Protecting the Symbol against Symbolic Speech: The Unconstitutionality of the Flag and Heraldic Code

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> *If the flag is a symbol of freedom and of our democracy, then it represents ideas just as words represent ideas, and in that case, we've got no more business telling people what they can or can't do with the flag than we do telling them how to think.*
>
> — *Mr. Justice Antonin Scalia*

> *If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.*
>
> — *Mr. Justice Robert Jackson*

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Prefatory

Life. Liberty. The pursuit of happiness. Invested in man by his very nature are these fundamental, inalienable rights that define the essence of his existence. Probing into the underpinnings of these inherent rights in relation to the greater sphere of societal relations wherein the Rule of Law allocates the limitations upon which man may conduct his affairs and mediates the relationship that governs the conduct thereof would take any discussion to a most reflective area of constitutional law where both man and Law converge to reach a delicate balance that would afford man the enjoyment of his inalienable rights yet at the same time measure the frontier for their exercise into an ordering of liberty.

This Article shall argue against the constitutionality of Section 34 (a) and (f) of the Flag and Heraldic Code of the Philippines[1] for being violative of one of man's most fundamental and quintessential rights under law — freedom of speech and expression.

As it stands, the Flag and Heraldic Code remains unchallenged before the courts of competent jurisdiction. Several months ago, however, the constitutionality of the Flag and Heraldic Code was poised to be tested in a case that would have proved to be novel had the same been brought before the Supreme Court.

On 28 January 2004, a group of soldiers of the Armed Forces of the Philippines, who identified themselves as "Kawal Pilipino," broadcasted on national television their grievances against the established system within the military institution. The group wore military uniforms and insignia and displayed two Philippine flags that were stitched together at length's end and bore the emblazoned word "KAWAL" along its entire length.

In the days that followed, Council on Philippine Affairs Chairman Pastor Saycon was one of those alleged to have taken part in the broadcast.

Thus, the National Bureau of Investigation was poised to file sedition charges against Mr. Saycon and six other individuals by reason that the broadcast was considered to be a plot to destabilize the incumbent administration leading to the presidential and national elections in May. In said charge, the alleged offense of disrespect to the flag committed in violation of the Flag and Heraldic Code was deemed absorbed in the charge of sedition.

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1. An Act Prescribing the Code of the National Flag, Anthem, Motto, Coat-of-Arms and Other Heraldic Devices of the Philippines [FLAG AND HERALDIC CODE].

Mr. Saycon requested author Leonard S. de Vera to represent him before the Supreme Court should the charge for desecration and disrespect to the flag be filed against him. This Article, in modified form, was early on prepared to be used as Mr. Saycon's Petition for Certiorari and Prohibition before the Supreme Court to challenge the constitutionality of the Flag and Heraldic Code had he been charged with its alleged violation. Mr. Saycon was in fact prepared to go before the Supreme Court to challenge the constitutionality of the Flag and Heraldic Code and preparation was done in anticipation of the charges, which were, however, not filed in court.

As this Article's core proposition, it is submitted that although there is a law punishing the desecration of the Philippine flag, placing on it the word "KAWAL" would not constitute a crime by reason that the same is an exercise of the constitutionally-guaranteed right to free speech and expression. More directly, placing the word "KAWAL" on the flag constitutes protected speech under the aegis of Section 4 of the Bill of Rights.

Since no case was filed in court, the Flag and Heraldic Code remains unchallenged to this day. Notwithstanding its non-filing, the issue of disrespect to the flag, as grounded on the above facts, raises a constitutional question of transcendental importance that merits scholarly analysis, if not judicial resolution. Needless to say, the authors love their country. Thus, the position set forth in this Article in no way reflects any diminution on their patriotism. However, the authors believe that national interest demands a proper discussion of the constitutional issues involved in this Article.

Thus, this Article shall draw its discussion from the circumstances mentioned above and shall expound on the same, taking into consideration pertinent constitutional principles and accompanying jurisprudence relating to freedom of speech and expression.

Partaking of the nature of an illicit and unlawful curtailment on the freedom of speech and expression as guaranteed by the Constitution, it is submitted that Section 34 (a) and (f) of the Flag and Heraldic Code should be declared unconstitutional considering that: (1) although the Flag and Heraldic Code protects the flag as a national symbol, it does so to the detriment of other guaranteed rights under the Constitution insofar as it imposes a prior restraint on the freedom of expression, and (2) the Flag and Heraldic Code is vague and overbroad and does not justify the State's policy of preventing breaches of the peace insofar as it is a direct and total suppression of an entire category of expressions.

Part I of this Article shall canvas the evolution of legislation relating to the Philippine flag, including the legislative debates on the present Flag and Heraldic Code. Part II shall survey Philippine and American jurisprudence with regard to conduct towards the flag, laying the foundation for a

thorough discussion on the conflict between the State interest in protecting the national symbol on the one hand and freedom of speech and expression on the other hand. Part III shall then discuss unconstitutionality of Section 34 (a) and (f) of the Flag and Heraldic Code. This Article shall then conclude with a discussion of free speech with respect to patriotism.

The circumstances upon which this Article shall base its discussion revolve around the conflict between two interests. At one end of the spectrum is the vital governmental interest to promote national unity and prevent breaches of peace that would be injurious to public welfare. At the other end, however, is the fundamental right of every citizen to express freely his sentiments without curtailment or abridgement.

Although both interests are guaranteed by the Constitution, when applied to the circumstances herein discussed, one is at odds with the other. It is therefore necessary to determine whether or not the vital governmental interest is sufficient to prevail over the fundamental right to free speech and expression.

I. PROTECTING THE NATIONAL SYMBOL: *The Evolution of Philippine flag laws*

Before taking on the legal intricacies that surround the Flag and Heraldic Code, a canvas of the history and development of Philippine laws relating to the protection of the flag as a national symbol is imperative in order to put proper perspective on the constitutional discussion to be undertaken in this Article.

The present Flag and Heraldic Code, Republic Act No. 8491, is the sixth statute that deals with the rules for the use and protection of the national flag and the penalties for violation thereof.

A. Philippine Flag Laws prior to Republic Act No. 8491

The first statute with respect to the national flag is Act No. 2928,[2] which was enacted by the Philippine Legislature and approved on 26 March 1920. The Act seeks to shield the national flag from dishonor, ridicule, or contempt. In this regard, Section 4 thereof pertinently provides:

> Sec. 4. Any utterance in speech, writing or drawing, and any act or omission casting dishonor, ridicule, or contempt upon the Philippine flag, as well as its use in places of ill-repute or for purposes involving disrespect,

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2. An Act to Adopt an Official Flag for the Government of the Philippine Islands, Prescribe Rules for its Use, and Provide Penalties for the Violation of said Rules, Act No. 2928 (1920).

> including use as trade-marks and for industrial, commercial or agricultural labels or designs, and any drawings or inscriptions upon the Philippine flag are hereby prohibited and their execution shall constitute an offence; and any person who, either himself or through another, violates any of the provisions of this Act and particularly those contained in this section, shall, upon conviction, be punished by a fine of not less than twenty-five nor more than one thousand pesos, or by imprisonment for not more than one year, or both such fine and imprisonment, in the discretion of the court: *Provided*, That in case of non-payment of the fine or any part thereof, the offender shall serve one day of subsidiary imprisonment for each peso of the fine unpaid: *And provided, further*, That for any second and additional offence, both fine and imprisonment shall always be imposed.

Three decades later, on 12 June 1950, President Elpidio Quirino promulgated Executive Order No. 321,[3] prescribing the code of the national flag. The opening statement provides that "[r]everence and respect for the accepted symbols of national solidarity are indicative of true patriotism and love of country." The Executive Order intended "to develop and consecrate such sublime virtues" and "inculcate in the minds of our people a just pride in their native land." In protecting the national flag, several acts were outlawed, among which are the following:

> 12. The Flag shall never be festooned, and shall always hang with nothing to cover its surface. It shall always occupy the highest place of honor and shall not be placed under any picture, or below a person.
>
> 13. The Flag shall never be used as a staff or whip, or covering for tables, or curtain for doorways. However, the Flag may be used by the Armed Forces to cover the casket of their honored dead, which includes deceased civilians who had rendered services in the Army, Navy, or civil office of great responsibility. The white triangle of the sun and stars will cover the head end of the casket, the blue stripe to the right, the red to the left of the deceased, with both colors evenly divided on each side of the casket. The Flag should not be lowered to the grave or allowed to touch the ground. Wreaths of flowers should not be placed on top of a flag-shrouded casket. A small cross of flowers may be placed over the Flag as a symbol of 'God above Country.'
>
> 14. No imprint shall be made on the Flag nor shall it be marred by advertisement, or in any manner desecrated. It shall not be worn as a whole or part of a costume. It shall not be used as a pennant in the hood or in any part of a motor vehicle except in celebration of the Independence Day, 'Fourth of July,' or on such other patriotic occasions as the President may designate.

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3. Prescribing the Code of the National Flag and the National Anthem of the Republic of the Philippines, Executive Order No. 321 (1950).

> 15. It is inappropriate to use the Flag in a dancing pavilion or in any place where hilarity is prevailing. Its use inside or outside a cockpit, club or other places where gambling or other vices are held is prohibited.
>
> 16. When the Flag is used in unveiling a statue or monument, it should not be allowed to fall to the ground but should be carried aloft to wave out, forming a distinctive feature of the ceremony. The Flag shall never be used as a covering for the statue.[4]

Executive Order No. 321 was amended three (3) times. First, by Executive Order No. 25[5] issued by President Ramon Magsaysay on 10 April 1954; second, by Executive Order No. 137[6] issued by President Diosdado Macapagal on 7 January 1965; and, third, by Executive Order No. 194[7] issued by President Ferdinand Marcos on 13 October 1969. Of the three amendments, only the amendments brought about by E.O. No. 137 directly relate to the discussion herein.[8]

Reaffirming the policy considerations stated in E.O. No. 321, E.O. No. 137 essentially replicated the parallel provisions found in E.O. No. 321, with certain changes, to wit:

> 13. The Flag shall never be festooned, and shall always hang with nothing to cover its surface. It shall always occupy the highest place of honor and shall not be placed under any picture, or below a person.
>
> 14. The Flag shall never be used as a staff or whip, or covering for tables, or curtain for doorways. However, the Flag may be used by the Armed Forces to cover the casket of their honored dead, which includes deceased

4. *Id.* part I, ¶ 12-16.

5. Amending Paragraph 3, Part II of Executive Order No. 321 Dated June 12, 1950, Entitled 'Prescribing the Code of the National Flag and the National Anthem of the Republic of the Philippines,' Executive Order No. 25 (1954).

6. Revising Executive Order No. 321 dated June 12, 1950, entitled 'Prescribing the Code of the National Flag and the National Anthem of the Republic of the Philippines,' Executive Order No. 137 (1965).

7. Further Amending Executive Order No. 321 dated June 12, 1950, As Revised by Executive Order No. 137 dated January 7, 1965, Prescribing the Code of the National Flag and the National Anthem of the Republic of the Philippines, Executive Order No. 194 (1969).

8. Parenthetically, the amendment contained in E.O. No. 25 prohibited the National Anthem to be played and sung for mere recreation, amusement, or entertainment purposes in social gatherings purely private in nature or at political or partisan meetings or places of hilarious or vicious amusement. Similarly, the amendment contained in E.O. No. 194 required the permanent hoisting of the national flag in front of certain national monuments and government buildings.

civilians who had rendered services in the Army, Navy, or civil office of great responsibility. The white triangle of the sun and stars will cover the head end of the casket, the blue stripe to the right, the red to the left of the deceased, with both colors evenly divided on each side of the casket. The Flag should not be lowered to the grave or allowed to touch the ground, except as authorized by Republic Act No. 3934. Wreaths of flowers should not be placed on top of a flag-shrouded casket. A small cross may be placed over the Flag as a symbol of 'God above Country.'

15. No imprint shall be made on the Flag nor shall it be marred by advertisement, or in any manner desecrated. It shall not be worn as a whole or part of a costume. It shall not be used as a pennant in the hood or in any part of a motor vehicle except in celebration of any national or special day as the President may designate.

16. It is inappropriate to use the Flag in a dancing pavilion or in any place where hilarity is prevailing. Its use inside or outside a cockpit, club or other places where gambling or other vices are held is prohibited.

17. The National Flag shall never be used as a covering for a statue or monument nor should it be used to unveil the same.

18. A National Flag worn out through wear and tear, should not be thrown on a garbage heap or used as rag. It should be reverently burned to avoid misuse or desecration thereof. Government offices and educational institutions must not display worn-out or tattered flags. They should replace the same immediately.[9]

B. *Flag and Heraldic Code*

Having mapped out the above previous laws, the canvas now comes to the present statute relating to the national flag. The Flag and Heraldic Code began as Senate Bill No. 630, introduced by Senator Blas Ople on 3 July 1995 and as House Bill No. 2586 by Representative Salvador Escudero III and Representative Rosenda Ann Ocampo on 21 August 1995.

1. Senate Bill No. 630

Senate Bill No. 630 was read on First Reading on 3 August 1995 and thereafter referred to the Committee on Constitutional Amendments, Revision of Codes and Laws, chaired by Senator Miriam Defensor-Santiago. On 21 May 1997, after committee deliberations, Senators Defensor-Santiago and Ople delivered their sponsorship speeches before a plenary session of the Senate. On 13 October 1997, the Senate witnessed the interpellation of Senator Alberto Romulo and S.B. No. 630's approval on Second Reading

9. E.O. No. 137, part I, ¶ 13-18.

with the committee amendments. On 21 October 1997, S.B. No. 630 was approved on Third Reading by 18 Senators, without any negative votes or abstentions.

As originally drafted in S.B. No. 630, the proposed proscriptions in relation to conduct before the Philippine Flag read:

> SECTION 34. It shall be prohibited:
>
> a) To mutilate, deface, defile, trample on or cast contempt upon the flag or cover its surface;
>
> b) To dip the flag to any person or object by way of compliment or salute;
>
> c) To use the flag:
>
> 1) As a drapery, festoon or tablecloth;
>
> 2) As covering for ceilings, walls, statues or other objects;
>
> 3) As a pennant in the hood, side, back and top of motor vehicles;
>
> 4) As a staff or whip;
>
> 5) For unveiling monuments or statues; and
>
> 6) As trademarks, or for industrial, commercial or agricultural labels or designs.
>
> d) To display the flag:
>
> 1) Under any painting or picture;
>
> 2) Horizontally face-up. It shall always be hoisted aloft and be allowed to fall freely;
>
> 3) Below any platform; or
>
> 4) In discotheques, cockpits, night and day clubs, casinos, gambling joints and places of vice or where frivolity prevails.
>
> e) To wear the flag in whole or in part as a costume or uniform;
>
> f) To add any word, figure, mark, picture, design, drawings, advertisement, or imprint of any nature on the flag;
>
> g) To print, paint or attach representation of the flag on handkerchiefs, napkins, cushions, and other articles of merchandise;
>
> h) To display in public any foreign flag, except in embassies and other diplomatic establishments, and in offices of international organizations;

i) To display the flag in front of buildings or offices occupied by aliens.[10]

Coming out of the committee deliberations, Section 34 (a) of the S.B. No. 630 was amended to read: "To mutilate, deface, defile, trample on or cast contempt *or commit any act or omission casting dishonor or ridicule* upon the flag or cover its surface."[11] Section 34 (f), however, was not subjected to any amendments.

In her sponsorship speech, Senator Defensor-Santiago stated that the S.B. No. 630 is a compendium of the laws on Philippine national emblems wherein reverence and respect for national symbols are emphasized. She mentioned that "[t]he primary objective of this bill is to inspire in every Filipino a deep appreciation of the past and an enlightened understanding of our history as a nation."[12] She further stated that "[t]o a true Filipino, our national emblems are the symbols of our nation's sovereignty and the emblem of freedom in its truest sense. They are the symbols of national solidarity which transcends all regional and cultural differences under one unifying Constitution."[13] The senator underlined the fact that the flag and our other national emblems are "the objects of patriotic adoration, emblematic of all for which the Republic of the Philippines stands." In ending her speech, she stated:

> The bill also provides for penalties for the desecration of the flag and other national emblems, prohibited utterances in speech, writing or drawing or any other act or omission which casts dishonor, ridicule or contempt upon the national emblems.
>
> When passed into law, this bill shall be our one great reminder of the lost values of love of country, patriotism, respect, honor and dignity. These are the positive values which emanate from a mind that is liberated from all forms of oppression. Love of country makes us not only a republic, but also a nation so certain of our future that we can all say 'I am proud to be a Filipino.'[14]

In his co-sponsorship speech, Senator Ople underscored that S.B. No. 630 was crafted so that every Filipino may be inspired "to have a deep appreciation of his past, an active commitment in the present and a positive vision for the future."[15] He stated that "[o]ur flag and anthem are the historic

10. An Act Prescribing the Code of the National Flag, Anthem, Motto, Coat-of-Arms and Great Seal of the Philippines, S.B. No. 630, 10th Cong. § 34 (1995).

11. II RECORD OF THE SENATE, No. 21, at 229 (1997) (emphasis supplied).

12. IV RECORD OF THE SENATE, No. 95, at 721 (1997).

13. *Id.*

14. *Id.* at 722.

15. *Id.*

symbols of our sovereignty and national solidarity, as well as the repositories of our ideals and traditions. It is only fitting, therefore, that reverence and respect should at all times be accorded to our national symbols."[16] The senator emphasized that the proposed law provides "administrative and penal sanctions upon those who commit any of the prohibited acts enumerated in the Code, such as the mutilation, defacement, or the casting of contempt upon the flag, or who make any utterance in speech, writing, or drawing, or make any act or omission casting dishonor, ridicule or contempt upon the flag or the national anthem."[17]

Before the approval of S.B. No. 630 on Second Reading, the most significant discussion regarding prohibited conduct towards the national flag unfolded during the interpellation by Senator Alberto Romulo, to wit:

> Senator Romulo. I notice here, Mr. President, that there are requirements, for instance, that the flag shall be displayed in all public buildings; the flag shall be displayed on certain dates, et cetera.
>
> Is there any sanction or penal clause, or any admonition or whatever in the event that this is not so, both in the original law and in this Code, Mr. President.
>
> Senator Santiago. That would be covered by Chapter VI on 'Penalties.' Section 44 penalizes only the failure or refusal to observe the flag ceremony and the penalties imposed on the educational institution concerned, but all other penalties in connection with the Flag Code would fall under Section 46 which penalizes any person who commits any of the prohibited acts under this Code.
>
> Senator Romulo. As a respected member of the Judiciary before our colleague entered the Senate and as a professor of law, would the distinguished lady know if there are any cases where entities, organization or persons were penalized under the old laws for violating any of other provisions on flags, on national anthem or on the other items contained in this Code, Mr. President?
>
> Senator Santiago. Mr. President, the most famous case in Philippine jurisprudence concerns the refusal by members of the sect known as the Jehovah's Witnesses to salute the flag.
>
> Initially, their refusal was made punishable under the ruling in an old case, entitled *Gerona* v. *the Secretary of Education* where the court said that the State, through the Secretary of Education, can compel students to salute the flag. After that case under this ruling, finally, I believe in 1992, the Supreme Court reversed the original ruling in the case of *Ebralinag* v. *Superintendent of Schools of Cebu.*

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16. *Id.*

17. *Id.*

Virtually, the same set of facts were present. There was a flag ceremony in school and the schoolchildren who were members of the Jehovah's Witnesses refused to participate in the flag ceremony.

Whereas in *Gerona*, the Supreme Court ruled that the students could be compelled to stand up and salute the flag during the ceremony, in *Ebralinag*, the Supreme Court reversed itself and said that they could no longer be so coerced. They could be free to abstain from participation in the flag ceremony, provided that they mode no acts or conducted themselves in such a manner that there would be no disruption of the existing flag ceremony.

Senator Romulo. What is the constitutional basis for this Supreme Court ruling? For instance, in the matter of religion, well, that is covered by specific constitutional provisions.

Senator Santiago. That is correct.

Senator Romulo. But in the case of the *Gerona* ruling which has been overruled, did the Supreme Court state a constitutional principle that made it reverse the original ruling?

Senator Santiago. I believe that in the original *Gerona* ruling, the Philippine Supreme Court was basing the decision not on an explicit provision of the Constitution but on an implication drawn from the fact that the Constitution, as it was before and as it is now, provides that the flag of the Philippine shall be — and then there follows a description of the flag and ends with a clause — 'as consecrated and honored by the people and recognized by law.'

Apparently, in *Gerona*, the ruling followed by the Supreme Court Justices was that the flag, since it is, according to the Constitution, entitled 'to consecration, honor and recognition,' should not be defiled by the sheer inability or refusal to participate in ceremonies intending to honor it.

Senator Romulo. Which brings me to the next point, Mr. President.

I believe in the United States, if I recall, there is a Supreme Court ruling that in cases where the flag was, in fact, defiled — I think the American flag was torn to pieces and trampled upon when this case was brought to the U.S. Supreme Court — the Supreme Court did not hold the person liable on a certain principle which I forgot. Would our distinguished colleague enlighten us on this if my recollection is correct on this U.S. Supreme Court ruling?

Senator Santiago. Senator Romulo is absolutely correct and his knowledge, as usual, of the latest developments in law, both here and abroad is abreast with the latest developments. Senator Romulo is referring to the case of *Texas* v. *Johnson*. In that case, the U.S. Supreme Court issued a decision which is now similar to the prevailing decision in the Philippines to the *Ebralinag* case. In both *Ebralinag* and *Texas* cases, both Supreme Courts ruled that: 'No person can be compelled to salute the flag if such a salute might violate the person's freedom of conscience or freedom of religion.'

In the case of *Texas* v. *Johnson*, the facts briefly were: that Johnson was accused of desecrating the American flag in violation of Texas law. Texas law used the nomenclature 'desecration of an object of veneration.' So, it was not really flag-specific.

But in any event, Johnson publicly burned an American flag in a political demonstration as a means of political protest. Actually, he burned the flag during a national party convention of the Republican Party.

The issue was whether or not his conviction was consistent with the First Amendment of the United State Constitution which protects freedom of expression. The American Supreme Court ruled that it was freedom of expression which must prevail over the right of the State to enforce discipline with respect to its public symbols.

Please allow me to quote from that decision. The U.S. Supreme Court said:

> The government may not prohibit the verbal or nonverbal expression of an idea merely because society finds the idea offensive or disagreeable, even where the flag is involved. It cannot also assume that every expression of a provocative idea will disturb the peace or incite a riot but must look to the actual circumstances surrounding the expression. Under the circumstances, Johnson's burning of the flag constituted expressive conduct permitting him to invoke the First Amendment.

So, in short, the U.S. Supreme Court said:

> When the accused burned the flag, he was simply availing of freedom of expression.

Senator Romulo. But there is also a portion there, Mr. President, where it said — I do not know if I am quoting the exact words — to the effect that, 'However, if it would provoke or cause a riot' — I do not know if I am paraphrasing it correctly — then, the situation that arises may be different, is that correct?

Senator Santiago. That is correct. That is a notable condition or limitation placed on that ruling of the U.S. Supreme Court. The majority said that, 'If the interest of the State in preventing breaches of the peace is implicated, then the ruling might be different.'

Senator Romulo. It is very clear, Mr. President.

My last two questions involve that point.

In the *Texas* v. *Johnson* case, there is a burning or desecration of the flag. Under what provision of this Code would that be covered, Mr. President?

Senator Santiago. Our instant Code does not use the specific word 'burn' as the American law does. Instead, however, it would be covered by the provision against ridicule of the flag. I shall search for the specific Section. It is Section 34.

Senator Romulo. I think I found it in the bill that our distinguished Senator is sponsoring. That is Section 46 in relation to Section 34, Mr. President.

Senator Santiago. Section 34 states: 'It shall be prohibited: (a) to mutilate, deface, defile, trample or cast contempt upon — and I will have to add this clause because it is a Committee amendment included in our Committee Report — or commit any act or omission casting dishonor or ridicule upon the flag or cover its surface;'.

Senator Romulo. In view of this specific provision, Mr. President, would the *Texas* v. *Johnson* case in the good Senator's view apply to a violation or a commission of the offense stated under Section 34 and Section 46?

Senator Santiago. That is an interesting question.

At this point, there is no basis for a categorical yes or no answer to that question because there is no existing rule/law on the point and there is no existing Supreme Court decision on the point.

In order to provide the parameters at least of an answer, I will have to point out that our Constitution is different from the American Constitution or even from American law because the Philippine Constitution uses a phrase that is not found in the U.S. Constitution or in American law. I am referring specifically to Article XVI, Section 1, which states:

> Section 1. The flag of the Philippines shall be red, white, and blue, with a sun and three stars, as consecrated and honored by the people and recognized by law.

This clause that I have emphasized could be the legal basis for deciding a Texas-type situation in a way different from the way it was decided by the United States.

Senator Romulo. Which means that under the provisions of this proposed Code, Section 46, enumerating the prohibited acts under Section 34, such a person who knowingly or willfully commits any of these, falling under the circumstances of the Texas case, may be penalized?

Senator Santiago. That is correct. Not only on the basis of this specific clause 'as consecrated and honored by the people and recognized by law,' but also on the basis of the fact that….I am searching for the section.

I cannot now find the specific expression but even so, it would be sufficient to make a reliance on this constitutional provision for consecration, honoring and recognition.[18]

After approval on Third Reading, the Bicameral Conference Committee constituted to reconcile the Senate and House versions neither discussed nor made any revision to Section 34 (a) and (f), the subsections that directly

18. *Id.* at 225-27.

relate to the discussion herein. Insofar as these subsections are concerned, the Conference Committee adopted the amendments made by the Senate Committee on Constitutional Amendments, Revision of Codes and Laws.

2. House Bill No. 2586

House Bill No. 2586 began as House Bill No. 436, which was referred to the Committee on Education and Culture. In Committee Report No. 3 dated 1 August 1995, the Committee recommended the approval of H.B. No. 2586 in substitution of H.B. No. 436, which was approved. Thus, H.B. No. 2586 was considered as a Substitute Bill. On 28 August 1995, Representative Escudero delivered his sponsorship speech before a plenary session of the House of Representatives. Thereafter, on 7 September 1995, Representative Ocampo delivered her co-sponsorship speech. On 20 February 1997, H.B. No. 2586 was approved on Second Reading without debate. On 21 April 1997, H.B. No. 2586 was approved on Third Reading by 170 Representatives, without any negative votes or abstentions.

As originally drafted in H.B. No. 2586, the proposed proscriptions in relation to conduct before the Philippine Flag, which are essentially the same proscriptions as proposed in the original version of S.B. No. 630, read:

> SECTION 28. It shall be prohibited:
>
> a) To mutilate, deface, defile, trample on or cast contempt upon the flag or cover its surface;
>
> b) To dip the flag to any person or object by way of compliment or salute;
>
> c) To use the flag:
>
> 1) As a drapery, festoon or tablecloth;
>
> 2) As covering for ceilings, walls, statues or other objects;
>
> 3) As a pennant in the hood, side, back and top of motor vehicles;
>
> 4) As a staff or whip; and
>
> 5) For unveiling monuments or statues.
>
> d) To display the flag:
>
> 1) Under any painting or picture;
>
> 2) Horizontally face-up. It should always be hoisted aloft and be allowed to fall freely;
>
> 3) Below any platform; and
>
> 4) In discotheques, cockpits, night and day clubs, casinos, gambling joints, and places of vice or where frivolity prevails.
>
> e) To wear the flag in whole or in part as a costume or uniform;

f) To add any word, figure, mark, picture, design, drawings, advertisement, or imprint of any nature on the flag;

g) To use, display or to be part of any advertisement or infomercial;

h) To print, paint or attach representation of the flag on handkerchiefs, napkins, cushions, and other articles of merchandise;

i) To display in public any foreign flag, except in embassies and other diplomatic establishments, and in offices of international organizations or in all places used by the Philippines to render post courtesies; and

j) To display the flag in front of buildings or offices occupied by aliens.[19]

In his sponsorship speech, Representative Escudero stated that "there is no symbol of a country and its soul as visible than its national flag. Along with the national anthem, the coat-of-arms and the seal, the flag is the unifying emblem of the people, the propelling motif for all the citizens to build a strong nation."[20] He further stated:

> The flag is not merely a piece of cloth, but a solemn object of high respect and honor. Being the embodiment of the national spirit, the flag becomes sacred second only to God in importance. To respect the flag is to honor the state and what it represents to the entire nation. To deny the flag the value it deserves is to demean the people it represents. It is an act of treason. It is a betrayal of what a nation holds dear.[21]

He adds, "the Philippine flag is a living witness to some of the momentous events in our country. It is a symbol of our will to independence, and the longing of our people to remain free and sovereign. Our flag is complete in expressing our collective sentiment. To our mind…it is the perfect symbol of what we were and have become as a nation and people."[22] The representative espoused the view that "there is a need to institute a measure that would enjoin all Filipinos to render the utmost respect and obedience to our national flag…."[23] Thus, he asserted that "a certain set of rules or standard behavior must be prescribed for every citizen during flag ceremonies, to give our national emblems the respect, honor and dignity they so richly deserve."[24] The passage of H.B. No. 2586 into law is

19. An Act Prescribing the Code of the Philippine Heraldry and Vexillary, H.B. No. 2586, 10th Cong. § 28 (1995).

20. RECORD OF THE HOUSE OF REPRESENTATIVES (Aug. 28, 1995).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

therefore seen as "a supreme act of patriotism to make the symbols live in the hearts and minds of the Filipino people."[25]

In her co-sponsorship speech, Representative Ocampo stated that "[n]ationhood, unity, heroism, independence and the cause Filipino's fight for are what our National Flag and National Anthem stand for: symbols whose meaning and messages have been eroded to the point of oblivion, as respect for the flag and the national anthem has been fading."[26] She argues that "if we truly treasure these historic symbols of our nationhood and independence, then we must prescribe rules and standards for their proper observance."[27] The representative stated that the approval of H.B. No. 2586 would be "a fitting and timely tribute to the gallantry and greatness of all our heroes and heroines who sacrificed their lives including those of their families. And as a way of repaying our deep gratitude to their legacy, let us lead in the proper observance and respect for our National symbols, the repository of the ideals and history of our race."[28]

3. Bicameral Conference Committee and Signing into Law

On 4 February 1998, the Bicameral Conference Committee constituted to consider the proposed Flag and Heraldic Code met to reconcile the provisions of S.B. No. 630 and H.B. No. 2586. As mentioned above, the Committee neither discussed nor made any revision to Section 34 (a) and (f). It adopted the same from the amendments made by the Senate Committee on Constitutional Amendments, Revision of Codes and Laws.

The Conference Committee Report was approved by the Senate on 5 February 1998 and by the House of Representatives on 6 February 1998. Thereafter, the Flag and Heraldic Code was signed into law by President Fidel Ramos on 12 February 1998.

II. CONDUCT TOWARDS THE FLAG: *Judicial Interpretation of Constitutional Rights*

A thorough survey of Philippine case law would reveal that there is scant jurisprudence that addresses the issue of conduct towards the national flag.

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25. *Id.*

26. *Id.* (Sep. 7, 1995).

27. *Id.*

28. *Id.*

In the landmark case of *Ebralinag, et al. v. The Division Superintendent of Schools of Cebu*,[29] the Supreme Court had occasion to rule on the issue of whether or not forty-three (43) high school and elementary students who are members of the religious sect Jehovah's Witnesses may be expelled from schools, both public and private, by the public school authorities in Cebu for refusing, on account of their religious belief, to salute the flag, sing the national anthem, and recite the patriotic pledge as required by Republic Act No. 1265 and Department Order No. 8 of the Department of Education, Culture and Sports making the flag ceremony compulsory in all educational institutions.

Jehovah's Witnesses believe that the actions being required of them are acts of worship or religious devotion that they cannot give to anyone or anything but God. Questioning the expulsion and the unconstitutionality of R.A. No. 1265 and the D.O. No. 8, the students, represented by their parents, filed special civil actions for certiorari, prohibition, and mandamus against the Division Superintendent of Schools of Cebu to ask for the nullification of their expulsion and for their readmission to their respective schools.

In resolving the issue, the *Ebralinag* Court revisited and eventually abandoned its previous holdings in *Gerona, et al. v. Secretary of Education, et al.*[30] and *Balbuna, et al. v. Secretary of Education*,[31] which cases upheld the then-existing flag salute law and upheld the expulsion of students who refuse to obey it.

Granting the petition and annulling the expulsion, the *Ebralinag* Court pronounced the ruling case law in this wise:

> Jehovah's Witnesses 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' (p. 10, Rollo) which they 'cannot conscientiously give…to anyone or anything except God' (p. 8, Rollo). They feel bound by the Bible's command to 'guard ourselves from idols — 1 John 5:21' (p. 9, Rollo). They consider the flag as an image or idol representing the State (p. 10, Rollo). They think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on the State's power and invades the sphere of the intellect and spirit which the Constitution protects against official control (p. 10, Rollo).

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29. Ebralinag, et al. v. The Division Superintendent of Schools of Cebu, 219 SCRA 256 (1993).
30. Gerona, et al. v. Secretary of Education, et al., 106 Phil. 2 (1959).
31. Balbuna, et al. v. Secretary of Education, 110 Phil. 150 (1960).

This is not the first time that the question, of whether the children of Jehovah's Witnesses may be expelled from school for disobedience of R.A. No. 1265 and Department Order No. 8, series of 1955, has been raised before this Court.

The same issue was raised in 1959 in *Gerona, et al. vs. Secretary of Education, et al.,* 106 Phil. 2 (1959) and *Balbuna, et al. vs. Secretary of Education,* 110 Phil. 150 (1960). This Court in the *Gerona* case upheld the expulsion of the students, thus:

> The flag is not an image but a symbol of the Republic of the Philippines, an emblem of national sovereignty, of national unity and cohesion and of freedom and liberty which it and the Constitution guarantee and protect. Under a system of complete separation of church and state in the government, the flag is utterly devoid of any religious significance. Saluting the flag does not involve any religious ceremony. The flag salute is no more a religious ceremony than the taking of an oath of office by a public official or by a candidate for admission to the bar.
>
> In requiring school pupils to participate in the flag salute, the State thru the Secretary of Education is not imposing a religion or religious belief or a religious test on said students. It is merely enforcing a non-discriminatory school regulation applicable to all alike whether Christian, Moslem, Protestant or Jehovah's Witness. The State is merely carrying out the duty imposed upon it by the Constitution which charges it with supervision over and regulation of all educational institutions, to establish and maintain a complete and adequate system of public education, and see to it that all schools aim to develop, among other things, civic conscience and teach the duties of citizenship.
>
> The children of Jehovah's Witnesses cannot be exempted from participation in the flag ceremony. They have no valid right to such exemption. Moreover, exemption to the requirements still disrupt school discipline and demoralize the rest of the school population which by far constitutes the great majority.
>
> The freedom of religious belief guaranteed by the Constitution does not and cannot mean exemption from or non-compliance with reasonable and non-discriminatory laws, rules and regulations promulgated by competent authority. (pp. 2-3.)

Gerona was reiterated in *Balbuna,* as follows:

> The Secretary of Education was duly authorized by the Legislature thru Republic Act 1265 to promulgate said Department Order, and its provisions requiring the observance of the flag salute, not being a religious ceremony but an act and profession of love and allegiance and pledge of loyalty to the fatherland which the flag stands for, does not violate the constitutional provision on freedom of religion. (Balbuna, et al. vs. Secretary of Education, et al., 110 Phil. 150.).

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Our task here is extremely difficult, for the 30-year-old decision of this Court in *Gerona* upholding the flag salute law and approving the expulsion of students who refuse to obey it, is not lightly to be trifled with.

It is somewhat ironic however, that after the *Gerona* ruling had received legislative cachet by its incorporation in the Administrative Code of 1987, the present Court believes that the time has come to reexamine it. *The idea that one may be compelled to salute the flag, sing the national anthem, and recite the patriotic pledge, during a flag ceremony on pain of being dismissed from one's job or of being expelled from school, is alien to the conscience of the present generation of Filipinos who cut their teeth on the Bill of Rights which guarantees their rights to free speech and the free exercise of religious profession and worship (Sec. 5, Article III, 1987 Constitution; Article IV, Section 8, 1973 Constitution; Article III, Section 1[7], 1935 Constitution).*

Religious freedom is a fundamental right which is entitled to the highest priority and the amplest protection among human rights, for it involves the relationship of man to his Creator (Chief Justice Enrique M. Fernando's separate opinion in German vs. Barangan, 135 SCRA 514, 530-531).

The right to religious profession and worship has a two-fold aspect, vis., freedom to believe and freedom to act on one's belief. The first is absolute as long as the belief is confined within the realm of thought. The second is subject to regulation where the belief is translated into external acts that affect the public welfare (J. Cruz, Constitutional Law, 1991 Ed., pp. 176-177).

Petitioners stress, however, that while they do not take part in the compulsory flag ceremony, they do not engage in 'external acts' or behavior that would offend their countrymen who believe in expressing their love of country through the observance of the flag ceremony. They quietly stand at attention during the flag ceremony to show their respect for the right of those who choose to participate in the solemn proceedings (Annex F, Rollo of G.R. No. 95887, p. 50 and Rollo of G.R. No. 95770, p. 48). Since they do not engage in disruptive behavior, there is no warrant for their expulsion.

'The sole justification for a prior restraint or limitation on the exercise of religious freedom (according to the late Chief Justice Claudio Teehankee in his dissenting opinion in German vs. Barangan*, 135 SCRA 514, 517) is the existence of a grave and present danger of a character both grave and imminent, of a serious evil to public safety, public morals, public health or any other legitimate public interest, that the State has a right (and duty) to prevent.' Absent such a threat to public safety, the expulsion of the petitioners from the schools is not justified.*

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If they quietly stand at attention during the flag ceremony while their classmates and teachers salute the flag, sing the national anthem and recite the patriotic pledge, we do not see how such conduct may possibly disturb the peace, or pose 'a grave and present danger of a serious evil to public

> safety, public morals, public health or any other legitimate public interest that the State has a right (and duty) to prevent' (German vs. Barangan, 135 SCRA 514, 517).[32]

According to the Court, "the sole justification for a prior restraint or limitation on the exercise of religious freedom is the existence of a grave and present danger of a character both grave and imminent, of a serious evil to public safety, public morals, public health or any other legitimate public interest, that the State has a right (and duty) to prevent."[33] This is the classic formulation of the clear and present danger test. Absent such a threat to public safety, the limitation on the exercise of free speech is not justified.

In this jurisdiction, therefore, any curtailment on the exercise of religious freedom must satisfy the stringent requirement of the *clear and present danger test*. Failing to do so, the protected freedom must be upheld. Although *Ebralinag* dealt with the free exercise of religious profession and worship, its ruling most certainly applies to the right to free speech, which is also a jealously-guarded right under the Constitution.

In sharp contrast to the predicament of Philippine case law relating to conduct towards the national flag, American jurisprudence, however, is fertile in this regard and equally instructive.

In *West Virginia State Board of Education v. Barnette*,[34] the U.S. Supreme Court had occasion to address the issue of whether or not a regulation of the local school board in compelling students to salute the flag and recite a pledge, under pain of expulsion, transcend constitutional limitations on its power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control. In that case, the U.S. District Court for the Southern District of West Virginia, upon complaint of members of Jehovah's Witnesses, retrained the enforcement of the assailed resolution. Upon direct appeal taken by the school board to the U.S. Supreme Court, the same was affirmed, to wit:

> The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time

32. *Ebralinag*, 219 SCRA at 263-73 (emphasis supplied).

33. *Id.* at 270-71.

34. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

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There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical reiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution. Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 73 A.L.R. 1484. Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous.

Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations. If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

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The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern

of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

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National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal

> opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.
>
> The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[35]

In *Texas v. Johnson*,[36] the United States Supreme Court had occasion to pronounce on the liability of a person who burned the U.S. flag in a political demonstration. In that case, Johnson was initially convicted of desecration of a venerated object in violation of Texas Penal Code Ann. 42.09(a)(3), which conviction was affirmed by the State Court of Appeals. However, the Texas Court of Criminal Appeals reversed the conviction, holding that the State could not punish Johnson for burning the flag under the circumstances attendant in Johnson's case since any penalty would be inconsistent with the First Amendment.[37] The U.S. Supreme Court affirmed the reversal, in sum:

> Johnson's conviction for flag desecration is inconsistent with the First Amendment.

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35. *Id*. at 631-42.

36. Texas v. Johnson, 491 U.S. 291 (1989).

37. The Court of Criminal Appeals first found that Johnson's burning of the flag was expressive conduct protected by the First Amendment. The court concluded that the State could not criminally sanction flag desecration in order to preserve the flag as a symbol of national unity. It also held that the statute did not meet the State's goal of preventing breaches of the peace, since it was not drawn narrowly enough to encompass only those flag burnings that would likely result in a serious disturbance, and since the flag burning in this case did not threaten such a reaction. Further, it stressed that another Texas statute prohibited breaches of the peace and could be used to prevent disturbances without punishing this flag desecration.

> (a) Under the circumstances, Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment. The State conceded that the conduct was expressive. Occurring as it did at the end of a demonstration coinciding with the Republican National Convention, the expressive, overtly political nature of the conduct was both intentional and overwhelmingly apparent.
>
> (b) Texas has not asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression and would therefore permit application of the test set forth in United States v. O'Brien, 391 U.S. 367, whereby an important governmental interest in regulating nonspeech can justify incidental limitations on First Amendment freedoms when speech and nonspeech elements are combined in the same course of conduct. An interest in preventing breaches of the peace is not implicated on this record. Expression may not be prohibited on the basis that an audience that takes serious offense to the expression may disturb the peace, since the government cannot assume that every expression of a provocative idea will incite a riot but must look to the actual circumstances surrounding the expression. Johnson's expression of dissatisfaction with the Federal Government's policies also does not fall within the class of 'fighting words' likely to be seen as a direct personal insult or an invitation to exchange fisticuffs. This Court's holding does not forbid a State to prevent 'imminent lawless action' and, in fact, Texas has a law specifically prohibiting breaches of the peace. Texas' interest in preserving the flag as a symbol of nationhood and national unity is related to expression in this case and, thus, falls outside the O'Brien test.
>
> (c) The latter interest does not justify Johnson's conviction. The restriction on Johnson's political expression is content based, since the Texas statute is not aimed at protecting the physical integrity of the flag in all circumstances, but is designed to protect it from intentional and knowing abuse that causes serious offense to others. It is therefore subject to 'the most exacting scrutiny.' Boos v. Barry, 485 U.S. 312. The government may not prohibit the verbal or nonverbal expression of an idea merely because society finds the idea offensive or disagreeable, even where our flag is involved. Nor may a State foster its own view of the flag by prohibiting expressive conduct relating to it, since the government may not permit designated symbols to be used to communicate a limited set of messages. Moreover, this Court will not create an exception to these principles protected by the First Amendment for the American flag alone.[38]

In the earlier case of *Spence v. Washington*,[39] the U.S. Supreme Court was confronted with the conviction of Spence for displaying out of the window of his apartment a U.S. flag with a large peace symbol fashioned of removable tape affixed on both surfaces. Spence was convicted under

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38. *Johnson*, 491 U.S. at 397-98.

39. Spence v. Washington, 418 U.S. 405 (1974).

Washington's "improper use" statute forbidding the exhibition of a U.S. flag to which is attached or superimposed figures, symbols, or other extraneous material. The Supreme Court of Washington affirmed the conviction. It rejected Spence's contentions that the statute under which he was charged, on its face and as applied, contravened the First Amendment, as incorporated by the Fourteenth Amendment, and was void for vagueness. The U.S. Supreme Court reversed and held that the Washington statue, as applied to the activity in question, impermissibly infringed a form of protected expression, to wit:

> A number of factors are important in the instant case. First, this was a privately owned flag. In a technical property sense it was not the property of any government. We have no doubt that the State or National Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property. But this is a different case. Second, appellant displayed his flag on private property. He engaged in no trespass or disorderly conduct. Nor is this a case that might be analyzed in terms of reasonable time, place, or manner restraints on access to a public area. Third, the record is devoid of proof of any risk of breach of the peace. It was not appellant's purpose to incite violence or even stimulate a public demonstration. There is no evidence that any crowd gathered or that appellant made any effort to attract attention beyond hanging the flag out of his own window. Indeed, on the facts stipulated by the parties there is no evidence that anyone other than the three police officers observed the flag.
>
> Fourth, the State concedes, as did the Washington Supreme Court, that appellant engaged in a form of communication. Although the stipulated facts fail to show that any member of the general public viewed the flag, the State's concession is inevitable on this record. The undisputed facts are that appellant 'wanted people to know that I thought America stood for peace.' To be sure, appellant did not choose to articulate his views through printed or spoken words. It is therefore necessary to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments, for as the Court noted in United States v. O'Brien, 391 U.S. 367, 376 (1968), '[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled `speech' whenever the person engaging in the conduct intends thereby to express an idea.' But the nature of appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression.[40]

After the U.S. Supreme Court invalidated the Texas statute criminalizing the desecration of the U.S. flag in a way that the actor know would seriously offend onlookers as unconstitutional in *Texas v. Johnson*, the U.S. Congress again passed the Flag Protection Act of 1989. This Act criminalizes the

40. *Id.* at 408-10.

conduct of anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon" a U.S. flag, except conduct related to the disposal of a "worn or soiled" flag.

This paved the way for the U.S. Supreme Court, in *United States v. Eichman*,[41] to once more uphold the overriding nature of the First Amendment. In said case, several persons were prosecuted in the district courts for violating the Act: some for knowingly burning several flags while protesting various aspects of the Government's policies, and others, in a separate incident, for knowingly burning a flag while protesting the Act's passage. In each case, those caught moved to dismiss the charges on the ground that the Act violates the First Amendment. Both district courts, following *Johnson*, held the Act unconstitutional as applied and dismissed the charges. On appeal, the U.S. Supreme Court affirmed, and held in sum:

> Appellees' prosecution for burning a flag in violation of the Act is inconsistent with the First Amendment. The Government concedes, as it must, that appellees' flag burning constituted expressive conduct, and this Court declines to reconsider its rejection in Johnson of the claim that flag burning as a mode of expression does not enjoy the First Amendment's full protection. It is true that this Act, unlike the Texas law, contains no explicit content-based limitation on the scope of prohibited conduct. Nevertheless, it is clear that the Government's asserted interest in protecting the 'physical integrity' of a privately owned flag in order to preserve the flag's status as a symbol of the Nation and certain national ideals is related to the suppression, and concerned with the content, of free expression. The mere destruction or disfigurement of a symbol's physical manifestation does not diminish or otherwise affect the symbol itself. The Government's interest is implicated only when a person's treatment of the flag communicates a message to others that is inconsistent with the identified ideals. The precise language of the Act's prohibitions confirms Congress' interest in the communicative impact of flag destruction, since each of the specified terms — with the possible exception of 'burns' — unmistakably connotes disrespectful treatment of the flag and suggests a focus on those acts likely to damage the flag's symbolic value, and since the explicit exemption for disposal of 'worn or soiled' flags protects certain acts traditionally associated with patriotic respect for the flag. Thus, the Act suffers from the same fundamental flaw as the Texas law, and its restriction on expression cannot 'be justified without reference to the content of the regulated speech,' Boos v. Barry, 485 U.S. 312, 320. It must therefore be subjected to 'the most exacting scrutiny,' id., at 321, and, for the reasons stated in Johnson, supra, at 413-415, the Government's interest cannot justify its infringement on First Amendment rights. This conclusion will not be reassessed in light of Congress' recent recognition of a purported 'national consensus' favoring a prohibition on flag burning, since any

41. United States v. Eichman, 496 U.S. 310 (1990),

> suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment. While flag desecration — like virulent ethnic and religious epithets, vulgar repudiations of the draft, and scurrilous caricatures — is deeply offensive to many, the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.[42]

A synthesis of *Johnson*, *Spence*, and *Eichman* would readily show that the right to free speech and expression as embodied in the First Amendment is a right of paramount importance that occupies a primordial place in the hierarchy of rights protected by the Constitution. Thus, the U.S. Supreme Court held that statutes punishing acts of burning, spitting, stepping on, or tearing the U.S. flag are unconstitutional and that the State should muster the test of strict scrutiny as a necessary pre-condition for the upholding of any regulation that directly impedes and contradicts the right to freedom of expression. Any legislation or official act that fails to meet and satisfy this jurisprudential standard must be struck down.

Associating the test of strict scrutiny with the test of clear and present danger, the State therefore, has a high bar to clear before its acts may be considered not constitutionally infirm. As appropriately stated by Mr. Justice George Malcolm, "No longer is there a Minister of the Crown or a person in authority of such exalted position that the citizen must speak of him only with bated breath."[43]

III. Primacy of Free Speech: *Unconstitutionality of Section 34 (a) and (f), Flag and Heraldic Code*

At the crux of the discussion in this Article are the provisions of the Flag and Heraldic Code specifically proscribing certain conduct towards the flag as embodied in Section 34 of the Code and in Section 39 of the Implementing Rules and Regulations promulgated on 30 January 2002, which reproduce Section 34, to wit:

> SECTION 34. It shall be prohibited:
>
> *a) To mutilate, deface, defile, trample on or cast contempt or commit any act or omission casting dishonor or ridicule upon the flag or cover its surface;*
>
> b) To dip the flag to any person or object by way of compliment or salute;
>
> c) To use the flag:

42. *Id.* at 310-11.

43. People of the Philippines v. Perfecto, 43 Phil. 887, 900 (1922).

1) As a drapery, festoon, tablecloth;

2) As covering for ceilings, walls, statues or other objects;

3) As a pennant in the hood, side, back and top of motor vehicles;

4) As a staff or whip;

5) For unveiling monuments or statues; and

6) As trademarks, or for industrial, commercial or agricultural labels or designs.

d) To display the flag:

1) Under any painting or picture;

2) Horizontally face-up. It shall always be hoisted aloft and be allowed to fall freely;

3) Below any platform; or

4) In discotheques, cockpits, night and day clubs, casinos, gambling joints and places of vice or where frivolity prevails.

e) To wear the flag in whole or in part as a costume or uniform;

f) To add any word, figure, mark, picture, design, drawings, advertisement, or imprint of any nature on the flag;

g) To print, paint or attach representation of the flag on handkerchiefs, napkins, cushions, and other articles of merchandise;

h) To display in public any foreign flag, except in embassies and other diplomatic establishments, and in offices of international organizations;

i) To use, display or be part of any advertisement or infomercial; and

To display the flag in front of buildings or offices occupied by aliens.[44]

Given the proscriptions in Section 34 (a) and (f) of the Flag and Heraldic Code, it is now necessary to determine whether or not the act of placing the word "KAWAL" on the Philippine flag comes within the purview of "speech" or "expression" so as to place Section 34 (a) and (f) in direct conflict with the constitutionally-guaranteed right to free speech and expression.

A. Prior Restraint on the Freedom of Expression

As this Article's first proposition, Section 34 (a) and (f) of the Flag and Heraldic Code is unconstitutional considering that although the Flag and Heraldic Code protects the flag as a national symbol, it does so to the

44. FLAG AND HERALDIC CODE § 34 (emphasis supplied).

detriment of other guaranteed rights under the Constitution insofar as it imposes a prior restraint on the freedom of expression.

At the core of the discussion is Section 4 of the Bill of Rights relating to freedom of speech and expression, to wit:

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

Section 4 involves two prohibitions: prohibition on prior restraint and prohibition on subsequent punishment. Prior restraint is considered to mean official governmental restrictions on the press or other forms of expression in advance of actual publication or dissemination.[45] Censorship belongs to this type of prior restraint.[46] Furthermore, the "mere prohibition of government interference *before* words are spoken or published would be an inadequate protection of the freedom of expression if the government could punish without restraint *after* publication."[47] Without a doubt, "unrestrained threat of subsequent punishment itself would operate as a very effective prior restraint."[48]

Beyond prior restraint, however, the guarantee of freedom of speech and expression also circumscribes a limitation on the power of the State to impose subsequent punishment.[49] Indubitably, if prior restraint was all the Constitution prohibited and the State could impose subsequent punishment without constraint, then freedom of speech and expression would be nothing more than a mockery and a delusion.[50] The words of Mr. Justice Thomas Cooley are apropos:

> [T]he mere exemption from previous restraint cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.[51]

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45. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 225 (2003).

46. *Id.* (citing Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961); Freedman v. Maryland, 380 U.S. 51 (1965)).

47. *Id.*

48. *Id.*

49. *Id.* at 226, 240.

50. *Id.* at 240.

51. THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 421 (1808).

Although Mr. Justice Oliver Wendell Holmes stated that the constitutional guarantee to free speech and expression was not intended to give immunity for every possible use of language,[52] the validity of legislation and official acts that impede or curtain freedom of speech and expression should be measured against the test of clear and present danger.

As eminent constitutionalist Fr. Joaquin G. Bernas, S.J. notes:

> In the early stages of Philippine jurisprudence, the accepted rule was that speech may be curtailed or punished when it 'creates a dangerous tendency which the State has the right to prevent.' This standard has been labeled the 'dangerous tendency' rule. All it requires, for speech to be punishable, is that there be a rational connection between the speech and the evil apprehended. In other words, under this rule, the constitutionality of a statute curtailing speech is determined in the same manner that the constitutionality of any statute is determined, namely, by answering the question whether a statute is 'reasonable.'
>
> In American jurisprudence, chiefly through the efforts of Justice Holmes, the 'dangerous tendency' rule yielded to the 'clear and present danger' test, a standard which serves to emphasize the importance of speech to a free society without sacrificing other freedoms essential to a democracy. In the celebrated case of *Schenck v. United States*, Justice Holmes rejected the absolutist view of freedom of speech saying that 'the character of every act depends upon the circumstances in which it is done...The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic.' At the same time, however, he made this oft-quoted formulation of the 'clear and present danger' rule: 'The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.' As the Supreme Court was later on to explain, in *Dennis v. United States*:
>
>> Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For

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52. Trohwerk v. United States, 249 U.S. 204, 206 (1919), *cited in* BERNAS, *supra* note 45, at 240.

> that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers of power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt...We must therefore reject the contention that success or probability of success is the criterion.

Citing Justice Learned Hand, the Supreme Court summarized the rule thus: 'In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid danger.'

Although like the 'dangerous tendency' rule, the 'clear and present danger' test evolved in the context of prosecutions for crimes involving overthrow of the government, the test can be applied to other substantive evils which the State has the right to prevent even if these evils do not clearly undermine the safety of the Republic. However, since the test is 'a question of proximity and degree' and since not all evils easily lend themselves to measurement in terms of proximity and degree, the test cannot always be conveniently applied to all types of encroachment on freedom of expression. As Professor Freund has observed:

> Even where it is appropriate, the clear and present danger test is an oversimplified judgment unless it takes account also of a number of other factors. The relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate controls than those the state has imposed; and perhaps the specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase 'clear and present danger,' or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedom which the judge must disentangle.[53]

By reason of the fact that Section 34 (a) and (f) of the Flag and Heraldic Code deals with the curtailment of free speech, a freedom most cherished by all men, the standards governing curtailment of speech should be narrowly drawn so as not to unnecessarily censor legitimate speech, which the challenged provision does not furnish. As such, it is unconstitutional.

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53. BERNAS, *supra* note 45, at 241-43.

In *United States v. Bustos*,[54] the Supreme Court formulated the classic juxtaposition between the freedom of speech on the one hand and commentaries on public issues on the other hand, to wit:

> The interest of society and the maintenance of good government demand a full discussion of public affairs. Complete liberty to comment on the conduct of public men is a scalpel in the case of free speech. The sharp incision of its probe relieves the abscesses of officialdom. Men in public life may suffer under a hostile and an unjust accusation; the wound can be assuaged with the balm of a clear conscience. A public officer must not be too thin-skinned with reference to comment upon his official acts. Only thus can the intelligence and dignity of the individual be exalted Of course, criticism does not authorize defamation. Nevertheless, *as the individual is less than the State, so must expected criticism be borne for the common good. Rising superior to any official or set of officials, to the Chief Executive, to the Legislature, to the Judiciary — to any or all the agencies of Government — public opinion should be the constant source of liberty and democracy.*[55]

In determining whether or not the act of placing the word "KAWAL" on the Philippine flag constitutes protected speech or expression under the Constitution, *Johnson* instructs as follows:

> Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words. This fact somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. See, e. g., Spence v. Washington, 418 U.S. 405, 409-411

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54. United States v. Bustos, 37 Phil 731 (1918).

55. *Id.* at 740-41 (emphasis supplied). (The Supreme Court further emphasized: 'The guaranties of a free speech and a free press include the right to criticize judicial conduct. The administration of the law is a matter of vital public concern. Whether the law is wisely or badly enforced is, therefore, a fit subject for proper comment. If the people cannot criticize a justice of the peace or a judge 'the same as any other public officer, public opinion will be effectively muzzled. Attempted terrorization of public opinion on the part of the judiciary would be tyranny of the basest sort. The sword of Damocles in the hands of a judge does not hang suspended over the individual who dares to assert his prerogative as a citizen and to stand up bravely before any official. On the contrary, it is a duty which everyone owes to society or to the State to assist in the investigation of any alleged misconduct. It is further the duty of all who know of any official dereliction on the part of a magistrate or the wrongful act of any public officer to bring the facts to the notice of those whose duty it is to inquire into and punish them. In the words of Mr. Justice Gaynor, who contributed so largely to the law of libel. 'The people are not obliged to speak of the conduct of their officials in whispers or with bated breath in a free government, but only in a despotism." (*Id.*)).

(1974). If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. See, e. g., United States v. O'Brien, 391 U.S. 367, 377 (1968); Spence, supra, at 414, n. 8. If the State's regulation is not related to expression, then the less stringent standard we announced in United States v. O'Brien for regulations of noncommunicative conduct controls. See O'Brien, supra, at 377. If it is, then we are outside of O'Brien's test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard. See Spence, supra, at 411. A third possibility is that the State's asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture. See 418 U.S., at 414, n. 8.

The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word. While we have rejected 'the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea,' United States v. O'Brien, supra, at 376, we have acknowledged that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments,' Spence, supra, at 409.

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.' 418 U.S., at 410-411. Hence, we have recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 505 (1969); of a sit-in by blacks in a 'whites only' area to protest segregation, Brown v. Louisiana, 383 U.S. 131, 141-142 (1966); of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, Schacht v. United States, 398 U.S. 58 (1970); and of picketing about a wide variety of causes, see, e. g., Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308, 313-314 (1968); United States v. Grace, 461 U.S. 171, 176 (1983).

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag, Spence, supra, at 409-410; refusing to salute the flag, Barnette, 319 U.S., at 632; and displaying a red flag, Stromberg v. California, 283 U.S. 359, 368-369 (1931), we have held, all may find shelter under the First Amendment. See also Smith v. Goguen, 415 U.S. 566, 588 (1974) (WHITE, J., concurring in judgment) (treating flag 'contemptuously' by wearing pants with small flag sewn into their seat is expressive conduct). That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, 'the one visible manifestation of two hundred years of nationhood.' Id., at 603 (REHNQUIST, J., dissenting). Thus, we have observed:

> [T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. Barnette, supra, at 632.

> Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in 'America.'
>
> We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred. In Spence, for example, we emphasized that Spence's taping of a peace sign to his flag was 'roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy.' 418 U.S., at 410. The State of Washington had conceded, in fact, that Spence's conduct was a form of communication, and we stated that 'the State's concession is inevitable on this record.' Id., at 409.
>
> The State of Texas conceded for purposes of its oral argument in this case that Johnson's conduct was expressive conduct, Tr. of Oral Arg. 4, and this concession seems to us as prudent as was Washington's in Spence. Johnson burned an American flag as part — indeed, as the culmination — of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, Johnson explained his reasons for burning the flag as follows: 'The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a just position [juxtaposition]. We had new patriotism and no patriotism.' 5 Record 656. In these circumstances, Johnson's burning of the flag was conduct 'sufficiently imbued with elements of communication,' Spence, 418 U.S., at 409, to implicate the First Amendment.[56]

According to the U.S. Supreme Court, the first issue to be determined is whether or not a particular action constitutes expressive conduct. If the conduct was expressive, the next question is as to whether or not the State's regulation is related to the suppression of free expression. However, if the State's regulation is not related to expression, then the less stringent standard held in *United States v. O'Brien*[57] for regulations of non-communicative

56. Texas v. Johnson, 491 U.S. 397, 402-06 (1989).

57. United States v. O'Brien, 391 U.S. 367 (1968),

conduct shall control.[58] Nonetheless, if the regulation is related to expression, then the *O'Brien* test does not apply. In such case, it must be determined whether or not the State's interest justifies a conviction for the alleged crime under a more demanding standard.

In construing this standard of strict scrutiny relating to the curtailment of expression, the U.S. Supreme Court aptly rejected the view that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." In other words, not every intention to express an idea will suffice as expressive conduct. Rather, there must be "an intent to convey a particularized message" and "the likelihood was great that the message would be understood by those who viewed it." Thus, the Court held that Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication" to implicate the First Amendment.

In this jurisdiction, since regulating conduct towards the flag embodied in the Flag and Heraldic Code directly affects the right to freedom of expression, the State's actions must meet the test of strict scrutiny as embodied and discussed in *Johnson*, *Spence*, and *Eichman* and not merely the reasonable standard test in *O'Brien*. Failing this, the violative proscriptions in the Flag and Heraldic Code must be struck down.

Applying the standard of strict scrutiny, therefore, in determining whether or not a particular action is indeed expressive conduct sought to be regulated by the State and assuming that the allegations of disrespect were indeed true and correct, the alleged desecration of the Philippine flag constitutes protected speech under the Constitution. Section 34 (a) and (f) of the Flag and Heraldic Code is unconstitutional as legislated, as worded, and as framed insofar as it curtails and restricts the constitutionally-guaranteed right to free expression. Although the State is justified in protecting national symbols in furtherance of national unity, it cannot protect these symbols to the detriment of other sections of the Constitution.

B. Vagueness and Overbreadth

As this Article's second proposition, Section 34 (a) and (f) of the Flag and Heraldic Code is unconstitutional considering that although the Flag and

58. According to the U.S. Supreme Court, a government regulation is sufficiently justified (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest (*Id.* at 377).

Heraldic Code is vague and overbroad and does not justify the State's policy of preventing breaches of the peace insofar as it is a direct and total suppression of an entire category of expressions.

In *Gonzales v. Commission on Elections*,[59] a statute designed to maintain the purity and integrity of the electoral process by calling to a halt to the undesirable practice of prolonged political campaigns was challenged on constitutional grounds. The basic liberties of free speech and free press, freedom of assembly, and freedom of association were invoked to nullify the Act. In upholding the questioned law, the Supreme Court ruled that the freedom of speech and expression is not absolute, to wit:

> From the language of the specific constitutional provision, it would appear that the right is not susceptible of any limitation. No law may be passed abridging the freedom of speech and of the press. The realities of life in a complex society preclude however a literal interpretation. Freedom of expression is not an absolute. It would be too much to insist that at all times and under all circumstances it should remain unfettered and unrestrained. There are other societal values that press for recognition. How is it to be limited then?
>
> This Court spoke, in Cabansag v. Fernandez, of two tests that may supply an acceptable criterion for permissible restriction. Thus: 'These are the 'clear and present danger' rule and the 'dangerous tendency' rule. The first, as interpreted in a number of cases, means that 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. The danger to be guarded against is the 'substantive evil' sought to be prevented.' It has the advantage of establishing according to the above decision 'a definite rule in constitutional law. It provides the criterion as to what words may be published.'
>
> The Cabansag case likewise referred to the other test, the 'dangerous tendency' rule and explained it thus: 'If 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. It is sufficient that such acts be advocated in general terms. Nor is it 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.'
>
> xxx xxx xxx
>
> Why repression is permissible only when the danger of substantive evil is present is explained by Justice Brandeis thus: '…the evil apprehended is so

59. Gonzales v. Commission on Elections, 27 SCRA 835 (1969).

> imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.' For him the apprehended evil must be 'relatively serious.' For '[prohibition] of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society.' Justice Black would go further. He would require that the substantive evil be 'extremely serious.' Only thus may there be a realization of the ideal envisioned by Cardozo: 'There shall be no compromise of the freedom to think one's thoughts and speak them, except at those extreme borders where thought merges into action.' It received its original formulation from Holmes. Thus: 'The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.'
>
> This test then as a limitation on freedom of expression is justified by the danger or evil of a substantive character that the state has a right to prevent. Unlike the dangerous tendency doctrine, the danger must not only be clear but also present. The term clear seems to point to a causal connection with the danger of the substantive evil arising from the utterance questioned. Present refers to the time element. It used to be identified with imminent and immediate danger. The danger must not only be probable but very likely inevitable.[60]

Because of the fundamental nature of the right to free speech and expression, as held by the Court, a bare suggestion of danger or a mere claim of foreseeable peril is not enough to disregard the exercise of such freedom. For protected speech to be curtailed, the danger must be clear and present and the evil substantial, not simply a peril that may tend to occur considering the circumstances of the case. This test requires the State to preserve the quintessential rights of its citizens; and only when the circumstances demand, pursuant to the test of clear and present danger, will the State, in the exercise of its police power, limit certain freedoms in order to avert a higher danger.

In *People of the Philippines v. Nazario*,[61] the Court had occasion to discourse on the constitutional infirmity of a legislative act by reason of vagueness:

> As a rule, a statute or act may be said to be vague when it lacks comprehensible standards that men 'of common intelligence must necessarily guess at its meaning and differ as to its application.' It is repugnant to the Constitution in two respects: (1) it violates due process for failure to accord persons, especially the parties targeted by it, fair notice of

60. *Id.* at 858-61 (1969) (emphasis supplied).

61. People of the Philippines v. Nazario, 165 SCRA 186 (1988).

the conduct to avoid; and (2) it leaves law enforcers unbridled discretion in carrying out its provisions and becomes an arbitrary flexing of the Government muscle.

But the act must be utterly vague on its face, that is to say, it cannot be clarified by either a saving clause or by construction. Thus, in Coates v. City of Cincinnati, the U.S. Supreme Court struck down an ordinance that had made it illegal for 'three or more persons to assemble on any sidewalk and there conduct themselves in a manner annoying to persons passing by.' Clearly, the ordinance imposed no standard at all 'because one may never know in advance what 'annoys some people but does not annoy others.''

Coates highlights what has been referred to as a 'perfectly vague' act whose obscurity is evident on its face. It is to be distinguished, however, from legislation couched in imprecise language — but which nonetheless specifies a standard though defectively phrased — in which case, it may be 'saved' by proper construction.

It must further be distinguished from statutes that are apparently ambiguous yet fairly applicable to certain types of activities. In that event, such statutes may not be challenged whenever directed against such activities. In Parker v. Levy, a prosecution originally under the U.S. Uniform Code of Military Justice (prohibiting, specifically, 'conduct unbecoming an officer and gentleman'), the defendant, an army officer who had urged his men not to go to Vietnam and called the Special Forces trained to fight there thieves and murderers, was not allowed to invoke the void for vagueness doctrine on the premise that accepted military interpretation and practice had provided enough standards, and consequently, a fair notice that his conduct was impermissible.

It is interesting that in Gonzales v. Commission on Elections, a divided Court sustained an act of Congress (Republic Act No. 4880 penalizing 'the too early nomination of candidates,' limiting the election campaign period, and prohibiting 'partisan political activities'), amid challenges of vagueness and overbreadth on the ground that the law had included an 'enumeration of the acts deemed included in the terms election campaign' or 'partisan political activity'' that would supply the standards. 'As thus limited, the objection that may be raised as to vagueness has been minimized, if not totally set at rest.' In his opinion, however, Justice Sanchez would stress that the conduct sought to be prohibited 'is not clearly defined at all.' 'As worded in R.A. 4880, prohibited discussion could cover the entire spectrum of expression relating to candidates and political parties.' He was unimpressed with the 'restrictions' Fernando's opinion had relied on: ''Simple expressions of opinions and thoughts concerning the election' and expression of 'views on current political problems or issues' leave the reader conjecture, to guesswork, upon the extent of protection offered, be it as to the nature of the utterance ('simple expressions of opinion and thoughts') or the subject of the utterance ('current political problems or issues').'

The Court likewise had occasion to apply the 'balancing-of-interests' test, insofar as the statute's ban on early nomination of candidates was concerned: 'The rational connection between the prohibition of Section

> 50-A and its object, the indirect and modest scope of its restriction on the rights of speech and assembly, and the embracing public interest which Congress has found in the moderation of partisan political activity, lead us to the conclusion that the statute may stand consistently with and does not offend the Constitution.' In that case, Castro would have the balance achieved in favor of State authority at the 'expense' of individual liberties.
>
> In the United States, which had ample impact on Castro's separate opinion, the balancing test finds a close kin, referred to as the 'less restrictive alternative' doctrine, under which the court searches for alternatives available to the Government outside of statutory limits, or for 'less drastic means' open to the State, that would render the statute unnecessary. In United States v. Robel, legislation was assailed, banning members of the (American) Communist Party from working in any defense facility. The U.S. Supreme Court, in nullifying the statute, held that it impaired the right of association, and that in any case, a screening process was available to the State that would have enabled it to identify dangerous elements holding defense positions. In that event, the balance would have been struck in favor of individual liberties.[62]

In *Estrada v. Sandiganbayan*,[63] the Supreme Court was confronted with the question of whether or not the Plunder Law is unconstitutional for being vague and overbroad. The beginning of the majority opinion sets the mood of the Decision, to wit:

> JOHN STUART MILL, in his essay On Liberty, unleashes the full fury of his pen in defense of the rights of the individual from the vast powers of the State and the inroads of societal pressure. But even as he draws a sacrosanct line demarcating the limits on individuality beyond which the State cannot tread — asserting that 'individual spontaneity' must be allowed to flourish with very little regard to social interference — he veritably acknowledges that the exercise of rights and liberties is imbued with a civic obligation, which society is justified in enforcing at all cost, against those who would endeavor to withhold fulfillment. Thus he says —
>
> > The sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.
>
> Parallel to individual liberty is the natural and illimitable right of the State to self-preservation. With the end of maintaining the integrity and cohesiveness of the body politic, it behooves the State to formulate a

62. *Id.* at 195-98 (1988) (emphasis supplied).

63. Estrada v. Sandiganbayan, 369 SCRA 394 (2001).

> system of laws that would compel obeisance to its collective wisdom and inflict punishment for non-observance.
>
> The movement from Mill's individual liberalism to unsystematic collectivism wrought changes in the social order, carrying with it a new formulation of fundamental rights and duties more attuned to the imperatives of contemporary socio-political ideologies. In the process, *the web of rights and State impositions became tangled and obscured, enmeshed in threads of multiple shades and colors, the skein irregular and broken. Antagonism, often outright collision, between the law as the expression of the will of the State, and the zealous attempts by its members to preserve their individuality and dignity, inevitably followed. It is when individual rights are pitted against State authority that judicial conscience is put to its severest test.*[64]

In affirming the constitutionality of the assailed law, the Court pertinently discussed:

> A statute or act may be said to be vague when it lacks comprehensible standards that men of common intelligence must necessarily guess at its meaning and differ in its application. In such instance, the statute is repugnant to the Constitution in two (2) respects - it violates due process for failure to accord persons, especially the parties targeted by it, fair notice of what conduct to avoid; and, it leaves law enforcers unbridled discretion in carrying out its provisions and becomes an arbitrary flexing of the Government muscle. But the doctrine does not apply as against legislations that are merely couched in imprecise language but which nonetheless specify a standard though defectively phrased; or to those that are apparently ambiguous yet fairly applicable to certain types of activities. The first may be 'saved' by proper construction, while no challenge may be mounted as against the second whenever directed against such activities. With more reason, the doctrine cannot be invoked where the assailed statute is clear and free from ambiguity, as in this case.
>
> The test in determining whether a criminal statute is void for uncertainty is whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice. It must be stressed, however, that the 'vagueness' doctrine merely requires a reasonable degree of certainty for the statute to be upheld - not absolute precision or mathematical exactitude, as petitioner seems to suggest. Flexibility, rather than meticulous specificity, is permissible as long as the metes and bounds of the statute are clearly delineated. An act will not be held invalid merely because it might have been more explicit in its wordings or detailed in its provisions, especially where, because of the nature of the act, it would be impossible to provide all the details in advance as in all other statutes.[65]

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64. *Id.* at 426-27 (emphasis supplied).

65. *Id.* at 439-43 (citing People of the Philippines v. Nazario, 165 SCRA 186, 195-96 (1988); State v. Hill, 189 Kan 403, 369 P2d 365, 91 ALR2d 750).

In his Concurring Opinion, Mr. Justice Vicente Mendoza engages in an authoritative discourse on the issue of vagueness and overbreadth, which the Court adopted in its Decision, to wit:

> Two justifications are advanced for this facial challenge to the validity of the entire statute. The first is that the statute comes within the specific prohibitions of the Constitution and, for this reason, it must be given strict scrutiny and the normal presumption of constitutionality should not be applied to it nor the usual judicial deference given to the judgment of Congress. The second justification given for the facial attack on the Anti-Plunder Law is that it is vague and overbroad.
>
> We find no basis for such claims either in the rulings of this Court or of those of the U.S. Supreme Court, from which petitioner's counsel purports to draw for his conclusions. We consider first the claim that the statute must be subjected to strict scrutiny.
>
> *A. Test of Strict Scrutiny Not Applicable to Penal Statutes*
>
> Petitioner cites the dictum in *Ople v. Torres* that 'when the integrity of a fundamental right is at stake, this Court will give the challenged law, administrative order, rule or regulation stricter scrutiny' and that 'It will not do for authorities to invoke the presumption of regularity in the performance of official duties.' As will presently be shown, 'strict scrutiny,' as used in that decision, is not the same thing as the 'strict scrutiny' urged by petitioner. Much less did this Court rule that because of the need to give 'stricter scrutiny' to laws abridging fundamental freedoms, it will not give such laws the presumption of validity.
>
> Petitioner likewise cites 'the most celebrated footnote in [American] constitutional law,' *i.e.*, footnote 4 of the opinion in *United States v. Carolene Products Co.*, in which it was stated:
>
> > There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
> >
> > It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.
> >
> > Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Again, it should be noted that what the U.S. Supreme Court said is that 'there may be narrower scope for the operation of the presumption of constitutionality' for legislation which comes within the first ten amendments to the American Federal Constitution compared to legislation covered by the Fourteenth Amendment Due Process Clause. The American Court did not say that such legislation is not to be presumed constitutional, much less that it is presumptively invalid, but only that a 'narrower scope' will be given for the presumption of constitutionality in respect of such statutes. There is, therefore, no warrant for petitioner's contention that 'the presumption of constitutionality of a legislative act is applicable only where the Supreme Court deals with facts regarding ordinary economic affairs, not where the interpretation of the text of the Constitution is involved.'

What footnote 4 of the *Carolene Products* case posits is a double standard of judicial review: strict scrutiny for laws dealing with freedom of the mind or restricting the political process, and *deferential* or *rational basis* standard of review for economic legislation. As Justice (later Chief Justice) Fernando explained in *Malate Hotel and Motel Operators Ass'n v. The City Mayor*, this simply means 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 what are at the most rights of property, the permissible scope of regulatory measures is wider.'

Hence, strict scrutiny is used today to test the validity of laws dealing with the regulation of speech, gender, or race and facial challenges are allowed for this purpose. But criminal statutes, like the Anti-Plunder Law, while subject to strict construction, are not subject to strict scrutiny. The two (i.e., strict construction and strict scrutiny) are not the same. The rule of strict construction is a rule of legal hermeneutics which deals with the parsing of statutes to determine the intent of the legislature. On the other hand, strict scrutiny is a standard of judicial review for determining the quality and the amount of governmental interest brought to justify the regulation of fundamental freedoms. It is set opposite such terms as 'deferential review' and 'intermediate review.'

Thus, under deferential review, laws are upheld if they rationally further a legitimate governmental interest, without courts seriously inquiring into the substantiality of such interest and examining the alternative means by which the objectives could be achieved. Under intermediate review, the substantiality of the governmental interest is seriously looked into and the availability of less restrictive alternatives are considered. Under strict scrutiny, the focus is on the presence of compelling, rather than substantial, governmental interest and on the absence of less restrictive means for achieving that interest.

Considering these degrees of strictness in the review of statutes, how many criminal laws can survive the test of strict scrutiny to which petitioner proposes to subject them? How many can pass muster if, as petitioner would have it, such statutes are not to be presumed constitutional? Above

all, what will happen to the State's ability to deal with the problem of crimes, and, in particular, with the problem of graft and corruption in government, if criminal laws are to be upheld only if it is shown that there is a compelling governmental interest for making certain conduct criminal and if there is no other means less restrictive than that contained in the law for achieving such governmental interest?

B. Vagueness and Overbreadth Doctrines, as Grounds for Facial Challenge, Not Applicable to Penal Laws

Nor do allegations that the Anti-Plunder Law is vague and overbroad justify a facial review of its validity. The void-for-vagueness doctrine states that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' The overbreadth doctrine, on the other hand, decrees that 'a governmental purpose may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'

A facial challenge is allowed to be made to a vague statute and to one which is overbroad because of possible 'chilling effect' upon protected speech. The theory is that '[w]hen statutes regulate or proscribe speech and no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution, the transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with narrow specificity.' The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that the protected speech of others may be deterred and perceived grievances left to fester because of possible inhibitory effects of overly broad statutes.

This rationale does not apply to penal statutes. Criminal statutes have general *in terrorem* effect resulting from their very existence, and, if facial challenge is allowed for this reason alone, the State may well be prevented from enacting laws against socially harmful conduct. In the area of criminal law, the law cannot take chances as in the area of free speech.

The overbreadth and vagueness doctrines then have special application only to free speech cases. They are inapt for testing the validity of penal statutes. As the U.S. Supreme Court put it, in an opinion by Chief Justice Rehnquist, 'we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.' In *Broadrick v. Oklahoma*, the Court ruled that 'claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate only spoken words' and, again, that 'overbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct.' For this reason, it has been held that 'a facial challenge to a legislative Act is … the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.' As for the vagueness doctrine,

it is said that a litigant may challenge a statute on its face only if it is vague in all its possible applications. 'A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'

In sum, the doctrines of strict scrutiny, overbreadth, and vagueness are analytical tools developed for testing 'on their faces' statutes in free speech cases or, as they are called in American law, First Amendment cases. They cannot be made to do service when what is involved is a criminal statute. With respect to such statute, the established rule is that 'one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.' As has been pointed out, 'vagueness challenges in the First Amendment context, like overbreadth challenges typically produce facial invalidation, while statutes found vague as a matter of due process typically are invalidated [only] 'as applied' to a particular defendant.' Consequently, there is no basis for petitioner's claim that this Court review the Anti-Plunder Law on its face and in its entirety.

C. Anti-Plunder Law Should be Construed 'As Applied'

Indeed, 'on its face' invalidation of statutes results in striking them down entirely on the ground that they might be applied to parties not before the Court whose activities are constitutionally protected. It constitutes a departure from the case and controversy requirement of the Constitution and permits decisions to be made without concrete factual settings and in sterile abstract contexts. But, as the U.S. Supreme Court pointed out in *Younger v. Harris*:

> [T]he task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judiciary. The combination of the relative remoteness of the controversy, the impact on the legislative process of the relief sought, and above all the speculative and amorphous nature of the required line-by-line analysis of detailed statutes,...ordinarily results in a kind of case that is wholly unsatisfactory for deciding constitutional questions, whichever way they might be decided.

This is the reason 'on its face' invalidation of statutes has been described as 'manifestly strong medicine,' to be employed 'sparingly and only as a last resort,' and is generally disfavored. In determining the constitutionality of a statute, therefore, its provisions which are alleged to have been violated in a case must be examined in the light of the conduct with which the defendant is charged.[66]

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66. *Id*. at 461-67 (Mendoza, J., concurring) (citing Ople v. Torres, 293 SCRA 161, 166 (1998); United States v. Carolene Products Co., 304 U.S. 144, 152 (1938); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926), *cited in* Ermita-

Thus, when a statute or act "lacks comprehensible standards that men 'of common intelligence must necessarily guess at its meaning and differ as to its application,'" then it is considered to be vague and overbroad so as to deny a person his right to be sufficiently informed of the act or omission sought to be outlawed by the State, on the one hand, and worse, give the agents of the State unbridled discretion. Any statute of this nature is repulsive to the Constitution, and, therefore, should be struck down without hesitation.

In *Adiong v. Commission of Elections*,[67] the Court declared null and void Section 15(a) of Resolution No. 2347 of the Commission on Elections providing that "decals and stickers may be posted only in any of the authorized posting areas" for being an infringement of freedom of speech and expression, to wit:

> The COMELEC's prohibition on posting of decals and stickers on 'mobile' places whether public or private except in designated areas provided for by the COMELEC itself is null and void on constitutional grounds.
>
> First — the prohibition unduly infringes on the citizen's fundamental right of free speech enshrined in the Constitution (Sec. 4, Article III) There is no public interest substantial enough to warrant the kind of restriction involved in this case.
>
> There are various concepts surrounding the freedom of speech clause which we have adopted as part and parcel of our own Bill of Rights provision on this basic freedom.
>
> All of the protections expressed in the Bill of Rights are important but we have accorded to free speech the status of a preferred freedom. (Thomas v.

Malate Hotel and Motel Operators Ass'n. v. City Mayor, 20 SCRA 849, 867 (1967); NAACP v. Alabama, 377 U.S. 288, 307 (1958); Shelton v. Tucker 364 U.S. 479 (1960); Gooding v. Wilson, 405 U.S. 518, 521 (1972); United States v. Salerno, 481 U.S. 739, 745 (1987); Broadrick v. Oklahoma, 413 U.S. 601, 612-613 (1973); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95 (1982); United States v. Raines, 362 U.S. 17, 21 (1960); Yazoo & Mississippi Valley RR. v. Jackson Vinegar Co., 226 U.S. 217 (1912); Angara v. Electoral Commission, 63 Phil. 139, 158 (1936); Younger v. Harris, 401 U.S. 37, 52-53 (1971); Board of Trustees, State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989); National Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998); FW/PBS, Inc. v. City of Dallas, 493 U.S. 223 (1990); United States v. National Dairy Prod. Corp., 372 U.S. 29, 32-33 (1963); Cruz v. Secretary of Environment and Natural Resources, 347 SCRA 128 (2000) (Mendoza, J., sep. op.); G. GUNTHER & K. SULLIVAN, CONSTITUTIONAL LAW 1299, 1328 (2001); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 UNIV. OF CHI. L. REV. 46, 50-53 (1987); Richard H. Fallon, Jr., *As Applied and Facial Challenges*, 113 HARV. L. REV. 1321 (2000)).

67. Adiong v. Commission of Elections, 207 SCRA 712 (1992).

Collins, 323 US 516, 89 L. Ed. 430 [1945]; Mutuc v. Commission on Elections, 36 SCRA 228 [1970]).

This qualitative significance of freedom of expression arises from the fact that it is the matrix, the indispensable condition of nearly every other freedom. (Palko v. Connecticut 302 U.S. 319 [1937]; Salonga v. Paño, 134 SCRA 438 [1985]) It is difficult to imagine how the other provisions of the Bill of Rights and the right to free elections may be guaranteed if the freedom to speak and to convince or persuade is denied and taken away.

We have adopted 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. (New York Times Co. v. Sullivan 376 U.S. 254, 11 L. Ed. 2d 686 [1964]; cited in the concurring opinion of then Chief Justice Enrique Fernando in Babst v. National Intelligence Board, 132 SCRA 316 [1984]) Too many restrictions will deny to people the robust, uninhibited, and wide open debate, the generating of interest essential if our elections will truly be free, clean, and honest.

We have also ruled that the preferred freedom of expression calls all the more for the utmost respect when what may be curtailed is the dissemination of information to make more meaningful the equally vital right of suffrage. (Mutuc v. Commission on Elections, *supra*)

The determination of the limits of the Government's power to regulate the exercise by a citizen of his basic freedoms in order to promote fundamental public interests or policy objectives is always a difficult and delicate task. The so-called balancing of interests — individual freedom on one hand and substantial public interests on the other — is made even more difficult in election campaign cases because the Constitution also gives specific authority to the Commission on Elections to supervise the conduct of free, honest, and orderly elections.

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The posting of decals and stickers in mobile places like cars and other moving vehicles does not endanger any substantial government interest. There is no clear public interest threatened by such activity so as to justify the curtailment of the cherished citizen's right of free speech and expression. Under the clear and present danger rule not only must the danger be patently clear and pressingly present but the evil sought to be avoided must be so substantive as to justify a clamp over one's mouth or a writing instrument to be stilled:

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> *For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other context might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation.*

> *Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the greatest abuses, endangering permanent interests, give occasion for permissible limitation.* (Thomas v. Collins, 323 US 516 [1945].” (Emphasis supplied)
>
> xxx xxx xxx

> Second — the questioned prohibition premised on the statute and as couched in the resolution is void for overbreadth.
>
> *A statute is considered void for overbreadth when 'it offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulations may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'* (Zwickler v. Koota, 19 L Ed 2d 444 [1967]).
>
> > *In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.*[68]

It is a well-established principle of law that the lofty significance of freedom of expression arises from the fact that it is “the indispensable condition of nearly every other freedom.” Thus, any attempt to restrict those liberties must be justified by clear public interest threatened not by such species of danger that are clear and present. Accordingly, “Only the greatest abuses, endangering permanent interests, give occasion for permissible limitation.”[69]

Furthermore, a statute is considered unconstitutional for overbreadth when “it offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulations may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”[70] Greatly exalted in society is the freedom of free speech and expression that notwithstanding vital and legitimate State interest sought to be upheld, that purpose cannot be pursued

68. *Id.* at 715-20 (1992) (emphasis supplied).

69. *Id.* at 719 (citing Thomas v. Collins, 323 U.S. 516 (1945)) (emphasis supplied).

70. *Id.* at 719-20 (citing Zwickler v. Koota, 389 U.S. 250 (1967)) (emphasis supplied).

by means that "broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[71]

In *Iglesia Ni Cristo v. Court of Appeals*,[72] the Court struck down the action of the Movie and Television Review and Classification Board for censoring certain program series of the Iglesia Ni Cristo, and touched upon the primacy of the freedoms of religion and of speech in this wise:

> Freedom of religion has been accorded a *preferred status* by the framers of our fundamental laws, past and present. We have affirmed this preferred status well aware that it is 'designed to protect the broadest possible liberty of conscience, to allow each man to believe as his conscience directs, to profess his beliefs, and to live as he believes he ought to live, consistent with the liberty of others and with the common good.' We have also laboriously defined in our jurisprudence the intersecting umbras and penumbras of the right to religious profession and worship.
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> xxx xxx xxx
>
> First. Deeply ensconced in our fundamental law is its hostility against all prior restraints on speech, including religious speech. Hence, any act that restrains speech is hobbled by the presumption of invalidity and should be greeted with furrowed brows. It is the burden of the respondent Board to overthrow this presumption. If it fails to discharge this burden, its act of censorship will be struck down. It failed in the case at bar.
>
> Second. The evidence shows that the respondent Board x-rated petitioners TV series for 'attacking' either religions, especially the Catholic Church. An examination of the evidence [...] will show that the so-called 'attacks' are mere *criticisms* of some of the deeply held dogmas and tenets of other religions. The videotapes were not viewed by the respondent court as they were not presented as evidence. Yet they were considered by the respondent court as indecent, contrary to law and good customs, hence, can be prohibited from public viewing under section 3(c) of PD 1986. This ruling clearly suppresses petitioner's freedom of speech and interferes with its right to free exercise of religion.
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> xxx xxx xxx
>
> 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 State from leaning towards any religion. Vis-a-vis religious differences, the State enjoys no

71. *Id*. at 720 (emphasis supplied).

72. Iglesia Ni Cristo v. Court of Appeals, 259 SCRA 529 (1996),

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.

Third. The respondents cannot also rely on the ground 'attacks against another religion' in x-rating the religious program of petitioner. Even a sideglance at section 3 of PD No. 1986 will reveal that it is not among the grounds to justify an order prohibiting the broadcast of petitioner's television program. The ground 'attack against another religion' was merely added by the respondent Board in its Rules. This rule is void for it runs smack against the hoary doctrine that administrative rules and regulations cannot expand the letter and spirit of the law they seek to enforce.

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Fourth. In x-rating the TV program of the petitioner, the respondents *failed to apply the clear and present danger rule.* In *American Bible Society v. City of Manila*, this Court held: '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.' In *Victoriano v. Elizalde Rope Workers Union*, we further ruled that '…it is only where it is unavoidably necessary to prevent an *immediate and grave danger* to the security and welfare of the community that infringement of religious freedom may be justified, *and only to the smallest extent necessary to avoid the danger.*'

The records show that the decision of the respondent Board, affirmed by the respondent appellate court, is 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.

It is suggested that we re-examine the application of clear and present danger rule to the case at bar. In the United States, it is true that the clear and present danger test has undergone permutations. It was Mr. Justice Holmes who formulated the test in *Schenck v. US*, as follows: '…the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger*

> that they will bring about the substantive evils that Congress has a right to prevent.' Admittedly, the test was *originally* designed to determine the latitude which should be given to speech that espouses *anti-government action*. Bannered by Justices Holmes and Brandeis, the test attained its full flowering in the decade of the forties, when its umbrella was used to protect speech *other than subversive speech*. Thus, for instance, the test was applied to annul a total ban on labor picketing. The use of the test took a downswing in the 1950's when the US Supreme Court decided *Dennis v. United States* involving communist conspiracy. In Dennis, the components of the test were altered as the High Court adopted Judge Learned Hand's formulation that '…in each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' The imminence requirement of the test was thus diminished and to that extent, the protection of the rule was weakened. In 1969, however, the strength of the test was reinstated in *Brandenburg v. Ohio*, when the High Court restored in the test the imminence requirement, and even added an intent requirement which according to a noted commentator ensured that only speech directed at inciting lawlessness could be punished. *Presently* in the United States, the clear and present danger test is *not applied* to protect *low value speeches* such as obscene speech, commercial speech and defamation. Be that as it may, *the test is still applied to four types of speech*: speech that advocates dangerous ideas, speech that provokes a hostile audience reaction, out of court contempt and release of information that endangers a fair trial. Hence, even following the drift of American jurisprudence, there is reason to apply the clear and present danger test to the case at bar which concerns speech that attacks other religions and could readily provoke hostile audience reaction. *It cannot be doubted that religious truths disturb and disturb terribly.*
>
> It is also opined that it is inappropriate to apply the clear and present danger test to the case at bar because the issue involves the *content* of speech and not the time, place or manner of speech. Allegedly, unless the speech is first allowed, its impact cannot be measured, and the causal connection between the speech and the evil apprehended cannot be established. The contention overlooks the fact that the case at bar involves videotapes that are *pre-taped* and hence, their speech content is known and not an X quantity. Given the specific content of the speech, it is not unreasonable to assume that the respondent Board, with its expertise, can determine whether its sulphur will bring about the substantive evil feared by the law.[73]

Prior restraint on speech and expression is severely frowned upon by the Constitution. Jurisprudence has been consistent in this regard. Any act of State that restrains or seeks to restrain speech is "hobbled by the presumption of invalidity and should be greeted with furrowed brows."[74] The same test

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73. *Id*. at 542-51 (emphasis supplied).

74. *Id*. at 545-46 (emphasis supplied).

of clear and present danger must be applied before any restriction relating to free speech and expression may be considered justified.

As applied to the discussion, Section 34 (a) and (f) of the Flag and Heraldic Code should be declared unconstitutional for being an undue restriction on the constitutionally guaranteed right to free speech and expression. Employing the clear and present danger test, the State does not meet the standards provided for by jurisprudence before necessary curtailment of such freedoms is held not to be constitutionally infirm.

Furthermore, Section 34 (a) and (f) of the Flag and Heraldic Code is unconstitutional because the law is vague and overbroad insofar as these subsections fail to sufficiently inform any person of the actual crime sought to be proscribed and the restrictions imposed upon agents of the state in enforcing such law.

Persons of common intelligence would agree that the Flag and Heraldic Code was enacted in order that "reverence and respect shall at all times be accorded the flag, the anthem, and other national symbols which embody the national ideals and traditions and which express the principles of sovereignty and national solidarity."[75] Such statement in the declaration of policy points to the intent of the legislature to proscribe acts that are inimical to such policy. Because of the vagueness and overbreadth of the Flag and Heraldic Code, even patriotic expressions that are not contrary to the avowed public policy is also suppressed by the law. Or at least the law does not say so expressly. Definitely, persons of common intelligence will "necessarily guess at its meaning and differ as to its application." There lies its intrinsic ambiguity.

CONCLUSION

In the oft-quoted statement of Mr. Justice Holmes, "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought: not free thought for those who agree with us but freedom for the thought we hate."

In *ABS-CBN Broadcasting Corporation v. Commission on Elections*,[76] the Honorable Court had another occasion to hold that freedom of expression is a fundamental principle in democratic government and is a preferred right that stands in a higher level than substantive economic or other liberties, to wit:

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75. FLAG AND HERALDIC CODE § 2.

76. ABS-CBN Broadcasting Corporation v. Commission on Elections, 323 SCRA 811 (2000).

Nature and Scope of Freedoms of Speech and of the Press

The freedom of expression is a fundamental principle of our democratic government. It 'is a 'preferred' right and, therefore, stands on a higher level than substantive economic or other liberties.... [T]his must be so because the lessons of history, both political and legal, illustrate that freedom of thought and speech is the indispensable condition of nearly every other form of freedom.'

Our Constitution clearly mandates that no law shall be passed abridging the freedom of speech or of the press. In the landmark case Gonzales v. Comelec, this Court enunciated that at the very least, *free speech and a free press consist of the liberty to discuss publicly and truthfully any matter of public interest without prior restraint.*

The freedom of expression is a means of assuring individual self-fulfillment, of attaining the truth, of securing participation by the people in social and political decision-making, and of maintaining the balance between stability and change. It represents a profound commitment to the principle that debates on public issues should be uninhibited, robust, and wide open. It means more than the right to approve existing political beliefs or economic arrangements, to lend support to official measures, or to take refuge in the existing climate of opinion on any of public consequence. And paraphrasing the eminent Justice Oliver Wendell Holmes, we stress that the freedom encompasses the thought we hate, no less than the thought we agree with.

Limitations

The realities of life in a complex society, however, preclude an absolute exercise of the freedoms of speech and of the press. Such freedoms could not remain unfettered and unrestrained at all times and under all circumstances. They are not immune to regulation by the State in the exercise of its police power. While the liberty to think is absolute, the power to express such thought in words and deeds has limitations.

In Cabansag v. Fernandez this Court had occasion to discuss two theoretical test in determining the validity of restrictions to such freedoms, as follows:

> These are the 'clear and present danger' rule and the 'dangerous tendency' rule. The first, as interpreted in a number of cases, means that 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. The danger to be guarded against is the 'substantive evil' sought to be prevented....
>
> The 'dangerous tendency' rule, on the other hand, ... may be epitomized as follows: if 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. It is sufficient that such acts be advocated in general terms. Nor is it

> 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.

Unquestionably, this Court adheres to the 'clear and present danger' test. It implicitly did in its earlier decisions in *Primicias v. Fugoso* and *American Bible Society v. City of Manila*; as well as in later ones, *Vera v. Arca, Navarro v. Villegas, Imbong v. Ferrer, Blo Umpar Adiong v. Comelec* and, more recently, in *Iglesia ni Cristo v. MTRCB.* In setting the standard or test for the 'clear and present danger' doctrine, the Court echoed the words of Justice Holmes: *'The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.'*

A limitation on the freedom of expression may be justified only by a danger of such substantive character that the state has a right to prevent. Unlike in the 'dangerous tendency' doctrine, the danger must not only be clear but also present. 'Present' refers to the time element; the danger must not only be probable but very likely to be inevitable. The evil sought to be avoided must be so substantive as to justify a clamp over one's mouth or a restraint of a writing instrument.

Justification for a Restriction

Doctrinally, the Court has always ruled in favor of the freedom of expression, and any restriction is treated an exemption. The power to exercise prior restraint is not to be presumed; rather the presumption is against its validity. And it is respondent's burden to overthrow such presumption. *Any act that restrains speech should be greeted with furrowed brows*, so it has been said.

To justify a restriction, the promotion of a substantial government interest must be clearly shown. Thus:

> A government regulation is sufficiently justified if it is within the constitutional power of the government, if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Hence, even though the government's purposes are legitimate and substantial, they cannot be pursued by means that broadly stifle fundamental personal liberties, when the end can be more narrowly achieved.[77]

In *Burgos v. Chief of Staff*,[78] the Honorable Court held that the closure of a publication is a prior restraint or censorship that constitutes a denial of the

77. *Id.* at 822-26 (emphasis supplied).

freedom to express dissent. Clearly, even in exigent circumstances, the Honorable Court has upheld freedom of speech and expression to be an overriding right.

In *New York Times v. United States*,[79] the United States Supreme Court had occasion to squarely rule on the issue of prior restraint on the freedom of expression. In that case, *even* with the possibility that national security may be compromised by the publication of certain military papers, the United States Supreme Court affirmed the overriding right to freedom of expression and refused to issue an injunction, stating: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[80] Thus, the State "carries a heavy burden of showing justification for the enforcement of such a restraint."[81]

In *Cohen v. California*[82] the U.S. Supreme Court held that lewdness, offensiveness, and profanity are not even excluded for purposes of the protective ambit of the First Amendment. In fact, in *Cohen*, the words *"Fuck the Drajt"* that were emblazoned on a leather jacket were held not to be obscene.

To determine the whether or not a material is obscene, *Miller v. California*[83] devised a three-part test: "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

In *Freedman v. Maryland*,[84] the United States Supreme Court held that prior restraints are burdened procedurally and substantial viewpoint. According to *Freedman*, following procedural requirements must be satisfied: (a) the censor has the burden of demonstrating that the material is unprotected; (b) there must be a prompt judicial proceeding in order to impose a valid and final restraint on publication; (c) the censor must either issue a license for publication or go to court to justify the restrain.

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78. Burgos v. Chief of Staff, 133 SCRA 800 (1984).

79. New York Times v. United States, 403 U.S. 713 (1971).

80. *Id.* (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Near v. Minnesota, 283 U.S. 697 (1931)).

81. *Id.* (citing Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)).

82. Cohen v. California, 403 U.S. 15 (1971).

83. Miller v. California, 413 U.S. 15 (1973).

84. Freedman v. Maryland, 380 U.S. 51 (1965).

As the cornerstone for the other fundamental rights under the Constitution, the right to free speech and expression is a right of paramount importance that occupies a primordial place in the hierarchy of rights protected by the Constitution. Without this most fundamental right, the other rights would be rendered meaningless and nugatory.

The Constitution ordains the weakest department, the Supreme Court, as the guardian and final arbiter of the Constitution. It postulates and requires an intellectually competent, morally incorruptible and courageously independent judiciary sworn to defend and enforce the Constitution and the law without fear or favor.

As a rule, a court of law shall address the issue of constitutionality of a particular statute only if it is absolutely essential and necessary to the issue brought before it for due resolution and judgment. This form of judicial statesmanship demonstrates the co-ordinate nature of a democratic system of government, wherein due respect is given to the other great co-equal branches whenever proper.

Central to our system of government is the division of great powers into three distinct and independent branches, with each branch having exclusive cognizance of and supremacy on matters within its own sphere of jurisdiction. However, there are instances when an interlocking of functions and duties between these great departments necessitates the invocation of the principle of checks and balances to the fore of a controversy in order to reign in each great branch of government to its own allocated place under the organic law.

As the final arbiter of all legal controversies and the last bulwark of democracy in the Philippine jurisdiction, the Court is tasked with the most noble and awesome duty to uphold the Constitution and protect the liberties of citizens, to wit:

> It cannot be overstressed that in a constitutional government such as ours, the rule of law must prevail. The Constitution is the basic and paramount law to which all other laws must conform and to which all person, including the highest official of the land, must defer. From this cardinal postulate, it follows that the three branches of government must discharge their respective functions within the limits of authority conferred by the Constitution. Under the principle of separation of powers, neither Congress, the President, nor the Judiciary may encroach on fields allocated to the other branches of government. The legislature is generally limited to the enactment of laws, the executive to the enforcement of laws and the judiciary to their interpretation and application to cases and controversies.
>
> The constitution expressly confers on the Judiciary the power to maintain inviolate what it decrees. As the guardian of the Constitution, we cannot shirk the duty of seeing to it that the officers in each branch of government do not go beyond their constitutionally allocated boundaries and that the

> entire government itself or any of its branches does not violate the basic liberties of the people.[85]

Thus, judicial review is not supremacy but duty, the essence of which was resolutely enunciated by Court in this wise:

> The Constitution is a definition of the powers of government. Who is to determine the nature, scope and extent of such powers? The Constitution itself has provided for the instrumentality of the Judiciary as the rational way. And when the Judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other department, it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them.[86]

The power of judicial review must not be abrogated or abandoned by the Court. Otherwise, the other branches of government will be able to operate as they very well please even beyond their fences, to the detriment of citizens. The Filipino people have entrusted to the Court the immense power and authority of the judicial pen to hold sway the purse and the sword to their own allocated places under the Constitution.

In view of the transcendental ramifications of Section 34 (a) and (f) of the Flag and Heraldic Code, the Supreme Court may exercise its expansive power of judicial review as mandated in Article VIII, Section 1 of the Constitution, to wit:

> Section 1. 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.

The power of judicial review is well established in this jurisdiction. It is within the province and duty of the Court to determine whether or not the other branches of government have kept themselves within the limits provided for by the Constitution and enacted laws and whether or not they have abused the discretion given them.[87]

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85. Bengzon v. Drilon, 208 SCRA 133, 142 (1992).

86. Angara v. Electoral Commission, 63 Phil. 139, 158 (1936).

87. As a rule of thumb, however, the Supreme Court does not ordinarily pass upon constitutional questions unless these questions are properly raised in appropriate

> It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.[88]

The exercise of judicial review is a duty specifically enjoined upon the judicial department by the fundamental law of the land as part of the system of checks and balances especially where it involves the most grave of national interests, the integrity and sanctity of the Constitution, and the most fundamental rights of citizens.[89]

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cases and their resolution is necessary for the determination of the case (Laurel v. Garcia, 187 SCRA 797, 813 (1990) (citing People v. Vera, 65 Phil. 56 (1937))). Thus, in order that a constitutional question may be addressed by this Honorable Supreme Court, the following requisites must concur: (1) the existence of an actual and appropriate case; (2) a personal or substantial interest of the party raising the constitutional question; (3) the exercise of judicial review is pleaded at the earliest opportunity, and (4) the constitutional question is the *lis mota* of the case (Philippine Constitution Association v. Enriquez, 235 SCRA 506, 518-19 (1994) (citing Luz Farms v. Secretary of the Department of Agrarian Reform, 192 SCRA 51 (1990); Dumlao v. Commission on Elections, 95 SCRA 392 (1980); People v. Vera, 65 Phil. 56 (1937))). The Supreme Court has, as far as practicable, desisted from delving on constitutional issues. Even if all the requisites for judicial review of a constitutional matter are present in a case, the Court will not pass upon a constitutional question unless it is the *lis mota* of the case or if the case can be disposed of on some other grounds, such as the application of the statute or general law (Lalican v. Vergara, 276 SCRA 518, 530-31 (1997).

88. United States v. Butler, 297 U.S. 1, 62-63 (1936).

89. The Supreme Court has highlighted its liberal stance on a petitioner's *locus standi* where the petitioner is able to craft an issue of transcendental significance to the people (Tatad v. Secretary of Energy, 281 SCRA 330 (1997); Garcia v. Executive Secretary, 211 SCRA 219 (1992); Osmeña v. COMELEC, 199 SCRA (1991); Basco v. Pagcor, 197 SCRA 52 (1991); Daza v. Singson, 180 SCRA 496 (1989); Araneta v. Dinglasan, 84 Phil. 368 (1949)). The question on

> ...The concept of the Constitution as the fundamental law, setting forth the criterion for the validity of any public act whether proceeding from the highest official or the lowest functionary, is a postulate of our system of government. That is to manifest fealty to the rule of law, with priority accorded to that which occupies the topmost rung in the legal hierarchy. The three departments of government in the discharge of the functions with which it is entrusted have no choice but to yield obedience to its commands. Whatever limits it imposes must be observed. congress in the enactment of statutes must ever be on guard lest the restrictions on its authority, either substantive or formal, be transcended. The Presidency in the execution of the laws cannot ignore or disregard what it ordains. In its task of applying the law to the facts as found in deciding cases, the judiciary is called upon to maintain inviolate what is decreed by the fundamental law. Even its power of judicial review to pass upon the validity of the acts of the coordinate branches in the course of adjudication is a logical corollary of this basic principle that the Constitution is paramount. It overrides any governmental measure that fails to live up to its mandates. Thereby there is a recognition of its being the supreme law.[90]

Assuming that the allegations of disrespect were indeed true and correct, not only is the act of placing the word "KAWAL" on the Philippine flag protected speech but it is also an expression of patriotism, which is certainly not contrary to the policy espoused by the State in enacting the Flag and Heraldic Code. Placing "KAWAL" on the surface of the national flag is clear an expression of patriotism and confidence in the military. The vagueness and overbreadth of Section 34 (a) and (f) of the Flag and Heraldic Code is now apparent.

"KAWAL" is in itself not desecrating. On the contrary, it evokes the patriotic values of courage and loyalty to the motherland. "KAWAL" is in any by itself an honorable, decent word unlike any other expletive or

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legal standing bears on the issue of whether or not a party has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions' (Baker v. Carr, 369 U.S. 186 (1962), *cited in* Kilosbayan, Inc. v. Morato, 246 SCRA 540, 562-63 (1995)). As regards *locus standi*, 'it has been held that the interest of a person assailing the constitutionality of a statute must be direct and personal. He must show, not only that the law or any government act is invalid, but also that he sustained or is in imminent danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers thereby in some indefinite way. It must appear that the person complaining has been or is about to be denied some right or privilege to which he is lawfully entitled or that he is about to be subjected to some burdens or penalties by reason of the statute or act complained of' (Bayan v. Zamora, 342 SCRA 449, 478 (2000)).

90. Mutuc v. Commission on Elections, 36 SCRA 228 (1970).

profane or vulgar word. Placing that word on the surface of the national flag communicates and conveys the idea that constitutes protected speech under the Constitution. It is no doubt legitimate speech and a legitimate exercise of the right to free speech and expression. Using "KAWAL" relates to the military institution as protector of the Filipino people. The communication was nothing but an act of sheer patriotism and nationalism.

Under the circumstances discussed, placing "KAWAL" on the flag cannot be said to be a desecration especially when its use is for the purpose of serving notice to the public that there are soldiers who protest the anomalies and graft and corruption in the Government.

The action sought to be punished by the State is one wherein citizens were evoking the passions of the nation in upholding the spirit of the nations. The alleged desecrators of the flag were not unmindful of the rampant irregularities in government. By employing "KAWAL," they intended to assure the Filipino people that there are patriots among the people who are courageous enough to place the best interests of the nation above all else. This was a message to Filipinos that their soldiers are not unmindful of their role as protectors of the people. Placing "KAWAL" on the surface of the national flag in order to convey a legitimate message to the Filipino people is not an act of desecration. The contrast is clear. The Flag and Heraldic Code demands that the act must *cast dishonor or ridicule upon the national flag*. Dishonor and ridicule to the flag is surely wanting in the circumstances discussed in this Article.

Section 34 (a) and (f) of the Flag and Heraldic Code does not justify the State's policy of preventing breaches of the peace insofar as it is a direct and total suppression of an entire category of expressions. The State interest sought to be protected and promoted can be achieved by means other than the suppression of the freedom of speech and expression.

If the State bans this category of conduct towards the national flag, then what prevents the State from proscribing all other forms of speech? This, indeed, is the beginning of repression. The State wants to forge national unity and patriotism at the expense of the right to free speech and expression. Coerced patriotism, however, is no patriotism at all. The government of the Third Reich crammed down its hideous brand of nationalism on its citizens, and what resulted was a herd of loyal minions who were prepared to parrot nationalistic platitudes at the government's beck and call. Yes, loyal they were. But suppressed nonetheless.

Some 30 years have passed since the President Marcos declared Martial Law. Through this, he was able to dictate the conduct of citizens and prescribe fatal chastisement to those who dissented. During these darkest of years, there were still dissenters who gallantly fought the worthy battle to uphold the very freedoms Filipinos now enjoy as a people.

Without doubt, the essence of all nationalism and patriotism is freedom. Freedom to believe in a worthy cause. Freedom to fight the noble battle. Freedom to speak and express one's belief in order that others with similar beliefs may know that they are not alone. In a free society, there is always dissent. A good democracy respects dissenters and recognizes them as the conscience of the ruling majority. Although it is true that there are those dissenters who wish our country ill by engaging in destructive acts, it is also true that there are those dissenters who wish our country well by engaging in constructive acts. The good should not be bundled with the evil.

The truly nationalistic and patriotic dissenters engage in legitimate constructive speech and freely express their ideas because they believe that tier country and fellowman need to hear what they have to say. Their speech represents the crucial issues of the day. And it is better for them to bring such issues to the bar of public opinion than let their principles and beliefs remain unheard. Betrayed are we who meet that day when free speech is no more and disagreeable expression is anathema just for the sake of portraying a nation unified. Loyal, indeed, we may appear, but suppressed nonetheless.

Inasmuch as the State pleads a higher interest in wanting to require its citizens to revere and salute national symbols as a manifestation of national unity, the State cannot legislate love of country. Love of country flows not from coerced acts but from free choosing. A true lover of our great motherland is one who is not bound under pain of chastisement of law to do so but one who nonetheless does so because he is convinced it should be so. As held in *Bartnette*:

> National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.
>
> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon

> find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.
>
> The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[91]

The belief that patriotism will not flourish if respect to national symbols are and spontaneous rather than compulsory is to doubt the very public spirit that flows in the veins of Filipinos. Freedom dies when citizens are required to revere a national symbol. As a nation, Filipinos have the inalienable right to be free and to exercise that freedom as they deem proper. The right to free speech and expression has been guaranteed by the fundamental law of the land. No act of man or State should impede or curtail its enjoyment — nothing less than the sovereign act to chart the nation's future without that freedom, should Filipinos chose to do so.

91. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 640-42 (1943).