

# THE TRUTH SHALL SET YOU FREE: Criminalization of Defamation and Similar Offenses in a Modern Democracy

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

- Justice Oliver Wendell Holmes Jr.<sup>2</sup>

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### I. Introduction

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>3</sup> This has been among those inherent rights echoed by the United Nations in 1948.

As Chief Justice Maria Lourdes Sereno stated in her opinion, there is nothing which can be plainer and more unambiguous than the Constitutional mandate that, “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 a redress of grievances.”<sup>4</sup> The Constitution’s mantle of protection is not limited to direct interference with the right to free speech; it prohibits anything that as much as subtly chills its exercise.<sup>5</sup>

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<sup>2</sup> Dissenting opinion of J. Holmes, *Abrams v. United States*, 250 U.S. 616 (1919).

<sup>3</sup> United Nations Declaration of Human Rights, December 10, 1948, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

<sup>4</sup> CONST., art. III, sec. 4.

<sup>5</sup> Dissenting and Concurring opinion of J. Sereno, *Disini v. Secretary of Justice*, G.R. Nos. 203335, et al., February 18, 2014

The language of the above-quoted Constitutional provision would make it seem that the freedom of speech is not susceptible to restrictions. However, no less than the Supreme Court (Court) recognized in the case of *Chavez v. Gonzales* that 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. Freedom of expression is not absolute and, definitely, not an unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse it.<sup>6</sup> However, such limitations must not be overly broad, vague, and too restrictive that it tends to create a chilling effect on free speech.

Freedom of speech is the rule, and restriction should be the exception. And such exceptions must be proven to be out of paramount necessity for the State.<sup>7</sup> The development of an informed public opinion in the Philippines can certainly not be brought about by the constant prosecution of those citizens who dare to denounce the maladministration of public affairs.<sup>8</sup>

The purpose of the article is not to declare defamatory statements as protected speech for it has been ruled time and again by the Court that it is not within that ambit.<sup>9</sup> But the mere fact that it is not a valid exercise of free speech does not necessarily entail that it should be made criminal in nature. What the paper seeks to address are the issues and legal implications which entails the criminal nature of defamation and why it is simply not in conjunction with the enjoyment of the blessings of independence and democracy that the Constitution envisions.<sup>10</sup>

## II. Historical Background

### a. Common Roots of *Lèse-majesté* and Defamation Laws

Defamation laws trace their roots far back during the age of historic England, being considered by modern legal scholars as a creation of English law. However, undisputedly, similar laws have existed a thousand years further - even being included in the Praetorian Edict as a law punishing the act of shouting injurious statements in public places. Germanic and English Laws have also been shown to have meted the penalty of tongue mutilation for offenders.<sup>11</sup> The penalty of deportation was also imposed by the Roman Empire for those who committed *laesio majestatis Populi Romani* (insult of magistrates) and the Roman law particularly designated the law of magistrates to be in the same category as *libelli famosi* (law on libel) having the same elements and penalty imposable attached to it.<sup>12</sup>

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<sup>6</sup> *Chavez v. Gonzales*, G.R. No. 168338, February 15, 2008.

<sup>7</sup> *Chavez v. Gonzales*, G.R. No. 168338, February 15, 2008.

<sup>8</sup> *US v. Perfecto*, 43 Phil 225 (1922).

<sup>9</sup> *Disini v. Secretary of Justice*, G.R. Nos. 203335, February 18, 2014.

<sup>10</sup> CONST., preamble.

<sup>11</sup> Van Vechter Veeder, *The History and Theory of the Law of Defamation*, 3 Colum. L. Rev.546-573 (1903).

<sup>12</sup> *Ibid.*

During the Middle Ages in Europe, when the Ecclesiastical church was at the pinnacle of influence, “*diffamation*” was a sin punishable by law. The crime was committed when a person spoke ill of the Church as an institution and of its teachings and its patrons. Back then, the Church had jurisdiction to try and render judgments over such crimes. William the Conqueror did not question the jurisdiction of the ecclesiastical order, and it remained in force up until Edward I claimed jurisdiction. Medieval Europe valued reputation so much that it was integrated into both secular and spiritual aspects of society. When the jurisdiction to try defamation crimes was vested upon the English King’s Court, its limited applicability deprived the common folk of the right to the protection of the law. Only the rich and those with peerage were deemed to have the right to a reputation.<sup>13</sup>

It was only during the Renaissance that individual injury caused by defamatory statements was recognized in addition to seditious libel. This was the juncture when distinction was made between libel as a matter of *lèse-majesté* and libel based on individual honor.

### **b. Brief History of Defamation Laws in the Philippines**

Defamation laws in the Philippines trace back to the Spanish colonial period. The *Código Penal* punished contempt, insults, *injurias*, and threats against persons in authority and insults, *injurias*, and threats against their agents and other public officers. Also included was the *lèse-majesté* law which punished the act of speaking ill of the monarchy. Censorship was legitimate during the Spanish colonial period.<sup>14</sup> After all, there was no such thing as a free press, and its propaganda publications were construed as seditious and furthering the causes for revolution.<sup>15</sup>

When the United States of America gained sovereignty over the Philippines, the local penal law was further modified. The United States Philippine Commission enacted Act No. 277, which punished libel in both civil and criminal cases. Then Governor-General William Howard Taft explained that the criminalization of libel in the Philippines was because of the differing perspectives on the concept of free speech that, according to him, was better understood by the Americans. As pointed out by Mr. Justice Marvic Mario Victor Leonen in his Concurring and Dissenting Opinion in the case of *Disini*:

In essence, Philippine libel law is “a ‘fusion’ of the Spanish law on *defamacion* and the American law on libel. It started as a legal tool to protect the government and the status quo. The bare text of the law had to be qualified through jurisprudential interpretation as the fundamental right to expression became clearer. In theory, libel prosecution has slowly evolved

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<sup>13</sup> Ibid.

<sup>14</sup> Concurring and Dissenting opinion of J. Leonen, *Disini v. Secretary of Justice*, G.R. Nos. 203335, February 18, 2014.

<sup>15</sup> Perfecto V. Fernandez, *Freedom of the Press in the Philippines*, 33 Phil. L. J. 473 (1958).

from protecting both private citizens and public figures to its modern notion of shielding only private parties from defamatory utterances.<sup>16</sup>

The enactment of the Revised Penal Code subsequently repealed the defamation laws further into their current form.

On March 29, 1977, President Ferdinand Marcos enacted Presidential Decree No. 100-A, as amended by Presidential Decree No. 1743, which punished the crime of *lèse-majesté* against the Chief Executive of the Republic of the Philippines, that of any member of his family, or against the life of any member of his cabinet. The enactment was repealed by the issuance of Executive Order No. 183 by President Corazon Aquino on June 5, 1987. The repeal pointed out that “the crime of *lèse-majesté* has no place in a democratic society.”

With the rise of the digital age, calls for protection of the laws within the cybersphere came to effect. The enactment of the Cybercrime Prevention Act of 2012 (Anti-Cybercrime Law) included the criminalization of cyber libel.<sup>17</sup> The enactment drew huge flak in the legal community as the issue of double jeopardy validly attached between libel punished under the Revised Penal Code and that of which is punished under the Cybercrime Prevention Act.

### c. Jurisprudential Standards on Free Speech

Defamation is the offense of injuring a person's character, fame, or reputation through false and malicious statements.<sup>18</sup> It is an invasion of a relational interest since it involves the opinion of the complainant and others in the community.

In the past, libel had been punished because it tended "to provoke an immediate breach of the peace." Modern views, however, justify libel laws on the value of reputation. History has shown several concepts of reputation that defamation laws seek to protect: reputation as property, reputation as an honor, and reputation as dignity.<sup>19</sup> The right to enjoy one's reputation is long regarded as essential to human society and civilization, falling under personal security. For this reason, those who harm another's reputation are penalized. However, in modern society, little attention is given to negative criticisms since the developing age has adapted not to be thin-skinned in the face of public scrutiny.<sup>20</sup>

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<sup>16</sup> *Disini v. Secretary of Justice*, G.R. Nos. 203335, et al., February 18, 2014.

<sup>17</sup> An Act Defining Cybercrime, Providing for The Prevention, Investigation, Suppression and the Imposition of Penalties Therefor and for Other Purposes, Republic Act No. 10175, (2012).

<sup>18</sup> *MVRS Publications v. Islamic Da'wah Council of the Philippines*, G.R. No. 135306, January 28, 2003.

<sup>19</sup> Robert C. Post, *The Social Foundations of Defamation Laws: Reputation and Constitution*, 74 (3) Cal. L. Rev. 691 (1986).

<sup>20</sup> *Ibid.*

The present libel laws reflect most of the American views on defamation. While the defamation laws in the Philippines were categorized under Crimes Against Honor, and not falling within the purview of Crimes Against Public Order like that of the crimes of Inciting to Sedition and Inciting to Rebellion, the same rule likewise applies in determining the criminality of the imputation alleged. The 1957 landmark case of *Cabansag v. Fernandez* provided the two tests which the Supreme Court uses utilizes in scrutinizing free speech restrictions. The Dangerous Tendency Rule and the Clear and Present Danger Test are used to determine whether such imputations would require government restrictions for the protection of the general public.<sup>21</sup>

The Dangerous Tendency Rule provides that when the words uttered create a dangerous tendency which the state has a right to prevent, then such words are punishable. It is not necessary that some definite or immediate acts of force, violence, or unlawfulness be advocated.<sup>22</sup> The test permits limitations on speech once a rational connection has been established between the speech restrained and the danger contemplated. Under this rule, it is not necessary that the language used be reasonably calculated to incite persons to acts of force, violence, or unlawfulness. 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.<sup>23</sup> The rule was further fortified by the introduction of the Brandenburg Test which was discussed by Justice Antonio Carpio in his Concurring Opinion in *Chavez*. Citing *Brandenburg v. Ohio*, Justice Carpio stated that the Constitution prohibits advocacies on the use of force or violation of the laws, unless it is directed to incite or produce imminent lawless action, or incite or produce such actions.<sup>24</sup> Under the Brandenburg Test, the State has the burden to prove that restraint was towards advocacies directed to incite or produce imminent lawless action, or incite or produce such action.

The recent pronouncement of the Court in *Calleja v. Executive Secretary* upholding the validity of Sec. 9 of the Republic Act No. 11479 or The Anti-Terrorism Act of 2020 sheds some light as to the Dangerous Tendency Rule. The Court ruled that communication that can aid or lead terrorist activities are factors which give rise to grave national concerns that would justify regulation of speech.<sup>25</sup> It further held that the threat of overthrow of the government is certainly a substantial interest the government must protect against. While there is still ambiguity as to the very definition of incitement under the law which the legislature left to judicial determination, the fact remains that the Court appreciated the imminence factor of the unprotected speech, as per the standards under *Brandenburg*.<sup>26</sup>

Under the Clear and Present Danger Rule, the evil consequence of the comment or utterance must be "extremely serious and the degree of imminence extremely high" before the utterance can be punished.<sup>27</sup> Under this rule, the advocacy of ideas cannot constitutionally be abridged unless there is a clear and present danger

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<sup>21</sup> *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>22</sup> *Cabansag v. Fernandez*, G.R. No. L-8974, October 18, 1957.

<sup>23</sup> *Ibid.*

<sup>24</sup> Separate Concurring Opinion of J. Carpio, *Chavez v. Gonzales*, G.R. No. 168338, February 15, 2008.

<sup>25</sup> *Calleja v. Executive Secretary*, G.R. No. 252578, December 7, 2021.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Cabansag v. Fernandez*, G.R. No. L-8974, October 18, 1957.

that such advocacy will harm the administration of justice.<sup>28</sup> Thus, only in cases where there is extreme necessity for state control such as a looming danger against the evils of a disorderly and unfair administration of justice should the exception be allowed. This test establishes a definite rule in constitutional law, providing the criterion as to what words may be published.<sup>29</sup>

While the State must protect the life, liberty, and property of the people as an essential ingredient in the enjoyment of democracy<sup>30</sup>, the same should also be Constitutional and should not conflict with another equally important guarantee.<sup>31</sup> Mr. Justice James Jenkins explained in one very early case the *raison d'être* of the criminal nature of defamation. The Court held *viz*:

"The enjoyment of a private reputation is as much a constitutional right as the possession of life, liberty, or property. It is one of those rights necessary to human society, that underlie the whole scheme of human civilization. . . . The law recognizes the value of such a reputation and constantly strives to give redress for its injury. It imposes upon him who attacks it by slanderous words or libelous publications, the liability to make full compensation for the damage to the reputation, for the shame, obloquy and for the injury to the feelings of its owner, which are caused by the publication of the slander or libel."<sup>32</sup>

The *ratio decidendi* provided the phrase "imposes upon him who attacks it by slanderous words or libelous publications, the liability to make full compensation for the damage". As understood in its plain meaning, the right to compensation for the damage incurred for the offended party is the reason for the law's existence. Hence, penalties imposed by the criminal nature of the law, such as imprisonment or payment of fine, are of no consequence to the service of justice.

### III. Discussion

#### a. Libel and Similar Defamation Laws in the Philippines

Libel is 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.<sup>33</sup> Peculiar to note is that the Revised Penal Code (RPC) mislabeled the definition of "libel" with that of the broader concept "defamation" which was directly translated from the Spanish Civil Code as *defamacion*.<sup>34</sup> To recall, libel pertains to defamation through writings or similar means.<sup>35</sup>

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> CONST., art. II, sec. 5

<sup>31</sup> Dissenting opinion, *Disini v. Secretary of Justice*, G.R. Nos. 203335, et al., February 18, 2014.

<sup>32</sup> *Worcester v. Ocampo*, G.R. No. L-5932, February 27, 1912.

<sup>33</sup> REV. PEN. CODE, art. 353.

<sup>34</sup> 2 Luis B. Reyes, *The Revised Penal Code: Criminal Law Book Two*, p. 1024, (19th Ed. Rhoda Regina R. Rara, 2017).

<sup>35</sup> REV. PEN. CODE, art. 355.

Defamation is committed when the following elements concur:<sup>36</sup>

- (a) That there must be an imputation of a crime, or of a vice or defect, real or imaginary, or any act or omission, status or circumstance.
- (b) That the imputation must be made publicly.
- (c) That it must be malicious.
- (d) That the imputation must be directed to a natural or juridical person.
- (e) That the imputation must tend to cause the dishonor, discredit or contempt of the person defamed.

The RPC provides for a rebuttable presumption regarding the nature of the publicity of the statement.<sup>37</sup>

ART. 354. Every defamatory imputation is presumed to be malicious, even if it be true, if no good intention and justifiable motive for making it is shown.

Slander, on the other hand, is defamation committed orally albeit having a lighter penalty over libel.

Cyber libel is a recent addition to the set of criminal defamation laws in the country. It is a punishable act under Republic Act No. 10175 which adopted the nomenclature of the crime of libel under the Revised Penal Code committed through a computer system or any other similar means which may be devised in the future.<sup>38</sup> Although cyber libel was not clearly defined under the Law, the Anti-Cybercrime Law designated libel, as defined under the RPC, as a punishable act and imposes a higher penalty than the former because of the use of information and communication technologies. The penalty imposed for cyber libel is imprisonment of prision mayor or a fine of at least Two hundred thousand pesos up to a maximum amount commensurate to the damage incurred or both.<sup>39</sup> The reason for the appreciation of a qualifying circumstance is due to the fact that in “using the technology in question, the offender often evades identification and is able to reach far more victims or cause greater harm.”<sup>40</sup> Under this law, the elements had a slight difference as compared to that of libel under the Revised Penal Code. To prove the commission of cyber libel, the following elements must concur:

- (a) publication of the charge;
- (b) identity of the person defamed, and
- (c) existence of malice.

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<sup>36</sup> REYES, supra note 28, at p. 1025.

<sup>37</sup> REV. PEN. CODE, art. 354.

<sup>38</sup> An Act Defining Cybercrime, Providing For The Prevention, Investigation, Suppression And The Imposition Of Penalties Therefor And For Other Purposes, Republic Act 10175, sec. 4(4) (2012)

<sup>39</sup> An Act Defining Cybercrime, Providing For The Prevention, Investigation, Suppression And The Imposition Of Penalties Therefor And For Other Purposes, Republic Act 10175, sec. 8 (2012).

<sup>40</sup> *Disini v. Secretary of Justice*, G.R. Nos. 203335, et al., February 18, 2014.

As with other criminal offenses, venue is also jurisdictional in cyber libel cases. The rule of venue is clear in ordinary libel is clear, that is, the criminal action shall be filed in the RTC of the province or city:

- (a) where the offended party actually resides at the time of the commission of the offense
- (b) where the libelous matter is printed and first published.

But in cases of internet libel, the place where the defamatory article was printed and first published is impossible to ascertain. Furthermore, the place where the article was first accessed cannot be equated to place of first publication. Hence, unlike ordinary libel, the venue for filing the civil or criminal action in cyber libel is limited to the offended party's place of residence.<sup>41</sup>

Under the Implementing Rules and Regulations of the Cybercrime Prevention Act of 2012, three (3) additional rules of venue were added for the prosecution of cybercrimes, namely, (a) where the cybercrime or any of its elements is committed, (b) where any part of the computer system used is situated, or (c) where any of the damage caused to a natural or juridical person took place.<sup>42</sup>

## **b. Incompatibility with a Modern Democracy**

Philippine democracy was loosely patterned after the American concept. Although certain peculiarities were brought about by Spanish influence, the Philippines remains to be a country that is “highly American.”<sup>43</sup> As a consequence, the English view on reputation is inapplicable to the Philippine view. The European view protects collective honor, reputation, and privacy as a matter of policy. The European basis of libel laws, which the Philippines subscribes to, is not suited to a democracy because of the concept of equality it advocates. Europeans would treat a besmirched reputation as defiance to the nobility or social classes established while a democracy treats it as an encroachment of a person’s right to privacy. The Eurocentric perspective on damage is based upon an objective social norm of class and nobility while the American view supports the perspective that damage is derivative of personal injury sustained.<sup>44</sup> Thus, defamation suits, being mostly aimed towards reparation for besmirched reputation of individual injury than a violation of public order and public peace, could simply be taken as a matter better adjudicated within the competence of civil courts.

Also, it is important to note is that under defamation laws, all defamatory statements have the presumption of malice<sup>45</sup>; thus it is, in effect, no longer needed to be proven by the prosecution. This provision of the law effectively shifted the burden of proof towards the accused. What added to the fatal flaw of the law is the fact that even if the imputation was true, it is still presumed to be malicious as contemplated under the

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<sup>41</sup> *Bonifacio v. RTC of Makati*, G.R. No. 184800, May 5, 2010.

<sup>42</sup> Rules and Regulations Implement the Cybercrime Act of 2020, Rule 4, Sec.22.

<sup>43</sup> Michael Paul Honaroto, *United States Influences in the Philippines*, 4(2) UPF (1987).

<sup>44</sup> David Riesman, *Democracy and Defamation: Control of Group Libel*, 42(5) Colum. L.Rev. 727-780 (1942).

<sup>45</sup> REV. PEN. CODE, Act No. 3815, art. 354.

essential elements of the law.<sup>46</sup> The only way to rebut the presumption of malice in cases of truthful statements is to prove otherwise which again, shifted the burden to the defendant. Not only do these laws silence criticism, but they also punish telling the truth. It is interesting to note that while the law protects reputations from being besmirched, it comes at the cost of the Constitutional right to be presumed innocent until proven guilty.

In addition, the Revised Penal Code provides a provision on the Proof of Truth in defamation cases:

**Art. 361.** Proof of the truth. - In every criminal prosecution for libel, the truth may be given in evidence to the court and if it appears that the matter charged as libelous is true, and, moreover, that it was published with good motives and for justifiable ends, the defendants shall be acquitted.

Proof of the truth of an imputation of an act or omission not constituting a crime shall not be admitted, unless the imputation shall have been made against Government employees with respect to facts related to the discharge of their official duties.

In such cases if the defendant proves the truth of the imputation made by him, he shall be acquitted.

The abovementioned provision, just like the presumption of malice, shifts the burden of proof to the defendant. The court may infer actual malice on the author of the imputation where the article, on its face, is defamatory.<sup>47</sup> The danger arises when the court merely relies on this statutory presumption, in which case, the accused is necessarily burdened with the need to prove otherwise. In an ordinary criminal proceeding, it should be the merits of the prosecution's case which should establish the guilt of the accused beyond reasonable doubt. The presumption leans towards the innocence of the accused considering his Constitutional right to be presumed innocent. To rebut such presumption, the prosecution must establish guilt with moral certainty or such degree of proof which produces conviction in an unprejudiced mind.<sup>48</sup> And should doubt exist with the evidence presented, the doubt should be resolved in favor of the accused. After all, well-settled is the rule that the prosecution must rely on the strength of its own evidence and not on the weakness of the defense.<sup>49</sup> As such, the defendant may even waive to present evidence and file for demurrer to evidence if he or she finds that the prosecution's case is weak.<sup>50</sup>

The United States Supreme Court upheld the constitutional guarantee of free speech in ruling with a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. In the immortal words of Justice William Brennan, "libel can claim no

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<sup>46</sup> REYES, *supra* note 28, at p. 1036.

<sup>47</sup> *Diaz v. People*, G.R. NO. 159787, May 25, 2007.

<sup>48</sup> 2019 Amendments to the 1989 Revised Rules on Evidence, Rule 133, sec. 2

<sup>49</sup> *People v. Besmonte*, G.R. No. 103306, April 5, 1993.

<sup>50</sup> *Napoles v. Sandiganbayan*, G.R. No. 224162, February 6, 2013.

talismanic immunity from constitutional limitations,” but must “be measured by standards that satisfy the First Amendment.”<sup>51</sup> The US Supreme Court, in *New York Times*, emphasized that imputations against figures within the public sphere must conclusively prove actual malice. If it were otherwise, the presumption afforded to protected speech would be negated by the shifting of the burden of proof to the defendant.

The actual malice test, however, was given limited application by the courts to public figures; and hence, a different standard was applied to imputations against private persons. Under the Gertz standard, the offended party does not have to show that a defendant acted with actual malice to prevail in a defamation suit. The private plaintiff must simply show that the defendant was negligent, or at fault.<sup>52</sup> In essence, the application of the Gertz standard to criminal defamation cases was a clear violation of the basic tenets of criminal procedure such as the presumption of innocence and the burden of proof in criminal cases. If indeed what was required for the legal retort was a simple proof of negligence or fault, then it would have leveled criminal defamation cases with that of civil suits which merely require a preponderance of evidence.<sup>53</sup> The existing defamation laws put a strain against the basic tenets of criminal procedure when it challenged the defendant to prove his own innocence.

### **c. Criminal Defamation: Weapons of Oppression in the New Century**

The enactment of the Anti-Cybercrime Law which brought about the crime of cyber libel prompted the filing of multiple petitions to strike it down. While it is true that a proper redress for grievances should always be available to the offended parties, the same should not be arbitrary and oppressive. One of the issues raised was the arbitrary imposition of penalties under the law. Under the said law, cyber libel has a penalty impossible of more than double that of ordinary libel.<sup>54</sup> This in effect, has made the mode of committing the crime through the internet an aggravating circumstance. As aptly put by Chief Justice Sereno in her dissent in *Disini*, when an offender incurs greater criminal liability and consequently a higher penalty, there must also be a greater perversity of the mind, a greater *mens rea*, or a greater criminal intent. In simpler terms, the aggravation arises because of a more perverse mind, not from the mere presence or use of the means. It is this malicious intent in the adoption of the circumstance that reveals an added perversity that justifies a greater penalty.<sup>55</sup> In this case, the higher penalty imposed by the law is not warranted by an aggravation because it is simply a means to commit a similar crime and not that which involves greater perversion of the mind.

On June 14, 2020, Rappler CEO Maria Ressa was convicted of cyber libel after almost a year of trial based on an article that Rappler had published about businessman Wilfredo Keng, tying the latter to issues of

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<sup>51</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>52</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>53</sup> CIVIL CODE, R.A. 386 as amended, art. 33.

<sup>54</sup> *Ibid*, at 4.

<sup>55</sup> *Ibid*.

corruption, illegal drugs, human trafficking, and murder a few years back.<sup>56</sup> Rappler republished the article after having made corrections in it. The trial court convicted Ressa and Santos for cyberlibel even though the article was published four (4) months before the effectivity of the Anti-Cybercrime Law for which the prosecution alleged that there was a republication that occurred when accused Ms. Ressa corrected a typographical error in the article back in 2014. Several cases are still pending against Ms. Ressa. Ressa, a staunch critic of the administration, and other activist groups have claimed that this was harassment committed against the freedom of the press and the weaponization of libel laws to silence her.<sup>57</sup>

In November 2021, Rep. Claudine Bautista-Lim, of the Drivers United for Mass Progress and Equal Rights - Philippines Taxi Drivers Association (DUMPER-PTDA) party-list filed a complaint for cyber libel against actor Enchong Dee and several other celebrities for their criticism of her lavish wedding expenses.<sup>58</sup> The criticism came forth as Rep. Bautista-Lim supposedly represents a marginalized sector of society that was suffering from lack of source of income and is merely relying on social welfare.<sup>59</sup> This would be a great example of the criminal intent as applied in cyber libel, after the prosecution dismissed all libel charges except that which pertains to Dee. Under the law, public officials and employees and their families shall lead modest lives appropriate to their positions and income. They shall not indulge in extravagant or ostentatious displays of wealth in any form.<sup>60</sup>

In December 2021, journalists were charged with the crime of libel by Energy Secretary Alfonso Cusi for their report on the graft and corruption charges filed against him by two US-based Filipinos about the highly suspicious approval of the buyout of Malampaya shares.<sup>61</sup> The journalists relied on the actual complaint filed with the Office of the Ombudsman; furthermore, the publication of such a report was not with malice but merely an exercise of effective journalism - to inform the general population on matters of public interest.<sup>62</sup> In *Tulfo*, the Supreme Court, citing Justice Malcolm in the *Bustos* case, held that a public officer may not recover damages based on the imputations about their public functions unless it is proven to be marred in malice.<sup>63</sup>

As such, in cases where the complaint stems from a publication written about a public official's act in his performance of public functions, there is little to no gain from the prosecution of alleged defamatory

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<sup>56</sup> Jason Gutierrez and Alexandra Stevenson, [Maria Ressa, Crusading Journalist, Is Convicted in Philippines Libel Case](https://www.nytimes.com/2020/06/14/business/maria-ressa-verdict-philippines-rappler.html?auth=link-dismiss-google1tap), THE NEW YORK TIMES, (June 14, 2020), <https://www.nytimes.com/2020/06/14/business/maria-ressa-verdict-philippines-rappler.html?auth=link-dismiss-google1tap>.

<sup>57</sup> Yen Nee Lee, [Conviction of Philippine journalist points to 'orchestrated attempt' to silence Duterte critics](https://www.cNBC.com/2020/06/16/maria-ressas-conviction-attempts-to-silence-duterte-critics-expert-says.html), CNBC, (June 16, 2020), <https://www.cNBC.com/2020/06/16/maria-ressas-conviction-attempts-to-silence-duterte-critics-expert-says.html>.

<sup>58</sup> Rommel Rebolledo and Herbie Gomez, [Prosecutors indict Enchong Dee for cyber libel, clear Agot Isidro, Pokwang, Ogie Diaz](https://www.rappler.com/nation/mindanao/prosecutors-indict-enchong-dee-cyber-libel-clear-agot-isidro-pokwang-ogie-diaz/), RAPPLER, (December 20, 2021), <https://www.rappler.com/nation/mindanao/prosecutors-indict-enchong-dee-cyber-libel-clear-agot-isidro-pokwang-ogie-diaz/>.

<sup>59</sup> Ibid.

<sup>60</sup> An Act Establishing a Code of Conduct and Ethical Standards for Public Officials and Employees, to Uphold the Time-Honored Principle of Public Office Being a Public Trust, Granting Incentives and Rewards for Exemplary Service, Enumerating Prohibited Acts and Transactions and Providing Penalties for Violations Thereof and for Other Purposes, Republic Act No. 6713, sec. 4h (1989).

<sup>61</sup> Pia Ranada, [Cusi libel complaints an 'embarrassment' for PH – Maria Ressa's lawyers](https://www.rappler.com/nation/maria-ressa-lawyers-response-cusi-libel-complaints-embarrassment-philippines/), RAPPLER, (December 8, 2021), <https://www.rappler.com/nation/maria-ressa-lawyers-response-cusi-libel-complaints-embarrassment-philippines/>.

<sup>62</sup> Ibid.

<sup>63</sup> *Tulfo v. People*, G.R. No. 187113/G.R. No. 187230, January 11, 2021.

statements. With such exception provided by jurisprudence, a complaint filed by public officers on such matters would be in the form of retaliation or censorship towards subsequent detractors. Public policy, the welfare of society, and the orderly administration of the government demand the protection of public opinion.<sup>64</sup>

Looking at the trend of controversial libel cases filed in the Philippines, there is a common denominator among them which is the fact that they are usually linked with public officials or people performing public functions. Subscribing to the Fair Commentary principle, a public official should not be thin-skinned. Strict personal discipline is expected of a public official because public office is a property of the public. An official is looked upon to set the example of how they should correctly conduct themselves even in the face of extreme provocation. A public official is expected to act and serve with the highest degree of responsibility, integrity, loyalty, and efficiency and shall remain accountable for his conduct to the people.<sup>65</sup>

An exception to this rule is when the public official is attacked directly on matters not within his public function.<sup>66</sup> In November 2016, an illicit affair maintained by Senator Leila De Lima with her married driver was exposed to the public in view of the on-going congressional investigations on her links to the drug trade.<sup>67</sup> Had the case been different and a newspaper publicized such affair for the purpose of throwing mud on the senator's reputation, the newspaper company would be liable for defamation. The material is obviously not within the ambit of a fair commentary, not being a criticism on the Senator's exercise of official functions. Strategic filing of criminal cases for defamation by public officials on fair commentaries could only mean either of two things: they are guilty of such and want to conceal the truth, or they wish to seek retribution against detractors and to silence further critics.

In essence, defamation laws today are still being used to silence public opinion. Otherwise, there is no reason for government officials to belabor filing criminal complaints for fair commentaries that only exposes matters of public interest. Public office is a necessarily within the public domain. Those who occupy such office is bound to be marred with criticisms, be it serious or petty.<sup>68</sup> Defamation laws remain to be private crimes.

#### **d. Trend of "Democratization" Around the Globe**

There have been legal developments upon the shift of the century when the victims of colonization across the globe have opted to enjoy the freedom of speech and expression along with the independence that comes with the blessings of democracy. It can be inferred that free speech is a necessary manifestation of a functioning democracy.<sup>69</sup>

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<sup>64</sup> *US v. Bustos*, G.R. No. L-12592, March 8, 1918.

<sup>65</sup> *Yabut v. Ombudsman*, G.R. No. 111304, June 17, 1994.

<sup>66</sup> *People v. del Fierro*, G.R. No. 3599-R, July 27, 1950.

<sup>67</sup> Mara Cepeda, [Lawmakers feast on De Lima-Dayan love affair](https://www.rappler.com/nation/153479-house-bilibid-probe-de-lima-dayan-love-affair/), RAPPLER, (November 24, 2016).  
<https://www.rappler.com/nation/153479-house-bilibid-probe-de-lima-dayan-love-affair/>.

<sup>68</sup> *Ibid*, at 11.

<sup>69</sup> Dissenting opinion, *Abrams v. United States*, 250 U.S. 616 (1918).

As previously discussed, criminal defamation laws have been seen today as a relic of the colonial past and an obstacle to a progressive democracy. Within the last decade, former British colonies have opted out of maintaining the repressive laws and repealed them altogether.

In Liberia, the law on criminal defamation was abolished because of widespread fear of persecution against journalists. The Liberian President claimed that the law was a tool to intimidate and punish journalists and political opponents.<sup>70</sup> The Kenyan High Court ruled for criminal defamation as unconstitutional. It held that the harmful and undesirable consequences of criminalizing defamation. The chilling possibilities of arrest, detention, and two years' imprisonment, are manifestly excessive in their effect and unjustifiable in a modern democratic society.<sup>71</sup> The Zimbabwe and Lesotho's High Courts have done the same. What is interesting in the rulings of the African Courts was the upholding of the right to free press and the prohibition against the chilling effects upon free speech, which must both be protected under a functioning democratic state.

On October 2, 2021, King Abdullah of Jordan pardoned journalists convicted of *lèse-majesté* laws. Following the controversial special pardon, calls for the repeal of the said defamation law came at their highest point. The decision to pardon all those convicted for *lèse-majesté* is a welcome step in acknowledging that laws criminalizing heads of state and others in power have no place in a democratic country. At the same time, the move underscores the need for steps to provide full legal protection for media freedom in Jordan and ensure that the conditions exist for free political debate in the country in order that journalists may scrutinize the country's rulers without fear of retaliation.<sup>72</sup> This is in pursuance of modernizations and a possible shift to a democracy that the Crown Prince has been aiming for.

The former British colonies around the world exhibited a trend of recognition of the basic principles of a functional democracy. One of such principles is the guarantee of the freedom of speech and the press. The abovementioned states, as part of their modernization process as a democracy, made sure that the advancement of national interest is not impeded by unnecessary state intrusion on expression and speech. The decriminalization or the subsequent rulings of the Courts in favor of free speech have empowered its citizens and members of the press to contribute to holding public officials accountable for their actions, paving way to a more responsible governance. It is indeed true what Justice Holmes Jr. stated in his dissenting opinion in *Abrams v. United States*, "ultimate good desired is better reached by free trade of ideas".<sup>73</sup> Modern democracies must do away with its antiquated laws; especially those which are incompatible with its most fundamental guarantees. Democracies evolve, and so must its laws follow the trend.

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<sup>70</sup> Center for Media Studies & Peace Building, [President George Weah signs new press freedom act which repeals libel](https://ifex.org/president-george-weah-signs-new-press-freedom-act-which-repeals-libel/), IFEX, March 1, 2019, <https://ifex.org/president-george-weah-signs-new-press-freedom-act-which-repeals-libel/>.

<sup>71</sup> *Okuta v. Attorney General*, Petition No. 397 OF 2016, (2017).

<sup>72</sup> Anne Ter Rele, [Jordan: Lèse-majesté pardon should pave way for larger decriminalization of free speech](https://ipi.media/jordan-lese-majeste-pardon-should-pave-way-for-larger-decriminalization-of-free-speech/), INTERNATIONAL PRESS INSTITUTE, (Oct 18, 2021), <https://ipi.media/jordan-lese-majeste-pardon-should-pave-way-for-larger-decriminalization-of-free-speech/>.

<sup>73</sup> *Ibid*, at 1.

On the other hand, a stark contrast can be observed for states which have opted not to democratize. Under such governments, censorship laws remain to be a crucial factor in controlling public opinion at the expense of curtailing their citizens' freedom of speech. In Thailand, the Constitutional Court held that the calls for the repeal of the *lèse-majesté* laws are seditious, and that the incarceration of activists is justified. The law has been repeatedly exploited as a political tool to undermine critics of the monarchy.<sup>74</sup> Thailand, despite previously holding free elections, remains to be a monarchy and its government, although supposedly a government of the people was held hostage by a successful coup a decade ago.<sup>75</sup> The decriminalization of the Thai *lèse-majesté* laws is a controversial issue for the past few years.

### III. Recommendations

Although the Court has time and again declared that defamatory statements are not protected speech, the criminal nature of libel and other defamation laws still bring about a chilling effect on speech which is prohibited by the Constitution.<sup>76</sup> As aptly put by the petitioners in the oral arguments to strike down the Anti-Terror Law, the chilling effect is a hesitation in the mind of a person who tries to weigh out whether his next words would be criminal in nature.<sup>77</sup> Advocates of maintaining criminal defamation in the Philippines would argue that such law is a good deterrent against reputational damages which offenders may cause. Again, this deterring effect, as with other criminal laws, is good in so much as it prevents criminality by naturally producing an *in terrorem* effect. Nevertheless, this very purpose is an indication that there is indeed a chilling effect once the same is employed against the rightful exercise of free speech.

Reputation is personal. Even though public opinion tends to influence such, in the end, only the person with the besmirched reputation has a cause of action against his detractors. Thus, it becomes apparent that there is hardly any social injury caused. The State may not even file a suit *de officio* because the right to file such is vested on the offended party.<sup>78</sup>

Furthermore, the decriminalized nature of libel will not be a free pass for the press to subject anyone to defamatory statements; for journalists who maliciously defame a person are likewise liable to administrative sanctions under the Journalist's Code of Ethics.<sup>79</sup> The establishment of the Journalist's Code of Ethics by virtue of Republic Act No. 4363, empowered Philippine Press Council to investigate and sanction violators of the said Code.

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<sup>74</sup> Pavin Chachavalpongpun, Thailand's Lese-Majeste Law Takes Center Stage at UN Rights Review, THE DIPLOMAT, (November 19, 2021), <https://thediplomat.com/2021/11/thailands-lese-majeste-law-takes-center-stage-at-un-rights-review/>.

<sup>75</sup> Marwaan Macan-Markar, Thailand's long history of coups stirs debate in time of danger, NIKKEI ASIA, (July 30, 2021), <https://asia.nikkei.com/Politics/Turbulent-Thailand/Thailand-s-long-history-of-coups-stirs-debate-in-time-of-danger>.

<sup>76</sup> *Ibid*, at 2.

<sup>77</sup> Neil Arwin Mercado, SC told in anti-terror law debates: 'Chilling effect' is hesitation in speaker's mind, INQUIRER, (February 9, 2021), <https://newsinfo.inquirer.net/1394042/sc-told-in-anti-terror-law-debates-chilling-effect-is-hesitation-in-speakers-mind>.

<sup>78</sup> *People v. Cojuangco-Aquino*, G.R. Nos. L-8777-79, August 14, 1956.

<sup>79</sup> An Act Further Amend Article Three Hundred Sixty of the Revised Penal Code, Republic Act No. 4363, sec. 3 (1965).

### a. Judicial Diversion Approach

Since the civil case for defamation is basically aimed towards claiming compensation for a damaged reputation, an alternative dispute resolution is the best recourse to prevent the parties from delving into costly lawsuits. The Supreme Court should promulgate a rule which would require the parties to the defamation suit to enter a diversion proceeding as an act precedent to the continuation of the civil case itself. The mechanism would be similar to that of the *Katarungang Pambarangay* where the Court, or an agency of the government, is empowered to set the parties to diversion *motu proprio* or refer them for conciliation proceedings.<sup>80</sup> This is pursuant to the mandate of the Court to persuade the parties to enter into an amicable settlement.<sup>81</sup> Unlike that which the Civil Code provided, the new Rule to be promulgated would automatically suspend the proceedings upon the filing of the case.<sup>82</sup> Should the diversion proceedings be a success, the compromise agreement is to be submitted to the court for approval. Approval of the Court should be necessary to ensure that what was agreed upon does not contravene law, morals, good customs, public order or public policy.<sup>83</sup> Only in cases where there has been a certification by the necessary body that the attempt for an amicable settlement is impossible would the Court allow the litigation of the civil case for defamation.

### b. Expedited Proceedings Approach

A concern many legal scholars pose is that with the decriminalization of libel and allied laws, the offended party will be forced to initiate expensive lawsuits for the reparation of their damaged reputations.<sup>84</sup> Unlike in a criminal prosecution where expenses for litigation are wholly shouldered by the State in its efforts to punish the offender for the disturbance of public order, the plaintiff in a civil suit for damages bears the expenses of litigation.

To remedy this, the Court should promulgate special rules in civil suits for defamation. For the remedy to not add to the piling cases the courts face on the day-to-day basis, and to prevent the clogging of court dockets, the claim for damages for defamation should be included to those cases covered under Summary Procedures which involves an expeditious and inexpensive resolution without regard to technicalities. Since the quantum of proof required is merely preponderance of evidence and the libelous statements may easily be proven by documentary evidence, the proceedings would be for the determination of civil liability.

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<sup>80</sup> Supreme Court, Guidelines on the Katarungang Pambarangay Conciliation Procedure to Prevent Circumvention Of The Revised Katarungang Pambarangay Law (Sections 399-422, Chapter VII, Title I, Book Iii, R.A. 7160. Otherwise Known as the Local Government Code of 1991), Administrative Circular No. 14-93 [SC Admin Circ. No. 14-93] (Jul. 15, 1993).

<sup>81</sup> CIVIL CODE, R.A. 386 as amended, art. 2029.

<sup>82</sup> CIVIL CODE, R.A. 386 as amended, art. 2030.

<sup>83</sup> CIVIL CODE, R.A. 386 as amended, art. 1409.

<sup>84</sup> David Howarth, *The Cost of Libel Actions: A Skeptical Note*, 70 Cambridge L.J. 397-419, (2011).

Even the Supreme Court recognizes the need to provide a leeway in disposition of defamation cases. Hence, it issued a guideline instructing courts to exercise sound discretion in imposing penalties of imprisonment or a fine in criminal defamation cases and were empowered to provide a preferential penalty which is payment of a fine.<sup>85</sup> Payment of civil liability was given primacy over imprisonment upon the determination whether the imposition of a fine alone would best serve the interests of justice or whether forbearing to impose imprisonment would depreciate the seriousness of the offense, work violence on the social order, or otherwise be contrary to the imperative of justice.<sup>86</sup> It is possible that the Courts realized the severity of the penalty of imprisonment as not commensurate with the severity of the crime committed; hence, the Rules.

#### **IV. Conclusion**

For justice to prevail, the striking down of oppressive laws is not enough. The government should look into ways by which the evils sought to be suppressed by these laws are still mitigated. Justice will certainly not prevail if the offended parties were prejudiced by the lack of access to immediate redress of violations of their rights. Failing to do which would not only deprive offended parties of their right to be restored from the damage suffered, but would also give habitual violators a free pass without fear of prosecution.

Modern democracies need more than a nominal freedom brought about by loosening of the “governmental leash” to operate, it needs a system which adapts and evolves along the changing of times. The trend of nations around the world seeking independence from their colonial masters is far from over. It has only been revived as these States have realized that the clutches of colonial implications remain in the form of oppressive laws. Hence, to be truly free, the State must also give the same guarantees to its people which they have demanded from their colonizers decades ago.<sup>87</sup> The freedom of speech remains to be a vital indication of a functioning democracy. And even though libel and defamation are not protected speech, the same should not be burdened by the fear of persecution. As the King of Jordan claimed, governance is better suited with accountability from the people.<sup>88</sup>

Although criminal defamation is not at all indispensable to the justice system, its decriminalization would likewise open the floodgates to issues such as plaintiffs' hesitations on seeking redress for their besmirched reputation due to the expensive costs of litigation. But as the discussion above would attest, the reparation for individual injury need not be costly nor protracted. The Supreme Court, in the exercise of its rule-making power, should look into available alternative dispute resolution approaches and formulating rules

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<sup>85</sup> Supreme Court, Guidelines in the Observance of a Rule of Preference in the Imposition of Penalties in Libel Cases, Administrative Circular No. 08-2008 [SC Admin Circ. No. 08-2008] par. 2 (Jan. 18, 2022).

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, at 14.

<sup>88</sup> *Ibid.*

on expedited claims for damages. Not only would these remedies aid the party litigants in resolving their legal disputes, but it would also declutter the courts of pending cases. The significance of compromise agreements as a mode of resolving a case lean towards the public policy on the preservation of social relationships and the prevention of further escalations.

Indeed, the value of reputation and honor is an essential part of a civilized society.<sup>89</sup> Although the State may validly set limitations to the personal liberties of individuals, the same should not encroach upon rights that are vested by the Constitution. Aside from the fact that the criminal nature of libel would bring about chilling effects on free speech, equally important matters of consideration are issues which encroach upon the presumption of innocence. In a fair justice system, no accused should be required to prove his innocence. It is incumbent upon the State to rebut such presumption.<sup>90</sup>

The law on criminal defamation may have been relevant in the past for the protection of paramount state interests, but that is about the extent of its relevance. For today it is merely an antiquated relic of colonial past which serves little to no purpose in the status quo but as a tool to harass the press and seek retaliation. While it is true that reputation and good character must be protected by the State, public interest demands that the freedom of expression must not be curtailed by prior restraint. As aptly put by Mr. Justice Leonen, the Congress, should look into the wisdom of the changing times in making their decision-makings. The chilling effect on various types of speech brought by the possibility of criminal libel prosecution compared with the consequences of civil liabilities for defamation has been repeatedly glossed over. There should be an acknowledgment that criminal libel has an *in terrorem* effect that is inconsistent with the contemporary protection of the primordial and necessary right of expression enshrined in our Constitution.<sup>91</sup>

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<sup>89</sup> Ibid, at 2.

<sup>90</sup> CONST., art. III, sec. 4.

<sup>91</sup> Ibid, at 4.