (spoken) means, instead of in writing. This pertains to the speaking of base and defamatory words which tend to prejudice another in his reputation, office, trade, business or means of livelihood. The gravity of the oral defamation depends not only (1) upon the expressions used, but also (2) on the personal relations of the accused and the offended party, and (3) the circumstances surrounding the case. Indeed, it is a doctrine of ancient respectability that defamatory words will fall under one or the other, depending not only upon their sense, grammatical significance, and accepted ordinary meaning judging them separately, but also upon the special circumstances of the case, antecedents or relationship between the offended party and the offender, which might tend to prove the intention of the offender at the time.

⁴ G.R. No. 160351, 10 April 2006.

Another provision in the RPC is **Libel** which is defined under Art. 353 as “a public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance, tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead.” Under Art. 355, a person may be imprisoned for a period of at least 6 months and 1 day to 2 years and 4 months (*prisión correccional* in its minimum), and at most 2 years 4 months and 1 day to 4 years and 2 months (*prisión correccional* in its medium period) or a fine ranging from Forty Thousand Pesos (₱40,000) to One Million Two Hundred Thousand Pesos (₱1,200,000), or both, in addition to the civil action which may be brought by the offended party.

A special law, **Republic Act No. 10175** or the “**Cybercrime Prevention Act of 2012**” was enacted to address the crimes committed in the rise of the digital age. Among the cybercrimes offenses named under Section 4 (c) (4) is Libel as defined in Article 355 of the RPC, but committed through a computer system or any other similar means which may be devised in the future.

Apart from any legislation criminalizing hate speech, the Supreme Court, through its power and authority to discipline the members of the Philippine Bar, had in one case suspended lawyer from the practice of law for a period of one (1) year. In the case of *Belo-Henares v. Atty. Guevarra*,⁵ a well-known Filipina physician filed a complaint for disbarment against the respondent lawyer whose Facebook posts she alleged were written in vulgar and obscene language “designed to inspire public hatred, destroy her reputation, and to close BMGI and all its clinics.” In his defense, the lawyer contended among other things that he wrote the posts in the exercise of his freedom of speech. The Supreme Court had this to say:

“Time and again, it has been held that the freedom of speech and of expression, like all constitutional freedoms, is not absolute. While the freedom of expression and the right of speech and of the press are among the most zealously protected rights in the Constitution, every person exercising them, as the Civil Code stresses, is obliged to act with justice, give everyone his due, and observe honesty and good faith. As such, the constitutional right of freedom of expression may not be availed of to broadcast lies or half-truths, insult others, destroy their name or reputation or bring them into disrepute.

A punctilious scrutiny of the Facebook remarks complained of disclosed that they were ostensibly made with malice tending to insult and tarnish the reputation of complainant and BMGI. Calling

⁵ A.C. No. 11394, 01 December 2016.

complainant a 'quack doctor,' 'Reyna ng Kaplastikan,' 'Reyna ng Payola,' and 'Reyna ng Kapalpakan,' and insinuating that she has been bribing people to destroy respondent smacks of bad faith and reveals an intention to besmirch the name and reputation of complainant, as well as BMGI. Respondent also ascribed criminal negligence upon complainant and BMGI by posting that complainant disfigured ('binaboy') his client Norcio, labeling BMGI a 'Frankenstein Factory,' and calling out a boycott of BMGI's services all these despite the pendency of the criminal cases that Norcio had already filed against complainant. He even threatened complainant with conviction for criminal negligence and estafa which is contrary to one's obligation 'to act with justice.'" (Citations omitted)

3. Does your country have restrictions by the criminal law of the freedom of speech? And if yes, could you give an overall picture of what the legislation is like? Including

- **Are there groups of persons who enjoy special protection of their freedom of speech due to their gender, sexual preference, religion, race or other conditions**

Gender

Women are protected under Republic Act No. 11313, otherwise known as the "**Safe Spaces Act**," from **Catcalling** defined under Section 3 (a) of the law as "unwanted remarks directed towards a person, commonly done in the form of wolf-whistling and misogynistic, transphobic, homophobic, and sexist slurs." Indeed, one way to express appreciation of a woman's attractiveness is to make compliments and gestures in respectful manner. However, this appreciation towards women had subjected the latter to harassment, not only physically, but also verbally. Thus, Section 2 of the law recognizes the role of women in nation-building, and that they are entitled along with men to security and safety in public spaces and even online:

Section 2. Declaration of Policies. – It is the policy of the State to value the dignity of every human person and guarantee full respect for human rights. It is likewise the policy of the State to recognize the role of women in nation-building and ensure the fundamental equality before the law of women and men. The State also recognizes that both men and women must have equality, security and safety not only in private, but also on the streets, public spaces, online, workplaces and educational and training institutions.

Religion

The religious expression of religious sect Jehovah's Witnesses was

upheld by the Supreme Court in the aforementioned case of *Ebralinag*, and that its members are not anymore threatened from expulsion from school for refusal to salute the Philippine Flag. It was stated in the case that the members of the sect admittedly teach their children not to salute the flag, sing the national anthem, and recite the patriotic pledge for they believe that those are “acts of worship” or “religious devotion” which they “cannot conscientiously give to anyone or anything except God.” They feel bound by the Bible’s command to “guard ourselves from idols – 1 John 5:21” and as such, consider the flag as an image or idol representing the State. The Supreme Court went on to say that:

“[T]he petitioners seek only is exemption from the flag ceremony, not exclusion from the public schools where they may study the Constitution, the democratic way of life and form of government, and learn not only the arts, sciences, Philippine history and culture but also receive training for a vocation of profession and be taught the virtues of “patriotism, respect for human rights, appreciation for national heroes, the rights and duties of citizenship, and moral and spiritual values (Sec. 3[2], Art. XIV, 1987 Constitution) as part of the curricula.”

xxx

“We hold that a similar exemption may be accorded to the Jehovah’s Witnesses with regard to the observance of the flag ceremony out of respect for their religious beliefs, however ‘bizarre’ those beliefs may seem to others. Nevertheless, their right not to participate in the flag ceremony does not give them a right to disrupt such patriotic exercises.”

The religious speech of a homegrown Christian sect called Iglesia Ni Cristo had been sustained in the case of *Iglesia ni Cristo v. Court of Appeals*.⁶ In that case, a government board regulating the movie and television programs gave an “x-rating” on some of the episode broadcasted by the sect in their channel after a series of “attacks” towards other religions, especially the Catholic church. The Supreme Court held that these so-called “attacks” are mere *criticisms* of some of the deeply held dogmas and tenets of other religions, and went on to state that:

“The respondent Board may disagree with the criticisms of other religions by petitioner but that gives it no excuse to interdict such criticisms, however, unclean they may be. Under our constitutional scheme, it is not the task of the State to favor any religion by protecting it against an attack by another religion. Religious dogmas and beliefs are often at war and to preserve peace among their followers, especially the fanatics, the establishment clause of freedom of religion prohibits the

⁶ G.R. No. 119673, 26 July 1996.

State from leaning towards any religion. Vis-a-vis religious differences, the State enjoys no banquet of options. Neutrality alone is its fixed and immovable stance. In fine, **respondent board cannot squelch the speech of petitioner Iglesia ni Cristo simply because it attacks other religions, even if said religion happens to be the most numerous church in our country.** In a State where there ought to be no difference between the appearance and the reality of freedom of religion, the remedy against bad theology is better theology. **The bedrock of freedom of religion is freedom of thought and it is best served by encouraging the marketplace of dueling ideas.** When the luxury of time permits, the marketplace of ideas demands that speech should be met by more speech for it is the spark of opposite speech, the heat of colliding ideas that can fan the embers of truth." (Emphases supplied)

Moreover, the *Iglesia* case cited *American Bible Society v. City of Manila*,⁷ a 1957 jurisprudence, which stated that:

"The constitutional guaranty of free exercise and enjoyment of religious profession and worship carries with it the right to disseminate religious information. Any restraint of such right can be justified like other restraints on freedom of expression on the ground that there is a clear and present danger of any substantive evil which the State has the right to prevent."

Furthermore, in upholding the right of *Iglesia* to broadcast its criticisms, the Supreme Court declared that the records are "completely *bereft of findings of facts* to justify the *conclusion* that the subject video tapes constitute impermissible attacks against another religion. There is no showing whatsoever of the *type of harm* the tapes will bring about especially the gravity and imminence of the threatened harm. *Prior restraint on speech, including religious speech, cannot be justified by hypothetical fears but only by the showing of a substantive and imminent evil which has taken the life of a reality already on ground.*" (Emphases in the original)

- **Are there topics that enjoy special protection in terms of freedom of speech – for example topics of religion and politics**

The topic of **religion** enjoys a special protection in terms of freedom of speech. This is understood because what follows the Bill of Rights provision on free speech and expression is the provision on the free exercise of religion. Article III, Section 5, of the 1987 Constitution of the Philippines provides:

Section 5. No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of

⁷ G.R. No. L-9637, 30 April 1957.

religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.

As can be inferred from the cited Philippines jurisprudence, there had been a unique treatment when it comes to religious expression as it goes hand in hand with, and is protected by, the free exercise clause.

4. If there are restrictions in the criminal law of the freedom of speech, are the restrictions then absolute or must they be weighed against the consideration of free speech?

- Does this apply to all groups and if not, are the restrictions either absolute or not? Please mention which persons and groups belong to which category
- In cases where the freedom of speech and the restrictions are to weighed against each other –
 - Are there then **guidelines** on how the **balancing** should be **done**?
 - If Yes, which of the two parameters weighs heaviest, a) the protection of free speech or b) the category that is protected by the legislation? And does this **differ** from category to category?
 - And how **much discretion is there such that the outcome of the balancing exercise may differ from judge to judge?**

As stated in the abovementioned case of *Chavez*, the Supreme Court held that neither freedom of expression, nor its restrictions, are absolute, thus:

“From the language of the specific constitutional provision, it would appear that the right to free speech and a free press is not susceptible of any limitation. But the realities of life in a complex society preclude a literal interpretation of the provision prohibiting the passage of a law that would abridge such freedom. **For freedom of expression is not an absolute, nor is it an ‘unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.’**

Thus, all speech are not treated the same. Some types of speech may be subjected to some regulation by the State under its pervasive police power, in order that it may not be injurious to the equal right of others or those of the community or society. The difference in treatment is expected because the relevant interests of one type of speech, e.g., political speech, may vary from those of another, e.g., obscene speech. **Distinctions have therefore been made in the treatment, analysis, and evaluation of the permissible scope of restrictions on various categories of speech.** We have ruled, for example, that in our jurisdiction slander or libel, lewd and obscene speech, as well as

'fighting words' are not entitled to constitutional protection and may be penalized.

Moreover, the **techniques of reviewing alleged restrictions on speech (overbreadth, vagueness, and so on) have been applied differently to each category**, either consciously or unconsciously. A study of free speech jurisprudence—whether here or abroad—will reveal that **courts have developed different tests as to specific types or categories of speech** in concrete situations; i.e., subversive speech; obscene speech; the speech of the broadcast media and of the traditional print media; libelous speech; speech affecting associational rights; speech before hostile audiences; symbolic speech; speech that affects the right to a fair trial; and speech associated with rights of assembly and petition." (Citations omitted; emphases supplied)

The restrictions in the criminal law of freedom of speech in our country are weighed against the consideration, not of free speech alone, but also taking into consideration the time and circumstances surrounding the utterance thereof. Having discussed so far, it is evident that the Constitution, and even several special laws of the Philippines, were adopted from American laws. However, having been colonies of Spain and the United States, and after invasion by several pre-Hispanic settlers, the legal system of the Philippines has developed into a hybrid of Roman Law (civil law), Anglo-American (common law) systems, and also of Islamic law.

The Philippines did not only incorporate pieces of legislation from other jurisdictions into its legal system, but also adopted several jurisprudential doctrines from the rulings of both the Spanish and American Supreme Courts. Thus, the Supreme Court of the Philippines has adopted several guidelines governing the topic of free speech from other jurisdictions. In the abovementioned case of *Chavez*, the Supreme Court recognized some of these guidelines as (1) Dangerous Tendency Doctrine; (2) Balancing of Interest; and (3) Clear and Present Danger Test.

The **dangerous tendency doctrine** permits limitations on speech once a rational connection has been established between the speech restrained and the danger contemplated. The **balancing of interests tests** is used as a standard when courts need to balance conflicting social values and individual interests, and requires a conscious and detailed consideration of the interplay of interests observable in a given situation of type of situation. The **clear and present danger rule** rests on the premise that speech may be restrained because there is substantial danger that the speech will likely lead to an evil the government has a right to prevent. This rule requires that the evil consequences sought to be prevented must be substantive, "extremely serious and the degree of

imminence extremely high.”⁸ In the Philippine jurisdiction, the last rule has generally been adhered to.⁹

5. Do you find that the legislation is clear and comprehensible to the citizen or does it give cause for doubt?

- If it gives cause for doubt, how is it expressed? Does it **deter** the citizen from making statements? Or does it **deter** citizens from suing?

It is submitted that any piece of legislation has a potential of being subjected to any possible controversy or doubt. Thus, it is the foremost function of the Supreme Court, under our 1987 Constitution, to resolve such controversies, thus:

ARTICLE VIII - JUDICIAL DEPARTMENT

Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

Hence, any citizen whose right to free speech has been curtailed by a statute is given an opportunity to question such law. As an aside, *Inciting to Rebellion or Insurrection*, as well as *Inciting to Sedition*, are crimes still punished under Articles 138 and 142 of the RPC, respectively. There had been recorded cases on these crimes, some of which predates the RPC, namely *U.S. v. Apurado* (1907), *People v. Perez* (1923), and *People v. Feleo* (1933). However, a significant decline, almost to a certain level of obsolescence, has transpired presumably because of the liberties granted to the citizens to speak or complain about the persons in authority. Moreover, with the advent of the digital age, as well as the proliferation of fake news and the overarching right of people to express their thoughts even by mere “tweets” or posts on social media, speech which seems to be “inciteful” or “provocative” had been considered something that is highly tolerated by any modern reader. Thus, laws do not anymore deter citizens from making statements; rather, the changing times, along with technological advancement, had given them an opportunity to freely express what is on their minds through digital mediums. Neither does it deter citizens from suing because they are nevertheless granted the right to question before

⁸ *Supra*, note 1.

⁹ *Ibid.*

the court any piece of legislation which may restrict free speech.

6. Do you find in your work as a judge that the relevant legislation in your country, as it pertains to the freedom of speech and its protection and the criminalization of hate speech, is clear and comprehensible, or do you find that it gives too much room for different outcomes in the same types of cases?

Taking into consideration the peculiar circumstances surrounding each case, there had been a liberty in terms of application of the pieces of legislation, along with the jurisprudential guidelines. This is so because as “*guidelines*,” these are but mere standards or parameters upon which the judge must base his or her rulings. As reiterated in the case of *Chavez*:

“[T]he determination in every case of whether there is an impermissible restraint on the freedom of speech has always been based on the circumstances of each case, including the nature of the restraint. **And in its application in our jurisdiction, the parameters of this principle have been etched on a case-to-case basis, always tested by scrutinizing the governmental issuance or act against the circumstances in which they operate, and then determining the appropriate test with which to evaluate.**” (Emphasis in the original)