EN BANC

G.R. No. 203335 - JOSE JESUS M. DISINI, JR., et al, *Petitioners*, v. THE SECRETARY OF JUSTICE, et al., *Respondents;* **G.R. No. 203299** - LOUIS "BAROL" C. BIRAOGO, *Petitioner*, v. NATIONAL BUREAU OF INVESTIGATION and PHILIPPINE NATIONAL POLICE, *Respondents;* **G.R. No. 203306** - ALAB NG MAMAMAHAYAG (ALAM), et al., *Petitioners*, v. OFFICE OF THE PRESIDENT, et al., *Respondents;* **G.R. No. 203359** - SENATOR TEOFISTO GUINGONA III, *Petitioner*, v. THE EXECUTIVE SECRETARY, et al., *Respondents;* **G.R. No. 203378** - ALEXANDER ADONIS, et al., *Petitioners,* v. THE EXECUTIVE SECRETARY, et al., *Respondents;* **G.R. No. 203391** - HON. RAYMOND PALATINO, et al., *Petitioners*, v. HON. PAQUITO OCHOA, JR., et al., *Respondents;* **G.R. No. 203407** - BAGONG ALYANSANG MAKABAYAN SECRETARY GENERAL RENATO M. REYES, JR., et al., *Petitioners*, v. BENIGNO SIMEON AQUINO III, et al., *Respondents;* **G.R. No. 203440** - MELENCIO STA. MARIA, et al., *Petitioners*, v. HON. PAQUITO OCHOA, JR., et al., *Respondents;* **G.R. No. 203453** - PAUL CORNELIUS CASTILLO, et al., *Petitioners*, v. HIS EXCELLENCY BENIGNO AQUINO III, et al., *Respondents;* **G.R. No. 203454** - ANTHONY IAN CRUZ, et al., *Petitioners*, v. HIS EXCELLENCY BENIGNO AQUINO III, et al., *Respondents;* **G.R. No. 203501** - PHILIPPINE BAR ASSOCIATION, INC., *Petitioner*, v. HIS EXCELLENCY BENIGNO SIMEON AQUINO III, et al., *Respondents;* **G.R. No. 203509** - BAYAN MUNA REPRESENTATIVE NERI COLMENARES, *Petitioner*, v. THE EXECUTIVE SECRETARY PAQUITO OCHOA, JR., *Respondent;* **G.R. No. 203515** - NATIONAL PRESS CLUB OF THE PHILIPPINES, INC., et al., *Petitioner*, v. OFFICE OF THE PRESIDENT BENIGNO SIMEON AQUINO III, et al., *Respondents;* **G.R. No. 203518** - PHILIPPINE INTERNET FREEDOM ASSOCIATION, et al., *Petitioners*, v. THE EXECUTIVE SECRETARY, et al. *Respondents*

Promulgated:

FEBRUARY 18, 2014

x_____x

DISSENTING AND CONCURRING OPINION

LEONEN, *J.*:

Most of the challenges to the constitutionality of some provisions of the Cybercrime Prevention Act of 2012 (Republic Act No. 10175) are raised without an actual case or controversy. Thus, the consolidated petitions should fail except for those that raise questions that involve the imminent possibility that the constitutional guarantees to freedom of expression will be

stifled because of the broadness of the scope of the text of the provision. In view of the primacy of this fundamental right, judicial review of the statute itself, even absent an actual case, is viable.

With this approach, I am of the opinion that the constitution requires that libel as presently contained in the Revised Penal Code and as reenacted in the Cybercrime Prevention Act of 2012 (Rep. Act No. 10175) be struck down as infringing upon the guarantee of freedom of expression provided in Article III, Section 4 of our Constitution. I am also of the firm view that the provisions on cybersex as well as the provisions increasing the penalties of all crimes committed with the use of computers are unconstitutional. The provision limiting unsolicited commercial communications should survive facial review and should not be declared as unconstitutional.

I concur with the majority insofar as they declare that the "take down" clause, the provision allowing dual prosecutions of all cybercrimes, and the provision that broadly allows warrantless searches and seizures of traffic data, are unconstitutional. This is mainly because these present unwarranted chilling effects on the guaranteed and fundamental rights of expression.

I
Framework of this Opinion

Reality can become far richer and more complex than our collective ability to imagine and predict. Thus, conscious and deliberate restraint — at times — may be the better part of judicial wisdom.

The judiciary's constitutionally mandated role is to interpret and apply the law. It is not to create or amend law on the basis of speculative facts which have not yet happened and which have not yet fully ripened into clear breaches of legally demandable rights or obligations. Without facts that present an actual controversy, our inquiry will be roving and unlimited. We substitute our ability to predict for the rigor required by issues properly shaped in adversarial argument of the real. We become oracles rather than a court of law.

This is especially so when the law is made to apply in an environment of rapidly evolving technologies that have deep and far-reaching consequences on human expression, interaction, and relationships. The internet creates communities which virtually cross cultures, creating cosmopolitarian actors present in so many ways and in platforms that we are yet starting to understand.

Petitioners came to this court via several petitions for certiorari and/or prohibition under Rule 65 of the Rules of Court. They seek to declare certain provisions of Rep. Act No. 10175 or the Cybercrime Prevention Act of 2012[1] as unconstitutional. They allege grave abuse of discretion on the part of Congress. They invoke our power of judicial review on the basis of the textual provisions of the statute in question, their reading of provisions of the Constitution, and their speculation of facts that have not happened — may or may not happen — in the context of one of the many technologies available and evolving in cyberspace. They ask us to choose the most evil among the many possible but still ambiguous future factual permutations and on that basis declare provisions not yet implemented by the Executive or affecting rights in the concrete as unconstitutional. In effect, they ask us to do what the Constitution has not even granted to the President: a provision-by-provision veto in the guise of their interpretation of judicial review.

Although pleaded, it is difficult to assess whether there was grave abuse of discretion on the part of the Executive. This court issued a temporary restraining order to even proceed with the drafting of the implementing rules. There has been no execution of any of the provisions of the law.

This is facial review in its most concrete form. We are asked to render a pre-enforcement advisory opinion of a criminal statute. Generally, this cannot be done if we are to be faithful to the design of our Constitution.

The only instance when a facial review is permissible is when there is a clear showing that the provisions are too broad under any reasonable reading that it imminently threatens expression. In these cases, there must be more of a showing than simply the *in terrorem* effect of a criminal statute. It must clearly and convincingly show that there can be no determinable standards that can guide interpretation. Freedom of expression enjoys a primordial status in the scheme of our basic rights. It is fundamental to the concept of the people as sovereign. Any law — regardless of stage of implementation — that allows vague and unlimited latitude for law enforcers to do prior restraints on speech must be struck down on its face.

This is the framework taken by this opinion.

The discussion in this dissenting and concurring opinion is presented in the following order:

1. Justiciability
2. The Complexity of the Internet and the Context of the Law

[1] Rep. Act No. 10175, sec. 1. The law was the product of Senate Bill No. 2796 and House Bill No. 5808.

3. The Doctrine of Overbreadth and the Internet
4. Take Down Clause
5. Libel Clauses
6. Cybersex Provisions
7. Speech Component in the Collection of Traffic Data
8. Commercial Speech

I (A)
Justiciability

Judicial review — the power to declare a law, ordinance, or treaty as unconstitutional or invalid — is inherent in judicial power.[2] It includes the power to "settle actual controversies involving rights which are legally demandable"[3] and "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on any part of any branch or instrumentality of Government."[4] The second aspect of judicial review articulated in the 1987 Constitution nuances the political question doctrine.[5] It is not licensed to do away with the requirements of justiciability.

The general rule is still that: "the constitutionality of a statute will be passed on only if, and to the extent that, it is directly and necessarily involved in a justiciable controversy and is essential to the protection of the rights of the parties concerned."[6] Justiciability on the other hand requires that: (a) there must be an *actual case or controversy* involving legal rights that are capable of judicial determination; (b) the parties raising the issue must have standing or *locus standi* to raise the constitutional issue; (c) the constitutionality must be raised at the earliest possible opportunity, thus *ripe* for adjudication; and (d) the constitutionality must be the very *lis mota* of the case, or the constitutionality must be essential to the disposition of the case.[7]

It is essential that there be an *actual case or controversy.*[8] "There must be existing conflicts ripe for judicial determination — not conjectural

---

2 Consti., art. VIII, sec. 1 which provides the following:

> 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 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 Government.

3 Consti., art. VIII, sec. 1.

4 Consti., art. VIII, sec. 1.

5 *Tanada v. Cuenco*, G.R. No. L-10520, 100 Phil. 1101 (1957) [Per J. Concepcion, En Banc].

6 *Philippine Association of Colleges and Universities v. Secretary of Education*, 97 Phil. 806, 809 (1955) [Per J. Bengzon, En Banc].

7 *Levy Macasiano v. National Housing Authority*, G.R. No. 107921, July 1, 1993, 224 SCRA 236, 242 [Per CJ Davide, Jr., En Banc].

8 *Angara v. Electoral Commission*, 63 Phil. 139, 158 (1936) [Per J. Laurel, En Banc].

or anticipatory. Otherwise, the decision of the Court will amount to an advisory opinion."[9]

In *Information Technology Foundation of the Phils. v. COMELEC,*[10] this court described the standard within which to ascertain the existence of an actual case or controversy:

> It is well-established in this jurisdiction that "x x x for a court to exercise its power of adjudication, there must be an actual case or controversy -- one which involves a conflict of legal rights, an assertion of opposite legal claims susceptible of judicial resolution; the case must not be moot or academic or based on extra-legal or other similar considerations not cognizable by a court of justice. x x x [C]ourts do not sit to adjudicate mere academic questions to satisfy scholarly interest, however intellectually challenging." The controversy must be justiciable -- definite and concrete, touching on the legal relations of parties having adverse legal interests. ***In other words, the pleadings must show an active antagonistic assertion of a legal right, on the one hand, and a denial thereof on the other; that is, it must concern a real and not a merely theoretical question or issue.*** There ought to be an actual and substantial controversy admitting of specific relief through a decree conclusive in nature, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.[11] (Citations omitted, emphasis supplied)

In *Lozano v. Nograles*,[12] this court also dismissed the petitions to nullify House Resolution No. 1109 or "A Resolution Calling upon the Members of Congress to Convene for the Purpose of Considering Proposals to Amend or Revise the Constitution, Upon a Three-fourths Vote of All the Members of Congress." In dismissing the petitions, this court held:

> It is well settled that it is the duty of the judiciary to say what the law is. The determination of the nature, scope and extent of the powers of government is the exclusive province of the judiciary, such that any mediation on the part of the latter for the allocation of constitutional boundaries would amount, not to its supremacy, but to its mere fulfillment of its "solemn and sacred obligation" under the Constitution. This Court's power of review may be awesome, but it is limited to actual cases and controversies dealing with parties having adversely legal claims, to be exercised after full opportunity of argument by the parties, and limited further to the constitutional question raised or the very *lis mota* presented. ***The "case-or-controversy" requirement bans this court from deciding "abstract, hypothetical or contingent questions,"[5] lest***

---

9 *Southern Hemisphere Engagement Network v. Anti-Terrorism Council*, G.R. No. 178552, October 5, 2010, 632 SCRA 146, 176 [Per J. Carpio-Morales, En Banc], *citing Republic Telecommunications Holding, Inc. v. Santiago*, 556 Phil. 83, 91 (2007) [Per J. Tinga, Second Division].

10 499 Phil. 281 (2005) [Per C.J. Panganiban, En Banc].

11 Id. at 304-305.

12 G.R. No. 187883, June 16, 2009, 589 SCRA 356 [Per C.J. Puno, En Banc].

> ***the court give opinions in the nature of advice concerning legislative or executive action.***"(Emphasis supplied)[13]

Then, citing the classic words in *Angara v. Electoral Commission*:[14]

> Any attempt at abstraction could only lead to dialectics and barren legal questions and to sterile conclusions unrelated to actualities. Narrowed as its function is in this manner, the judiciary does not pass upon questions of wisdom, justice or expediency of legislation. More than that, courts accord the presumption of constitutionality to legislative enactments, not only because the legislature is presumed to abide by the Constitution but ***also because the judiciary in the determination of actual cases and controversies must reflect the wisdom and justice of the people as expressed through their representatives in the executive and legislative departments of the government***.[15] (Citations omitted)

In *Republic of the Philippines v. Herminio Harry Roque et al.*,[16] this court ruled in favor of the petitioner and dismissed the petitions for declaratory relief filed by respondents before the Quezon City Regional Trial Court against certain provisions of the Human Security Act. In that case, the court discussed the necessity of the requirement of an actual case or controversy:

> Pertinently, a justiciable controversy refers to an existing case or controversy that is appropriate or ripe for judicial determination, not one that is conjectural or merely anticipatory. ***Corollary thereto, by "ripening seeds" it is meant, not that sufficient accrued facts may be dispensed with, but that a dispute may be tried at its inception before it has accumulated the asperity, distemper, animosity, passion, and violence of a full blown battle that looms ahead.*** The concept describes a state of facts indicating imminent and inevitable litigation provided that the issue is not settled and stabilized by tranquilizing declaration.
>
> ***A perusal of private respondents' petition for declaratory relief would show that they have failed to demonstrate how they are left to sustain or are in immediate danger to sustain some direct injury as a result of the enforcement of the assailed provisions of RA 9372.*** Not far removed from the factual milieu in the Southern Hemisphere cases, private respondents only assert general interests as citizens, and taxpayers and infractions which the government could prospectively commit if the enforcement of the said law would remain untrammeled. As their petition would disclose, private respondents' fear of prosecution was solely based on remarks of certain government officials which were addressed to the general public. They, however, failed to show how these

---

13 Id. at 357-358.
14 63 Phil. 139 (1936) [Per J. Laurel, En Banc].
15 Id. at 158.
16 G.R. No. 204603, September 24, 2013 [Per J. Perlas-Bernabe, En Banc].

> remarks tended towards any prosecutorial or governmental action geared towards the implementation of RA 9372 against them. In other words, there was no particular, real or imminent threat to any of them."[17] (Emphasis supplied)

Referring to *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council:*[18]

> Without any justiciable controversy, the petitions have become pleas for declaratory relief, over which the Court has no original jurisdiction. Then again, declaratory actions characterized by "double contingency," where both the activity the petitioners intend to undertake and the anticipated reaction to it of a public official are merely theorized, lie beyond judicial review for lack of ripeness.
>
> ***The possibility of abuse in the implementation of RA 9372 does not avail to take the present petitions out of the realm of the surreal and merely imagined. Such possibility is not peculiar to RA 9372 since the exercise of any power granted by law may be abused. Allegations of abuse must be anchored on real events before courts may step in to settle actual controversies involving rights which are legally demandable and enforceable***. (Emphasis supplied; citations omitted)[19]

None of the petitioners in this case have been charged of any offense arising from the law being challenged for having committed any act which they have committed or are about to commit. No private party or any agency of government has invoked any of the statutory provisions in question against any of the petitioners. The invocations of the various constitutional provisions cited in petitions are in the abstract. Generally, petitioners have ardently argued possible applications of statutory provisions to be invoked for future but theoretical state of facts.

The blanket prayer of assailing the validity of the provisions cannot be allowed without the proper factual bases emanating from an actual case or controversy.

II
The Complexity of the Internet and the Context of the Law

This is especially so when the milieu is cyberspace.

---

17 Id.

18 *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council,* G.R. No. 178552, October 5, 2010, 632 SCRA 146, 176 [Per J. Carpio-Morales, En Banc].

19 Id. at 179.

The internet or cyberspace is a complex phenomenon. It has pervasive effects and are, by now, ubiquitous in many communities. Its possibilities for reordering human relationships are limited only by the state of its constantly evolving technologies and the designs of various user interfaces. The internet contains exciting potentials as well as pernicious dangers.

The essential framework for governance of the parts of cyberspace that have reasonable connections with our territory and our people should find definite references in our Constitution. However, effective governance of cyberspace requires cooperation and harmonization with other approaches in other jurisdictions. Certainly, its scope and continuous evolution require that we calibrate our constitutional doctrines carefully: in concrete steps and with full and deeper understanding of incidents that involve various parts of this phenomenon. The internet is neither just one relationship nor is it a single technology. It is an interrelationship of many technologies and cultures.

An overview may be necessary if only to show that judicial pre-enforcement review — or a facial evaluation of only the statute in question — may be inadvisable. Cases that involve cyberspace are the paradigmatic examples where courts should do an evaluation of enshrined constitutional rights only in the context of real and actual controversies.

II (A)
A "Network of Networks"[20]

The very concept of an "internet" envisions pervasiveness. The first recorded description of the interactions that would come to typify the internet was contained in a series of memos in August 1962 by J.C.R. Licklider. In these memos, the pioneering head of the computer research program at the United States Department of Defense's Advanced Research Projects Agency (ARPA) discussed his concept of a "Galactic Network."[21]

The term "internet" is an abbreviation for "inter-networking."[22] It refers to a "combination of networks that communicate between themselves."[23] A "network" pertains to the interconnection of several

---

[20] D. MACLEAN, 'Herding Schrödinger's Cats: Some Conceptual Tools For Thinking About Internet Governance', Background Paper for the ITU Workshop on Internet Governance, Geneva, February 26-27, 2004, 8 <http://www.itu.int/osg/spu/forum/intgov04/contributions/itu-workshop-feb-04-internet-governance-background.pdf> (visited October 16, 2013).

[21] 'Brief History of the Internet' <http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet> (visited October 16, 2013).

[22] 'Comprehensive Study on Cybercrime' prepared by United Nations Office on Drugs and Crime for the Intergovernmental Expert Group on Cybercrime, February 2013, <http://www.unodc.org/documents/commissions/CCPCJ_session22/13 80699_Ebook_2013_study_CRP5.pdf> (visited October 16, 2013).

[23] Id.

distinct components. To speak of an "internet" is, therefore, to speak of the interconnection of interconnections. Thus, "[t]he Internet today is a widespread information infrastructure."[24] It is "at once a world-wide broadcasting capability, a mechanism for information dissemination, and a medium for collaboration and interaction between individuals and their computers without regard for geographic location."[25]

The internet grew from ARPA's ARPANet. It took off from the revolutionary concept of packet-switching as opposed to circuit switching. Packet switching eliminated the need for connecting at the circuit level where individual bits of data are passed synchronously along an end-to-end circuit between two end locations. Instead, packet switching allowed for the partitioning of data into packets, which are then transmitted individually and independently, even through varying and disjointed paths. The packets are then reassembled in their destination.[26] At any given microsecond, without our jurisdiction, complete content may be sent from any computer connected by wire or wirelessly to the internet. At the same time, there can be small parts or packets of information passing through other computers destined to be reassembled in a requesting computer somewhere in this planet.

Packet switching requires that "open architecture networking" be the underlying technical foundation of the internet. Separately designed and developed networks are connected to each other. Each of these participating networks may have its own unique interfaces that it offers to its users. Every user in each of these separate but participating networks, however, remains connected to each other.[27]

This open-architecture network environment in turn requires a communications protocol that allows a uniform way of joining different networks.[28] Developed in 1973, this protocol eventually came to be known as the Transmission Control Protocol/Internet Protocol (TCP/IP).[29] "The Internet Protocol (IP) sets how data is broken down into chunks for transmission, as well as how the source and destination addresses are specified."[30]

---

24 'Brief History of the Internet' <http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet> (visited October 16, 2013).

25 Id.

26 Id. at 3.

27 Id.

28 'Comprehensive Study on Cybercrime' prepared by United Nations Office on Drugs and Crime for the Intergovernmental Expert Group on Cybercrime, February 2013, 282 <http://www.unodc.org/documents/commissions/CCPCJ_session22/13-80699_Ebook_2013_study_CRP5.pdf> (visited October 16, 2013).

29 'Brief History of the Internet', p. 4 <http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet> (visited October 16, 2013).

30 'Comprehensive Study on Cybercrime' prepared by United Nations Office on Drugs and Crime for the Intergovernmental Expert Group on Cybercrime, February 2013, 278 <http://www.unodc.org/documents/commissions/CCPCJ_session22/13-80699_Ebook_2013_study_CRP5.pdf> (visited October 16, 2013).

To identify connected devices, each device on the internet is assigned a unique address in the form of a "dotted quad," otherwise known as the IP address (100.962.28.27). These IP addresses are used to route data packets to their respective destinations.[31] There are a finite number of IP addresses available. With the growth of the internet beyond all expectations, the expansion of available IP addresses became imperative. There is now an ongoing effort to shift from IP version 4 (IPv4) to IP version 6 (Ipv6). From a communication protocol that allows for roughly 4.3 billion unique addresses, the new version will allow for 2^{128} unique addresses. Written in ordinary decimal form, this number is 39 digits long.[32]

TCP/IP addressed the need for connected devices to have a unique identification and designation. But, to make these addresses accessible and readable to its human users, "domain names" were introduced. Internet addresses are now also written as "domain names" under what is known as the Domain Name System (DNS)."[33] The internet address of this court is thus: sc.judiciary.gov.ph.

The allocation of unique identifiers for the internet, such as IP addresses and domain names, is administered not by a public[34] entity but by a nonprofit public benefit corporation based in the United States of America: the Internet Corporation for Assigned Names and Numbers (ICANN). ICANN allocates IP addresses and "administers the DNS through delegated authority to domain name registries."[35] These registries consist of databases of all domain names registered in generic top level domains (gTLD), such as .com, .org, .gov, and country code top level domains (ccTLD), such as .ph and .sg.[36]

II (B)
Openness and the World Wide Web

In 1989, Tim Berners-Lee of the European Organization for Nuclear Research (CERN) developed the World Wide Web (WWW). The World Wide Web "allowed documents, or *pages*, to link to other documents stored across a network."[37] Together with electronic mail (email), the World Wide Web has been the "driving force" of the internet.[38] The World Wide Web provided the impetus for others to develop software called "browsers," which allowed the user to navigate access to content as well as to exchange

---

31 Id.
32 Id. at 279.
33 Id.
34 Id. Government or state-run.
35 Id.
36 Id.
37 Id. at 282.
38 Id. at 280.

information through "web pages." Information can be carried through different media. Thus, text can be combined with pictures, audio, and video. These media can likewise be "hyperlinked" or marked so that it could provide easy access to other pages containing related information.

This new form of interface hastened the internet's environment of openness.[39] It is this openness and the innovation it continuously engendered that enabled the internet to eclipse networks built around appliances connected or tethered to specific proprietary infrastructure such as America Online and CompuServe.[40] It is this openness that enabled the internet to become the present-day "widespread information infrastructure"[41] or universal "network of networks."[42]

Today, the use of the internet and its prevalence are not only inevitable facts, these are also escalating phenomena. By the end of 2011, it was estimated that some 2.3 billion individuals, or more than one-third of the world's population, had access to the internet.[43] The use of the internet is inevitably bound to increase as wireless or mobile broadband services become more affordable and available. By 2015, the estimates are that the extent of global internet users will rise to nearly two-thirds of the world's population.[44]

II (C)
The Inevitability of Use and Increasing Dependency on the Internet

Contemporary developments also challenge the nature of internet use. No longer are we confined to a desktop computer to access information on the internet. There are more mobile and wireless broadband subscriptions. As of 2011, the number of networked devices[45] has exceeded the global

---

39 Some call this "generativity", i.e. "a system's capacity to produce unanticipated change through unfiltered contributions from broad and varied audiences." J. L. ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 70 (2008).

40 J. L. ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT (2008).

41 'Brief History of the Internet' <http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet> (visited October 16, 2013).

42 D. MACLEAN, 'Herding Schrödinger's Cats: Some Conceptual Tools For Thinking About Internet Governance', Background Paper for the ITU Workshop on Internet Governance, Geneva, February 26-27, 2004, 8 <http://www.itu.int/osg/spu/forum/intgov04/contributions/itu-workshop-feb-04-internet-governance-background.pdf> (visited October 16, 2013).

43 ''Measuring the Information Society 2012', International Telecommunication Union, 2012, Geneva, Switzerland, 6-7 <http://www.itu.int/en/ITU-D/Statistics/Documents/publications/mis2012/MIS2012_without_Annex_4.pdf> (visited October 16, 2013). The International Telecommunication Union (ITU) is the United Nations' specialized agency for information and communication technologies (ICTs).

44 Id. at 10.

45 "In the 'Internet of things,' objects such as household appliances, vehicles, power and water meters, medicines or even personal belongings such as clothes, will be capable of being assigned an IP address, and of identifying themselves and communicating using technology such as RFID and NFC." 'Comprehensive Study on Cybercrime' prepared by United Nations Office on Drugs and Crime for the Intergovernmental Expert Group on Cybercrime, February 2013, 2

population. By 2020, this disparity of connected *devices* as opposed to connected *individuals* is expected to escalate to a ratio of six to one.[46] Today, individuals may have all or a combination of a desktop, a mobile laptop, a tablet, several smart mobile phones, a smart television, and a version of an Xbox or a PlayStation or gaming devices that may connect to the internet. It is now common to find homes with Wi-Fi routers having broadband connection to the internet.

This reality has increased the density of communication among individuals. A July 2011 study reported that every day, 294 billion electronic mails (emails) and 5 billion phone messages are exchanged worldwide.[47] Another survey yielded the following:[48]

	Global	Philippines
Percentage of respondents who said they access the Internet many or several times a day	89%	78%
Percentage of respondents who used e-mail at least once a day	87%	79%
Percentage of respondents who used social media at least once a day	60%	72%
Percentage of respondents who used instant messaging at least once a day	43%	51%

The accelerating rate of increase of internet users is relevant to developing countries like the Philippines. Reports reveal that, as of 2011, "[i]nternet user growth was higher in developing (16 per cent) than developed (5 per cent) countries."[49] Thus, "[i]nternet user penetration rates in developing countries have tripled over the past five years, and the developing countries' share of the world's total number of Internet users has

---

<http://www.unodc.org/documents/commissions/CCPCJ_session22/13-80699_Ebook_2013_study_CRP5.pdf> (visited October 16, 2013).

46 Id.

47 'Issues Monitor: Cyber Crime--A Growing Challenge for Governments', KPMG International 2014, 2 <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/Documents/cyber-crime.pdf> (visited October 16, 2013).

48 The Global Internet User Survey is "[a] worldwide survey of more than 10,000 Internet users in 20 countries conducted by the Internet Society revealed attitudes towards the Internet and user behavior online. The Global Internet User Survey is one of the broadest surveys of Internet user attitudes on key issues facing the Internet. This year's survey covered areas such as how users manage personal information online, attitudes toward the Internet and human rights, censorship, and the potential for the Internet to address issues such as economic development and education." The results are available at <https://www.Internetsociety.org/news/global-Internet-user-survey-reveals-attitudes-usage-and-behavior> (visited October 16, 2013). *See also* 'Global Internet User Survey 2012' <https://www.Internetsociety.org/sites/default/files/GIUS2012-GlobalData-Table-20121120_0.pdf> (visited October 16, 2013).

49 'Measuring the Information Society 2012', International Telecommunication Union, 2012, Geneva, Switzerland, 7 <http://www.itu.int/en/ITU-D/Statistics/Documents/publications/mis2012/MIS2012_without_Annex_4.pdf> (visited October 16, 2013).

increased, from 44 per cent in 2006 to 62 per cent in 2011."[50] Consistent with this accelerating trend, the internet-user penetration rate for developing countries stood at 24% at the end of 2011; the estimates are that this will double by 2015.[51] There are more citizens in developing countries using the internet. The share, in internet traffic, by developing countries, has also increased as compared with developed countries.

The attitude of users shows a marked trend towards dependence. A survey showed that the internet is viewed by its users as playing a positive role; not only for individual lives but also for society at large. Moreover, the internet has come to be perceived as somewhat of an imperative. Of its many findings, the following data from the 2012 Global Internet Survey are particularly notable:[52]

	Percentage of respondents who agreed or agreed strongly (GLOBAL)	Percentage of respondents who agreed or agreed strongly (PHILIPPINES)
The Internet does more to help society than it does to hurt it	83%	91%
Their lives have improved due to using the Internet	85%	93%
The Internet is essential to their knowledge and education	89%	96%
The Internet can play a significant role in:		
1. Increasing global trade and economic relationships among countries	81%	95%
2. Achieving universal primary school education	76%	91%
3. Promoting gender equality	70%	89%
4. Protecting the environment	74%	92%
5. Helping to combat serious diseases	72%	92%
6. Eliminating extreme poverty and hunger	61%	75%
7. Improving maternal health	65%	84%
8. Reducing child mortality	63%	80%
9. Improving emergency response and assistance during natural disasters	77%	92%

50 Id.
51 Id. at 10.
52 'Global Internet User Survey 2012' <https://www.Internetsociety.org/sites/default/files/GIUS2012-GlobalData-Table-20121120_0.pdf> (visited October 16, 2013).

10. Preventing the trafficking of women and children	69%	84%
11. Improving the quality of education	80%	95%
12. Improving social problems by increasing communication between and among various groups in society	76%	93%
13. Reducing rural and remote community isolation	80%	96%
14. Keeping local experts in or bringing experts back to their country because they can use technology to create business	75%	94%

Of more pronounced legal significance are the following findings:[53]

	Percentage of respondents who agreed or agreed strongly (GLOBAL)	Percentage of respondents who agreed or agreed strongly (PHILIPPINES)
The Internet should be considered a basic human right	83%	88%
Their respective governments have an obligation to ensure that they have the opportunity to access the Internet	80%	85%
Freedom of expression should be guaranteed on the Internet	86%	86%
Services such as social media enhance their right to peaceful assembly and association	80%	91%

The relationship of internet use and growth in the economy has likewise been established. The significance of the internet is as real as it is perceived, thus:

> Research by the World Bank suggests that a 10% increase in broadband penetration could boost GDP by 1.38% in low- and middle-income countries."[54] More specifically, it cited that, in the Philippines, "[m]obile broadband adoption was found to contribute an annual 0.32% of GDP, [representing] 6.9% of all GDP growth for the economy during the past decade.[55]

---

53 Id.

54 'The State of Broadband 2012: Achieving Digital Inclusion for All', Report prepared by the Broadband Commission for Digital Development, September 2012, 23 <http://www.broadbandcommission.org/documents/bb-annualreport2012.pdf> (visited October 16, 2013).

55 As cited by the Broadband Commission for Digital Development in 'The State of Broadband 2012: Achieving Digital Inclusion for All'. The Broadband Commission was set up by the ITU and the United Nations Educational, Scientific and Cultural Organization (UNESCO) pursuant to the

II (D)
The Dangers in the Internet

While the internet has engendered innovation and growth, it has also engendered new types of disruption. A noted expert employs an "evolutionary metaphor" as he asserts:

> [Generative technologies] encourage mutations, branchings away from the status quo—some that are curious dead ends, others that spread like wildfire. They invite disruption—along with the good things and bad things that can come with such disruption.[56]

Addressing the implications of disruption, he adds:

> Disruption benefits some while others lose, and the power of the generative Internet, available to anyone with a modicum of knowledge and a broadband connection, can be turned to network-destroying ends. x x x [T]he Internet's very generativity — combined with that of the PCs attached — sows the seeds for a "digital Pearl Harbor."[57]

The internet is an infrastructure that allows for a "network of networks."[58] It is also a means for several purposes. As with all other "means enhancing capabilities of human interaction,"[59] it can be used to facilitate benefits as well as nefarious ends. The internet can be a means for criminal activity.

Parallel to the unprecedented escalation of the use of the internet and its various technologies is also an escalation in what has been termed as cybercrimes. As noted in the 2010 Salvador Declaration on Comprehensive Strategies for Global Challenges, annexed to United Nations General Assembly resolution 65/230:

Millennium Development Goals (MDGs), 78 <http://www.broadbandcommission.org/documents/bb-annualreport2012.pdf> (visited October 16, 2013).

56 J. L. ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 96-97 (2008).

57 "The term is said to have been coined in 1991 by D. James Bidzos, the then-president of RSA Data Security, when he said that the government's digital signature standard provided 'no assurance that foreign governments cannot break the system, running the risk of a digital Pearl Harbor.' x x x The term has since become prominent in public debate, being employed most notably by former member of the National Security Council Richard A. Clarke." J. L. ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 97 and 275 (2008).

58 D. MACLEAN, 'Herding Schrödinger's Cats: Some Conceptual Tools For Thinking About Internet Governance', Background Paper for the ITU Workshop on Internet Governance, Geneva, February 26-27, 2004, 8 <http://www.itu.int/osg/spu/forum/intgov04/contributions/itu-workshop-feb-04-internet-governance-background.pdf> (visited October 16, 2013).

59 'Comprehensive Study on Cybercrime' prepared by United Nations Office on Drugs and Crime for the Intergovernmental Expert Group on Cybercrime, February 2013, 5 <http://www.unodc.org/documents/commissions/CCPCJ_session22/13-80699_Ebook_2013_study_CRP5.pdf> (visited October 16, 2013).

> [The] development of information and communications technologies and the increasing use of the Internet create new opportunities for offenders and facilitate the growth of crime.[60]

Also as observed elsewhere:

> Over the past few years, the global cyber crime landscape has changed dramatically, with criminals employing more sophisticated technology and greater knowledge of cyber security. Until recently, malware, spam emails, hacking into corporate sites and other attacks of this nature were mostly the work of computer 'geniuses' showcasing their talent. These attacks, which were rarely malicious, have gradually evolved into cyber crime syndicates siphoning off money through illegal cyber channels. By 2010, however, politically motivated cyber crime had penetrated global cyberspace. In fact, weaponry and command and control systems have also transitioned into the cyberspace to deploy and execute espionage and sabotage, as seen in the example of digital espionage attacks on computer networks at Lockheed Martin and NASA.[61]

Computer-related criminal activity is not peculiar to the 21st century.[62] One of the first reported "major" instances of cybercrime was in 2000 when the mass-mailed "I Love You" Worm (which originated from Pandacan, Manila)[63] "affected nearly 45 million computer users worldwide."[64] This entailed as much as US$ 15 billion to repair the damage. Cyber attacks have morphed into myriad forms. The following is just a summary of some of the known attacks:[65]

Type of Attack	Details
Viruses and worms	Viruses and worms are computer programs that affect the storage devices of a computer or network, which then replicate information without the knowledge of the user.
Spam emails	Spam emails are unsolicited emails or junk newsgroup postings. Spam emails are sent without the consent of the receiver — potentially

---

60 Id. at 6-7.

61 'Issues Monitor: Cyber Crime--A Growing Challenge for Governments', KPMG International 2014, 3 <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/Documents/cyber-crime.pdf> (visited October 16, 2013), *citing National insecurity*, Information Age, January 26, 2011 and *Stuxnet was about what happened next*, FT.com, February 16, 2011.

62 "In 1994, the United Nations Manual on the Prevention and Control of Computer Related Crime noted that fraud by computer manipulation; computer forgery; damage to or modifications of computer data or programs; unauthorized access to computer systems and service; and unauthorized reproduction of legally protected computer programs were common types of computer crime." 'Comprehensive Study on Cybercrime' prepared by United Nations Office on Drugs and Crime for the Intergovernmental Expert Group on Cybercrime, February 2013, 5 <http://www.unodc.org/documents/commissions/CCPCJ_session22/13 80699_Ebook_2013_study_CRP5.pdf> (visited October 16, 2013).

63 '*Love bug* hacker is Pandacan man, 23' <http://www.philstar.com/networks/83717/love-bug-hacker-pandacan-man-23> (visited October 16, 2013).

64 'Issues Monitor: Cyber Crime--A Growing Challenge for Governments', KPMG International 2014, 2 <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/Documents/cyber-crime.pdf> (visited October 16, 2013).

65 Id. at 2, *citing Cyber attacks: from Facebook to nuclear weapons*, The Telegraph, February 4, 2011; *A Good Decade for Cybercrime*, McAfee, 2010; Spamhaus on March 10, 2011; PCMeg.com on March 10, 2011; and *The cost of cybercrime*, Detica, February 2011.

	creating a wide range of problems if they are not filtered appropriately.
Trojan	A Trojan is a program that appears legitimate. However, once run, it moves on to locate password information or makes the system more vulnerable to future entry. Or a Trojan may simply destroy programs or data on the hard disk.
Denial-of-service (DoS)	DoS occurs when criminals attempt to bring down or cripple individual websites, computers or networks, often by flooding them with messages.
Malware	Malware is a software that takes control of any individual's computer to spread a bug to other people's devices or social networking profiles. Such software can also be used to create a 'botnet' — a network of computers controlled remotely by hackers, known as 'herders,' — to spread spam or viruses.
Scareware	Using fear tactics, some cyber criminals compel users to download certain software. While such software is usually presented as antivirus software, after some time, these programs start attacking the user's system. The user then has to pay the criminals to remove such viruses.
Phishing	Phishing attacks are designed to steal a person's login and password. For instance, the phisher can access the victims' bank accounts or assume control of their social network.
Fiscal fraud	By targeting official online payment channels, cyber attackers can hamper processes such as tax collection or make fraudulent claims for benefits.
State cyber attacks	Experts believe that some government agencies may also be using cyber attacks as a new means of warfare. One such attack occurred in 2010, when a computer virus called Stuxnet was used to carry out an invisible attack on Iran's secret nuclear program. The virus was aimed at disabling Iran's uranium enrichment centrifuges.
Carders	Stealing bank or credit card details is another major cyber crime. Duplicate cards are then used to withdraw cash at ATMs or in shops.

The shift from wired to mobile devices has also brought with it the escalation of attacks on mobile devices. As reported by IT security group McAfee, "[t]he number of pieces of new mobile malware in 2010 increased by 46 percent compared with 2009."[66] Hackers have also increased targeting mobile devices using Apple's iOS and Google's Android systems as these increased their market share. As McAfee put it, "cybercriminals are keeping tabs on what's popular."[67]

---

66 'McAfee Q4 Threat Report Identifies New Attacks on Mobile Devices; Malware Growth at All-Time High' <http://www.mcafee.com/mx/about/news/2011/q1/20110208-01.aspx> (visited October 16, 2013).

67 Id.

Cybercrimes come at tremendous costs. A report notes that "[i]n the US over the course of one year in 2009, the amount of information lost to cyber crime nearly doubled, from US$265 million in 2008 to US$560 million x x x."[68] In the United Kingdom, the annual cost arising from cybercrime was estimated at GBP27 billion (US$ 43 billion). Of this amount, intellectual property theft accounts for GBP9.2 billion (US$ 14 billion), while espionage activities account for more than GBP7 billion (US$ 11 billion).[69] In Germany, a joint report by the information technology trade group Bitkom and the German Federal Criminal Police Office estimates phishing to have increased 70 percent year on year in 2010, resulting in a loss of as much as EUR 17 million (US$ 22 million).[70]

The costs in the Philippines are certainly present, but the revelation of its magnitude awaits research that may come as a result of the implementation of the Cybercrime Prevention Act of 2012.

Another report summarizes the costs to government as follows:[71]

1. Costs in anticipation of cyber crime
- Security measures, such as antiviral software installation, cost of insurance and IT security standards maintenance.

2. Costs as a consequence of cyber crime
- Monetary losses to organizations, such as gaps in business continuity and losses due to IP theft.

3. Costs in response to cyber crime
- Paying regulatory fines and compensations to victims of identity theft, and cost associated with investigation of the crime.

4. Indirect costs associated with cyber crime
- Costs resulting from reputational damage to organizations and loss of confidence in cyber transactions.

II (E)
The Challenges for "Internet Governance"

All these have triggered spirited discussion on what has been termed as "internet governance" or "internet/cyberspace regulation."

Particularly challenging are the "jurisdictional challenges that 'virtual' computer networks posed to territorially constituted nation states x x

---

68 'Issues Monitor: Cyber Crime--A Growing Challenge for Governments', KPMG International 2014, 6 <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/Documents/cyber-crime.pdf> (visited October 16, 2013)

69 Id., *citing The cost of cybercrime*, Detica, February 2011.

70 Id., *citing Cybercrime in Germany on the rise*, DW World, September 7, 2010.

71 Id., *citing The cost of cybercrime*, Cabinet Office (UK), February 2011.

x."[72]John Perry Barlow, for example, proclaimed in his Declaration of the Independence of Cyberspace:

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.[73]

Many have considered the internet as "ungovernable,"[74] having the ability to "undermine traditional forms of governance,"[75] and "radically subvert[ing] a system of rule-making based on borders between physical spaces, at least with respect to the claim that cyberspace should naturally be governed by territorially defined rules."[76]

Adding to the complexity of internet regulation is the private character of the internet as manifested in: (1) the ownership and operation of internet infrastructure; and (2) the organizational framework of the internet. This private character, in turn, gives rise to pressing questions on legitimacy and accountability.

The United Nations Office on Drugs and Crime (UNODC) describes the private ownership and operation of internet infrastructure as follows:

> A significant proportion of internet infrastructure is owned and operated by the private sector. Internet access requires a "passive" infrastructure layer of trenches, ducts, optical fibre, mobile base stations, and satellite hardware. It also requires an 'active' infrastructure layer of electronic equipment, and a 'service' layer of content services and applications.
>
> x x x x
>
> As an infrastructure, the internet's growth can be compared to the development of roads, railways, and electricity, which are dependent on private sector investment, construction and maintenance, but regulated and incentivized by national governments. At the same time, the internet is often regarded as more private-sector led.[77]

---

72 M. Ziewitz and I. Brown, *A Prehistory of Internet Governance*, in RESEARCH HANDBOOK ON GOVERNANCE OF THE INTERNET 27 (2013). Available at <http://ssrn.com/abstract=1844720 (visited October 16, 2013).

73 Id.

74 Id.

75 Id.

76 Johnson, D. R. and D. Post (1995), 'Law and borders: The rise of law in cyberspace', *Stan. L. Rev.*,**48**, 1367, *cited* in M. Ziewitz and I. Brown, *A Prehistory of Internet Governance*, in RESEARCH HANDBOOK ON GOVERNANCE OF THE INTERNET 27 (2013). Available at <http://ssrn.com/abstract=1844720 (visited October 16, 2013).

77 'Comprehensive Study on Cybercrime' prepared by United Nations Office on Drugs and Crime for the Intergovernmental Expert Group on Cybercrime, February 2013, 3-4 <http://www.unodc.org/documents/commissions/CCPCJ_session22/13-80699_Ebook_2013_study_CRP5.pdf> (visited October 16, 2013).

As to the organizational framework of the internet, a professor writes:

> As far as the organizational framework of the Internet is concerned, the present "system" is mainly designed by private bodies and organizations, i.e. a self-regulatory system applies in reality. Thereby, the key player is the Internet Corporation for Assigned Names and Numbers (ICANN), being in place since November 1998.[78]

There are private bodies and organizations that exist for the purpose of regulation. There are commercial entities – vendors and service providers – that emerge as *de facto* regulators. A noted expert observes that an increasing response has been the creation of devices and services which rely on a continuing relationship with vendors and service providers who are then accountable for ensuring security and privacy.[79] There is now a marked tendency to resort to "sterile appliances tethered to a network of control."[80] This may stunt the very "capacity to produce unanticipated change through unfiltered contributions from broad and varied audiences."[81] It is these unanticipated changes which facilitated the internet's rise to ubiquity.

The fear is that too much reliance on commercial vendors and their standards and technologies transfers control over the all important internet from innovation from varied sources. In a way, it stunts democratic creativity of an important media.

On the other end, states have consciously started more legal intervention. As observed by the United Nations Office on Drugs and Crime:

> Legal measures play a key role in the prevention and combating of cybercrime. Law is [a] dynamic tool that enables the state to respond to new societal and security challenges, such as the appropriate balance between privacy and crime control, or the extent of liability of corporations that provide services. In addition to national laws, at the international level, the *law of nations* – international law – covers relations between states in all their myriad forms. Provisions in both national laws and international law are relevant to cybercrime.[82]

At the normative level, legal measures address, if not negate, apprehensions of legitimacy, consent, and accountability. Functionally, legal measures are vital in:

---

78 R. H. Weber, 'Accountability in Internet Governance', University of Zurich Professor, 154 <http://ijclp.net/files/ijclp_web-doc_8-13-2009.pdf> (visited October 16, 2013).

79 J. L. ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT (2008).

80 Id. at 3.

81 Id. at 70.

82 'Comprehensive Study on Cybercrime' prepared by United Nations Office on Drugs and Crime for the Intergovernmental Expert Group on Cybercrime, February 2013, 51 <http://www.unodc.org/documents/commissions/CCPCJ_session22/13-80699_Ebook_2013_study_CRP5.pdf> (visited October 16, 2013).

1. Setting clear standards of behavior for the use of computer devices;

2. Deterring perpetrators and protecting citizens;

3. Enabling law enforcement investigations while protecting individual privacy;

4. Providing fair and effective criminal justice procedures;

5. Requiring minimum protection standards in areas such as data handling and retention; and

6. Enabling cooperation between countries in criminal matters involving cybercrime and electronic evidence.[83]

In performing these functions, legal measures must adapt to emerging exigencies. This includes the emergence of a virtual, rather than physical, field of governance. It also includes specific approaches for specific acts and specific technologies. Effective internet governance through law cannot be approached too generally or in the abstract:

> The technological developments associated with cybercrime mean that – while traditional laws can be applied to some extent – legislation must also grapple with new concepts and objects, not traditionally addressed by law. In many states, laws on technical developments date back to the 19th century. These laws were, and to a great extent, still are, focused on *physical* objects – around which the daily life of industrial society revolved. For this reason, many traditional general laws do not take into account the particularities of information and information technology that are associated with cybercrime and crimes generating electronic evidence. These acts are largely characterized by new *intangible* objects, such as data or information.
>
> x x x x
>
> This raises the question of whether cybercrime should be covered by general, existing criminal law provisions, or whether new, computer-specific offences are required. **The question cannot be answered generally, but rather depends upon the nature of individual acts, and the scope and interpretation of national laws**.[84] (Emphasis provided)

II (F)
The Lack of a Universal Policy Consensus: Political Nature of the Content of Cybercrime Legislation

The description of the acts in cyberspace which relates to "new concepts and objects, not traditionally addressed by law"[85] challenges the very concept of crimes. This is of preeminent significance as there can be no

---

83 Id. at 52.
84 Id. at 51-52.
85 Id. at 51.

crime where there is no law punishing an act (*nullum crimen, nulla poena sine lege*).[86]

The Comprehensive Study on Cybercrime prepared by UNODC for the Intergovernmental Expert Group on Cybercrime, February 2013, reports that a survey of almost 200 pieces of national legislation fails to establish a clear definition of cybercrime. If at all, domestic laws tend to evade having to use the term "cybercrime" altogether:

> Out of almost 200 items of national legislation cited by countries in response to the Study questionnaire, fewer than five per cent used the word "cybercrime" in the title or scope of legislative provisions. Rather, legislation more commonly referred to "*computer crimes," "electronic communications," "information technologies,"* or "*high-tech crime."* In practice, many of these pieces of legislation created criminal offences that are included in the concept of cybercrime, such as unauthorized access to a computer system, or interference with a computer system or data. Where national legislation did specifically use cybercrime in the title of an act or section (such as "Cybercrime Act"), the definitional section of the legislation rarely included a definition for the word "cybercrime." When the term "cybercrime" *was* included as a legal definition, a common approach was to define it simply as *"the crimes referred to in this law."*[87]

International or regional legal instruments are also important for states because they articulate a consensus, established or emerging, among several jurisdictions. With respect to international or legal instruments however, the United Nations Office on Drugs and Crime notes the same lack of a conceptual consensus as to what makes cybercrimes:

> In a similar manner, very few international or regional legal instruments define cybercrime. Neither the Council of Europe Cybercrime Convention, the League of Arab States Convention, nor the Draft African Union Convention, for example, contains a definition of cybercrime for the purposes of the instrument. The Commonwealth of Independent States Agreement, without using the term "cybercrime," defines an "offence relating to computer information" as a "*criminal act of which the target is computer information."* Similarly, the Shanghai Cooperation Organization Agreement defines "information offences" as *"the use of information resources and (or) the impact on them in the informational sphere for illegal purposes."*[88]

More than defining the term "cybercrime," international legal instruments list acts which may be considered as falling under the broad umbrella of cybercrimes. As surveyed in 'The Comprehensive Study on Cybercrime prepared by UNODC for the Intergovernmental Expert Group on Cybercrime, February 2013,' there are sixteen (16) international or regional instruments which exist with the objective of countering

---

86 Id. at 53.
87 Id. at 11-12.
88 Id. at 12.

cybercrime. The UNODC notes that nine (9) of these instruments are binding,[89] while seven (7) are non-binding.[90] In all, these instruments include a total of eighty-two (82) countries which have signed and/or ratified them. Of these, it is the Council of Europe Cybercrime Convention which has the widest coverage: Forty-eight (48) countries,[91] including five (5) non-member states of the Council of Europe, have ratified and/or acceded to it. Other instruments have significantly smaller scopes. For example, the League of Arab States Convention only included eighteen (18) countries or territories; the Commonwealth of Independent States Agreement, with ten (10) countries; and the Shanghai Cooperation Organization Agreement, with six (6) countries.[92]

Surveying these sixteen (16) instruments, the United Nations Office on Drugs and Crime summarizes acts of cybercrimes *vis-a-vis* the instruments (and specific provisions of such instruments) covering each act as follows:

	Criminalized Act	African Union[93]	COMESA[94]	The Commonwealth[95]	Commonwealth of Independent States[96]	Council of Europe (Budapest Convention)[97]	Council of Europe (Lanzarote Convention)[98]	ECOWAS[99]	European Union (Framework Decision 2005/222/JHA)[100]	European Union (Directive Proposal 2010/0273)[101]	European Union (Directive Framewrok Decision 2001/413/JHA)[102]	European Union (Directive 2011/92/EU and 2002/58/EC)[103]	ITU / CARICOM / CTU (Model Legislative Texts[104]	League of Arab States (Convention)[105]	League of Arab States (Model Law)[106]	Shanghai Cooperation Organization[107]	United Nations (CRC OP)[108]

89 Id. at 64.

90 Id.

91 Id. at 67.

92 'Comprehensive Study on Cybercrime' prepared by United Nations Office on Drugs and Crime for the Intergovernmental Expert Group on Cybercrime, February 2013, 64 <http://www.unodc.org/documents/commissions/CCPCJ_session22/13-80699_Ebook_2013_study_CRP5.pdf> (visited October 16, 2013).

93 African Union, 2012. Draft Convention on the Establishment of a Legal Framework Conducive to Cybersecurity in Africa.

94 Common Market for Eastern and Southern Africa (COMESA), 2011. Cybersecurity Draft Model Bill.

95 The Commonwealth, 2002. (i) Computer and Computer Related Crimes Bill and (ii) Model Law on Electronic Evidence.

96 Commonwealth of Independent States, 2001. Agreement on Cooperation in Combating Offences related to Computer Information.

97 Council of Europe, 2001. Convention on Cybercrime and Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

98 Council of Europe, 2007. Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.

99 Economic Community of West African States (ECOWAS), 2009. Draft Directive on Fighting Cybercrime within ECOWAS.

100 European Union, 2005. Council Framework Decision 2002/222/JHA on attacks against information systems.

101 European Union, 2010. Proposal COM (2010) 517 final for a Directive of the European Parliament and of the Council on attacks against information systems and repealing Council Framework Decision 2005/222/JHA.

102 European Union, 2001. Council Framework Decision 2001/413/JHA combating fraud and counterfeiting of non-cash means of payment.

103 European Union, 2011. Directive 2011/92/EU of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA and European Union, 2002. Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector.

1	Illegal access to a computer system	Art. III (15) III (16)	Art. 18 and 19	Art. 5 and 7		Art. 2		Art. 2 and 3	Art. 2(1)	Art. 3			Art. 4 and 5	Art. 6	Art. 3, 5, 15 and 22		
2	Illegal access, interception or acquisition of computer data	Art. III (23)	Art. 19 and 21	Art. 5 and 8	Art. 3 (1) (a)	Art. 2 and 3		Art. 6		Art. 6			Art. 6 and 8	Art. 6, 7 and 18	Art. 3 and 8		
3	Illegal intereference with computer data	Art. III (19), (20) and (24)	Art. 20 and 22(a)	Art. 6	Art. 3 (1) (c)	Art. 4		Art. 5 and 7	Art. 4	Art. 5	Art. 3		Art. 7	Art. 8	Art. 6		
4	Illegal intereference with a computer system	Art. III (18) and (19)	Art. 22 (a)	Art. 7	Art. 3 (1) (c)	Art. 5		Art. 4	Art. 3	Art. 4	Art. 3		Art. 9	Art. 6	Art. 7		
5	Computer misuse tools	Art. III (22)	Art. 22 (b) and (c)	Art. 9	Art. 3 (1) (b)	Art. 6		Art. 12	Art. 5	Art. 7	Art. 4		Art. 10	Art. 9			
6	Breach of privacy or data protection measures	Art. III (27) and (54)			Art. 3			Art. 11				Art. 15 (a) (1)					
7	Computer-related forgery	Art. III (24) and (25)	Art. 23			Art. 7		Art. 8			Art. 2 and 4		Art. 11	Art. 10 and 18	Art. 4		
8	Computer-related fraud	Art. III (25), (26) and (41)	Art. 24 (a) and (b)			Art. 8		Art. 9, 10 and 23			Art. 2 and 4		Art. 12	Art. 11	Art. 10, 11 and 12		
9	Electronic payment tools offenses										Art. 2			Art. 18	Art. 11		
10	Identity-related crime												Art. 14				
11	Computer-related copyright and trademark offenses				Art. 3 (1) (d)	Art. 10								Art. 17	Art. 14		

---

104 International Telecommunication Union (ITU)/Caribbean Community (CARICOM)/Caribbean Telecommunications Union (CTU), 2010. (i) Model Legislative Texts on Cybercrime/e-Crimes and (ii) Electronic Evidence.

105 League of Arab States, 2010. Arab Convention on Combating Information Technology Offences.

106 League of Arab States, 2004. Model Arab Law on Combating Offences related to Information Technology Systems.

107 Shanghai Cooperation Organization, 2010. Agreement on Cooperation in the Field of International Information Security.

108 United Nations, 2000. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography.

12	Spam		Art. 19 (g)									Art. 13 (3)	Art. 15				
13	Computer-related harassment, extortion or acts causing personal harm	Art. III (40) and (41)	Art. 25										Art. 18		Art. 9		
14	Computer-related acts involving racism or xenophobia	Art. III (34), (35) and (36)				Art. 3, 4, 5 (OP)		Art. 18, 19 and 20									
15	Computer-related denial or justification of genocide or crimes against humanity	Art. III (37)				Art. 6 (OP)		Art. 21									
16	Computer-related production, distribution, or possession of child pornography	Art. III (29), (30), (31) and (32)		Art. 10		Art. 9	Art. 20	Art, 14, 15, 16 and 17				Art. 5	Art. 13	Art. 12			Art. 3
17	Computer-related solicitation or ‘grooming’ of children						Art. 23					Art. 6					
18	Computer-related acts in support of terrorism	Art. III (40)	Art. 18, 19, 20 and 22 (a)											Art. 15	Art. 21		
19	Computer-related offenses involving money laundering													Art. 15	Art. 19		
20	Computer-related offenses involving illicit trafficking													Art. 16	Art. 17 and 18		
21	Computer-related offenses against public order, morality or security							Art. 14, 15, 16 and 17						Art. 12, 13, 14 and 15	Art. 13, 16 and 20		
22	Law enforcement investigation-related offenses	Art. III (54)		Art. 13 and 21		Art. 16 (3), 20 (3) and 21 (3)							Art. 16 and 17	Art. 23 (3), 28 (3) and 29 (3)			
23	Aggravating circumstances for conventional crime committed by means of a computer system	Art. III (40)						Art. 22						Art. 21			
24	Attempt and aiding or		Art. 26			Art. 11 and 7	Art. 24			Art. 8							

	abetting					(OP)											
25	Corporate liability		Art. 27			Art. 12	Art. 26										

Informed by the various approaches and challenges to defining cybercrime, 'The Comprehensive Study on Cybercrime prepared by UNODC for the Intergovernmental Expert Group on Cybercrime, February 2013' suggests that "cybercrime" is "best considered as a collection of acts or conduct."[109] Thus, in a manner consistent with the approach adopted by international instruments such as the United Nations Convention Against Corruption,[110] it "identifies a list, or 'basket', of acts which could constitute cybercrime."[111] The list, however, is tentative and not exhaustive, provided "with a view to establishing a basis for analysis,"[112] rather than to "represent legal definitions."[113] These acts are "organized in three broad categories",[114] as follows:

1. Acts against the confidentiality, integrity and availability of computer data or systems
   a. Illegal access to a computer system
   b. Illegal access, interception or acquisition of computer data
   c. Illegal interference with a computer system or computer data
   d. Production, distribution or possession of computer misuse tools
   e. Breach of privacy or data protection measures

2. Computer-related acts for personal or financial gain or harm
   a. Computer-related fraud or forgery
   b. Computer-related identity offences
   c. Computer-related copyright or trademark offences
   d. Sending or controlling sending of Spam
   e. Computer-related acts causing personal harm
   f. Computer-related solicitation or 'grooming' of children

3. Computer content-related acts
   a. Computer-related acts involving hate speech
   b. Computer-related production, distribution or possession of child pornography

---

109 'Comprehensive Study on Cybercrime' prepared by United Nations Office on Drugs and Crime for the Intergovernmental Expert Group on Cybercrime, February 2013, 12 <http://www.unodc.org/documents/commissions/CCPCJ_session22/13-80699_Ebook_2013_study_CRP5.pdf> (visited October 16, 2013).

110 The United Nations Convention Against Corruption "does not define 'corruption', but rather obliges States Parties to criminalize a specific set of conduct which can be more effectively described." 'Comprehensive Study on Cybercrime' prepared by United Nations Office on Drugs and Crime for the Intergovernmental Expert Group on Cybercrime, February 2013, 12 <http://www.unodc.org/documents/commissions/CCPCJ_session22/13-80699_Ebook_2013_study_CRP5.pdf> (visited October 16, 2013).

111 Id.

112 Id. at 16.

113 Id.

114 Id.

c. Computer-related acts in support of terrorism offences[115]

Apart from the conceptual and definitional mooring of cybercrimes, equally significant are the "procedural powers including search, seizure, orders for computer data, real-time collection of computer data, and preservation of data x x x."[116] As noted by the United Nations Office on Drugs and Crime, these procedural powers, along with the criminalization of certain acts and obligations for international cooperation, form the "core provisions" shared by international and legal instruments.[117]

The United Nations Office on Drugs and Crime's survey of key international and regional instruments summarizes each instrument's provision of procedural powers as follows:

	Procedural Power	African Union[118]	COMESA[119]	The Commonwealth[120]	Commonwealth of Independent States[121]	Council of Europe (Budapest Convention)[122]	Council of Europe (Lanzarote Convention)[123]	ECOWAS[124]	European Union (Framework Decision 2005/222/JHA)[125]	European Union (Directive Proposal 2010/0273)[126]	European Union (Directive Framewrok Decision 2001/413/JHA)[127]	European Union (Directive 2011/92/EU and 2002/58/EC)[128]	ITU / CARICOM / CTU (Model Legislative Texts[129]	League of Arab States (Convention)[130]	League of Arab States (Model Law)[131]	Shanghai Cooperation Organization[132]	United Nations (CRC OP)[133]

115 Id.
116 Id. at 70.
117 Id.
118 African Union, 2012. Draft Convention on the Establishment of a Legal Framework Conducive to Cybersecurity in Africa.
119 Common Market for Eastern and Southern Africa (COMESA), 2011. Cybersecurity Draft Model Bill.
120 The Commonwealth, 2002. (i) Computer and Computer Related Crimes Bill and (ii) Model Law on Electronic Evidence.
121 Commonwealth of Independent States, 2001. Agreement on Cooperation in Combating Offences related to Computer Information.
122 Council of Europe, 2001. Convention on Cybercrime and Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.
123 Council of Europe, 2007. Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.
124 Economic Community of West African States (ECOWAS), 2009. Draft Directive on Fighting Cybercrime within ECOWAS.
125 European Union, 2005. Council Framework Decision 2002/222/JHA on attacks against information systems.
126 European Union, 2010. Proposal COM (2010) 517 final for a Directive of the European Parliament and of the Council on attacks against information systems and repealing Council Framework Decision 2005/222/JHA.
127 European Union, 2001. Council Framework Decision 2001/413/JHA combating fraud and counterfeiting of non-cash means of payment.
128 European Union, 2011. Directive 2011/92/EU of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA and European Union, 2002. Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector.
129 International Telecommunication Union (ITU)/Caribbean Community (CARICOM)/Caribbean Telecommunications Union (CTU), 2010. (i) Model Legislative Texts on Cybercrime/e-Crimes and (ii) Electronic Evidence.
130 League of Arab States, 2010. Arab Convention on Combating Information Technology Offences.
131 League of Arab States, 2004. Model Arab Law on Combating Offences related to Information Technology Systems.
132 Shanghai Cooperation Organization, 2010. Agreement on Cooperation in the Field of International Information Security.
133 United Nations, 2000. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography.

1	Search for computer hardware or data	Art. III (50)	Art. 37 (a) and (b)	Art. 12		Art. 19 (1) and (2)		Art. 33					Art. 20	Art. 26			
2	Seizure of computer hardware or data	Art. III (51)	Art. 37 (c)	Art. 12 and 14		Art. 19 (3)		Art. 33					Art. 20	Art. 27 (1)			
3	Order for stored computer date		Art. 36 (a)	Art. 15		Art. 18 (1)(1)							Art. 22 (a)	Art. 25 (1)			
4	Order for subscriber information		Art. 36 (b)			Art. 18 (1) (b)							Art. 22 (b)	Art. 25 (2)			
5	Order for stored traffic data		Art. 34 (a) (ii)	Art. 16		Art. 17 (1) (b)							Art. 24	Art. 24			
6	Real-time collection of traffic data		Art. 38	Art. 19		At. 20							Art. 25	Art. 28			
7	Real-time collection of content-data	Art. III (55)	Art. 39	Art. 18		Art. 21							Art. 26	Art. 29			
8	Expedited preservation of computer-data	Art. III (53)	Art. 33, 34 (a) (i) and 35	Art. 17		Art. 16, 17 (1) (a)		Art. 33					Art. 23	Art. 23 (2)			
9	Use of (remote) forensic tools						Art. 30 (5)					Art. 15	Art. 27				
10	Trans-border access to computer data		Art. 49 (b)			Art. 32 (b)								Art. 40 (2)			
11	Provision of assistance		Art. 37 (d)	Art. 13		Art. 19 (4)							Art. 21	Art. 27 (2)			
12	Retention of computer data		Art. 29, 30 and 31								Art. 3 and 6						

In the Philippines, Republic Act No. 10175 adopts an approach which is similar to the UNODC's appreciation of cybercrimes as a "collection of acts or conduct." We have thus transplanted some of the provisions that are still part of an emerging consensus. Thus, the Cybercrime Prevention Act of 2012 in question provides for the following "basket" of punishable acts:

CHAPTER II
PUNISHABLE ACTS

SEC. 4. *Cybercrime Offenses.* — The following acts constitute the offense of cybercrime punishable under this Act:

(a) Offenses against the confidentiality, integrity and availability of computer data and systems:

(1) Illegal Access. – The access to the whole or any part of a computer system without right.

(2) Illegal Interception. – The interception made by technical means without right of any non-public transmission of computer data to, from, or within a computer system including electromagnetic emissions from a computer system carrying such computer data.

(3) Data Interference. — The intentional or reckless alteration, damaging, deletion or deterioration of computer data, electronic document, or electronic data message, without right, including the introduction or transmission of viruses.

(4) System Interference. — The intentional alteration or reckless hindering or interference with the functioning of a computer or computer network by inputting, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data or program, electronic document, or electronic data message, without right or authority, including the introduction or transmission of viruses.

(5) Misuse of Devices.

(i) The use, production, sale, procurement, importation, distribution, or otherwise making available, without right, of:

(aa) A device, including a computer program, designed or adapted primarily for the purpose of committing any of the offenses under this Act; or

(bb) A computer password, access code, or similar data by which the whole or any part of a computer system is capable of being accessed with intent that it be used for the purpose of committing any of the offenses under this Act.

(ii) The possession of an item referred to in paragraphs 5(i)(aa) or (bb) above with intent to use said devices for the purpose of committing any of the offenses under this section.

(6) Cyber-squatting. – The acquisition of a domain name over the internet in bad faith to profit, mislead, destroy reputation, and deprive others from registering the same, if such a domain name is:

(i) Similar, identical, or confusingly similar to an existing trademark registered with the appropriate government agency at the time of the domain name registration:

(ii) Identical or in any way similar with the name of a person other than the registrant, in case of a personal name; and

(iii) Acquired without right or with intellectual property interests in it.

(b) Computer-related Offenses:

(1) Computer-related Forgery. —

(i) The input, alteration, or deletion of any computer data without right resulting in inauthentic data with the intent that it be considered or acted upon for legal purposes as if it were authentic, regardless whether or not the data is directly readable and intelligible; or

(ii) The act of knowingly using computer data which is the product of computer-related forgery as defined herein, for the purpose of perpetuating a fraudulent or dishonest design.

(2) Computer-related Fraud. — The unauthorized input, alteration, or deletion of computer data or program or interference in the functioning of a computer system, causing damage thereby with fraudulent intent: *Provided,* That if no damage has yet been caused, the penalty imposable shall be one (1) degree lower.

(3) Computer-related Identity Theft. – The intentional acquisition, use, misuse, transfer, possession, alteration or deletion of identifying information belonging to another, whether natural or juridical, without right: *Provided,* That if no damage has yet been caused, the penalty imposable shall be one (1) degree lower.

(c) Content-related Offenses:

(1) Cybersex. — The willful engagement, maintenance, control, or operation, directly or indirectly, of any lascivious exhibition of sexual organs or sexual activity, with the aid of a computer system, for favor or consideration.

(2) Child Pornography. — The unlawful or prohibited acts defined and punishable by Republic Act No. 9775 or the Anti-Child Pornography Act of 2009, committed through a computer system: *Provided,* That the penalty to be imposed shall be (1) one degree higher than that provided for in Republic Act No. 9775.

(3) Unsolicited Commercial Communications. — The transmission of commercial electronic communication with the use of computer system which seek to advertise, sell, or offer for sale products and services are prohibited unless:

(i) There is prior affirmative consent from the recipient; or

(ii) The primary intent of the communication is for service and/or administrative announcements from the sender to its existing users, subscribers or customers; or

(iii) The following conditions are present:

(aa) The commercial electronic communication contains a simple, valid, and reliable way for the recipient to reject receipt of further commercial electronic messages (opt-out) from the same source;

(bb) The commercial electronic communication does not purposely disguise the source of the electronic message; and

> (cc) The commercial electronic communication does not purposely include misleading information in any part of the message in order to induce the recipients to read the message.
>
> (4) Libel. — The unlawful or prohibited acts of libel as defined in Article 355 of the Revised Penal Code, as amended, committed through a computer system or any other similar means which may be devised in the future.
>
> SEC. 5. *Other Offenses.* — The following acts shall also constitute an offense:
>
> (a) Aiding or Abetting in the Commission of Cybercrime. – Any person who willfully abets or aids in the commission of any of the offenses enumerated in this Act shall be held liable.
>
> (b) Attempt in the Commission of Cybercrime. — Any person who willfully attempts to commit any of the offenses enumerated in this Act shall be held liable.

II (G)
No Actual Controversy

The overview of the internet and the context of cyberspace regulation should readily highlight the dangers of proceeding to rule on the constitutional challenges presented by these consolidated petitions barren of actual controversies. The platforms and technologies that move through an ever expanding network of networks are varied. The activities of its users, administrators, commercial vendors, and governments are also as complex as they are varied.

The internet continues to grow. End User License Agreements (EULA) of various applications may change its terms based on the feedback of its users. Technology may progress to ensure that some of the fears that amount to a violation of a constitutional right or privilege will be addressed. Possibly, the violations, with new technologies, may become more intrusive and malignant than jurisprudential cures that we can only imagine at present.

All these point to various reasons for judicial restraint as a natural component of judicial review when there is no actual case. The court's power is extraordinary and residual. That is, it should be invoked only when private actors or other public instrumentalities fail to comply with the law or the provisions of the Constitution. Our faith in deliberative democracy requires that we presume that political forums are as competent to read the Constitution as this court.

Also, the court's competence to deal with these issues needs to evolve as we understand the context and detail of each technology

implicated in acts that are alleged to violate law or the Constitution. The internet is an environment, a phenomenon, a network of complex relationships and, thus, a subject that cannot be fully grasped at first instance. This is where adversarial positions with concrete contending claims of rights violated or duties not exercised will become important. Without the benefit of these adversarial presentations, the implications and consequences of judicial pronouncements cannot be fully evaluated.

Finally, judicial economy and adjudicative pragmatism requires that we stay our hand when the facts are not clear. Our pronouncements may not be enough or may be too detailed. Parties might be required to adjudicate again. Without an actual case, our pronouncements may also be irrelevant to the technologies and relationships that really exist. This will tend to undermine our own credibility as an institution.

We are possessed with none of the facts. We have no context of the assertion of any right or the failure of any duty contained in the Constitution. To borrow a meme that has now become popular in virtual environments: We cannot be asked to doubt the application of provisions of law with most of the facts in the cloud.

III
Limited Exception: Overbreadth Doctrine

There is, however, a limited instance where facial review of a statute is not only allowed but essential: ***when the provision in question is so broad that there is a clear and imminent threat that actually operates or it can be used as a prior restraint of speech.*** This is when there can be an invalidation of the statute "on its face" rather than "as applied."

The use of the doctrine gained attention in this jurisdiction within a separate opinion by Justice Mendoza in *Cruz v. Secretary of Environment and Natural Resources*,[134] thus:

> **The only instance where a facial challenge to a statute is allowed is when it operates in the area of freedom of expression**. In such instance, the overbreadth doctrine permits a party to challenge the validity of a statute even though as applied to him it is not unconstitutional but it might be if applied to others not before the Court whose activities are constitutionally protected. Invalidation of the statute "on its face" rather than "as applied" is permitted in the interest of preventing a "chilling" effect on freedom of expression. But in other cases, even if it is found that a provision of a statute is unconstitutional, courts will decree only partial invalidity unless the invalid portion is so far inseparable

[134] 400 Phil. 904 (2002) [Per Curiam, En Banc].

> from the rest of the statute that a declaration of partial invalidity is not possible.[135] (Emphasis supplied)

The doctrine was again revisited in the celebrated plunder case of former President Joseph Estrada, when Justice Mendoza, in his concurring opinion, explained at length when a facial challenge may be allowed:

> 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."

---

[135] *See* the Separate Opinion of Justice Mendoza in *Cruz v. Secretary of Environment and Natural Resources*, 400 Phil. 904,1092 (2002) [Per Curiam, En Banc].

> 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.[136]

The overbreadth doctrine in the context of a facial challenge was refined further in *David v. Arroyo*,[137] where this court speaking through Justice Sandoval-Gutierrez disallowed petitioners from challenging Proclamation No. 1017 on its face for being overbroad. In doing so, it laid down the guidelines for when a facial challenge may be properly brought before this court, thus:

> *First and foremost*, the overbreadth doctrine is an analytical tool developed for testing "on their faces" statutes in **free speech cases,** also known under the American Law as First Amendment cases.
>
> xxxx
>
> Moreover, the overbreadth doctrine is not intended for testing the validity of a law that "reflects legitimate state interest in maintaining comprehensive control over harmful, constitutionally unprotected conduct." x x x
>
> x x x x
>
> Thus, claims of facial overbreadth are 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**." Here, the incontrovertible fact remains that PP 1017 pertains to a spectrum of **conduct**, not free speech, which is manifestly subject to state regulation.

---

136 *See* the Concurring Opinion of Justice Mendoza in *Estrada v. Sandiganbayan*, 421 Phil. 290, 430-432 (2001) [Per J. Bellosillo, En Banc] *citing Gooding v. Wilson*, 405 U.S. 518, 521, 31 L.Ed.2d 408, 413 (1972); *United States v. Salerno*, 481 U.S. 739, 745, 95 L.Ed.2d 697, 707 (1987*); People v. De la Piedra*, 403 Phil. 31 (2001); *Broadrick v. Oklahoma*, 413 U.S. 601, 612-613, 37 L. Ed. 2d 830, 840-841 (1973); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 71 L.Ed.2d 362, 369 (1982); *United States v. Raines*, 362 U.S. 17, 21, 4 L.Ed.2d 524, 529 (1960); *Yazoo & Mississippi Valley RR. v. Jackson Vinegar Co.*, 226 U.S. 217, 57 L.Ed. 193 (1912).

137 522 Phil. 705 (2006) [Per J. Sandoval-Gutierrez, En Banc].

Second, facial invalidation of laws is considered as "**manifestly strong medicine**," to be used "**sparingly and only as a last resort**," and is "**generally disfavored**;" The reason for this is obvious. Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a law may be applied will not be heard to challenge a law on the ground that it may conceivably be applied unconstitutionally to others, i.e., **in other situations not before the Court.** A writer and scholar in Constitutional Law explains further:

> **The most distinctive feature of the overbreadth technique is that it marks an exception to some of the usual rules of constitutional litigation. Ordinarily, a particular litigant claims that a statute is unconstitutional as applied to him or her; if the litigant prevails, the courts carve away the unconstitutional aspects of the law by invalidating its improper applications on a case to case basis. Moreover, challengers to a law are not permitted to raise the rights of third parties and can only assert their own interests. In overbreadth analysis, those rules give way; challenges are permitted to raise the rights of third parties**; and the court invalidates the entire statute "on its face," not merely "as applied for" so that the overbroad law becomes unenforceable until a properly authorized court construes it more narrowly. The factor that motivates courts to depart from the normal adjudicatory rules is the concern with the "chilling;" deterrent effect of the overbroad statute on third parties not courageous enough to bring suit. The Court assumes that an overbroad law's "very existence may cause others not before the court to refrain from constitutionally protected speech or expression." An overbreadth ruling is designed to remove that deterrent effect on the speech of those third parties.

In other words, a facial challenge using the overbreadth doctrine will require the Court to examine PP 1017 and pinpoint its flaws and defects, not on the basis of its actual operation to petitioners, but on the assumption or prediction that its very existence may cause **others not before the Court** to refrain from constitutionally protected speech or expression. In *Younger v. Harris*, it was held that:

> [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.

And *third*, a facial challenge on the ground of overbreadth is the most difficult challenge to mount successfully, since the challenger must establish that **there can be no instance when the assailed**

> **law may be valid**. Here, petitioners did not even attempt to show whether this situation exists.[138] (Emphasis originally provided)

The Mendoza opinion, however, found its way back into the legal spectrum when it was eventually adopted by this court in the cases of *Romualdez v. Sandiganbayan*[139] and *Romualdez v. Commission on Elections.*[140] Upon motion for reconsideration in *Romualdez v. Commission on Elections,*[141] however, this court revised its earlier pronouncement that a facial challenge only applies to free speech cases, thereby expanding its scope and usage. It stated that:

> x x x The rule established in our jurisdiction is, only statutes on free speech, religious freedom, and other fundamental rights may be facially challenged. Under no case may ordinary penal statutes be subjected to a facial challenge.[142]

However, the latest pronouncement of this court on the doctrine was the case of *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council.*[143] In it, this court, while reiterating Justice Mendoza's opinion as cited in the *Romualdez* cases, explained further the difference between a "facial" challenge and an "as applied" challenge.

> Distinguished from an **as-applied** challenge which considers only extant facts affecting real litigants, a **facial** invalidation is an examination of the **entire law**, pinpointing its flaws and defects, not only on the basis of its actual operation to the parties, but also on the assumption or prediction that its very existence may cause others not before the court to refrain from constitutionally protected speech or activities.
>
> Justice Mendoza accurately phrased the subtitle in his concurring opinion that the vagueness and overbreadth doctrines, *as grounds for a facial challenge*, are not applicable to **penal** laws. **A litigant cannot thus successfully mount a facial challenge against a criminal statute on either vagueness or overbreadth grounds.**
>
> The allowance of a facial challenge in free speech cases is justified by the aim to avert the "chilling effect" on protected speech, the exercise of which should not at all times be abridged. As reflected earlier, this rationale is inapplicable to plain penal statutes that generally bear an "*in terrorem* effect" in deterring socially harmful

---

138 *David v. Arroyo*, 522 Phil. 705 (2006) [Per J. Sandoval-Gutierrez, En Banc] *citing* the Concurring Opinion of Justice Mendoza in *Estrada v. Sandiganbayan*, 421 Phil. 290, 430-432 (2001) [Per J. Bellosillo, En Banc]; *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Younger v. Harris*, 401 U.S. 37, 52-53, 27 L.Ed.2d 669, 680 (1971); *United States v. Raines*, 362 U.S. 17, 4 L.Ed.2d 524 (1960); *Board of Trustees, State Univ. of N.Y v. Fox*, 492 U.S. 469, 106 L.Ed.2d 388 (1989).

139 479 Phil. 265 (2004) [Per J. Panganiban, En Banc].

140 576 Phil. 357 (2008) [Per J. Chico-Nazario, En Banc].

141 573 SCRA 639 (2008) [Per J. Chico-Nazario, En Banc].

142 *Romualdez v. Commission on Elections*, G.R. No. 167011, December 11, 2008, 573 SCRA 639, 645 [Per J. Chico-Nazario, En Banc].

143 G.R. No. 178552, October 5, 2010, 632 SCRA 146 [Per J. Carpio-Morales, En Banc].

conduct. In fact, the legislature may even forbid and penalize acts formerly considered innocent and lawful, so long as it refrains from diminishing or dissuading the exercise of constitutionally protected rights.

The Court reiterated that there are "critical limitations by which a criminal statute may be challenged" and "underscored that an 'on-its-face' invalidation of penal statutes x x x may not be allowed."

> [T]he rule established in our jurisdiction is, only statutes on free speech, religious freedom, and other fundamental rights may be facially challenged. **Under no case may ordinary penal statutes be subjected to a facial challenge**. The rationale is obvious. If a facial challenge to a penal statute is permitted, the prosecution of crimes may be hampered. No prosecution would be possible. A strong criticism against employing a facial challenge in the case of penal statutes, if the same is allowed, would effectively go against the grain of the doctrinal requirement of an existing and concrete controversy before judicial power may be appropriately exercised. A facial challenge against a penal statute is, at best, amorphous and speculative. It would, essentially, force the court to consider third parties who are not before it. As I have said in my opposition to the allowance of a facial challenge to attack penal statutes, such a test will impair the State's ability to deal with crime. If warranted, there would be nothing that can hinder an accused from defeating the State's power to prosecute on a mere showing that, as applied to third parties, the penal statute is vague or overbroad, notwithstanding that the law is clear as applied to him.

It is settled, on the other hand, that **the application of the overbreadth doctrine is limited to a facial kind of challenge and, owing to the given rationale of a facial challenge, applicable only to free speech cases**.

By its nature, the overbreadth doctrine has to necessarily apply a facial type of invalidation in order to plot areas of protected speech, inevitably almost always under situations not before the court, that are impermissibly swept by the substantially overbroad regulation. Otherwise stated, a statute cannot be properly analyzed for being substantially overbroad if the court confines itself only to facts as applied to the litigants.

x x x x

In restricting the overbreadth doctrine to free speech claims, the Court, in at least two cases, observed that the US Supreme Court has not recognized an overbreadth doctrine outside the limited context of the First Amendment, and that claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate only spoken words. In *Virginia v. Hicks*, it was held that rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or speech-related conduct. Attacks on overly broad statutes are justified by the "transcendent value to all society of constitutionally protected expression."[144] (Emphasis and underscoring originally supplied)

---

[144] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, G.R. No. 178552, October 5, 2010, 632 SCRA 146, 186-189 [Per J. Carpio-Morales, En Banc], *citing David v. Macapagal-*

III (A)
Test for Allowable Facial Review

In my view, the prevailing doctrine now is that a facial challenge only applies to cases where the free speech and its cognates are asserted before the court. While as a general rule penal statutes cannot be subjected to facial attacks, a provision in a statute can be struck down as unconstitutional when there is a clear showing that there is an imminent possibility that its broad language will allow ordinary law enforcement to cause prior restraints of speech and the value of that speech is such that its absence will be socially irreparable.

This, therefore, requires the following:

First, the ground for the challenge of the provision in the statute is that it violates freedom of expression or any of its cognates;

Second, the language in the statute is impermissibly vague;

Third, the vagueness in the text of the statute in question allows for an interpretation that will allow prior restraints;

Fourth, the "chilling effect" is not simply because the provision is found in a penal statute but because there can be a clear showing that there are special circumstances which show the imminence that the provision will be invoked by law enforcers;

Fifth, the application of the provision in question will entail prior restraints; and

Sixth, the value of the speech that will be restrained is such that its absence will be socially irreparable. This will necessarily mean balancing between the state interests protected by the regulation and the value of the speech excluded from society.

Arroyo, 489 SCRA 160, 239 (2006) [Per J. Sandoval-Gutierrez, En Banc]; *Romualdez v. Commission on Elections*, 573 SCRA 639 (2008) [Per J. Chico-Nazario, En Banc]; *Estrada v. Sandiganbayan*, Phil. 290 (2001) [Per J. Bellosillo, En Banc]; Consti., art. III, sec. 4; *People v. Siton*, 600 SCRA 476, 485 (2009) [Per J. Ynares-Santiago, En Banc]; *Virginia v. Hicks*, 539 U.S. 113, 156 L. Ed. 2d 148 (2003); *Gooding v. Wilson*, 405 U.S. 518, 31 L. Ed 2d 408 (1972).

III (B)
Reason for the Doctrine

The reason for this exception can be easily discerned.

The right to free speech and freedom of expression take paramount consideration among all the rights of the sovereign people. In *Philippine Blooming Mills Employment Organization et al. v. Philippine Blooming Mills, Co. Inc.,*[145] this court discussed this hierarchy at length:

> (1) In a democracy, the preservation and enhancement of the dignity and worth of the human personality is the central core as well as the cardinal article of faith of our civilization. The inviolable character of man as an individual must be "protected to the largest possible extent in his thoughts and in his beliefs as the citadel of his person."
>
> (2) The Bill of Rights is designed to preserve the ideals of liberty, equality and security "against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, and the scorn and derision of those who have no patience with general principles."
>
> In the pithy language of Mr. Justice Robert Jackson, the purpose of the Bill of Rights is 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 rights to life, liberty and property, to free speech, or free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." Laski proclaimed that "the happiness of the individual, not the well-being of the State, was the criterion by which its behaviour was to be judged. His interests, not its power, set the limits to the authority it was entitled to exercise."
>
> (3) The freedoms of expression and of assembly as well as the right to petition are included among the immunities reserved by the sovereign people, in the rhetorical aphorism of Justice Holmes, to protect the ideas that we abhor or hate more than the ideas we cherish; or as Socrates insinuated, not only to protect the minority who want to talk, but also to benefit the majority who refuse to listen. And as Justice Douglas cogently stresses it, the liberties of one are the liberties of all; and the liberties of one are not safe unless the liberties of all are protected.
>
> (4) The rights of free expression, free assembly and petition, are not only civil rights but also political rights essential to man's enjoyment of his life, to his happiness and to his full and complete fulfillment. Thru these freedoms the citizens can participate not

[145] 151-A Phil. 656 (1973) [Per J. Makasiar, En Banc].

> merely in the periodic establishment of the government through their suffrage but also in the administration of public affairs as well as in the discipline of abusive public officers. The citizen is accorded these rights so that he can appeal to the appropriate governmental officers or agencies for redress and protection as well as for the imposition of the lawful sanctions on erring public officers and employees.
>
> (5) While the Bill of Rights also protects property rights, the primacy of human rights over property rights is recognized. Because these freedoms are "delicate and vulnerable, as well as supremely precious in our society" and the "threat of sanctions may deter their exercise almost as potently as the actual application of sanctions," they "need breathing space to survive," permitting government regulation only "with narrow specificity."
>
> Property and property rights can be lost thru prescription; but human rights are imprescriptible. If human rights are extinguished by the passage of time, then the Bill of Rights is a useless attempt to limit the power of government and ceases to be an efficacious shield against the tyranny of officials, of majorities, of the influential and powerful, and of oligarchs — political, economic or otherwise.
>
> In the hierarchy of civil liberties, the rights of free expression and of assembly occupy a preferred position as they are essential to the preservation and vitality of our civil and political institutions; and such priority "gives these liberties the sanctity and the sanction not permitting dubious intrusions."
>
> The superiority of these freedoms over property rights is underscored by the fact that a mere reasonable or rational relation between the means employed by the law and its object or purpose — that the law is neither arbitrary nor discriminatory nor oppressive — would suffice to validate a law which restricts or impairs property rights. On the other hand, a constitutional or valid infringement of human rights requires a more stringent criterion, namely existence of a grave and immediate danger of a substantive evil which the State has the right to prevent.[146] (Citations omitted)

The right to freedom of expression is a primordial right because it is not only an affirmation but a positive execution of the basic nature of the state defined in Article II, Section 1 of the 1987 Constitution:

> The Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them.

The power of the State is derived from the authority and mandate given to it by the people, through their representatives elected in the

---

[146] *Philippine Blooming Mills Employment Organization et al v. Philippine Blooming Mills, Co. Inc.,* 151-A Phil. 656, 674-676 (1973) [Per J. Makasiar, En Banc].

legislative and executive branches of government. The sovereignty of the Filipino people is dependent on their ability to freely express themselves without fear of undue reprisal by the government. Government, too, is shaped by comments and criticisms of the various publics that it serves.

The ability to express and communicate also defines individual and collective autonomies. That is, we shape and refine our identity and, therefore, also our thoughts as well as our viewpoints through interaction with others. We choose the modes of our expression that will also affect the way that others receive our ideas. Thoughts remembered when expressed with witty eloquence are imbibed through art. Ideas, however, can be rejected with a passion when expressed through uncouth caustic verbal remarks or presented with tasteless memes. In any of these instances, those who receive the message see the speaker in a particular way, perhaps even belonging to a category or culture.

Furthermore, what we learn from others bears on what we think as well as what and how we express. For the quality of our own expression, it is as important to tolerate the expression of others.

This fundamental and primordial freedom has its important inherent and utilitarian justifications. With the imminent possibility of prior restraints, the protection must be extraordinarily vigilant.

In *Chavez v. Gonzales*,[147] the court elaborated further on the primacy of the right to freedom of speech:

> Freedom of speech and of the press means something more than the right to approve existing political beliefs or economic arrangements, to lend support to official measures, and to take refuge in the existing climate of opinion on any matter of public consequence. When atrophied, the right becomes meaningless. The right belongs as well – if not more – to those who question, who do not conform, who differ. The ideas that may be expressed under this freedom are confined not only to those that are conventional or acceptable to the majority. To be truly meaningful, freedom of speech and of the press should allow and even encourage the articulation of the unorthodox view, though it be hostile to or derided by others; or though such view "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." To paraphrase Justice Holmes, it is freedom for the thought that we hate, no less than for the thought that agrees with us.
>
> The scope of freedom of expression is so broad that it extends protection to nearly all forms of communication. It protects speech, print and assembly regarding secular as well as political causes,

[147] 569 Phil. 155 (2008) [Per C.J. Puno, En Banc].

> and is not confined to any particular field of human interest. The protection covers myriad matters of public interest or concern embracing all issues, about which information is needed or appropriate, so as to enable members of society to cope with the exigencies of their period. The constitutional protection assures the broadest possible exercise of free speech and free press for religious, political, economic, scientific, news, or informational ends, inasmuch as the Constitution's basic guarantee of freedom to advocate ideas is not confined to the expression of ideas that are conventional or shared by a majority.
>
> The constitutional protection is not limited to the exposition of ideas. The protection afforded free speech extends to speech or publications that are entertaining as well as instructive or informative. Specifically, in *Eastern Broadcasting Corporation (DYRE) v. Dans*, this Court stated that all forms of media, whether print or broadcast, are entitled to the broad protection of the clause on freedom of speech and of expression. (Citations omitted) [148]

III (C)
Overbreadth versus Vagueness

A facial challenge, however, can only be raised on the basis of overbreadth, not vagueness. Vagueness relates to a violation of the rights of due process. A facial challenge, on the other hand, can only be raised on the basis of overbreadth, which affects freedom of expression.

Southern Hemisphere provided the necessary distinction:

> A statute or act suffers from the defect of vagueness 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 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. The overbreadth doctrine, meanwhile, decrees 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.
>
> As distinguished from the vagueness doctrine, the overbreadth doctrine assumes that individuals will understand what a statute prohibits and will accordingly refrain from that behavior, even though some of it is protected.[149]

---

148 *Chavez v. Gonzales*, 569 Phil. 155, 197-198 (2008) [Per C.J. Puno, En Banc].

149 *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, G.R. No. 178552, October 5, 2010, 632 SCRA 146, 185 [Per J. Carpio-Morales, En Banc].

The facial challenge is different from an "as-applied" challenge or determination of a penal law. In an "as-applied" challenge, the court undertakes judicial review of the constitutionality of legislation "as applied" to particular facts, parties or defendants and on a case-to-case basis. In a challenge "as applied," the violation also involves an abridgement of the due process clause. In such instances, the burden of the petitioner must be to show that the only reasonable interpretation is one that is arbitrary or unfair.

III (D)
"Chilling Effect"

In the petitions before this court, the facial challenge can be used but only insofar as those provisions that are so broad as to ordinarily produce a "chilling effect" on speech.

We have transplanted and adopted the doctrine relating to "chilling effects" from the jurisprudence of the United States Supreme Court. The evolution of their doctrine, therefore, should be advisory but not binding for this court.

The concept of a "chilling effect" was first introduced in the case of *Wieman v. Updegraff.*[150] In that case, the United States Supreme Court declared as unconstitutional Oklahoma state legislature which authorized the docking of salaries of employees within the state who failed to render a "loyalty oath" disavowing membership in communist organizations. The validity of the Oklahama state legislature included teachers in public schools who alleged violations of the Due Process Clause. In his concurring opinion, Justice Frankfurter first introduced the concept of a "chilling effect," stating:

> By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.[151]

---

150 344 U.S. 183 (1952).

151 *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952).

The concept of a "chilling effect" was further elaborated in the landmark case of *New York Times v. Sullivan*:[152]

> We should be particularly careful, therefore, adequately to protect the liberties which are embodied in the First and Fourteenth Amendments. It may be urged that deliberately and maliciously false statements have no conceivable value as free speech. That argument, however, is not responsive to the real issue presented by this case, which is whether that freedom of speech which all agree is constitutionally protected can be effectively safeguarded by a rule allowing the imposition of liability upon a jury's evaluation of the speaker's state of mind. If individual citizens may be held liable in damages for strong words, which a jury finds false and maliciously motivated, there can be little doubt that public debate and advocacy will be constrained. And if newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished. *Cf. Farmers Educational & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 530. The opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms in the area of race relations. The American Colonists were not willing, nor should we be, to take the risk that "[m]en who injure and oppress the people under their administration [and] provoke them to cry out and complain" will also be empowered to "make that very complaint the foundation for new oppressions and prosecutions." The Trial of John Peter Zenger, 17 Howell's St. Tr. 675, 721-722 (1735) (argument of counsel to the jury). To impose liability for critical, albeit erroneous or even malicious, comments on official conduct would effectively resurrect "the obsolete doctrine that the governed must not criticize their governors." *Cf. Sweeney v. Patterson,* 76 U.S.App.D.C. 23, 24, 128 F.2d 457, 458.[153]

In *National Association for the Advancement of Colored People v. Button,*[154] the United States Supreme Court categorically qualified the concept of a "chilling effect":

> Our concern is with the impact of enforcement of Chapter 33 upon First Amendment freedoms.
>
> x x x x
>
> For, in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill v. Alabama,* 310 U. S. 88, 310 U. S. 97-98; *Winters v. New York, supra,*at 333 U. S. 518-520. *Cf. Staub v. City of Baxley,* 355 U. S.

---

152 376 U.S. 254 (1964).
153 *New York Times v. Sullivan*, 376 U.S. 254, 300-301(1964).
154 371 U.S. 415 (1963).

> 313. It makes no difference that the instant case was not a criminal prosecution, and not based on a refusal to comply with a licensing requirement. **The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. *Marcus v. Search Warrant,* 367 U. S. 717, 367 U. S. 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.** *Cf. Smith v. California, supra,* at 361 U. S. 151-154; *Speiser v. Randall,* 357 U. S. 513, 357 U. S. 526. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Cantwell v. Connecticut,* 310 U. S. 296, 3 310 U. S. 11. (Emphasis supplied)[155]

Philippine jurisprudence has incorporated the concept of a "chilling effect," but the definition has remained abstract. In *Chavez v. Gonzales*,[156] this court stated that a "chilling effect" took place upon the issuance of a press release by the National Telecommunications Commission warning radio and television broadcasters from using taped conversations involving former President Gloria Macapagal-Arroyo and the allegations of fixing elections:

> We rule that **not every violation of a law will justify straitjacketing the exercise of freedom of speech and of the press**. Our **laws are of different kinds** and doubtless, some of them provide norms of conduct which even if violated have only an adverse effect on a person's private comfort but does not endanger national security. There are laws of great significance but their violation, **by itself and without more**, cannot support suppression of free speech and free press. In fine, **violation of law is just a factor**, a vital one to be sure, which should be weighed in adjudging whether to restrain freedom of speech and of the press. The **totality of the injurious effects** of the violation to private and public interest must be calibrated in light of the preferred status accorded by the Constitution and by related international covenants protecting freedom of speech and of the press. In calling for a careful and calibrated measurement of the circumference of all these factors to determine compliance with the clear and present danger test, **the Court should not be misinterpreted as devaluing violations of law**. By all means, violations of law should be vigorously prosecuted by the State for they breed their own evil consequence. But to repeat, **the need to prevent their violation cannot per se trump the exercise of free speech and free press, a preferred right whose breach can lead to greater evils**. For this failure of the respondents alone to offer proof to satisfy the clear and present danger test, the Court has no option

---

155 *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415, 431-433 (1963).
156 569 Phil. 155 (2008) [Per C.J. Puno, En Banc].

> but to uphold the exercise of free speech and free press. There is no showing that the feared violation of the anti-wiretapping law clearly endangers the **national security of the State**.
>
> This is not all the faultline in the stance of the respondents. We slide to the issue of whether the **mere press statements** of the Secretary of Justice and of the NTC in question constitute a form of content-based prior restraint that has transgressed the Constitution. In resolving this issue, we hold that **it is not decisive that the press statements made by respondents were not reduced in or followed up with formal orders or circulars. It is sufficient that the press statements were made by respondents while in the exercise of their official functions**. Undoubtedly, respondent Gonzales made his statements as Secretary of Justice, while the NTC issued its statement as the regulatory body of media. **Any act done, such as a speech uttered, for and on behalf of the government in an official capacity is covered by the rule on prior restraint. The concept of an "act" does not limit itself to acts already converted to a formal order or official circular. Otherwise, the non formalization of an act into an official order or circular will result in the easy circumvention of the prohibition on prior restraint.** The press statements at bar are acts that should be struck down as they constitute impermissible forms of prior restraints on the right to free speech and press.
>
> There is enough evidence of **chilling effect** of the complained acts on record. The **warnings** given to media **came from no less** the NTC, a regulatory agency that can cancel the Certificate of Authority of the radio and broadcast media. They also came from the Secretary of Justice, the alter ego of the Executive, who wields the awesome power to prosecute those perceived to be violating the laws of the land. **After the warnings,** the KBP inexplicably joined the NTC in issuing an ambivalent Joint Press Statement. After the warnings, petitioner Chavez was left alone to fight this battle for freedom of speech and of the press. This silence on the sidelines on the part of some media practitioners is too deafening to be the subject of misinterpretation.
>
> The constitutional imperative for us to strike down unconstitutional acts should always be exercised with care and in light of the distinct facts of each case. For there are no hard and fast rules when it comes to slippery constitutional questions, and the limits and construct of relative freedoms are never set in stone. Issues revolving on their construct must be decided on a case to case basis, always based on the peculiar shapes and shadows of each case. But in cases where the challenged acts are patent invasions of a constitutionally protected right, **we should be swift** in striking them down as nullities per se. **A blow too soon struck for freedom is preferred than a blow too late.**[157]

Taking all these into consideration, as mentioned earlier, ***a facial attack of a provision can only succeed when the basis is freedom of***

---

[157] *Chavez v. Gonzales*, 569 Phil. 155, 219-221 (2008) [Per C.J. Puno, En Banc].

expression, when there is a clear showing that there is an imminent possibility that its broad language will allow ordinary law enforcement to cause prior restraints of speech, and when the value of that speech is such that its absence will be socially irreparable.

Among all the provisions challenged in these consolidated petitions, there are only four instances when the "chilling effect" on speech can be palpable: (a) the "take down" provision; (b) the provision on cyber libel; (c) the provision on cybersex; and (d) the clause relating to unbridled surveillance of traffic data. The provisions that provide for higher penalties for these as well as for dual prosecutions should likewise be declared unconstitutional because they magnify the "chilling effect" that stifles protected expression.

For this reason alone, these provisions and clauses are unconstitutional.

IV
The "Take Down" Clause

Section 19 of Republic Act No. 10175 is unconstitutional because it clearly allows prior restraint. This section provides:

> SEC. 19. Restricting or Blocking Access to Computer Data — When a computer data is prima facie found to be in violation of the provisions of this Act, the DOJ shall issue an order to restrict or block access to such computer data.

Among all the provisions, this is the sole provision that the Office of the Solicitor General agrees to be declared as unconstitutional.

IV (A)
A Paradigmatic Example of Prior Restraint

There is no doubt of the "chilling effect" of Section 19 of Republic Act No. 10175. It is indeed an example of an instance when law enforcers are clearly invited to do prior restraints within vague parameters. It is blatantlyunconstitutional.

Chavez v. Gonzales presents a clear and concise summary of the doctrines governing prior restraint:

> ***Prior restraint*** refers to official governmental restrictions on the press or other forms of expression in advance of actual publication

> or dissemination. Freedom from prior restraint is largely freedom from government censorship of publications, whatever the form of censorship, and regardless of whether it is wielded by the executive, legislative or judicial branch of the government. Thus, it precludes governmental acts that required approval of a proposal to publish; licensing or permits as prerequisites to publication including the payment of license taxes for the privilege to publish; and even injunctions against publication. Even the closure of the business and printing offices of certain newspapers, resulting in the discontinuation of their printing and publication, are deemed as previous restraint or censorship. Any law or official that requires some form of permission to be had before publication can be made, commits an infringement of the constitutional right, and remedy can be had at the courts.
>
> Given that deeply ensconced in our fundamental law is the hostility against all prior restraints on speech, and any act that restrains speech is presumed invalid, and "any act that restrains speech is hobbled by the presumption of invalidity and should be greeted with furrowed brows," it is important to stress not all prior restraints on speech are invalid. **Certain previous restraints may be permitted by the Constitution,** but determined only upon a careful evaluation of the challenged act as against the appropriate test by which it should be measured against.

As worded, Section 19 provides an arbitrary standard by which the Department of Justice may exercise this power to restrict or block access. A *prima facie* finding is *sui generis* and cannot be accepted as basis to stop speech even before it is made. It does not provide for judicially determinable parameters. It, thus, ensures that all computer data will automatically be subject to the control and power of the Department of Justice. This provision is a looming threat that hampers the possibility of free speech and expression through the internet. The sheer possibility that the State has the ability to unilaterally decide whether data, ideas or thoughts constitute evidence of a *prima facie* commission of a cybercrime will limit the free exchange of ideas, criticism, and communication that is the bulwark of a free democracy.

There is no question that Section 19 is, thus, unconstitutional.

V
Cyber Libel

Also unconstitutional is Section 4(c)(4) which reads:

> SEC. 4. *Cybercrime Offenses.* — The following acts constitute the offense of cybercrime punishable under this Act:
> x x x x
> (c) Content-related Offenses:
> (4) Libel. — The unlawful or prohibited acts of libel as defined in Article 355 of the Revised Penal Code, as amended, committed

> through a computer system or any other similar means which may be devised in the future.

The intent of this provision seems to be to prohibit the defense that libel committed through the use of a computer is not punishable. Respondents counter that, to date, libel has not been declared unconstitutional as a violation of the rights to free speech, freedom of expression, and of the press.

Reference to Article 355 of the Revised Penal Code in Section 4(c)(4) resulted in the implied incorporation of Articles 353 and 354 as well. Articles 353 to 355 of the Revised Penal Code provide:

> Title Thirteen
> CRIMES AGAINST HONOR
> Chapter One
> LIBEL
>
> Section One. — Definitions, forms, and punishment of this crime.
>
> Art. 353. Definition of libel. — A libel is public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead.
>
> Art. 354. Requirement for publicity. — Every defamatory imputation is presumed to be malicious, even if it be true, if no good intention and justifiable motive for making it is shown, except in the following cases:
>
> 1. A private communication made by any person to another in the performance of any legal, moral or social duty; and
>
> 2. A fair and true report, made in good faith, without any comments or remarks, of any judicial, legislative or other official proceedings which are not of confidential nature, or of any statement, report or speech delivered in said proceedings, or of any other act performed by public officers in the exercise of their functions.
>
> Art. 355. Libel means by writings or similar means. — A libel committed by means of writing, printing, lithography, engraving, radio, phonograph, painting, theatrical exhibition, cinematographic exhibition, or any similar means, shall be punished by prision correccional in its minimum and medium periods or a fine ranging from 200 to 6,000 pesos, or both, in addition to the civil action which may be brought by the offended party.

The ponencia claims that "libel is not a constitutionally protected speech" and "that government has an obligation to protect private individuals from defamation."[158]

I strongly dissent from the first statement. Libel is a label that is often used to stifle protected speech. I agree with the second statement but only to the extent that defamation can be protected with civil rather than criminal liabilities.

Given the statutory text, the history of the concept of criminal libel and our court's experience with libel, I am of the view that its continued criminalization especially in platforms using the internet unqualifiedly produces a "chilling effect" that stifles our fundamental guarantees of free expression. Criminalizing libel contradicts our notions of a genuinely democratic society.

V (B)
As Currently Worded,
Libel is Unconstitutional

The crime of libel in its 1930 version in the Revised Penal Code was again reenacted through the Cybercrime Prevention Act of 2012. It simply added the use of the internet as one of the means to commit the criminal acts. The reenactment of these archaic provisions is unconstitutional for many reasons. **At minimum, it failed to take into consideration refinements in the interpretation of the old law through decades of jurisprudence. It now stands starkly in contrast with the required constitutional protection of freedom of expression.**

The ponencia fails to account for the evolution of the requirement of malice in situations involving public officers and public figures. At best, the majority will have us believe that jurisprudence can be read into the current text of the libel law as referred to in the Cybercrime Prevention Act of 2012.

However, this does not appear to be the intent of the legislature based on the text of the provision. Congress reenacted the provisions defining and characterizing the crime of libel as it was worded in 1930. I concur with Justice Carpio's observations that the law as crafted fails to distinguish the malice requirement for criticisms of public officers (and public figures) on the one hand and that for ordinary defamation of private citizens carefully crafted by jurisprudence. Understandably, it creates doubt on the part of those who may be subject to its provisions. The vagueness of the current text, reenacted by reference by Rep. Act No. 10175 is as plain as day.

---

[158] Ponencia, J. Abad, p. 24.

It is difficult to accept the majority's view that present jurisprudence is read into the present version of the law. This is troubling as it is perplexing. The majority of the 200 plus members of the House of Representatives and the 24 Senators chose the old text defining the crime of libel. The old text does not conform to the delicate balance carved out by jurisprudence. Just the sheer number of distinguished and learned lawyers in both chambers would rule out oversight or negligence. As representatives of our people, they would have wanted the crime to be clearly and plainly spelled out so that the public will be properly informed. They could not have wanted the ordinary Filipino to consult the volumes of Philippine Reports in order to find out that the text did not mean plainly what it contained before they exercised their right to express.

It is, thus, reasonable to presume that Congress insists on the plain meaning of the old text. Possibly, through inaction, they would replace jurisprudential interpretation of the freedom of expression clause in relation to defamation by reenacting the same 1930 provisions.

V (C)
Negating the Balance Struck
Through Jurisprudence

A survey of these constant efforts in jurisprudence to qualify libel as provided in the old statute is needed to understand this point.

United States v. Bustos[159] interpreted the requirement of malice for libel under Act No. 277.[160] This court ruled that "malice in fact" is required to sustain a conviction under the law when there are "justifiable motives present" in a case. Thus:

> In an action for libel suppose the defendant fails to prove that the injurious publication or communication was true. Can he relieve himself from liability by showing that it was published with "justifiable motives" whether such publication was true or false or even malicious? **There is no malice in law when "justifiable motives" exist, and, in the absence of malice, there is no libel under the law.** (U. S. vs. Lerma, supra.) **But if there is malice in fact, justifiable motives can not exist.** The law will not allow one person to injure another by an injurious publication, under the cloak of "good ends" or "justifiable motives," when, as a matter of fact, the publication was made with a malicious intent. It is then a

[159] 13 Phil. 690 (1918) [Per J. Johnson].

[160] "An Act defining the law of libel and threats to publish a libel, making libel and threats to publish a libel misdemeanors, giving a right of civil action therefor, and making obscene or indecent publications misdemeanors." This was repealed by the Revised Penal Code via Article 367, Repealing Clause.

> malicious defamation. **The law punishes a malicious defamation and it was not intended to permit one to maliciously injure another under the garb of "justifiable motives." When malice in fact is shown to exist the publisher can not be relieved from liability by a pretense of "justifiable motives." Section 3 relieves the plaintiff from the necessity of proving malice simply when no justifiable motives are shown, but it does not relieve the defendant from liability under the guise of "justifiable motives" when malice actually is proved.** The defense of "the truth" of the "injurious publication" (sec. 4) and its character as a privileged communication (sec. 9) means nothing more than the truth in one instance and the occasion of making it in the other together with proof of justifiable motive, rebuts the prima facie inference of malice in law and throws upon the plaintiff or the State, the onus of proving malice in fact. The publication of a malicious defamation, whether it be true or not, is clearly an offense under Act No. 277.[161] (Emphasis supplied)

Actual malice as a requirement evolved further.

It was in the American case of *New York Times Co. v. Sullivan*,[162] which this court adopted later on,[163] that the "actual malice"[164] requirement was expounded and categorically required for cases of libel involving public officers. In resolving the issue of "whether x x x an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments",[165] the *New York Times* case required that actual malice should be proven when a case for defamation "includes matters of public concern, public men, and candidates for office."[166] Thus:

> Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, **libel can claim no talismanic immunity from constitutional limitations.** It must be measured by standards that satisfy the First Amendment.
>
> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. **The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."** *Roth v. United States*, 354 U.S. 476, 484.

---

161 *U.S. v. Bustos*, 13 Phil. 690, 698 (1918) [Per J. Johnson].

162 *New York Times v. Sullivan*, 376 U.S. 254 (1964).

163 *See Lopez v. Court of Appeal*s, 145 Phil. 219 (1970) [Per J. Fernando, En Banc]; *Mercado v. Court of First Instance*, 201 Phil. 565 (1982) [Per J. Fernando, Second Division]; and *Adiong vs. Commission on Elections*, G.R. No. 103956, March 31, 1992, 207 SCRA 712 [Per J. Gutierrez, En Banc].

164 Actual malice may mean that it was with the "knowledge that it was false or with reckless disregard of whether it was false or not." *See New York Times v. Sullivan*, 376 U.S. 254, 268 (1964).

165 *New York Times v. Sullivan*, 376 U.S. 254, 268 (1964).

166 Id. at 281-282.

> **The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.**
>
> x x x x
>
> **Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision.** *Bridges v. California*, 314 U.S. 252.**This is true even though the utterance contains "half-truths" and "misinformation."** *Pennekamp v. Florida*, 328 U.S. 331, 342, 343, n. 5, 345. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. See also *Craig v. Harney*, 331 U.S. 367; Wood v. Georgia, 370 U.S. 375. If judges are to be treated as "men of fortitude, able to thrive in a hardy climate," *Craig v. Harney*, supra, 331 U.S. at 376, surely the same must be true of other government officials, such as elected city commissioners. **Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism, and hence diminishes their official reputations.** *Stromberg v. California*, 283 U.S. 359, 369.[167] (Emphasis supplied)

Ayer Productions Pty. Ltd and McElroy & McElroy Film Productions v. Hon. Ignacio M. Capulong,[168] as affirmed in the case of *Borjal v. Court of Appeals*,[169] adopted the doctrine in *New York Times* to "**public figures.**" In *Ayer Productions*:

> A limited intrusion into a person's privacy has long been regarded as permissible where that person is a public figure and the information sought to be elicited from him or to be published about him constitute of a public character. Succinctly put, the right of privacy cannot be invoked resist publication and dissemination of matters of public interest. The interest sought to be protected by the right of privacy is the right to be free from *unwarranted* publicity, from the *wrongful* publicizing of the private affairs and activities of an individual *which are outside the realm of legitimate public concern*.[170]

Public figures were defined as:

---

167 Id. at 269-273.

168 243 Phil. 1007 (1988) [Per J. Feliciano, En Banc].

169 361 Phil. 1 (1999) [Per J. Bellosillo, Second Division].

170 *Ayer Productions Pty. Ltd and McElroy & McElroy Film Productions v. Hon. Ignacio M. Capulong*, 243 Phil. 1007, 1018-1019 (1988) [Per J. Feliciano, En Banc].

A public figure has been defined as a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a 'public personage.' He is, in other words, a celebrity. *Obviously to be included in this category are those who have achieved some degree of reputation by appearing before the public*, as in the case of an actor, a professional baseball player, a pugilist, or any other entertainment. The list is, however, broader than this. *It includes public officers, famous inventors and explorers, war heroes and even ordinary soldiers,* an infant prodigy, and no less a personage than the Grand Exalted Ruler of a lodge. ***It includes, in short, anyone who has arrived at a position where public attention is focused upon him as a person.***

Such public figures were held to have lost, to some extent at least, their tight to privacy. Three reasons were given, more or less indiscriminately, in the decisions" *that they had sought publicity and consented to it, and so could not complaint when they received it; that their personalities and their affairs has already public, and could no longer be regarded as their own private business; and that the press had a privilege, under the Constitution, to inform the public about those who have become legitimate matters of public interest.* On one or another of these grounds, and sometimes all, it was held that there was *no liability when they were given additional publicity, as to matters legitimately within the scope of the public interest they had aroused.*

The privilege of giving publicity to news, and other matters of public interest, was held to arise out of the desire and the right of the public to know what is going on in the world, and the freedom of the press and other agencies of information to tell it. "News" includes all events and items of information which are out of the ordinary hum-drum routine, and which have 'that indefinable quality of information which arouses public attention.' To a very great extent the press, with its experience or instinct as to what its readers will want, has succeeded in making its own definition of news, as a glance at any morning newspaper will sufficiently indicate. It includes homicide and other crimes, arrests and police raids, suicides, marriages and divorces, accidents, a death from the use of narcotics, a woman with a rare disease, the birth of a child to a twelve year old girl, the reappearance of one supposed to have been murdered years ago, and undoubtedly many other similar matters of genuine, if more or less deplorable, popular appeal.

The privilege of enlightening the public was not, however, limited, to the dissemination of news in the scene of current events. It extended also to information or education, or even entertainment and amusement, by books, articles, pictures, films and broadcasts concerning interesting phases of human activity in general, as well as the reproduction of the public scene in newsreels and travelogues. In determining where to draw the line, the courts were invited to exercise a species of censorship over what the public

> may be permitted to read; and they were understandably liberal in allowing the benefit of the doubt.[171] (Emphasis supplied)

This doctrine was reiterated in *Vasquez v. Court of Appeals*.[172] Petitioner was charged with libel for allegedly defaming his Barangay Chairperson in an article published in the newspaper, *Ang Tinig ng Masa.* Petitioner allegedly caused the dishonor and discredit of the Barangay Chairperson through the malicious imputation that the public officer landgrabbed and that he was involved in other illegal activities. In acquitting the petitioner:

> The question is whether from the fact that the statements were defamatory, malice can be presumed so that it was incumbent upon petitioner to overcome such presumption. Under Art. 361 of the Revised Penal Code, if the defamatory statement is made against a public official with respect to the discharge of his official duties and functions and the truth of the allegation is shown, the accused will be entitled to an acquittal even though he does not prove that the imputation was published with good motives and for justifiable ends.
>
> x x x x
>
> In denouncing the barangay chairman in this case, petitioner and the other residents of the Tondo Foreshore Area were not only acting in their self-interest but engaging in the performance of a civic duty to see to it that public duty is discharged faithfully and well by those on whom such duty is incumbent. **The recognition of this right and duty of every citizen in a democracy is inconsistent with any requirement placing on him the burden of proving that he acted with good motives and for justifiable ends.**
>
> **For that matter, even if the defamatory statement is false, no liability can attach if it relates to official conduct, unless the public official concerned proves that the statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. This is the gist of the ruling in the landmark case of New York Times v. Sullivan, which this Court has cited with approval in several of its own decisions. This is the rule of "actual malice."**
>
> **A rule placing on the accused the burden of showing the truth of allegations of official misconduct and/or good motives and justifiable ends for making such allegations would not only be contrary to Art. 361 of the Revised Penal Code. It would, above all, infringe on the constitutionally guaranteed freedom of expression.** Such a rule would deter citizens from performing

---

171 Id. at 1023-1024, *citing* Professors William Lloyd Prosser and W. Page Keeton, Prosser and Keeton on Torts, 5th ed. at 859–861 (1984).

172 373 Phil. 238 (1999) [Per J. Mendoza, En Banc].

> their duties as members of a self-governing community. Without free speech and assembly, discussions of our most abiding concerns as a nation would be stifled. As Justice Brandeis has said, "public discussion is a political duty" and the "greatest menace to freedom is an inert people."[173] (Emphasis supplied)

Guingguing v. Court of Appeals[174] involved the publication of information on private complainant's criminal cases including photographs of him being arrested. This court again reiterated:

> [Article 354 of the Revised Penal Code], as applied to **public figures** complaining of criminal libel, must be construed in light of the constitutional guarantee of free expression, and this Court's precedents upholding the standard of actual malice with the necessary implication that a statement regarding a public figure if true is not libelous. The provision itself allows for such leeway, accepting as a defense "good intention and justifiable motive." The exercise of free expression, and its concordant assurance of commentary on public affairs and public figures, certainly qualify as "justifiable motive," if not "good intention."
>
> x x x x
>
> **As adverted earlier, the guarantee of free speech was enacted to protect not only polite speech, but even expression in its most unsophisticated form.** Criminal libel stands as a necessary qualification to any absolutist interpretation of the free speech clause, if only because it prevents the proliferation of untruths which if unrefuted, would gain an undue influence in the public discourse. **But in order to safeguard against fears that the public debate might be muted due to the reckless enforcement of libel laws, truth has been sanctioned as a defense, much more in the case when the statements in question address public issues or involve public figures.**[175] (Emphasis supplied)

In *Villanueva v. Philippine Daily Inquirer, Inc.*,[176] despite the respondents' false reporting, this court continued to apply the actual malice doctrine that evolved from *Ayer Productions*. Hence:

> A newspaper, especially one national in reach and coverage, should be free to report on events and developments in which the public has a legitimate interest with minimum fear of being hauled to court by one group or another on criminal or civil charges for malice or damages, i.e. libel, so long as the newspaper respects and keeps within the standards of morality and civility prevailing within the general community.[177]

---

173 Id. at 250-255.
174 508 Phil. 193 (2005) [Per J. Tinga, Second Division].
175 Id. at 221-222.
176 G.R. No. 164437, May 15, 2009, 588 SCRA 1 [Per J. Quisumbing, Second Division].
177 *Villanueva v. Philippine Daily Inquirer, Inc.*, G.R. No. 164437, May 15, 2009, 588 SCRA 1, 15 [Per J. Quisumbing, Second Division].

V (D)
Overbreadth by Reenactment

With the definite evolution of jurisprudence to accommodate free speech values, it is clear that the reenactment of the old text of libel is now unconstitutional. ***Articles 353, 354, and 355 of the Revised Penal Code — and by reference, Section 4(c)4 of the law in question — are now overbroad as it prescribes a definition and presumption that have been repeatedly struck down by this court for several decades.***

A statute falls under the overbreadth doctrine when "a governmental purpose may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[178] Section 4(c)(4) of Rep. Act No. 10175 and Articles 353, 354, and 355 produce a chilling effect on speech by being fatally inconsistent with *Ayer Productions* as well as by imposing criminal liability in addition to civil ones. Not only once, but several times, did this court uphold the freedom of speech and expression under Article III, Section 4 of the 1987 Constitution[179] over an alleged infringement of privacy or defamation. This trend implies an evolving rejection of the criminal nature of libel and must be expressly recognized in view of this court's duty to uphold the guarantees under the Constitution.

The threat to freedom of speech and the public's participation in matters of general public interest is greater than any satisfaction from imprisonment of one who has allegedly "malicious[ly] imput[ed] x x x a crime, or x x x a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or xxx blacken[ed] the memory of [the] dead."[180] The law provides for other means of preventing abuse and unwarranted attacks on the reputation or credibility of a private person. Among others, this remedy is granted under the Chapter on Human Relations in the Civil Code, particularly Articles 19,[181] 20,[182] 21,[183] and even 26.[184] ***There is, thus, no cogent reason that a penal statute would***

---

178 *Estrada v. Sandiganbayan*, 421 Phil. 290, 353 (2001) [Per J. Bellosillo, En Banc] *citing NAACP v. Alabama*, 377 U.S. 288, 307, 12 L.Ed.2d 325, 338 (1958); *Shelton v. Tucker*, 364 U.S. 479, 5 L.Ed.2d 231 (1960).

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

180 Revised Penal Code, Art. 353.

181 Art. 19. Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.

182 Art. 20. Every person who, contrary to law, wilfully or negligently causes damage to another, shall indemnify the latter for the same.

183 Art. 21. Any person who wilfully causes loss or injury to another in manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage.

184 Art. 26. Every person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons. The following and similar acts, though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention and other relief:

overbroadly subsume the primordial right of freedom of speech provided for in the Constitution.

V (E)
Dangers to Protected Speech Posed by Libel
Exacerbated in the Internet

The effect on speech of the dangerously broad provisions of the current law on libel is even more palpable in the internet.

Libel under Article 353 is textually defined as the:

> x x x **public and malicious imputation** of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead. (Emphasis supplied)

Social media allows users to create various groups of various sizes. Some of these sites are for specific purposes. Others are only open to a select group of "friends" or "followers". The ponencia's distinction between the author and those who share (or simply express their approval) of the posted message oversimplifies the phenomenon of exchanges through these sites.

Social media or social networking sites are websites that primarily exist to allow users to post a profile online and exchange or broadcast messages and information with their friends and contacts.[185]

Social media or social networking as it is used today began in the United States in 1994 when Beverly Hills Internet created the online community known as Geocities.[186] In Geocities, individuals were able to design custom-made websites using hypertext mark-up language or HTML and upload content online. This community then paved the way for widespread online interaction, leading to the inception of America Online's Instant Messenger, where subscribers of the internet service provider could

---

(1) Prying into the privacy of another's residence;
(2) Meddling with or disturbing the private life or family relations of another;
(3) Intriguing to cause another to be alienated from his friends;
(4) Vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect, or other personal condition.

See also Justice Carpio's dissenting opinion in *MVRS Publications, Inc., v. Islamic Da'wah Council of the Philippines, Inc.*, 444 Phil. 230 (2004) [Per J. Bellosillo, En Banc]. Justice Carpio was of the view that the defamatory article published in the case fell under Article 26 of the Civil Code.

185 *See* Tucker, C. and A. Matthews, *Social Networks, Advertising and Antitrust*, in GEORGE MASON LAW REVIEW, 19 Geo. Mason L. Rev. 1211, 1214.

186 *See* < http://www2.uncp.edu/home/acurtis/NewMedia/SocialMedia/SocialMediaHistory.html> (visited February 19, 2014).

send real-time exchanges through the network. This led to the prevalence of instant messaging applications such as ICQ and online chatrooms such as mIRC.[187] In 1999, British website Friends Reunited was the first popular online hub whose primary purpose was to allow users to interact and reconnect with former classmates through the internet.[188] Friendster, launched in 2002, became one the first and largest online social networking sites, reaching up to 117 million users before its decline.[189] The site was dedicated to connecting with as many people as possible, without a need for prior physical contact or established relationships. MySpace, another social networking site launched in 2003, garnered more visitors than popular search engine sites Google and Yahoo in 2006.[190] These online social networking sites have had several popular iterations such as Multiply, LiveJournal or Blogger, which serve as venues for individuals who wish to post individual journal entries, photographs or videos.

Today, the most popular social networking sites are Facebook and Twitter. Facebook, which was initially known as Facesmash for exclusive use of Harvard University students and alumni, began in 2003. Eventually, Facebook became the most prevalent and ubiquitous online social networking site, with some 750 million users worldwide, as of July 2011.[191]

Twitter gained popularity immediately after its founding in 2006. It gained prominence by positioning itself as a real-time information network while allowing ease of access and immediate sharing to an expanding set of users. To date, Twitter has about 750 million registered users, with about 200 million users making use of the platform on a regular basis.[192] In its latest initial public offering, Twitter disclosed that there are over 500 million tweets (messages with a140-character limit) made in a day.[193]

The most recent social networking phenomenon is Instagram, which was launched in October 2010. This application allows instantaneous sharing of photographs especially through smartphones. Today, Instagram has 150 million active users and with over 1.5 billion "likes" of photos shared on the network every day.[194]

---

187 *See* < http://im.about.com/od/imbasics/a/imhistory_3.htm> (visited February 19, 2014).

188 *See* < http://www.friendsreunited.com/About> (visited February 19, 2014).

189 D. Garcia, P. Mavrodiev, and F. Schweitzer, Social Resilience in Online Communities: The Autopsy of Friendster. Available at < http://arxiv.org/pdf/1302.6109v1.pdf> (visited February 19, 2014).

190 *See* < http://www.huffingtonpost.com/2011/06/29/myspace-history-timeline_n_887059.html#s299557&title=July_2006_Number> (visited February 19, 2014).

191 *See* S. Davis, *STUDENT COMMENT: Social Media Activity & the Workplace: Updating the Status of Social Media*, 39 Ohio N.U.L. Rev. 359, 361.

192 *See* < http://venturebeat.com/2013/09/16/how-twitter-plans-to-make-its-750m-users-like-its-250m-real-users/> (visited February 19, 2014).

193 *See* < http://abcnews.go.com/Business/twitter-ipo-filing-reveals-500-million-tweets-day/story?id=20460493> (visited February 19, 2014).

194 *See* < http://sourcedigit.com/4023-instagram-timeline-history/> (visited February 19, 2014).

These platforms in social media allow users to establish their own social network. It enables instantaneous online interaction, with each social networking platform thriving on its ability to engage more and more users. In order to acquire more users, the owners and developers of these social media sites constantly provide their users with more features, and with more opportunities to interact. The number of networks grows as each participant is invited to bring in more of their friends and acquaintances to use the platforms. Social media platforms, thus, continue to expand in terms of its influence and its ability to serve as a medium for human interaction. These also encourage self-expression through words, pictures, video, and a combination of these genres.

There can be personal networks created through these platforms simply for conversations among friends. Like its counterpart in the real world, this can be similar to a meeting over coffee where friends or acquaintances exchange views about any and all matters of their interest. In normal conversation, the context provided by the participants' relationships assure levels of confidence that will allow them to exchange remarks that may be caustic, ironic, sarcastic or even defamatory.

With social media, one's message in virtual conversations may be reposted and may come in different forms. On Facebook, the post can be "shared" while on Twitter, the message can be "retweeted." In these instances, the author remains the same but the reposted message can be put in a different context by the one sharing it which the author may not have originally intended. The message that someone is a thief and an idiot in friendly and private conversation when taken out of that context will become defamatory. This applies regardless of the standing of the subject of conversation: The person called a thief and an idiot may be an important public figure or an ordinary person.

The ponencia proposes to exonerate the user who reposts but maintain the liability of the author. This classification is not clear anywhere in the text of the law. Parenthetically, whether calling someone a thief or an idiot is considered defamatory is not also clear in the text of the law.

Even if we assume arguendo that this is a reasonable text-based distinction, the result proposed by the majority does not meet the proposed intent of the law. Private individuals (as opposed to public officials or figures) are similarly maligned by reposts.

This shows the arbitrariness of the text of the law as well as the categorization proposed by the ponencia. It leaves too much room for the law enforcer to decide which kinds of posts or reposts are defamatory. The

limits will not be clear to the speaker or writer. Hence, they will then limit their expression or stifle the sharing of their ideas. They are definite victims of the chilling effect of the vagueness of the provisions in question.

The problem becomes compounded with messages that are reposted with or without comment. The following tweets are examples which will provide the heuristic to understand the problem:

> Form A: "@marvicleonen: RT @somebody: Juan is a liar, a thief and an idiot" #thetruth
>
> Form B: "@marvicleonen: *This!* RT @somebody: Juan is a liar, a thief and an idiot" #thetruth

Both are posts from a user with the handle @marvicleonen. RT means that the following message was only reposted (retweeted), and the hashtag #thetruth is simply a way of categorizing one's messages. The hashtag itself may also contain speech elements.

Form A is a simple repost. The reasons for reposting are ambiguous. Since reposting is only a matter of a click of a button, it could be that it was done without a lot of deliberation. It is also possible that the user agreed with the message and wanted his network to know of his agreement. It is possible that the user also wanted his network to understand and accept the message.

Form B is a repost with a comment "This!". While it may be clearer that there is some deliberation in the intent to share, it is not clear whether this is an endorsement of the statement or simply sarcasm. This form is not part of the categorization proposed by the ponencia.

There are other permutations as there are new platforms that continue to emerge. Viber and WhatsApp for instance now enable SMS users to create their own network.

There are other problems created by such broad law in the internet. The network made by the original author may only be of real friends of about 10 people. The network where his or her post was shared might consist of a thousand participants. Again, the current law on libel fails to take these problems of context into consideration.

A post, comment or status message regarding government or a public figure has the tendency to be shared. It easily becomes "viral." After all, there will be more interest among those who use the internet with messages that involve issues that are common to them or are about people that are known to them—usually public officers and public figures. When the

decision in this case will be made known to the public, it is certain to stimulate internet users to initially post their gut reactions. It will also entice others to write thought pieces that will also be shared among their friends and followers.

Then, there is the problem of extraterritoriality and the evils that it spawns on speech. Enforcement of the crime of libel will be viable only if the speaker is within our national territory. Those residing in other countries are beyond our jurisdiction. To be extradited, they will have to have laws similar to ours. If they reside in a state different from our 1930 version of libel, then we will have the phenomenon of foreigners or expatriates having more leeway to criticize and contribute to democratic exchanges than those who have stayed within our borders.

The broad and simplistic formulation now in Article 353 of the Revised Penal Code essential for the punishment of cyber libel can only cope with these variations produced by the technologies in the internet by giving law enforcers wide latitude to determine which acts are defamatory. There are no judicially determinable standards. The approach will allow subjective case-by-case ad hoc determination. There will be no real notice to the speaker or writer. The speaker or writer will calibrate speech not on the basis of what the law provides but on who enforces it.

This is quintessentially the chilling effect of this law.

The threat of being prosecuted for libel stifles the dynamism of the conversations that take place in cyberspace. These conversations can be loose yet full of emotion. These can be analytical and the product of painstaking deliberation. Other conversations can just be exponential combinations of these forms that provide canisters to evolving ideas as people from different communities with varied identities and cultures come together to test their messages.

Certainly, there will be a mix of the public and the private; the serious and the not so serious. But, this might be the kind of democratic spaces needed by our society: a mishmash of emotion and logic that may creatively spring solutions to grave public issues in better and more entertaining ways than a symposium of scholars. Libel with its broad bright lines, thus, is an anachronistic tool that may have had its uses in older societies: a monkey wrench that will steal inspiration from the democratic mob.

V (F)
No State Interest in Criminalizing Libel

The kinds of speech that are actually deterred by libel law are more valuable than the state interest that is sought to be protected by the crime. Besides, there are less draconian alternatives which have very minimal impact on the public's fundamental right of expression. Civil actions for defamation do not threaten the public's fundamental right to free speech. They narrow its availability such that there is no unnecessary chilling effect on criticisms of public officials or policy. They also place the proper economic burden on the complainant and, therefore, reduce the possibility that they be used as tools to harass or silence dissenters.

The purposes of criminalizing libel come to better light when we review its history. This court has had the opportunity to trace its historical development. *Guingguing v. Court of Appeals*[195] narrated:

> Originally, the truth of a defamatory imputation was not considered a defense in the prosecution for libel. In the landmark opinion of England's Star Chamber in the *Libelis Famosis* case in 1603, two major propositions in the prosecution of defamatory remarks were established: first, that libel against a public person is a greater offense than one directed against an ordinary man, and second, that it is immaterial that the libel be true. These propositions were due to the fact that **the law of defamatory libel was developed under the common law to help government protect itself from criticism and to provide an outlet for individuals to defend their honor and reputation so they would not resort to taking the law into their own hands**.
>
> Our understanding of criminal libel changed in 1735 with the trial and acquittal of John Peter Zenger for seditious libel in the then English colony of New York. Zenger, the publisher of the New-York Weekly Journal, had been charged with seditious libel, for his paper's consistent attacks against Colonel William Cosby, the Royal Governor of New York. In his defense, Zenger's counsel, Andrew Hamilton, argued that the **criticisms against Governor Cosby were "the right of every free-born subject to make when the matters so published can be supported with truth."** The jury, by acquitting Zenger, acknowledged albeit unofficially the defense of truth in a libel action. The *Zenger* case also laid to rest the idea that public officials were immune from criticism.
>
> The *Zenger* case is crucial, not only to the evolution of the doctrine of criminal libel, but also to the emergence of the American democratic ideal. It has been characterized as the first landmark in the tradition of a free press, then a somewhat radical notion that eventually evolved into the First Amendment in the

---

[195] *Guingguing v. Court of Appeals*, 508 Phil. 193 (2005) [Per J. Tinga, Second Division].

> American Bill of Rights and also proved an essential weapon in the war of words that led into the American War for Independence.
>
> Yet even in the young American state, the government paid less than ideal fealty to the proposition that Congress shall pass no law abridging the freedom of speech. The notorious Alien and Sedition Acts of 1798 made it a crime for any person who, by writing, speaking or printing, should threaten an officer of the government with damage to his character, person, or estate. The law was passed at the insistence of President John Adams, whose Federalist Party had held a majority in Congress, and who had faced persistent criticism from political opponents belonging to the Jeffersonian Republican Party. As a result, at least twenty-five people, mostly Jeffersonian Republican editors, were arrested under the law. The Acts were never challenged before the U.S. Supreme Court, but they were not subsequently renewed upon their expiration.
>
> The massive unpopularity of the Alien and Sedition Acts contributed to the electoral defeat of President Adams in 1800. In his stead was elected Thomas Jefferson, a man who once famously opined, "Were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."[196]

It was in that case where the court noted the history of early American media that focused on a "mad dog rhetoric" approach. This, in turn, led the court to conclude that "[t]hese observations are important in light of the misconception that freedom of expression extends only to polite, temperate, or reasoned expression. x x x Evidently, the First Amendment was designed to protect expression even at its most rambunctious and vitriolic form as it had prevalently taken during the time the clause was enacted."[197]

The case that has defined our understanding of the concept of modern libel – the *New York Times Co. v. Sullivan*[198] – then followed. As discussed earlier, the *New York Times* case required proof of actual malice when a case for defamation "includes matters of public concern, public men, and candidates for office."[199]

The cases of *Garrison v. Louisiana*, and *Curtis Publishing Co. v. Butts* both expanded the *New York Times'* actual malice test to public officials and public figures, respectively.[200]

---

196 *Guingguing v. Court of Appeals*, 508 Phil. 193, 204-206 (2005) [Per J. Tinga, Second Division], *citing New York Times v. Sullivan*, 376 U.S. 254, 300-301(1964).

197 Id. at 207.

198 376 U.S. 254 (1964).

199 *New York Times v. Sullivan*, 376 U.S. 254, 281-282 (1964).

200 *See Guingguing v. Court of Appeals*, 508 Phil. 193, 209-211 (2005) [Per J. Tinga, Second Division], *citing Garrison v. Louisiana*, 379 U.S. 64 (1964) and *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 163-164 (1967), CJ Warren, concurring.

Libel in the Philippines first emerged during the Spanish colonial times. The Spanish Penal Code criminalized "rebellion, sedition, assaults, upon persons in authority, and their agents, and contempts, insults, *injurias*, and threats against persons in authority and insults, *injurias*, and threats against their agents and other public officers."[201] Thus, noting the developments in both the Spanish and American colonial periods, it was correctly observed that:

> The use of criminal libel to regulate speech – especially speech critical of foreign rule or advocating Philippine independence – was a feature of both the Spanish and American colonial regimes. The Spanish Penal Code and the Penal Code of the Philippines made insult and calumny a crime. In the early 1900s, the Philippine Commission (whose members were all appointed by the President of the United States) punished both civil and criminal libel under Act No. 277, one of its earliest laws.[202]

During the American occupation, Governor-General William Howard Taft explained how "libel was made into a criminal offense in the Philippines because 'the limitations of free speech are not very well understood' unlike in the US'"[203] Then came the case of *U.S. v. Ocampo*,[204] where Martin Ocampo, Teodoro M. Kalaw, Lope K. Santos, Fidel A. Reyes, and Faustino Aguilar were charged with libel in connection with the publication of the article "Birds of Prey" in the newspaper *El Renacimiento*. The article allegedly defamed Philippine Commission member and Interior Secretary Mr. Dean C. Worcester. This court affirmed the conviction of Ocampo and Kalaw stating that there were no justifiable motives found in the publication of the article.

In essence, Philippine libel law is "a 'fusion' of the Spanish law on *defamacion* and the American law on libel."[205] It started as a legal tool to protect government and the status quo. The bare text of the law had to be qualified through jurisprudential interpretation as the fundamental right to expression became clearer. In theory, libel prosecution has slowly evolved from protecting both private citizens and public figures to its modern notion of shielding only private parties from defamatory utterances.

But, a survey of libel cases during the past two (2) decades will reveal that the libel cases that have gone up to the Supreme Court[206] generally involved notable personalities for parties. Relatively, libel cases that involve

---

201 D. G. K. Carreon, *A Long History*, in LIBEL AS POLITICS 70 (2008).
202 J. M. I. Diokno, *A Human Rights Perspective*, in LIBEL AS POLITICS 17-18 (2008).
203 D. G. K. Carreon, *A Long History*, in LIBEL AS POLITICS 71 (2008).
204 18 Phil. 1 (1910) [Per J. Johnson].
205 J. M. I. Diokno, *A Human Rights Perspective*, in LIBEL AS POLITICS 18 (2008) *citing People v. Del Rosario*, 86 Phil. 163 (1950).
206 These include cases that resolved the issue of guilt for the offense as well as cases that tackled procedural or jurisdictional issues and remanded the main issue to the trial court.

private parties before the Supreme Court are sparse.[207] Dean Raul Pangalangan, former dean of the University of the Philippines College of Law and now publisher of the Philippine Daily Inquirer, observed that "libel cases are pursued to their conclusion mainly by public figures, x x x [since those filed] by private persons are settled amicably before the prosecutor."[208] Among the cases that reached the Supreme Court were those involving offended parties who were electoral candidates,[209] ambassadors and business tycoons,[210] lawyers,[211] actors or celebrities,[212] corporations, [213] and, public officers.[214] Even court officials have been involved as complainants in libel cases.[215]

This attests to the propensity to use the advantages of criminal libel by those who are powerful and influential to silence their critics. Without doubt, the continuous evolution and reiteration of the jurisprudential limitations in the interpretation of criminal libel as currently worded has not been a deterrent. The present law on libel as reenacted by Section 4(c)(4) of Rep. Act No. 10175 will certainly do little to shield protected speech. This is clear because there has been no improvement in statutory text from its version in 1930.

---

207 *See Magno v. People*, 516 Phil. 72 (2006) [Per J. Garcia, Second Division]; *See also MVRS Publications, Inc. v. Islamic Da'wah Council of the Philippines, Inc.*, 444 Phil. 230 (2004) [Per J. Bellosillo, En Banc]; *Villamar-Sandoval v. Cailipan*, G.R. No. 200727, March 4, 2013, 692 SCRA 339 (2013) [Per J. Perlas-Bernabe, Second Division].

208 R. Pangalangan, *Libel as Politics*, in LIBEL AS POLITICS 11 (2008). Note, however, our ruling in *Crespo v. Mogul*, 235 Phil. 465 (1987), where we said that, "it is the duty of the fiscal to proceed with the presentation of evidence of the prosecution to the Court to enable the Court to arrive at its own independent judgment as to whether the accused should be convicted or acquitted. x x x The rule therefore in this jurisdiction is that once a complaint or information is filed in Court any disposition of the case as its dismissal or the conviction or acquittal of the accused rests in the sound discretion of the Court."

209 *See Brillante v. Court of Appeals*, 483 Phil. 568 (2004) [Per J. Tinga, Second Division]*; Villanueva v. Philippine Daily Inquirer*, Inc., G.R. No. 164437, May 15, 2009, 588 SCRA 1 [Per J. Quisumbing, Second Division].

210 *See Yuchengco v. Manila Chronicle Publishing Corporation*, G.R. No. 184315, November 25, 2009, 605 SCRA 684 [Per J. Chico-Nazario, Third Division]; *Bonifacio v. Regional Trial Court of Makati, Branch 149*, G.R. No. 184800, May 5, 2010, 620 SCRA 268 [Per J. Carpio-Morales, First Division]. This case involved allegedly libelous articles published in websites.

211 *See Buatis v. People*, 520 Phil. 149 (2006) [Per J. Austria-Martinez, First Division]; *See also Tulfo v. People*, 587 Phil. 64 (2008) [Per J. Velasco, Jr., Second Division]; and *Fortun v. Quinsayas*, G.R. No. 194578, February 13, 2013, 690 SCRA 623 [Per J. Carpio, Second Division]. This case originated as a special civil action for contempt involving Atty. Sigfrid A. Fortun and several media outfits. However, this court expanded the concept of public figures to lawyers, stating that lawyers of high-profile cases involving public concern become public figures.

212 *See Fermin v. People*, G.R. No. 157643, March 28, 2008, 550 SCRA 132 [Per J. Nachura, Third Division]; *Bautista v. Cuneta-Pangilinan*, G.R. No. 189754, October 24, 2012, 684 SCRA 521 [Per J. Peralta, Third Division].

213 *See Banal III v. Panganiban*, 511 Phil. 605 (2005) [Per J. Ynares-Santiago, First Division]. *See also Insular Life Assurance Company, Limited v. Serrano*, 552 Phil. 469 (2007) [Per C.J. Puno, First Division].

214 *See Lagaya v. People*, G.R. No. 176251, July 25, 2012, 677 SCRA 478 [Per J. Del Castillo, First Division]; *Lopez v. People*, G.R. No. 172203, February 14, 2011 642 SCRA 668 [Per J. Del Castillo, First Division]; *Binay v. Secretary of Justice*, 532 Phil. 742 (2006) [Per J. Ynares-Santiago, First Division]; *See also Jalandoni v. Drilon*, 383 Phil. 855 (2000) [Per J. Buena, Second Division]; *Macasaet v. Co, Jr.*, G.R. No. 156759, June 5, 2013, 697 SCRA 187; *Tulfo v. People*, 587 Phil. 64 (2008) [Per J. Velasco, Jr., Second Division].

215 *See Yambot v. Tuquero*, G.R. No. 169895, March 23, 2011, 646 SCRA 249 [Per J. Leonardo-De Castro, First Division].

Libel law now is used not so much to prosecute but to deter speech. What is charged as criminal libel may contain precious protected speech. There is very little to support the view of the majority that the law will not continue to have this effect on speech.

This court has adopted the American case of *Garrison v. Louisiana*, albeit qualifiedly, in recognizing that there is an "international trend in diminishing the scope, if not the viability, of criminal libel prosecutions."[216] *Garrison* struck down the Louisiana Criminal Defamation Statute and held that the statute incorporated constitutionally invalid standards when it came to criticizing or commenting on the official conduct of public officials.

It is time that we now go further and declare libel, as provided in the Revised Penal Code and in the Cybercrime Prevention Act of 2012, as unconstitutional.

This does not mean that abuse and unwarranted attacks on the reputation or credibility of a private person will not be legally addressed. The legal remedy is civil in nature and granted in provisions such as the Chapter on Human Relations in the Civil Code, particularly Articles 19, 20, and 21.[217] These articles provide:

> Art. 19. Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.

---

[216] *Guingguing v. Court of Appeals*, 508 Phil. 193, 214 (2005), *citing Garrison*, 379 U.S. 64 (1964). This court in *Guingguing* said that:

> Lest the impression be laid that criminal libel law was rendered extinct in regards to public officials, the Court made this important qualification in Garrison:
>
> > The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once with odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.

[217] *See also* Justice Carpio's dissenting opinion in *MVRS Publications, Inc. v. Islamic Da'wah Council of the Philippines, Inc.* 444 Phil. 230 (2004) [Per J. Bellosillo, En Banc] where he opined that the defamatory article published in the case falls under Article 26 of the Civil Code.

Article 26. Every person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons. The following and similar acts, though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention and other relief:

(1) Prying into the privacy of another's residence;

(2) Meddling with or disturbing the private life or family relations of another;

(3) Intriguing to cause another to be alienated from his friends;

(4) Vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect, or other personal condition.

> Article 20. Every person who, contrary to law, wilfully or negligently causes damage to another, shall indemnify the latter for the same.
>
> Article 21. Any person who wilfully causes loss or injury to another in manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage.

This court previously discussed the nature and applicability of Articles 19 to 21 of the Civil Code, stating that:

> [Article 19], known to contain what is commonly referred to as the principle of abuse of rights, sets certain standards which must be observed not only in the exercise of one's rights but also in the performance of one's duties. These standards are the following: to act with justice; to give everyone his due; and to observe honesty and good faith. The law, therefore, recognizes a primordial limitation on all rights; that in their exercise, the norms of human conduct set forth in Article 19 must be observed. A right, though by itself legal because recognized or granted by law as such, may nevertheless become the source of some illegality. When a right is exercised in a manner which does not conform with the norms enshrined in Article 19 and results in damage to another, a legal wrong is thereby committed for which the wrongdoer must be held responsible. But while Article 19 lays down a rule of conduct for the government of human relations and for the maintenance of social order, it does not provide a remedy for its violation. Generally, an action for damages under either Article 20 or Article 21 would be proper.
>
> Article 20, which pertains to damage arising from a violation of law, provides that:
>
> Art. 20. Every person who contrary to law, wilfully or negligently causes damage to another, shall indemnify the latter for the same.
>
> x x x Article 21 of the Civil Code provides that:
>
> Art. 21. Any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage.
>
> This article, adopted to remedy the "countless gaps in the statutes, which leave so many victims of moral wrongs helpless, even though they have actually suffered material and moral injury" [*Id*.] should "vouchsafe adequate legal remedy for that untold number of moral wrongs which it is impossible for human foresight to provide for specifically in the statutes" [*Id*. it p. 40; *See also* PNB v. CA, G.R. No. L-27155, May 18, 1978, 83 SCRA 237, 247].
>
> In determining whether or not the principle of abuse of rights may be invoked, there is no rigid test which can be applied.

> While the Court has not hesitated to apply Article 19 whether the legal and factual circumstances called for its application [*See* for e.g., Velayo v. Shell Co. of the Phil., Ltd., 100 Phil. 186 (1956); PNB v. CA, *supra;* Grand Union Supermarket, Inc. v. Espino, Jr., G.R. No. L-48250, December 28, 1979, 94 SCRA 953; PAL v. CA, G.R. No. L-46558, July 31, 1981,106 SCRA 391; United General Industries, Inc, v. Paler G.R. No. L-30205, March 15,1982,112 SCRA 404; Rubio v. CA, G.R. No. 50911, August 21, 1987, 153 SCRA 183] the question of whether or not the principle of abuse of rights has been violated resulting in damages under Article 20 or Article 21 or other applicable provision of law, depends on the circumstances of each case. x x x.[218]

In affirming award of damages under Article 19 of the Civil Code, this court has said that "[t]he legitimate state interest underlying the law of libel is the compensation of the individuals for the harm inflicted upon them by defamatory falsehood. After all, the individual's right to protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty.'"[219]

In a civil action, the complainant decides what to allege in the complaint, how much damages to request, whether to proceed or at what point to compromise with the defendant. Whether reputation is tarnished or not is a matter that depends on the toleration, maturity, and notoriety of the person involved. Varying personal thresholds exists. Various social contexts will vary at these levels of toleration. Sarcasm, for instance, may be acceptable in some conversations but highly improper in others.

In a criminal action, on the other hand, the offended party does not have full control of the case. He or she must get the concurrence of the public prosecutor as well as the court whenever he or she wants the complaint to be dismissed. The state, thus, has its own agency. It will decide for itself through the prosecutor and the court.

Criminalizing libel imposes a standard threshold and context for the entire society. It masks individual differences and unique contexts. Criminal libel, in the guise of protecting reputation, makes differences invisible.

Libel as an element of civil liability makes defamation a matter between the parties. Of course, because trial is always public, it also provides for measured retribution for the offended person. The possibility of being sued also provides for some degree of deterrence.

---

[218] *Globe Mackay Cable and Radio Corp. v. Court of Appeals*, 257 Phil. 783, 783-785 (1989) [Per J. Cortes, Third Division].

[219] *Philippine Journalists, Inc. (People's Journal) v. Thoenen*, 513 Phil. 607, 625 (2005) [Per J. Chico-Nazario, Second Division], *citing Garrison v. Louisiana*, 379 US 64 (1964), which in turn cited Justice Stewart's concurring opinion in *Rosenblatt v. Baer*, 383 US 75 (1966).

The state's interest to protect private defamation is better served with laws providing for civil remedies for the affected party. It is entirely within the control of the offended party. The facts that will constitute the cause of action will be narrowly tailored to address the perceived wrong. The relief, whether injunctive or in damages, will be appropriate to the wrong.

Declaring criminal libel as unconstitutional, therefore, does not mean that the state countenances private defamation. It is just consistent with our democratic values.

VI
Cybersex is Unconstitutional

Section 4(c)(1) of Rep. Act No. 10175 is also overbroad and, therefore, unconstitutional. As presently worded:

> SEC. 4. *Cybercrime Offenses.* —The following acts constitute the offense of cybercrime punishable under this Act:
>
> (c) Content-related Offenses:
>
> (1) Cybersex. — The willful engagement, maintenance, control, or operation, directly or indirectly, of any lascivious exhibition of sexual organs or sexual activity, with the aid of a computer system, for favor or consideration.

The ponencia invites us to go beyond the plain and ordinary text of the law and replace it with the deliberations in committees that prepared the provision. Thus, it claims: "(t)he Act actually seeks to punish cyber prostitution, white slave trade, and pornography for favor and consideration. This includes interactive prostitution and pornography, i.e. by webcam."[220]

The majority is not clear why the tighter language defining the crimes of prostitution and white slavery was not referred to clearly in the provision. Neither does it explain the state's interest in prohibiting intimate private exhibition (even for favor or consideration) by web cam as opposed to physical carnal knowledge required now in the crime of prostitution.

Worse, the ponencia fails to appreciate the precarious balance that decades of jurisprudence carved out in relation to criminalizing expression with sexual content. Instead, the ponencia points out that the "x x x subject

---

[220] Ponencia, J. Abad, 17-18. Citations omitted.

of section 4(c)(1)—lascivious exhibition of sexual organs or sexual activity—is not novel. Article 201 of the RPC punishes 'obscene publications and exhibitions and indecent shows.'"[221] Again, we are thrown back to the 1930 version of the Revised Penal Code. With constant and painstaking tests that will bring enlightenment to expression with sexual content evolved through jurisprudence, it seems that we, as a society, are being thrown back to the dark ages.

VI (B)
Sweeping Scope of Section 4(c)(1)

This provision is too sweeping in its scope.

As worded, it unreasonably empowers the state to police intimate human expression. The standard for "lascivious exhibition" and the meaning of "sexual organ or sexual activity" empowers law enforcers to pass off their very personal standards of their own morality. Enforcement will be strict or loose depending on their tastes. Works of art sold in the market in the form of photographs, paintings, memes, and other genre posted in the internet would have to shape their expression in accordance with the tastes of local law enforcers. Art — whether free, sold or bartered — will not expand our horizons; it will be limited by the status quo in our culture wherein the dominant themes will remain dominant. There will be patriarchal control over what is acceptable intimate expression.

This provision, thus, produces a chilling effect. It provides for no restrictions to power and allows power to determine what is "lascivious" and what is not.

Respondents concede that certain artistic works — even if they feature nudity and the sexual act — are protected speech. They argue that the interpretation of the provision should allow for these kinds of expression. However, this reading cannot be found from the current text of the provision. The Solicitor General, though an important public officer, is not the local policeman in either an urban or rural setting in the Philippines.

Certain art works that depict the nude human body or the various forms of human intimacies will necessarily have a certain degree of lasciviousness. Human intimacy, depicted in the sexual act, is not sterile. It is necessarily evocative, expressive, and full of emotions. Sexual expression can be titillating and engaging. It is to be felt perhaps more than it should be rationally understood.

---

[221] Id. at 18.

Michaelangelo's marble statue, *David*, powerfully depicted an exposed Biblical hero. Sandro Boticelli's painting, *Birth of Venus*, emphatically portrays the naked, full-grown mythological Roman goddess Venus. The Moche erotic pots of Peru depict various sexual acts. These representations of human nakedness may be lascivious for some but expressively educational for others. This can be in images, video files, scientific publications, or simply the modes of expression by internet users that can be exchanged in public.

VI (C)
Standards for "Obscenity"

This is not the first time that this court deals with sexually-related expression. This court has carefully crafted operative parameters to distinguish the "obscene" from the protected sexual expression. While I do not necessarily agree with the current standards as these have evolved, it is clear that even these standards have not been met by the provision in question. I definitely agree that "lascivious" is a standard that is too loose and, therefore, unconstitutional.

Even for this reason, the provision cannot survive the constitutional challenge.

Obscenity is not easy to define.[222] In *Pita v. Court of Appeals*, we recognized that "individual tastes develop, adapt to wide-ranging influences, and keep in step with the rapid advance of civilization. What shocked our forebears, say, five decades ago, is not necessarily repulsive to the present generation. James Joyce and D.H. Lawrence were censored in the thirties yet their works are considered important literature today."[223]

Using the concept of obscenity or defining this term is far from being settled.[224] The court's task, therefore, is to "[evolve] standards for proper police conduct faced with the problem" and not so much as to arrive at the perfect definition.[225]

In *Gonzales v. Kalaw-Katigbak*,[226] we noted the persuasiveness of *Roth v. United States*[227] and borrowed some of its concepts in judging obscenity.

---

222 *Pita v. Court of Appeals*, 258-A Phil. 134, 146 (1989) [Per J. Sarmiento, En Banc], *cited in Fernando v. Court of Appeals*, 539 Phil. 407, 416 (2006) [Per J. Quisumbing, Third Division].

223 *Id., citing Kingsley Pictures v. N.Y. Regents*, 360 US 684 (1959). The case involved the movie version in *Lady Chatterley's Lover*.

224 Id. at 146.

225 Id. at 147.

226 *Gonzales v. Kalaw-Katigbak*, 222 Phil. 225 (1985) [Per C.J. Fernando, En Banc].

227 354 US 476, 487 (1957).

> There is persuasiveness to the approach followed in Roth: 'The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. Regina v. Hicklin [1968] LR 3 QB 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: **whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.** The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. **On the other hand, the substituted standard provides safeguards to withstand the charge of constitutional infirmity.**"[228] (Emphasis supplied)

Thus, at present, we follow *Miller v. California*,[229] a United States case, as the latest authority on the guidelines in characterizing obscenity.[230] The guidelines, which already integrated the *Roth* standard on prurient interest, are as follows:

> a. Whether the 'average person, applying contemporary standards' would find the work, taken as a whole, appeals to the prurient interest x x x;
>
> 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.[231]

The guidelines in *Miller* were adopted in *Pita v. Court of Appeals*[232] and *Fernando v. Court of Appeals.*[233] It was also cited in the 2009 case of *Soriano v. Laguardia*[234] wherein we stated:

> Following the contextual lessons of the cited case of *Miller v. California* a patently offensive utterance would come within the pale of the term *obscenity* should it appeal to the prurient interest of an average listener applying contemporary standards.[235]

---

228 *Gonzales v. Kalaw-Katigbak*, 222 Phil. 225, 232 (1985).
229 413 US 15 (1973).
230 *Pita v. Court of Appeals*, 258-A Phil. 134, 145 (1989) [Per J. Sarmiento, En Banc], *cited in Fernando v. Court of Appeals*, 539 Phil. 407, 417 (2006) [Per J. Quisumbing, Third Division].
231 Id., *cited in Pita v. Court of Appeals*, 258-A Phil. 134, 145 (1989) *and cited in Fernando v. Court of Appeals*, 539 Phil. 407, 417 (2006).
232 258-A Phil. 134, 145 (1989) [Per J. Sarmiento, En Banc].
233 539 Phil. 407, 417 [Per J. Quisumbing, Third Division].
234 G.R. No. 164785 and G.R. No. 165636, April 29, 2009, 587 SCRA 79 [Per J. Velasco, En Banc].
235 Id. at 101.

The tests or guidelines cited above were created and applied as demarcations between protected expression or speech and obscene expressions. The distinction is crucial because censorship or prohibition beyond these guidelines is a possible danger to the protected freedom. For this reason, the courts, as "guard[ians] against any impermissible infringement on the freedom of x x x expression," "should be mindful that no violation of such is freedom is allowable."[236]

The scope of the cybersex provision is defective. Contrary to the minimum standards evolved through jurisprudence, the law inexplicably reverts to the use of the term "lascivious" to qualify the prohibited exhibition of one's sexuality. This effectively broadens state intrusion. It is an attempt to reset this court's interpretation of the constitutional guarantee of freedom of expression as it applies to sexual expression.

First, the current text does not refer to the standpoint of the "average person, applying contemporary standards." Rather it refers only to the law enforcer's taste.

Second, there is no requirement that the "work depicts or describes in a patently offensive way sexual conduct"[237] properly defined by law. Instead, it simply requires "exhibition of sexual organs or sexual activity"[238] without reference to its impact on its audience.

Third, there is no reference to a judgment of the "work taken as a whole"[239] and that this work "lacks serious literary, artistic, political or scientific" value. Rather, it simply needs to be "lascivious."[240]

Roth v. United States[241] sheds light on the relationship between sex and obscenity, and ultimately, cybersex as defined in Rep. Act No. 10175 and obscenity:

> However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, *e.g.* in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it

---

236 *Gonzales v. Kalaw-Katigbak*, 222 Phil. 225, 232 (1985) [Per C.J. Fernando, En Banc].
237 *Pita v. Court of Appeals*, 258-A Phil. 134, 145 (1989) [Per J. Sarmiento, En Banc],
238 Rep. Act No. 10175, sec. 4(c)(1).
239 *Pita v. Court of Appeals*, 258-A Phil. 134, 145 (1989) [Per J. Sarmiento, En Banc],
240 Rep. Act No. 10175, sec. 4(c)(1).
241 354 US 476 (1957).

> is one of the vital problems of human interest and public concern.[242]

This court adopted these views in *Gonzales* v. *Kalaw-Katigbak.*[243]

VI (D)
Obscenity and Equal Protection

Some of the petitioners have raised potential violations of the equal protection clause in relation to provisions relating to obscenity.

We are aware that certain kinds of offensive and obscene expression can be stricken down as unconstitutional as it violates the equal protection clause. At this point, any assessment of this argument must require the framework of adversarial positions arising from actual facts. However, a survey of this argument may be necessary in order to show that even the current text will not be able to survive this challenge.

Catharine MacKinnon suggests that there is a conflict between the application of doctrines on free expression and the idea of equality between the sexes.[244] The issue of obscenity, particularly pornography, is "legally framed as a vehicle for the expression of ideas."[245] Pornography, in essence, is treated as "only words" or expressions that are distinct from what it does (from its acts).[246] As such, it is accorded the status of preferred freedom, without regard to its harmful effects, that is perpetuating a social reality that women are subordinate to men.[247] Hence, in protecting pornography as an expression, the actions depicted become protected in the name of free expression.[248]

The issue of inequality had, in the past, been rendered irrelevant when faced with the issue of obscenity or pornography.[249] This was not addressed by our jurisprudence on obscenity.[250] The guidelines on determining what is obscene are premised on the idea that men and women are equal and viewed

---

242 Id.
243 *Gonzales v. Kalaw-Katigbak*, 222 Phil. 225, 233 (1985) [Per C.J. Fernando, En Banc].
244 *See* C. MacKinnon, ONLY WORDS (1993).
245 Id. at 14.
246 Id. at 14-15, 89-90.
247 Id. at 14-15, 88-91. Catharine MacKinnon and Andrea Dworkin proposed a law that defines pornography as "graphic sexually explicit materials that subordinate women through pictures or words," p. 22.
248 Id. at 9.
249 Id. at 87-88.
250 Id at 87. *See also* C. MacKinnon, *From Pornography, Civil Rights, and Speech*, in DOING ETHICS 303 (2009).

equally — which basically pertains to the male's point of view of equality that women are inferior.[251]

In treating pornography, therefore, as protected expression, it is alleged that the State protects only the men's freedom of speech.[252] Simultaneously, however, women's freedom of speech is trampled upon.[253] Each time pornography is protected as free expression, the male view of equality is perpetuated.[254] It becomes more and more integrated into the consciousness of the society, silencing women, and rendering the reality of female subordination so unremarkable that it becomes inconsequential and even doubtful.[255]

Others do not agree with MacKinnon's view. According to Edwin Baker, MacKinnon's theory "fails to recognize or provide for the primary value of or justification for protecting expression."[256] It fails to recognize the status of this freedom *vis a vis* individual liberty, and why this freedom is fundamental.[257] More than through arguments about ideas, people induce changes and transform their social and political environments through expressive behavior.[258] Also, being able to participate in the process of social and political change is "encompassed in the protected liberty."[259]

Baker provides an example, thus:

> Even expression that is received less as argument than "masturbation material", becomes a part of a cultural or behavioral "debate" about sexuality, about the nature of human relations, and about pleasure and morality, as well as about the roles of men and women. Historically, puritanical attempts to suppress sexually explicit materials appear largely designed to shut down this cultural contestation in favor of a traditional practice of keeping women in the private sphere. Opening up this cultural debate has in the past, and can in the future, contribute to progressive change.[260]

---

251 *See* C. MacKinnon, ONLY WORDS (1993); *See also* C. MacKinnon, *From Pornography, Civil Rights, and Speech*, in DOING ETHICS 301.

252 *See* C. MacKinnon, ONLY WORDS (1993); *See also* C. MacKinnon, *From Pornography, Civil Rights, and Speech*, in DOING ETHICS 309.

253 *See* C. MacKinnon, ONLY WORDS (1993); *See also* C. MacKinnon, *From Pornography, Civil Rights, and Speech*, in DOING ETHICS.

254 *See* C. MacKinnon, ONLY WORDS (1993); *See also* C. MacKinnon, *From Pornography, Civil Rights, and Speech*, in DOING ETHICS 300-302.

255 *See* C. MacKinnon, ONLY WORDS (1993); *See also* C. MacKinnon, *From Pornography, Civil Rights, and Speech*, in DOING ETHICS 301-302, 307.

256 Baker, E. C. *REVIEW: Of Course, More Than Words. Only Words. Catharine A. MacKinnon.* 61 U. Chi. L. Rev. 1181 (1994) 1197.

257 Id.

258 Id.

259 Id.

260 Id. at 1194.

Baker also points out that MacKinnon disregards that receivers of communicated expressions are presumably autonomous agents who bear the responsibility for their actions and are capable of moral choice.[261]

The expression should also be treated as independent of the act or offense. The expression or "autonomous act of the speaker does not itself cause x x x harm. Rather, the harm occurs through how the other person, presumably an autonomous agent whom we normally treat as bearing the responsibility for her own acts, responds."[262]

Baker agrees that expressions "[construct] the social reality in which [offenses] take place."[263] However, the expression itself is not the offense.[264]

> Part of the reason to protect speech, or, more broadly, to protect liberty, is a commitment to the view that people should be able to participate in constructing their world, or to the belief that this popular participation provides the best way to move toward a better world. The guarantee of liberty represents a deep faith in people and in democracy.[265]

Punishing or even threatening to punish "lascivious exhibition of sexual organs or sexual activity" through "the aid of a computer system" for "favor or consideration" does nothing to alleviate the subordination of women. Rather, it facilitates the patriarchy. It will allow control of what a woman does with her body in a society that will be dominated by men or by the ideas that facilitate men's hegemony.

The current provision prohibiting cybersex will reduce, through its chilling effect, the kind of expression that can be the subject of mature discussion of our sexuality. The public will, therefore, lose out on the exchanges relating to the various dimensions of our relationships with others. The cybersex provisions stifles speech, aggravates inequalities between genders, and will only succeed to encrust the views of the powerful.

If freedom of expression is a means that allows the minority to be heard, then the current version of this law fails miserably to protect it. It is overbroad and unconstitutional and should not be allowed to exist within our constitutional order.

---

261 Id. at 1197-1211.
262 Id. at 1199.
263 Id. at 1203.
264 Id. at 1204.
265 Id.

VI (E)
Child Pornography Different from Cybersex

It is apt to express some caution about how the parties confused child pornography done through the internet and cybersex.

Section 4(c)(2), which pertains to child pornography, is different from the cybersex provision. The provision on child pornography provides:

> (2) Child Pornography. — The unlawful or prohibited acts defined and punishable by Republic Act No. 9775 or the Anti-Child Pornography Act of 2009, committed through a computer system: *Provided*, That the penalty to be imposed shall be (1) one degree higher than that provided for in Republic Act No. 9775.

In my view, this provision should survive constitutional challenge. Furthermore, it is not raised in this case. The explicit reference to the Anti-Pornography Law or Republic Act No. 9775 constitutes sufficient standard within which to base the application of the law and which will allow it to survive a facial challenge for now.

VII
Traffic Data and Warrants

Section 12 of the Cybercrime Prevention Act of 2012 provides:

> *Real-Time Collection of Traffic Data* — Law enforcement authorities, with due cause, shall be authorized to collect or record by technical or electronic means traffic data in real-time associated with specified communications transmitted by means of a computer system.
>
> Traffic data refer only to the communication's origin, destination, route, time, date, size, duration, or type of underlying service, but not content, nor identities.
>
> All other data to be collected or seized or disclosed will require a court warrant.
>
> Service providers are required to cooperate and assist law enforcement authorities in the collection or recording of the above-stated information.
>
> The court warrant required under this section shall only be issued or granted upon written application and the examination under oath or affirmation of the applicant and the witnesses he may produce and the showing:

> (1) that there are reasonable grounds to believe that any of the crimes enumerated hereinabove has been committed, or is being committed, or is about to be committed:
>
> (2) that there are reasonable grounds to believe that evidence that will be obtained is essential to the conviction of any person for, or to the solution of, or to the prevention of, any such crimes; and
>
> (3) that there are no other means readily available for obtaining such evidence.

VII (B)
Traffic Data and Expression

Traffic data, even as it is defined, still contains speech elements. When, how, to whom, and how often messages are sent in the internet may nuance the content of the speech. The message may be short (as in the 140-character limit of a tweet) but when it is repeated often enough in the proper context, it may imply emphasis or desperation. That a message used the email with a limited number of recipients with some blind carbon copies (Bcc) characterizes the message when it is compared to the possibility of actually putting the same content in a public social media post.

The intended or unintended interception of these parts of the message may be enough deterrent for some to make use of the space provided in cyberspace. The parameters are so loosely and broadly defined as "due cause" to be determined by "law enforcers". Given the pervasive nature of the internet, it can rightly be assumed by some users that law enforcers will make use of this provision and, hence, will definitely chill their expression.

Besides, the provision — insofar as it allows warrantless intrusion and interception by law enforcers upon its own determination of due cause — does not specify the limits of the technologies that they can use. Traffic data is related to and intimately bound to the content of the packets of information sent from one user to the other or from one user to another server. The provision is silent on the limits of the technologies and methods that will be used by the law enforcer in tracking traffic data. This causes an understandable apprehension on the part of those who make use of the same servers but who are not the subject of the surveillance. Even those under surveillance — even only with respect to the traffic data — have no assurances that the method of interception will truly exclude the content of the message.

As observed by one author who sees the effect of general and roving searches on freedom of expression:

> Most broadly, freedom from random governmental monitoring—of both public spaces and recorded transactions—might be an essential predicate for self definition and development of the viewpoints that make democracy vibrant. This reason to be concerned about virtual searches, while somewhat amorphous, is important enough to have been remarked on by two Supreme Court justices. The first wrote, 'walking and strolling and wandering…have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right to dissent and have honoured the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed suffocating silence.' The second justice wrote:
>
> Suppose that the local police in a particular jurisdiction were to decide to station a police car at the entrance to the parking lot of a well-patronised bar from 5:30 p.m. to 7:30 p.m. every day…I would guess that the great majority of people…would say that this is not a proper police function…There would be an uneasiness, and I think a justified uneasiness, if those who patronised the bar felt that their names were being taken down and filed for future reference…This ought not to be governmental function when the facts are as extreme as I put them.[266]

It will be different if it will be in the context of a warrant from a court of law. Its duration, scope, and targets can be more defined. The methods and technologies that will be used can be more limited. There will thus be an assurance that the surveillance will be reasonably surgical and provided on the basis of probable cause. Surveillance under warrant, therefore, will not cause a chilling effect on internet expression.

In *Blo Umpar Adiong v. COMELEC*,[267] this court reiterated:

> 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

---

[266] C. Slobogin, *Is the Fourth Amendment Relevant in a Technological Age?*, in J. Rosen and B. Wittes, eds., Constitution 3.0, 23 (2011), *citing* Justice Douglas in Papachristou *v* Jacksonville, 405 U.S. 156, 164 (1972) and W. H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?; or Privacy, You've Come a Long Way, Baby*, 23 Kansas Law Review 1, 9 (1974).

[267] G.R. No. 103956, March 31, 1992, 207 SCRA 712.

> 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.
>
> In Lovell v. Griffin, 303 US 444, 82 L ed 949, 58 S Ct 666, the Court invalidated an ordinance prohibiting all distribution of literature at any time or place in Griffin, Georgia, without a license, pointing out that so broad an interference was unnecessary to accomplish legitimate municipal aims. In Schneider v. Irvington, 308 US 147, 84 L ed 155, 60 S Ct. 146, the Court dealt with ordinances of four different municipalities which either banned or imposed prior restraints upon the distribution of handbills. In holding the ordinances invalid, the court noted that where legislative abridgment of fundamental personal rights and liberties is asserted, "the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions," 308 US, at 161. In Cantwell v Connecticut, 310 US 296, 84 L ed 1213, 60 S Ct. 900, 128 ALR 1352, the Court said that "[c]onduct remains subject to regulation for the protection of society," but pointed out that in each case "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." (310 US at 304) (Shelton v. Tucker, 364 US 479 [1960][268]

Section 12 of Rep. Act No. 10175 broadly authorizes law enforcement authorities "with due cause" to intercept traffic data in real time. "Due cause" is a uniquely broad standard different from the "probable cause" requirement in the constitution or the parameters of "reasonable searches" in our jurisprudence.

The statute does not care to make use of labels of standards replete in our jurisprudence. It foists upon the public a standard that will only be defined by those who will execute the law. It therefore amounts to a carte blanche and roving authority whose limits are not statutorily limited. Affecting as it does our fundamental rights to expression, it therefore is clearly unconstitutional.

VII (C)
Traffic Data and Privacy Rights

Traffic data is defined by the second paragraph of Section 12 of Rep. Act No. 10175, thus:

---

[268] Id. at 719-720.

> Traffic data refer only to the communication's origin, destination, route, time, date, size, duration, or type of underlying service, but not content, nor identities.

As worded, the collection, aggregation, analysis, storage and dissemination of these types of data may implicate both the originator's and the recipient's rights to privacy.

That these data move through privately owned networks, administered by private internet service providers, and run through privately owned internet exchange nodes is no moment. We will have to decide in some future case (where the facts and controversy would be clearer and more concrete) the nature and levels of intrusion that would be determined as a "reasonable search" and the uses of such data that would be reasonable "seizures" within the meaning of Article III, Section 2 of the Constitution. In such cases, we will have to delimit the privacy interests in the datum in question as well as in the data that may be collaterally acquired.

There are many types of "searches".

There are instances when the observation is done only for purposes of surveillance. In these types of "searches," the law enforcers may not yet have a specific criminal act in mind that has already been committed. Perhaps, these are instances when government will just want to have access to prevent the occurrence of cyber attacks of some kind. Surveillance can be general, i.e., one where there is no specific actor being observed. Some general surveillance may also be suspicionless. This means that there is no concrete indication that there will be some perpetrator. It is the surveillance itself that is the preventive action to deter any wrongdoing. It can also be specific, i.e., that there is already an actor or a specific group or classification of actors that is of interest to the government.

Then, there are the "searches" which are more properly called investigations. That is, that there is already a crime that has been committed or certain to be committed and law enforcers will want to find evidence to support a case. Then there is the "search" that simply enables law enforcers to enter a physical or virtual space in order to retrieve and preserve evidence already known to law enforcers.

For the moment, it is enough to take note that almost all of our jurisprudence in this regard has emerged from physical intrusions into personal spaces.

In *In the Matter of the Petition for the Writ of the Petition for Issuance of Writ of Habeas Corpus of Camilo L. Sabio v. Gordon,*[269] this court explained the determination of a violation of the right of privacy:

> Zones of privacy are recognized and protected in our laws. Within these zones, any form of intrusion is impermissible unless excused by law and in accordance with customary legal process. The meticulous regard we accord to these zones arises not only from our conviction that the right to privacy is a "*constitutional right*" and "the *right most valued by civilized men*," but also from our adherence to the Universal Declaration of Human Rights which mandates that, "*no one shall be subjected to arbitrary interference with his privacy*" and "*everyone has the right to the protection of the law against such interference or attacks*."
>
> Our Bill of Rights, enshrined in Article III of the Constitution, provides at least two guarantees that explicitly create zones of privacy. It highlights a person's "*right to be let alone*" or the "*right to determine what, how much, to whom and when information about himself shall be disclosed*." **Section 2** guarantees "**the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures of whatever nature and for any purpose**." **Section 3** renders inviolable the "**privacy of communication and correspondence**" and further cautions that "**any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding**."
>
> In evaluating a claim for violation of the right to privacy, a court must determine whether a person has exhibited a reasonable expectation of privacy and, if so, whether that expectation has been violated by unreasonable government intrusion.[270]

"Reasonable expectations of privacy," however, may not be the only criterion that may be useful in situations arising from internet use. Some have suggested that in view of the infrastructure or the permeability of the networks created virtually and its cosmopolitarian or cross-cultural character, it may be difficult to identify what may be the normative understanding of all the participants with respect to privacy.[271] It has been suggested that privacy may best be understood in its phases, i.e., a core inalienable category where personal information is within the control of the individual, the right to initial disclosure, and the right for further dissemination.[272]

---

269 535 Phil. 687 (2006).

270 Id. at 714-715.

271 *See for instance* J. Rosen et al., CONSTITUTION 3.0 FREEDOM AND TECHNOLOGICAL CHANGE (2011).

272 *See E.C. Baker,* 'Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment', < http://www.yale.edu/lawweb/jbalkin/telecom/bakerautonomyandinformationalprivacy.pdf> (visited February 21, 2014).

In *People v. Chua Ho San*,[273] this court made an explicit connection between the right to privacy and the right against unreasonable searches and seizures. Even then, based on the facts there alleged, a search was described as a "State intrusion to a person's body, personal effects or residence":

> Enshrined in the Constitution is the inviolable right to privacy of home and person. It explicitly ordains that people have the right to be secure in their persons, houses, papers and effects against unreasonable searches and seizures of whatever nature and for any purpose. Inseparable, and not merely corollary or incidental to said right and equally hallowed in and by the Constitution, is the exclusionary principle which decrees that any evidence obtained in violation of said right is inadmissible for any purpose in any proceeding.
>
> The Constitutional proscription against unreasonable searches and seizures does not, of course, forestall reasonable searches and seizure. What constitutes a reasonable or even an unreasonable search in any particular case is purely a judicial question, determinable from a consideration of the circumstances involved. Verily, the rule is, the Constitution bars State intrusions to a person's body, personal effects or residence except if conducted by virtue of a valid search warrant issued in compliance with the procedure outlined in the Constitution and reiterated in the Rules of Court; "otherwise such search and seizure become 'unreasonable' within the meaning of the aforementioned constitutional provision."[274]

In the more recent case of *Valeroso v. People*,[275] this court held that:

> Unreasonable searches and seizures are the menace against which the constitutional guarantees afford full protection. While the power to search and seize may at times be necessary for public welfare, still it may be exercised and the law enforced without transgressing the constitutional rights of the citizens, for no enforcement of any statute is of sufficient importance to justify indifference to the basic principles of government. Those who are supposed to enforce the law are not justified in disregarding the rights of an individual in the name of order. Order is too high a price to pay for the loss of liberty.[276]

Very little consideration, if any, has been taken of the speed of information transfers and the ephemeral character of information exchanged in the internet.

I concede that the general rule is that in order for a search to be considered reasonable, a warrant must be obtained. In *Prudente v. Dayrit*:[277]

---

273 367 Phil. 703 (1999).
274 Id. at 715.
275 G.R. No. 164815, September 3, 2009, 598 SCRA 41.
276 Id. at 59.
277 259 Phil. 541 (1989).

> For a valid search warrant to issue, there must be probable cause, which is to be determined personally by the judge, after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized. The probable cause must be in connection with one specific offense and the judge must, before issuing the warrant, personally examine in the form of searching questions and answers, in writing and under oath, the complainant and any witness he may produce, on facts personally known to them and attach to the record their sworn statements together with any affidavits submitted.
>
> The "probable cause" for a valid search warrant, has been defined "as such facts and circumstances which would lead a reasonably discreet arid prudent man to believe that an offense has been committed, and that objects sought in connection with the offense are in the place sought to be searched." This probable cause must be shown to be within the personal knowledge of the complainant or the witnesses he may produce and not based on mere hearsay.[278] (Citations omitted)

However, not all searches without a warrant are per se invalid. Jurisprudence is replete with the exceptions to the general rule.

In *People v. Rodrigueza*,[279] this court reiterated the enumeration of the instances when a search and seizure may be conducted reasonably without the necessity of a search warrant:

> As provided in the present Constitution, a search, to be valid, must generally be authorized by a search warrant duly issued by the proper government authority. True, in some instances, this Court has allowed government authorities to conduct searches and seizures even without a search warrant. Thus, when the owner of the premises waives his right against such incursion; when the search is incidental to a lawful arrest; when it is made on vessels and aircraft for violation of customs laws; when it is made on automobiles for the purpose of preventing violations of smuggling or immigration laws; when it involves prohibited articles in plain view; or in cases of inspection of buildings and other premises for the enforcement of fire, sanitary and building regulations, a search may be validly made even without a search warrant.[280] (Citations omitted)

---

278 Id. at 549.
279 G.R. No. 95902, February 4, 1992, 205 SCRA 791.
280 Id. at 798.

In specific instances involving computer data, there may be analogies with searches of moving or movable vehicles. *People v. Bagista*[281] is one of many that explains this exception:

> The constitutional proscription against warrantless searches and seizures admits of certain exceptions. Aside from a search incident to a lawful arrest, a warrantless search had been upheld in cases of a moving vehicle, and the seizure of evidence in plain view.
>
> With regard to the search of moving vehicles, this had been justified on the ground that the mobility of motor vehicles makes it possible for the vehicle to be searched to move out of the locality or jurisdiction in which the warrant must be sought.
>
> This in no way, however, gives the police officers unlimited discretion to conduct warrantless searches of automobiles in the absence of probable cause. When a vehicle is stopped and subjected to an extensive search, such a warrantless search has been held to be valid only as long as the officers conducting the search have reasonable or probable cause to believe before the search that they will find the instrumentality or evidence pertaining to a crime, in the vehicle to be searched.[282] (Citations omitted)

Then again in *People v. Balingan*,[283] this court held that there was a valid search and seizure, even if done in a moving vehicle. It gave the rationale for this holding:

> We also find no merit in appellant's argument that the marijuana flowering tops should be excluded as evidence, they being the products of an alleged illegal warrantless search. The search and seizure in the case at bench happened in a moving, public vehicle. In the recent case of *People vs. Lo Ho Wing*, 193 SCRA 122 (1991), this Court gave its approval to a warrantless search done on a taxicab which yielded the illegal drug commonly known as *shabu*. In that case, we raciocinated:
>
> x x x x
>
> The contentions are without writ. As correctly averred by appellee, that search and seizure must be supported by a valid warrant is not an absolute rule. There are at least three (3) well-recognized exceptions thereto. As set forth in the case of *Manipon, Jr. vs. Sandiganbayan*, these are: [1] a search incidental to an arrest, [2] *a search of a moving vehicle*, and [3] seizure of evidence in plain view (emphasis supplied). The circumstances of the case clearly show that the search in question was made as regards a moving vehicle. Therefore, a valid warrant was not necessary to effect the search on appellant and his co-accused.
>
> In this connection, We cite with approval the averment of the Solicitor General, as contained in the appellee's brief, that the rules governing search and seizure have over the years been steadily liberalized whenever

---

281 G.R. No. 86218, September 18, 1992, 214 SCRA 63.
282 Id. at 68-69.
283 G.R. No. 105834, February 13, 1995, 241 SCRA 277.

> a moving vehicle is the object of the search on the basis of practicality. This is so considering that before a warrant could be obtained, the place, things and persons to be searched must be described to the satisfaction of the issuing judge — a requirement which borders on the impossible in the case of smuggling effected by the use of a moving vehicle that can transport contraband from one place to another with impunity. We might add that a warrantless search of a moving vehicle is justified on the ground that "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."[284]

Another instance of a reasonable and valid warrantless search which can be used analogously for facts arising from internet or computer use would be in instances where the existence of the crime has been categorically acknowledged. *People v. De Gracia*,[285] explains:

> The next question that may be asked is whether or not there was a valid search and seizure in this case. While the matter has not been squarely put in issue, we deem it our bounden duty, in light of advertence thereto by the parties, to delve into the legality of the warrantless search conducted by the raiding team, considering the gravity of the offense for which herein appellant stands to be convicted and the penalty sought to be imposed.
>
> It is admitted that the military operatives who raided the Eurocar Sales Office were not armed with a search warrant at that time. The raid was actually precipitated by intelligence reports that said office was being used as headquarters by the RAM. Prior to the raid, there was a surveillance conducted on the premises wherein the surveillance team was fired at by a group of men coming from the Eurocar building. When the military operatives raided the place, the occupants thereof refused to open the door despite requests for them to do so, thereby compelling the former to break into the office. The Eurocar Sales Office is obviously not a gun store and it is definitely not an armory or arsenal which are the usual depositories for explosives and ammunition. It is primarily and solely engaged in the sale of automobiles. The presence of an unusual quantity of high-powered firearms and explosives could not be justifiably or even colorably explained. In addition, there was general chaos and disorder at that time because of simultaneous and intense firing within the vicinity of the office and in the nearby Camp Aguinaldo which was under attack by rebel forces. The courts in the surrounding areas were obviously closed and, for that matter, the building and houses therein were deserted.
>
> Under the foregoing circumstances, it is our considered opinion that the instant case falls under one of the exceptions to the prohibition against a warrantless search. In the first place, the military operatives, taking into account the facts obtaining in this case, had reasonable ground to believe that a crime was being committed. There was consequently more than sufficient probable cause to warrant their action. Furthermore, under the situation then

---

[284] Id. at 283-284.
[285] G.R. Nos. 102009-10, July 6, 1994, 233 SCRA 716.

> prevailing, the raiding team had no opportunity to apply for and secure a search warrant from the courts. The trial judge himself manifested that on December 5, 1989 when the raid was conducted, his court was closed. Under such urgency and exigency of the moment, a search warrant could lawfully be dispensed with.[286]

But the internet has created other dangers to privacy which may not be present in the usual physical spaces that have been the subject of searches and seizures in the past. Commercial owners of servers and information technologies as well as some governments have collected data without the knowledge of the users of the internet. It may be that our Data Privacy Law[287] may be sufficient.

Absent an actual case therefore, I am not prepared to declare Section 12 of Rep. Act 10175 as unconstitutional on the basis of Section 2 or Section 3(a) of Article III of the Constitution. My vote only extends to its declaration of unconstitutionality because the unlimited breadth of discretion given to law enforcers to acquire traffic data for "due cause" chills expression in the internet. For now, it should be stricken down because it violates Article III, Section 4 of the Constitution.

VIII
Limitations on Commercial Speech are Constitutional

I dissent from the majority in their holding that Section 4(c)(3) of Rep. Act No. 10175 is unconstitutional. This provides:

> "(3) Unsolicited Commercial Communications. – The transmission of commercial electronic communication with the use of computer system which seek to advertise, sell, or offer for sale product and services are prohibited unless:
>
> > "(i) there is prior affirmative consent from the recipient; or
> >
> > "(ii) the primary intent of the communication is for service and/or administrative announcements from the sender to its existing users, subscribers or customers; or
> >
> > "(iii) the following conditions are present:
> >
> > > "(aa) the commercial electronic communication contains a simple, valid, and

---

[286] Id. at 728-729.

[287] Rep. Act No. 10173, otherwise known as the "Data Privacy Act of 2012."

> reliable way for the recipient to reject receipt of further commercial electronic messages (opt out) from the same source;
>
> "(bb) the commercial electronic communication does not purposely disguise the source of the electronic message; and
>
> "(cc) the commercial electronic communication does not purposely include misleading information in any part of the message in order to induce the recipients to read the message."

On the origins of this provision, the Senate Journal's reference to the deliberations on the Cybercrime Law[288] states:

> Unsolicited Commercial Communications in Section 4(C)(3)
>
> This offense is not included in the Budapest Convention. Although there is an ongoing concern against receiving spams or unsolicited commercial e-mails sent in bulk through the computer or telecommunication network, Section 4(C)(3) is too general in the sense it can include a simple email from one person to another person, wherein the sender offers to sell his house or car to the receiver. Therefore, to avoid such acts of injustice, Section 4(C)(3) should be narrowed.
>
> Senator Angara accepted the recommendation as he clarified that what the bill covers is unsolicited emails in bulk.[289]

VIII (B)
Section 4(c)(3) Has No Chilling Effect on Speech of Lower Value

Section 4(c)(3) of Rep. Act No. 10175 on unsolicited commercial communication has no chilling effect. It is narrowly drawn. Absent an actual case, it should not be declared as unconstitutional simply on the basis of its provisions. I dissent, therefore, in the majority's holding that it is unconstitutional.

Commercial speech merited attention in 1996 in *Iglesia ni Cristo v. Court of Appeals*.[290] In *Iglesia ni Cristo*, this court stated that commercial

---

[288] Session No. 17, September 12, 2011, Fifteenth Congress, Second Regular Session
[289] Id. at 279.
[290] 328 Phil. 893 (1996) [Per J. Puno, En Banc].

speech is "low value" speech to which the clear and present danger test is not applicable.[291]

In 2007, Chief Justice Reynato Puno had the opportunity to expound on the treatment of and the protection afforded to commercial speech in his concurring and separate opinion in *Pharmaceutical and Health Care Association of the Philippines v. Duque III*.[292] Writing "to elucidate another reason why the absolute ban on the advertising and promotion of breastmilk substitutes x x x should be struck down,"[293] he explained the concept of commercial speech and traced the development of United States jurisprudence on commercial speech:

> The advertising and promotion of breastmilk substitutes properly falls within the ambit of the term commercial speech-that is, speech that proposes an economic transaction. This is a separate category of speech which is not accorded the same level of protection as that given to other constitutionally guaranteed forms of expression but is nonetheless entitled to protection.
>
> A look at the development of jurisprudence on the subject would show us that initially and for many years, the United States Supreme Court took the view that commercial speech is not protected by the First Amendment. It fastened itself to the view that the broad powers of government to regulate commerce reasonably includes the power to regulate speech concerning articles of commerce.
>
> This view started to melt down in the 1970s. In *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, the U.S. Supreme court struck down a law prohibiting the advertising of prices for prescription drugs. It held that price information was important to consumers, and that the First Amendment protects the "right to receive information" as well as the right to speak. It ruled that consumers have a strong First Amendment interest in the free flow of information about goods and services available in the marketplace and that any state regulation must support a substantial interest.
>
> *Central Hudson Gas & Electric v. Public Service Commission* is the watershed case that established the primary test for evaluating the constitutionality of commercial speech regulations. In this landmark decision, the U.S. Supreme Court held that the regulation issued by the Public Service Commission of the State of New York, which reaches all promotional advertising regardless of the impact of the touted service on overall energy use, is more extensive than necessary to further the state's interest in energy conservation. In addition, it ruled that there must be a showing that a more limited restriction on the content of

---

[291] Id. at 933. "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."

[292] 561 Phil. 386 (2007) [En Banc].

[293] Id. at 449.

> promotional advertising would not adequately serve the interest of the State. In applying the First Amendment, the U.S. Court rejected the highly paternalistic view that the government has complete power to suppress or regulate commercial speech.
>
> *Central Hudson* provides a four-part analysis for evaluating the validity of regulations of commercial speech. To begin with, the commercial speech must "concern lawful activity and not be misleading" if it is to be protected under the First Amendment. Next, the asserted governmental interest must be substantial. If both of these requirements are met, it must next be determined whether the state regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[294] (Citations omitted)

In his separate concurring opinion in *Chavez v. Gonzales*,[295] Justice Antonio Carpio, citing *Pharmaceutical and Health Care Association of the Philippines*, stated that "false or misleading advertisement" is among the instances in which "expression may be subject to prior restraint,"[296] thus:

> The exceptions, when expression may be subject to prior restraint, apply in this jurisdiction to only four categories of expression, namely: pornography, false or misleading advertisement, advocacy of imminent lawless action, and danger to national security. All other expression is not subject to prior restraint. As stated in Turner Broadcasting System v. Federal Communication Commission, "[T]he First Amendment (Free Speech Clause), subject only to narrow and well understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."[297] (Citations omitted)

Further in his separate concurring opinion, Justice Carpio reiterates this point. Making reference to the norm in the United States, he states that "false or deceptive commercial speech is categorized as unprotected expression that may be subject to prior restraint".[298] Conformably, he also cited *Pharmaceutical and Health Care Association of the Philippines* and its having "upheld the constitutionality of Section 6 of the Milk Code requiring the submission to a government screening committee of advertising materials for infant formula milk to prevent false or deceptive claims to the public."

In his twelfth footnote, Justice Carpio made reference to the state interest, articulated in the Constitution itself, in regulating advertisements:

---

294 Id. at 449-450.
295 569 Phil. 155 (2008) [En Banc].
296 Id. at 237.
297 Id.
298 Id. at 244.

> Another fundamental ground for regulating false or misleading advertisement is Section 11(2), Article XVI of the Constitution which states : "The advertising industry is impressed with public interest, and shall be regulated by law for the protection of consumers and the promotion of the general welfare."[299]

As acknowledged by the majority, "[c]ommercial speech is a separate category of speech which is not accorded the same level of protection as that given to other constitutionally guaranteed forms of expression but is nonetheless entitled to protection."[300]

I agree that the basis of protection accorded to commercial speech rests in its informative character: "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising":[301]

> Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible [447 U.S. 557, 562] dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interest if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . ." Id., at 770; see Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 92 (1977). Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all. Bates v. State Bar of Arizona, supra, at 374.[302]

Since it is valuable only to the extent of its ability to inform, advertising is not at par with other forms of expression such as political or religious speech. The other forms of speech are indispensable to the democratic and republican mooring of the state whereby the sovereignty residing in the people is best and most effectively exercised through free expression. Business organizations are not among the sovereign people. While business organizations, as juridical persons, are granted by law a capacity for rights and obligations, they do not count themselves as among those upon whom human rights are vested.

---

299 Id.

300 Page 14 of Justice Roberto Abad's February 7, 2014 draft.

301 *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557 (1980) < http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=447&invol=557> (visited February 13, 2014).

302 Id.

The distinction between commercial speech and other forms of speech is, thus, self-evident. As the United States Supreme Court noted in a discursive footnote in *Virginia Pharmacy Board:*[303]

> In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. **There are commonsense differences between speech that does "no more than propose a commercial transaction,"** Pittsburgh Press Co., v. Human Relations Comm'n, 413 U.S., at 385, **and other varieties**. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest **that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired**. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.
>
> **Attributes such as these**, the greater objectivity and hardiness of commercial speech, **may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker**. Compare New York Times Co. v. Sullivan, 376 U.S. 254 (1964), with Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898 (1971). They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. Compare Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), with Banzhaf v. FCC, 132 U.S. App. D.C. 14, 405 F.2d 1082 (1968), cert. denied sub nom. Tobacco Institute, Inc. v. FCC, 396 U.S. 842 (1969). Cf. United States v. 95 Barrels of Vinegar, 265 U.S. 438, 443 (1924) ("It is not difficult to choose statements, designs and devices which will not deceive"). They may also make inapplicable the prohibition against prior restraints. Compare New York Times Co. v. United States, 403 U.S. 713(1971), with Donaldson v. Read Magazine, 333 U.S. 178, 189 - 191 (1948); FTC v. Standard Education Society, 302 U.S. 112 (1937); E. F. Drew & Co. v. FTC, 235 F.2d 735, 739-740 (CA2 1956), cert. denied,352 U.S. 969 (1957).[304] (Emphasis supplied)

---

[303] *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976) < http://caselaw.lp.findlaw.com/cgi bin/getcase.pl?friend=llrx&navby=volpage&court=us&vol=425&page=765> (visited February 21, 2014).

[304] Id.

It follows, therefore, that the state may validly suppress commercial speech that fails to express truthful and accurate information. As emphasized in *Central Hudson*:[305]

> **The First Amendment's concern for commercial speech is based on the informational function of advertising**. See First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978). **Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity**. The government may ban forms of communication more likely to deceive the public than to inform it, Friedman v. Rogers, supra, at 13, 15-16; Ohralik v. Ohio State Bar Assn., supra, at 464-465, or [447 U.S. 557, 564] commercial speech related to illegal activity, Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 388 (1973).
>
> If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.[306]

Section 4(c) (3) of the Rep. Act No. 10175 refers only to commercial speech since it regulates communication that advertises or sells products or services. These communications, in turn, proposes only commercial or economic transactions. Thus, the parameters for the regulation of commercial speech as articulated in the preceding discussions are squarely applicable.

---

[305] *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557 (1980) < http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=447&invol=557> (visited February 13, 2014).

[306] Id. There are contrary opinions, but their reasoning is not as cogent. As explained by Justice Clarence Thomas in his concurring opinion in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996): I do not see a philosophical or historical basis for asserting that "commercial" speech is of "lower value" than "noncommercial" speech. Indeed, some historical materials suggest the contrary.

As noted by Aaron A. Scmoll, referring to the United States Supreme Court Decision in *44 Liquormart,*: "While Stevens and several other Justices seemed willing to apply strict scrutiny to regulations on truthful advertising, a majority seemed content to continue down the path Central Hudson created. The strongest reading drawn from 44 Liquormart may be that as to complete bans on commercial speech, the Court will strictly apply Central Hudson so that in those cases, the analysis resembles strict scrutiny." Schmoll, Aaron A. (1998) "Sobriety Test: The Court Walks the Central Hudson Line Once Again in 44 Liquormart, but Passes on a New First Amendment Review, "Federal Communications Law Journal: Vol. 50: Iss. 3, Article 11.

Definitely, there is no occasion for Section 4(c)(3) to chill speech of fundamental value. Absent an actual case, judicial review should not go past that test. Hence, this provision should not be declared unconstitutional.

VIII (C)
The Provision has a Valid Purpose

As noted by the majority, Section 4(c)(3) refers to what, in contemporary language, has been referred to as "spam". The origin of the term is explained as follows:

> The term "spam," as applied to unsolicited commercial email and related undesirable online communication, is derived from a popular Python sketch set in a cafe that includes the canned meat product SPAM in almost every dish. As the waitress describes the menu with increasing usage of the word "spam," a group of Vikings in the cafe start singing, "Spam, spam, spam, spam, spam," drowning out all other communication with their irrelevant repetitive song.[307]

Spam is typified by its being unsolicited and repetitive as well as by its tendency to drown out other communication. Compared with other forms of advertising, spam has been distinguished as a negative externality. This means that it imposes upon a party a cost despite such party's not having chosen to engage in any activity that engenders such cost. Thus:

> How does spam differ from legitimate advertising? If you enjoy watching network television, using a social networking site, or checking stock quotes online, you know that you will be subjected to advertisements, many of which you may find relevant or even annoying. Google, Yahoo!, Microsoft, Facebook, and others provide valuable consumer services, such as search, news, and email, supported entirely by advertising revenue. While people may resent advertising, most consumers accept that advertising is a price they pay for access to content and services that they value. By contrast, unsolicited commercial email imposes a negative externality on consumers without any market-mediated benefit, and without the opportunity to opt-out.[308]

The noxious effects of spam are clearly demonstrable. Any email user knows the annoyance of having to sift through several spam messages in a seemingly never ending quest to weed them out. Moreover, while certain spam messages are readily identifiable, a significant number are designed (or disguised) in such a way as to make a user think that they contain legitimate content.

---

[307] Rao, J. M. and D. H. Reiley, *The Economics of Spam*, JOURNAL OF ECONOMIC PERSPECTIVES, 26(3): 87-110 (2012).

[308] Id.

For instance, spam emails are given titles or headings like, “Please update your information,” “Conference Invitation,” “Please Confirm,” “Alert,” “Hello My Dearest,” and “Unclaimed Check.” Spam messages also make reference to current events and civic causes.

Similarly, spam messages disguise themselves as coming from legitimate sources by using subtle or inconspicuous alterations in sender information. Thus, a letter “i,” which appears in the middle of a word, is replaced with the number “1,” a letter “o” may be replaced with the number zero; a spam message may be made to appear to come from the legitimate online financial intermediary PayPal, when in fact, the sending address is “paypol.com”. At times, entirely false names are used, making spam messages appear to come from relatively unfamiliar but ostensibly legitimate senders such as low-key government agencies or civic organizations. As noted by Cisco Systems: “The content in the message looks and sounds much more legitimate and professional than it used to. Spam often closely mimics legitimate senders' messages—not just in style but by ‘spoofing’ the sender information, making it look like it comes from a reputable sender.”[309]

The damage cost by spamming is manifest in calculable financial and economic costs and not just in the nebulous vexation it causes users. IT research firm Nuclear Research found that as far back as eleven (11) years ago, in 2003, an average employee receives 13.3 spam messages a day. Moreover, a person may spend as much as ninety (90) minutes a day managing spam. This translates to 1.4% lost productivity per person per year and an average cost of US$ 874 per employee per year.[310] A 2012 study also noted that some US$20 billion is spent annually to fend off unwanted email with US$6 billion spent annually on anti-spam software.[311]

Apart from being associated with the vexation of users and costs undermining productivity and efficiency, spamming is also a means for actually attacking IT systems. The 2000 attack of the “I Love You” Worm, which was earlier noted in this opinion, was committed through means of email messages sent out to a multitude of users. While defensive technologies against spamming have been developed (e.g., IP blacklisting, crowd sourcing, and machine learning), spammers have likewise improved on their mechanisms. The present situation is thus indicative of escalation, an arms race playing out in cyberspace. As is typical of escalation, the capacity of spammers to inflict damage has significantly increased. In 2003,

---

309 ‘The Bad Guys from Outside: Malware’, http://www.ciscopress.com/articles/article.asp?p=1579061&seqNum=4 (visited February 14, 2014).

310 ‘Spam: The Silent ROI Killer’, < http://www.spamhelp.org/articles/d59.pdf> (visited February 14, 2014).

311 Rao, J. M. and D. H. Reiley, *The Economics of Spam*, JOURNAL OF ECONOMIC PERSPECTIVES, 26(3): 87-110 (2012).

spamming botnets began to be used, thereby enabling the spread of malware (i.e., malicious software):

> Blacklists gradually made it impossible for spammers to use their own servers (or others' open relay servers) with fixed IP addresses. Spammers responded with a "Whack-a-Mole" strategy, popping up with a new computer IP address every time the old one got shut down. This strategy was observed and named as early as 1996, and eventually became considerably cheaper with another major innovation in spam: the botnet.
>
> A botnet is a network of "zombie" computers infected by a piece of malicious software (or "malware") designed to enslave them to a master computer. The malware gets installed in a variety of ways, such as when a user clicks on an ad promising "free ringtones." The infected computers are organized in a militaristic hierarchy, where early zombies try to infect additional downstream computers and become middle managers who transmit commands from the central "command and control" servers down to the frontline computers
>
> The first spamming botnets appeared in 2003. Static blacklists are powerless against botnets. In a botnet, spam emails originate from tens of thousands of IP addresses that are constantly changing because most individual consumers have their IP addresses dynamically allocated by Dynamic Host Control Protocol (DHCP). Dynamic blacklisting approaches have since been developed; Stone-Gross, Holz, Stringhini, and Vigna (2011) document that 90 percent of zombie computers are blacklisted before the end of each day. However, if the cable company assignsa zombie computer a new IP address each day, that computer gets a fresh start and can once again successfully send out spam.[312]

Spam's capacity to deceive recipients through false and misleading headers, content, and senders likewise makes it a viable means for phishing and identity theft, thereby enabling spammers to gain control of user accounts (e.g., online banking, social networking). This is demonstrated by the case of Jeffrey Brett Goodin, the first person to be convicted under the United States' Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (more briefly and popularly known as the CAN-SPAM Act). Goodin was found guilty of sending emails to users of America Online (AOL). Posing as someone from AOL's billing department, his emails directed users to go to websites operated by Goodin himself. On the pretense that information was necessary to prevent the termination of their AOL services, these websites prompted users to supply personal and credit

---

[312] Rao, J. M. and D. H. Reiley, *The Economics of Spam*, JOURNAL OF ECONOMIC PERSPECTIVES, 26(3): 87-110 (2012).

card information. This, in turn, enabled Goodin to engage in fraudulent transactions.[313]

There can be no more direct way of curtailing spamming and its deleterious effects than by prohibiting the "transmission of commercial electronic communication with the use of computer system which seek to advertise, sell, or offer for sale products and services",[314] unless falling under any of the enumerated exceptions, as Section 4(c)(3) does. The preceding discussion has clearly demonstrated the extent to which spamming engenders or otherwise facilitates vexation, intrusions, larceny, deception, violence, and economic damage. Spamming represents a hazard, and its riddance will entail the concomitant curtailment of the perils it entails.

VIII (D)
The Provision is Narrowly Drawn

Section 4(c)(3) is phrased in a manner that is sufficiently narrow. It is not a blanket prohibition of the "transmission of commercial electronic communication with the use of computer system which seek to advertise, sell, or offer for sale products and services."[315] Quite the contrary, it recognizes instances in which commercial information may be validly disseminated electronically. It provides multiple instances in which such communications are not prohibited.

First, when there is prior affirmative consent from the recipient.

Second, when it is primarily in the nature of a service and/or administrative announcement sent by a service provider to its clients.

Third, when there is a means to opt out of receiving such communication, such communication not being deceptive in that it purposely disguises its source or does not purposely contain misleading information.

The first exception, far from curtailing free commercial expression, actually recognizes it. It vests upon the parties to a communication, albeit with emphasis on the receiver, the freedom to will for themselves if the transmission of communication shall be facilitated.

---

313 'California Man Guilty of Defrauding AOL Subscribers, U.S. Says', <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a3ukhOXubw3Y> (visited February 14, 2014). On spam laws, < http://www.spamlaws.com/aol-phishing.html> (visited February 14, 2014).

314 Rep. Act No. 10175, sec. 4 (c) (3).

315 Rep. Act No. 10175, sec. 4 (c) (3).

The second exception recognizes that there are instances when a service provider must necessarily disseminate information (with or without the recipient's consent) to ensure the effective functioning and client's use of its services.

The third exception directly deals with intentionally deceptive spam that intends to ensnare users by not allowing them to opt out of receiving messages.

Section 4(c)(3) merely provides parameters to ensure that the dissemination of commercial information online is done in a manner that is not injurious to others. For as long as they are not vexatious (i.e., prior affirmative consent and opt-out requirement) or misleading, to the extent that they are not intrusive on their recipients, they may continue to be validly disseminated.

The opt-out provision provides the balance. Others may have as much right to speak about their products and exaggerate as they offer to make a commercial transaction. But that right is not an entitlement to vex others by their repetitive and insistent efforts to insist that others listen even if the customer has already declined. Commercial speech is protected only until it ceases to inform.

A FINAL NOTE

> "Section 4. No law shall be passed abridging the freedom of speech, of expression or of the press x x x"

Rather than act with tempered but decisive vigilance for the protection of these rights, we have precariously perched the freedoms of our people on faith that those who are powerful and influential will not use the overly broad provisions that prohibit libel, cyber libel, and cybersex against their interests. We have exposed those that rely on our succor to the perils of retaliation because we stayed our hand in declaring libel provisions as unconstitutional. By diminishing the carefully drawn jurisprudential boundaries of what is obscene and what is not, we have allowed the state to unleash the dominant patriarchal notions of "lascivious" to police sexual expression.

On the other hand, the majority has opted to strike down what appears to be narrowly tailored protections against unsolicited commercial communication through cyberspace. I decline to endow this kind of speech — the commercial and the corporate — with more value. The balance struck by the majority in this case weighs more heavily towards those who have

more resources and are more powerful. We have put the balance in favor of what is in the hegemony. Legitimate dissent will be endangered.

That, to me, is not what the Constitution says.

The Constitution protects expression. It affirms dissent. The Constitution valorizes messages and memes at the margins of our society. The Constitution also insists that we will cease to become a democratic society when we diminish our tolerance for the raw and dramatically delivered idea, the uncouth defamatory remark, and the occasional lascivious representations of ourselves.

What may seem odd to the majority may perhaps be the very kernel that unlocks our collective creativity.

ACCORDINGLY, I vote to **declare as unconstitutional for being overbroad and violative of Article III, Section 4 of the Constitution** the following provisions of Republic Act No. 10175 or the Cybercrime Prevention Act of 2012:

(a) The entire Section 19 or the "take down" provision;
(b) The entire Section 4(c)(4) on cyber libel as well as Articles 353, 354, and 355 on libel of the Revised Penal Code;
(c) The entire Section 4(c)(1) on cybersex;
(d) Section 5 as it relates to Sections 4(c)(1) and 4(c)(4);
(e) Section 6 as it increases the penalties to Sections 4(c)(1) and 4(c)(4);
(f) Section 7 as it allows impermissibly countless prosecution of Sections 4(c)(1) and 4(c)(4); and
(g) Section 12 on warrantless real-time traffic data surveillance.

I dissent with the majority in its finding that Section 4(c)(3) on Unsolicited Commercial Advertising is unconstitutional.

I vote to dismiss the rest of the constitutional challenges against the other provisions in Republic Act No. 10175 as raised in the consolidated petitions for not being justiciable in the absence of an actual case or controversy.

MARVIC MARIO VICTOR F. LEONEN
Associate Justice