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DETERMINED IN THE

SUPREME COURT OF THE PHILIPPINES

EN BANC

[G.R. No. 172302. February 18, 2014]

PRYCE CORPORATION, *petitioner, vs.* **CHINA BANKING CORPORATION,** *respondent.*

SYLLABUS

1. **REMEDIAL LAW; CIVIL PROCEDURE; JUDGMENTS; DOCTRINE OF *RES JUDICATA*; DEFINED.—** According to the doctrine of *res judicata*, "a final judgment or decree on the merits by a court of competent jurisdiction is conclusive of the rights of the parties or their privies in all later suits on all points and matters determined in the former suit."

2. **ID.; ID.; ID.; ID.; ELEMENTS.—** The elements for *res judicata* to apply are as follows: (a) the former judgment was final; (b) the court that rendered it had jurisdiction over the subject matter and the parties; (c) the judgment was based on the merits; and (d) between the first and the second actions, there was an identity of parties, subject matters, and causes of action.

3. **ID.; ID.; ID.; ID.; ID.; ON THE ELEMENT OF IDENTITY OF PARTIES, *RES JUDICATA* DOES NOT REQUIRE ABSOLUTE IDENTITY OF PARTIES AS SUBSTANTIAL IDENTITY IS ENOUGH; EXPLAINED.—** On the element of identity of parties, *res judicata* does not require absolute identity of parties as substantial identity is enough. Substantial identity of parties exists "when there is a community of interest between a party in the first case and a party in the second

case, even if the latter was not impleaded in the first case." Parties that represent the same interests in two petitions are, thus, considered substantial identity of parties for purposes of *res judicata*. Definitely, one test to determine substantial identity of interest would be to see whether the success or failure of one party materially affects the other.

4. ID.; ID.; ID.; ID.; TWO CONCEPTS OF *RES JUDICATA*; DISTINGUISHED.— *Res judicata* embraces two concepts: (1) bar by prior judgment and (2) conclusiveness of judgment. Bar by prior judgment exists "when, as between the first case where the judgment was rendered and the second case that is sought to be barred, there is identity of parties, subject matter, and causes of action." On the other hand, the concept of conclusiveness of judgment finds application "when a fact or question has been squarely put in issue, judicially passed upon, and adjudged in a former suit by a court of competent jurisdiction." This principle only needs identity of parties and issues to apply.

5. POLITICAL LAW; CONSTITUTIONAL LAW; BILL OF RIGHTS; NON-IMPAIRMENT CLAUSE; THE COURT HAS BRUSHED ASIDE INVOCATION OF NON-IMPAIRMENT CLAUSE TO GIVE WAY TO A VALID EXERCISE OF POLICE POWER AND AFFORD PROTECTION TO LABOR.— The non-impairment clause first appeared in the United States Constitution as a safeguard against the issuance of worthless paper money that disturbed economic stability after the American Revolution. This constitutional provision was designed to promote commercial stability. At its core is "a prohibition of state interference with debtor-creditor relationships." This clause first became operative in the Philippines through the Philippine Bill of 1902, the fifth paragraph of Section 5 which states "[t]hat no law impairing the obligation of contracts shall be enacted." It was consistently adopted in subsequent Philippine fundamental laws, namely, the Jones Law of 1916, the 1935 Constitution, the 1973 Constitution, and the present Constitution. Nevertheless, this court has brushed aside invocations of the non-impairment clause to give way to a valid exercise of police power and afford protection to labor.

6. COMMERCIAL LAW; CORPORATE REHABILITATION; INTERIM RULES OF PROCEDURE ON CORPORATE

REHABILITATION (2000); STAY ORDER AND APPOINTMENT OF A RECEIVER; WHILE THE INTERIM RULES DOES NOT REQUIRE THE HOLDING OF A HEARING BEFORE THE ISSUANCE OF A STAY ORDER, NEITHER DOES IT PROHIBIT THE HOLDING OF ONE; APPLICATION IN CASE AT BAR.— Section 6 of the Interim Rules states explicitly that "[i]f the court finds the petition to be sufficient in form and substance, it shall, not later than five (5) days from the filing of the petition, issue an Order (a) appointing a Rehabilitation Receiver and fixing his bond; (b) staying enforcement of all claims x x x." x x x Nowhere in the Interim Rules does it require a comprehensive discussion in the stay order on the court's findings of sufficiency in form and substance. The stay order and appointment of a rehabilitation receiver dated July 13, 2004 is an "extraordinary, preliminary, *ex parte* remed[y]." The effectivity period of a stay order is only "from the date of its issuance until dismissal of the petition or termination of the rehabilitation proceedings." It is not a final disposition of the case. It is an interlocutory order defined as one that "does not finally dispose of the case, and does not end the Court's task of adjudicating the parties' contentions and determining their rights and liabilities as regards each other, but obviously indicates that other things remain to be done by the Court." Thus, it is not covered by the requirement under the Constitution that a decision must include a discussion of the facts and laws on which it is based. Neither does the Interim Rules require a hearing before the issuance of a stay order. What it requires is an initial hearing before it can give due course to or dismiss a petition. Nevertheless, while the Interim Rules does not require the holding of a hearing before the issuance of a stay order, neither does it prohibit the holding of one. Thus, the trial court has ample discretion to call a hearing when it is not confident that the allegations in the petition are sufficient in form and substance, for so long as this hearing is held within the five (5)-day period from the filing of the petition — the period within which a stay order may issue as provided in the Interim Rules. One of the important objectives of the Interim Rules is "to promote a speedy disposition of corporate rehabilitation cases[,] x x x apparent from the strict time frames, the non-adversarial nature of the proceedings, and the prohibition of certain kinds of pleadings." It is in light of this

objective that a court with basis to issue a stay order must do so not later than five (5) days from the date the petition was filed.

7. ID.; ID.; ID.; CORPORATE REHABILITATION ALLOWS A COURT-SUPERVISED PROCESS TO REJUVENATE A CORPORATION; SUSTAINED.— Corporate rehabilitation is one of many statutorily provided remedies for businesses that experience a downturn. Rather than leave the various creditors unprotected, legislation now provides for an orderly procedure of equitably and fairly addressing their concerns. Corporate rehabilitation allows a court-supervised process to rejuvenate a corporation. Its twin, insolvency, provides for a system of liquidation and a procedure of equitably settling various debts owed by an individual or a business. It provides a corporation's owners a sound chance to re-engage the market, hopefully with more vigor and enlightened services, having learned from a painful experience. Necessarily, a business in the red and about to incur tremendous losses may not be able to pay all its creditors. Rather than leave it to the strongest or most resourceful amongst all of them, the state steps in to equitably distribute the corporation's limited resources. The cram-down principle adopted by the Interim Rules does, in effect, dilute contracts. When it permits the approval of a rehabilitation plan even over the opposition of creditors, or when it imposes a binding effect of the approved plan on all parties including those who did not participate in the proceedings, the burden of loss is shifted to the creditors to allow the corporation to rehabilitate itself from insolvency. Rather than let struggling corporations slip and vanish, the better option is to allow commercial courts to come in and apply the process for corporate rehabilitation. x x x Corporate rehabilitation is preferred for addressing social costs. Allowing the corporation room to get back on its feet will retain if not increase employment opportunities for the market as a whole.

APPEARANCES OF COUNSEL

R.R. Torralba and Associates for petitioner.
Lim Vigilia Alcala Dumlao Orencia for respondent.

R E S O L U T I O N

LEONEN, *J.*:

This case resolves conflicting decisions between two divisions. Only one may serve as *res judicata* or a bar for the other to proceed. This case also settles the doctrine as to whether a hearing is needed prior to the issuance of a stay order in corporate rehabilitation proceedings.

The present case originated from a petition for corporate rehabilitation filed by petitioner Pryce Corporation on July 9, 2004 with the Regional Trial Court of Makati, Branch 138.[1]

The rehabilitation court found the petition sufficient in form and substance and issued a stay order on July 13, 2004 appointing Gener T. Mendoza as rehabilitation receiver.[2]

On September 13, 2004, the rehabilitation court gave due course to the petition and directed the rehabilitation receiver to evaluate and give recommendations on petitioner Pryce Corporation's proposed rehabilitation plan attached to its petition.[3]

The rehabilitation receiver did not approve this plan and submitted instead an amended rehabilitation plan, which the rehabilitation court approved by order dated January 17, 2005.[4] In its disposition, the court found petitioner Pryce Corporation "eligible to be placed in a state of corporate rehabilitation."[5] The disposition likewise identified the assets to be held and

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[1] *Rollo* (vol. 1), pp. 120-134. A copy of this petition for corporate rehabilitation was attached as Annex "F" of the petition.

[2] *Id.* at 135-136. A copy of this order dated July 13, 2004 was attached as Annex "G" of the petition.

[3] *Id.* at 153-155. A copy of this order dated September 13, 2004 was attached as Annex "I" of the petition.

[4] *Id.* at 221-243. A copy of this order dated January 17, 2005 was attached as Annex "K" of the petition.

[5] *Id.* at 239.

disposed of by petitioner Pryce Corporation and the manner by which its liabilities shall be paid and liquidated.[6]

On February 23, 2005, respondent China Banking Corporation elevated the case to the Court of Appeals. Its petition questioned the January 17, 2005 order that included the following terms:

> 1. The indebtedness to China Banking Corporation and Bank of the Philippine Islands as well as the long term commercial papers will be paid through a *dacion en pago* of developed real estate assets of the petitioner.
>
> x x x x x x x x x
>
> 4. All accrued penalties are waived[.]
>
> 5. Interests shall accrue only up to July 13, 2004, the date of issuance of the stay order[.]
>
> 6. No interest will accrue during the pendency of petitioner's corporate rehabilitation[.]
>
> 7. Dollar-denominated loans will be converted to Philippine Pesos on the date of the issuance of this Order using the reference rate of the Philippine Dealing System as of this date.[7]

Respondent China Banking Corporation contended that the rehabilitation plan's approval impaired the obligations of contracts. It argued that neither the provisions of Presidential Decree No. 902-A nor the Interim Rules of Procedure on Corporate Rehabilitation (Interim Rules) empowered commercial courts "to render without force and effect valid contractual stipulations."[8] Moreover, the plan's approval authorizing *dacion en pago* of petitioner Pryce Corporation's properties without respondent China Banking Corporation's consent not only violated "mutuality of contract and due process, but [was] also antithetical to the avowed policies of the state to maintain a competitive financial system."[9]

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[6] *Id.* at 239-243.

[7] *Id.* at 239.

[8] *Id.* at 614.

[9] *Id.* at 622.

The Bank of the Philippine Islands (BPI), another creditor of petitioner Pryce Corporation, filed a separate petition with the Court of Appeals assailing the same order by the rehabilitation court. BPI called the attention of the court "to the non-impairment clause and the mutuality of contracts purportedly ran roughshod by the [approved rehabilitation plan]."[10]

On July 28, 2005, the Court of Appeals Seventh (7th) Division[11] granted respondent China Banking Corporation's petition, and reversed and set aside the rehabilitation court's: (1) July 13, 2004 stay order that also appointed Gener T. Mendoza as rehabilitation receiver; (2) September 13, 2004 order giving due course to the petition and directing the rehabilitation receiver to evaluate and give recommendations on petitioner Pryce Corporation's proposed rehabilitation plan; and (3) January 17, 2005 order finding petitioner Pryce Corporation eligible to be placed in a state of corporate rehabilitation, identifying assets to be disposed of, and determining the manner of liquidation to pay the liabilities.[12]

With respect to BPI's separate appeal, the Court of Appeals First (1st) Division[13] granted its petition initially and set aside the January 17, 2005 order of the rehabilitation court in its decision dated May 3, 2006.[14] On reconsideration, the court issued a resolution dated May 23, 2007 setting aside its original decision and dismissing the petition.[15] BPI elevated the case to this court, docketed as G.R. No. 180316. By resolution dated January 30, 2008, the First (1st) Division of this court denied

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[10] *Rollo* (G.R. No. 180316), p. 28.

[11] Penned by Associate Justice Vicente Q. Roxas and concurred in by Justices Portia Alino-Hormachuelos and Juan Q. Enriquez, Jr.

[12] *Rollo* (vol. 1), pp. 55-70.

[13] Penned by Associate Justice Rebecca de Guia-Salvador and concurred in by Justices Ruben T. Reyes and Aurora Santiago-Lagman.

[14] *Rollo* (G.R. No. 180316), pp. 84-102.

[15] *Id.* at 182-188.

the petition.[16] By resolution dated April 28, 2008, this court denied reconsideration with finality.[17]

Meanwhile, petitioner Pryce Corporation also appealed to this court assailing the July 28, 2005 decision of the Court of Appeals Seventh (7th) Division granting respondent China Banking Corporation's petition as well as the resolution denying its motion for reconsideration.

In the decision dated February 4, 2008,[18] the First (1st) Division of this court denied its petition with the dispositive portion as follows:

> WHEREFORE, we **DENY** the petition. The assailed Decision of the Court of Appeals in CA-G.R. SP No. 88479 is **AFFIRMED** with the modification discussed above. Let the records of this case be **REMANDED** to the RTC, Branch 138, Makati City, sitting as Commercial Court, for further proceedings with dispatch to determine the merits of the petition for rehabilitation. No costs.[19]

Petitioner Pryce Corporation filed an omnibus motion for (1) reconsideration or (2) partial reconsideration and (3) referral to the court *En Banc* dated February 29, 2008. Respondent China Banking Corporation also filed a motion for reconsideration on even date, praying that the February 4, 2008 decision be set aside and reconsidered only insofar as it ordered the remand of the case for further proceedings "to determine whether petitioner's financial condition is serious and whether there is clear and imminent danger that it will lose its corporate assets."[20]

By resolution dated June 16, 2008, this court denied with finality the separate motions for reconsideration filed by the parties.

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[16] *Id.* at 871.

[17] *Id.* at 878.

[18] *Rollo* (vol. 2), pp. 1,627-1,634 [Per *J.* Sandoval-Gutierrez, First Division].

[19] *Id.* at 1,634 [Per *J.* Sandoval-Gutierrez, First Division].

[20] *Id.* at 1,644.

On September 10, 2008, petitioner Pryce Corporation filed a second motion for reconsideration praying that the Court of Appeals' decision dated February 4, 2008 be set aside.

The First Division of this court referred this case to the *En Banc en consulta* by resolution dated June 22, 2009.[21] The court *En Banc*, in its resolution dated April 13, 2010, resolved to accept this case.[22]

On July 30, 2013, petitioner Pryce Corporation and respondent China Banking Corporation, through their respective counsel, filed a joint manifestation and motion to suspend proceedings. The parties requested this court to defer its ruling on petitioner Pryce Corporation's second motion for reconsideration "so as to enable the parties to work out a mutually acceptable arrangement."[23]

By resolution dated August 6, 2013, this court granted the motion but only for two (2) months. The registry receipts showed that counsel for respondent China Banking Corporation and counsel for petitioner Pryce Corporation received their copies of this resolution on September 5, 2013.[24]

More than two months had lapsed since September 5, 2013, but no agreement was filed by the parties. Thus, we proceed to rule on petitioner Pryce Corporation's second motion for reconsideration.

This motion raises two grounds.

First, petitioner Pryce Corporation argues that the issue on the validity of the rehabilitation court orders is now *res judicata.* Petitioner Pryce Corporation submits that the ruling in *BPI v. Pryce Corporation* docketed as G.R. No. 180316 contradicts the present case, and it has rendered the issue on the validity and regularity of the rehabilitation court orders as *res judicata*.[25]

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[21] *Id.* at 1,804.

[22] *Id.* at 1,805.

[23] *Id.* at 1,849.

[24] *Id.* at 1,854.

[25] *Id.* at 1,791.

Second, petitioner Pryce Corporation contends that Rule 4, Section 6 of the Interim Rules of Procedure on Corporate Rehabilitation[26] does not require the rehabilitation court to hold a hearing before issuing a stay order. Considering that the Interim Rules was promulgated later than *Rizal Commercial Banking Corp. v. IAC*[27] that enunciated the "serious situations" test,[28] petitioner Pryce Corporation argues that the test has effectively been abandoned by the "sufficiency in form and substance test" under the Interim Rules.[29]

The present second motion for reconsideration involves the following issues:

I. WHETHER THE ISSUE ON THE VALIDITY OF THE REHABILITATION ORDER DATED JANUARY 17, 2005 IS NOW *RES JUDICATA* IN LIGHT OF *BPI V. PRYCE CORPORATION* DOCKETED AS G.R. NO. 180316;

II. WHETHER THE REHABILITATION COURT IS REQUIRED TO HOLD A HEARING TO COMPLY WITH THE "SERIOUS SITUATIONS" TEST LAID DOWN IN THE CASE OF *RIZAL COMMERCIAL BANKING CORP. V. IAC* BEFORE ISSUING A STAY ORDER.

We proceed to discuss the first issue.

BPI v. Pryce Corporation docketed as G.R. No. 180316 rendered the issue on the validity of the rehabilitation court's January 17, 2005 order approving the amended rehabilitation plan as *res judicata*.

In *BPI v. Pryce Corporation*, the Court of Appeals set aside initially the January 17, 2005 order of the rehabilitation court.[30]

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[26] A.M. No. 00-8-10-SC, November 21, 2000, otherwise known as the Interim Rules of Procedure on Corporate Rehabilitation.

[27] *Rizal Commercial Banking Corp. v. IAC*, 378 Phil. 10 (1999) [Per *J.* Melo, *En Banc*].

[28] *Id.* at 23.

[29] *Rollo* (vol. 2), p. 1,794.

[30] *Rollo* (G.R. No. 180316), pp. 84-102, Court of Appeals decision dated May 3, 2006.

On reconsideration, the court set aside its original decision and dismissed the petition.[31] On appeal, this court denied the petition filed by BPI with finality. An entry of judgment was made for *BPI v. Pryce Corporation* on June 2, 2008.[32] In effect, this court upheld the January 17, 2005 order of the rehabilitation court.

According to the doctrine of *res judicata*, "a final judgment or decree on the merits by a court of competent jurisdiction is conclusive of the rights of the parties or their privies in all later suits on all points and matters determined in the former suit."[33]

The elements for *res judicata* to apply are as follows: (a) the former judgment was final; (b) the court that rendered it had jurisdiction over the subject matter and the parties; (c) the judgment was based on the merits; and (d) between the first and the second actions, there was an identity of parties, subject matters, and causes of action.[34]

Res judicata embraces two concepts: (1) bar by prior judgment[35] and (2) conclusiveness of judgment.[36]

Bar by prior judgment exists "when, as between the first case where the judgment was rendered and the second case that is sought to be barred, there is identity of parties, subject matter, and causes of action."[37]

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[31] *Id.* at 182-188, Court of Appeals resolution dated May 23, 2007.

[32] *Id.* at 884.

[33] *Antonio v. Sayman Vda. de Monje*, G.R. No. 149624, September 29, 2010, 631 SCRA 471, 479-480 [Per *J.* Peralta, Second Division], citing *Agustin v. Delos Santos*, G.R. No. 168139, January 20, 2009, 576 SCRA 576, 585.

[34] *Social Security Commission v. Rizal Poultry and Livestock Association, Inc.*, G.R. No. 167050, June 1, 2011, 650 SCRA 50, 57-58 [Per *J.* Perez, First Division].

[35] RULES OF CIVIL PROCEDURE, Rule 39, Sec. 47 (b).

[36] RULES OF CIVIL PROCEDURE, Rule 39, Sec. 47 (c). See also *Selga v. Brar*, G.R. No. 175151, September 21, 2011, 658 SCRA 108, 119.

[37] *Antonio v. Sayman Vda. de Monje*, 631 SCRA 471, 480 [Per *J.* Peralta, Second Division], citing *Agustin v. Delos Santos*, G.R. No. 168139, January 20, 2009, 576 SCRA 576, 585.

On the other hand, the concept of conclusiveness of judgment finds application "when a fact or question has been squarely put in issue, judicially passed upon, and adjudged in a former suit by a court of competent jurisdiction."[38] This principle only needs identity of parties and issues to apply.[39]

The elements of *res judicata* through bar by prior judgment are present in this case.

On the element of identity of parties, *res judicata* does not require absolute identity of parties as substantial identity is enough.[40] Substantial identity of parties exists "when there is a community of interest between a party in the first case and a party in the second case, even if the latter was not impleaded in the first case."[41] Parties that represent the same interests in two petitions are, thus, considered substantial identity of parties for purposes of *res judicata*.[42] Definitely, one test to determine substantial identity of interest would be to see whether the success or failure of one party materially affects the other.

In the present case, respondent China Banking Corporation and BPI are creditors of petitioner Pryce Corporation and are

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[38] *Antonio v. Sayman Vda. de Monje*, 631 SCRA 471, 480 [Per J. Peralta, Second Division], citing *Hacienda Bigaa, Inc. v. Chavez*, G.R. No. 174160, April 20, 2010, 618 SCRA 559; *Chris Garments Corporation v. Sto. Tomas*, G.R. No. 167426, January 12, 2009, 576 SCRA 13, 21-22; *Heirs of Rolando N. Abadilla v. Galarosa*, 527 Phil. 264, 277-278 (2006).

[39] *Antonio v. Sayman Vda. de Monje*, 631 SCRA 471, 481 [Per J. Peralta, Second Division].

[40] *Coastal Pacific Trading, Inc. v. Southern Rolling Mills Co., Inc.*, 529 Phil. 10, 33 (2006) [Per J. Panganiban, First Division].

[41] *Social Security Commission v. Rizal Poultry and Livestock Association, Inc.*, G.R. No. 167050, June 1, 2011, 650 SCRA 50, 58-59. See also *Coastal Pacific Trading, Inc. v. Southern Rolling Mills, Co., Inc.*, 529 Phil. 10, 33 (2006) [Per J. Panganiban, First Division]; *Cruz v. Court of Appeals (Second Division)*, G.R. No. 164797, 517 Phil. 572, 584 (2006) [Per J. Chico-Nazario, First Division].

[42] See *University of the Philippines v. Court of Appeals*, G.R. No. 97827, February 9, 1993, 218 SCRA 728, 737-738 [Per J. Romero, Third Division].

both questioning the rehabilitation court's approval of the amended rehabilitation plan. Thus, there is substantial identity of parties since they are litigating for the same matter and in the same capacity as creditors of petitioner Pryce Corporation.

There is no question that both cases deal with the subject matter of petitioner Pryce Corporation's rehabilitation. The element of identity of causes of action also exists.

In separate appeals, respondent China Banking Corporation and BPI questioned the same January 17, 2005 order of the rehabilitation court before the Court of Appeals.

Since the January 17, 2005 order approving the amended rehabilitation plan was affirmed and made final in G.R. No. 180316, this plan binds all creditors, including respondent China Banking Corporation.

In any case, the Interim Rules or the rules in effect at the time the petition for corporate rehabilitation was filed in 2004 adopts the cram-down principle which "consists of two things: (*i*) approval despite opposition and (*ii*) binding effect of the approved plan x x x."[43]

First, the Interim Rules allows the rehabilitation court[44] to "approve a rehabilitation plan even over the opposition of creditors holding a majority of the total liabilities of the debtor if, in its judgment, the rehabilitation of the debtor is feasible and the opposition of the creditors is manifestly unreasonable."[45]

Second, it also provides that upon approval by the court, the rehabilitation plan and its provisions "shall be binding upon the debtor and all persons who may be affected by it, including

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[43] R. LUCILA, *CORPORATE REHABILITATION IN THE PHILIPPINES* 158-159 (2007), *citing* Atty. Balgos in the October 18, 2000 meeting of the SC Committee on SEC Cases.

[44] Under Sec. 5.2 of the Securities Regulation Code, commercial courts have primary jurisdiction over petitions for corporate rehabilitation.

[45] *INTERIM RULES OF PROCEDURE ON CORPORATE REHABILITATION* (2000), Rule 4, Sec. 23.

the creditors, whether or not such persons have participated in the proceedings or opposed the plan or whether or not their claims have been scheduled."[46]

Thus, the January 17, 2005 order approving the amended rehabilitation plan, now final and executory resulting from the resolution of *BPI v. Pryce Corporation* docketed as G.R. No. 180316, binds all creditors including respondent China Banking Corporation.

This judgment in *BPI v. Pryce Corporation* covers necessarily the rehabilitation court's September 13, 2004 order giving due course to the petition. The general rule precluding relitigation of issues extends to questions implied necessarily in the final judgment, *viz:*

> The general rule precluding the relitigation of material facts or questions which were in issue and adjudicated in former action are commonly applied to all matters essentially connected with the subject matter of the litigation. Thus, it extends to questions necessarily implied in the final judgment, although no specific finding may have been made in reference thereto and although such matters were directly referred to in the pleadings and were not actually or formally presented. x x x.[47]

The dispositive portion of the Court of Appeals' decision in *BPI v. Pryce Corporation*, reversed on reconsideration, only mentioned the January 17, 2005 order of the rehabilitation court approving the amended rehabilitation plan. Nevertheless, the affirmation of its validity necessarily included the September 13, 2004 order as this earlier order gave due course to the petition and directed the rehabilitation receiver to evaluate and give recommendations on the rehabilitation plan proposed by petitioner.[48]

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[46] *INTERIM RULES OF PROCEDURE ON CORPORATE REHABILITATION* (2000), Rule 4, Sec. 24 (a).

[47] *Alamayri v. Pabale*, 576 Phil. 146, 159 (2008) [Per J. Chico-Nazario, Third Division], citing *Calalang v. Register of Deeds*, G.R. No. 76265, March 11, 1994, 231 SCRA 88, 99-100.

[48] *Rollo* (vol. 1), pp. 153-155. A copy of this order dated September 13, 2004 was attached as Annex "I" of the petition.

In *res judicata*, the primacy given to the first case is related to the principle of immutability of final judgments essential to an effective and efficient administration of justice, *viz*:

> x x x [**W]ell-settled is the principle that a decision that has acquired finality becomes immutable and unalterable** and may no longer be modified in any respect even if the modification is meant to correct erroneous conclusions of fact or law and whether it will be made by the court that rendered it or by the highest court of the land.
>
> The reason for this is that litigation must end and terminate sometime and somewhere, and **it is essential to an effective and efficient administration of justice** that, once a judgment has become final, the winning party be not deprived of the fruits of the verdict. Courts must guard against any scheme calculated to bring about that result and must frown upon any attempt to prolong the controversies.
>
> The only exceptions to the general rule are the correction of clerical errors, the so-called *nunc pro tunc* entries which cause no prejudice to any party, void judgments, and whenever circumstances transpire *after* the finality of the decision rendering its execution unjust and inequitable.[49] (Emphasis provided)

Generally, the later case is the one abated applying the maxim *qui prior est tempore, potior est jure* (he who is before in time is the better in right; priority in time gives preference in law).[50] However, there are limitations to this rule as discussed in *Victronics Computers, Inc. v. Regional Trial Court, Branch 63, Makati*:[51]

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[49] *Siy v. NLRC*, 505 Phil. 265, 274 (2005) [Per *J*. Corona, Third Division], citing *Sacdalan v. Court of Appeals*, G.R. No. 128967, May 20, 2004, 428 SCRA 586, 599, further citing *Philippine Veterans Bank v. Judge Estrella*, 453 Phil. 45, 51 (2003) [Per *J*. Callejo, Sr., Second Division] and *Salva v. Court of Appeals*, 364 Phil. 281, 294-295 (1999) [Per *J*. Puno, Second Division].

[50] *Victronics Computers, Inc. v. Regional Trial Court Branch 63, Makati*, G.R. No. 104019, January 25, 1993, 217 SCRA 517, 531 [Per *J*. Davide, Third Division].

[51] *Id.* at 517.

In our jurisdiction, the law itself does not specifically require that the pending action which would hold in abatement the other must be a pending *prior* action. Thus, in *Teodoro vs. Mirasol*, this Court observed:

> It is to be noted that the Rules do not require as a ground for dismissal of a complaint that there is a *prior* pending action. **They provide that there is a pending action, not a pending *prior* action.** The fact that the unlawful detainer suit was of a later date is no bar to the dismissal of the present action. We find, therefore, no error in the ruling of the court *a quo* that plaintiff's action should be dismissed on the ground of the pendency of another more appropriate action between the same parties and for the same cause.

In *Roa-Magsaysay vs. Magsaysay*, wherein it was the first case which was abated, this Court ruled:

> In any event, since We are not really dealing with jurisdiction but mainly with venue, considering both courts concerned do have jurisdiction over the causes of action of the parties herein against each other, **the better rule in the event of conflict between two courts of concurrent jurisdiction as in the present case, is to allow the litigation to be tried and decided by the court which, under the circumstances obtaining in the controversy, would, in the mind of this Court, be in a better position to serve the interests of justice, considering the nature of the controversy, the comparative accessibility of the court to the parties, having in view their peculiar positions and capabilities, and other similar factors.** Without in any manner casting doubt as to the capacity of the Court of First Instance of Zambales to adjudicate properly cases involving domestic relations, it is easy to see that the Juvenile and Domestic Relations Court of Quezon City which was created in order to give specialized attention to family problems, armed as it is with adequate and corresponding facilities not available to ordinary courts of first instance, would be able to attend to the matters here in dispute with a little more degree of expertise and experience, resulting in better service to the interests of justice. A reading of the causes of action alleged by the contending spouses and a consideration of their nature, cannot but convince Us that, since anyway, there is an available Domestic Court that can legally take cognizance of such family

issues, it is better that said Domestic Court be the one chosen to settle the same as the facts and the law may warrant.

We made the same pronouncement in *Ramos vs. Peralta*:

> Finally, **the rule on *litis pendentia* does not require that the later case should yield to the earlier case.** What is required merely is that there be another pending action, not a *prior* pending action. Considering the broader scope of inquiry involved in Civil Case No. 4102 and the location of the property involved, no error was committed by the lower court in deferring to the Bataan court's jurisdiction.

An analysis of these cases unravels the *ratio* for the rejection of the priority-in-time rule and establishes the criteria to determine which action should be upheld and which is to be abated. **In *Teodoro,* this Court used the criterion of the *more appropriate action*.** We ruled therein that the unlawful detainer case, which was filed later, was the more appropriate action because the earlier case — for specific performance or declaratory relief — filed by the lessee (Teodoro) in the Court of First Instance (CFI) to seek the extension of the lease for another two (2) years or the fixing of a longer term for it, was "prompted by a desire on plaintiff's part to anticipate the action for unlawful detainer, the probability of which was apparent from the letter of the defendant to the plaintiff advising the latter that the contract of lease expired on October 1, 1954." The real issue between the parties therein was whether or not the lessee should be allowed to continue occupying the leased premises under a contract the terms of which were also the subject matter of the unlawful detainer case. Consonant with the doctrine laid down in *Pue vs. Gonzales* and *Lim Si vs. Lim*, the right of the lessee to occupy the land leased against the lessor should be decided under Rule 70 of the Rules of Court; the fact that the unlawful detainer case was filed later then of no moment. Thus, the latter was the more appropriate action.

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In *Roa-Magsaysay*[,] the criterion used was the consideration of the *interest of justice*. In applying this standard, what was asked was which court would be "in a better position to serve the interests of justice," taking into account (a) the nature of the controversy, (b) the comparative accessibility of the court to the parties and (c) other similar factors. While such a test was enunciated therein, this

Court relied on its constitutional authority to change venue to avoid a miscarriage of justice.

It is interesting to note that in common law, as earlier adverted to, and pursuant to the *Teodoro vs. Mirasol* case, **the *bona fide*s or good faith of the parties is a crucial element.** In the former, the second case shall not be abated if not brought to harass or vex; in the latter, the first case shall be abated if it is merely an anticipatory action or, more appropriately, an anticipatory defense against an expected suit — a clever move to steal the march from the aggrieved party.[52] (Emphasis provided and citations omitted)

None of these situations are present in the facts of this instant suit. In any case, it is the better part of wisdom in protecting the creditors if the corporation is rehabilitated.

We now proceed to the second issue on whether the rehabilitation court is required to hold a hearing to comply with the "serious situations" test laid down in *Rizal Commercial Banking Corp. v. IAC* before issuing a stay order.

The rehabilitation court complied with the Interim Rules in its order dated July 13, 2004 on the issuance of a stay order and appointment of Gener T. Mendoza as rehabilitation receiver.[53]

The 1999 *Rizal Commercial Banking Corp. v. IAC*[54] case provides for the "serious situations" test in that the suspension of claims is counted only upon the appointment of a rehabilitation receiver,[55] and certain situations serious in nature must be shown to exist before one is appointed, *viz*:

Furthermore, as relevantly pointed out in the dissenting opinion, a petition for rehabilitation does not always result in the appointment

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[52] *Id.* at 531-534.

[53] *Rollo* (vol. 1), pp. 135-136. A copy of this order dated July 13, 2004 was attached as Annex "G" of the petition.

[54] *Rizal Commercial Banking Corp. v. IAC*, 378 Phil. 10 (1999) [Per *J.* Melo, *En Banc*].

[55] *Id.* at 30.

of a receiver or the creation of a management committee. The SEC has to initially determine whether such appointment is appropriate and necessary under the circumstances. Under Paragraph (d), Section 6 of Presidential Decree No. 902-A, certain situations must be shown to exist before a management committee may be created or appointed, such as:

1. when there is imminent danger of dissipation, loss, wastage or destruction of assets or other properties; or

2. when there is paralization of business operations of such corporations or entities which may be prejudicial to the interest of minority stockholders, parties-litigants or to the general public.

On the other hand, receivers may be appointed whenever:

1. necessary in order to preserve the rights of the parties-litigants; and/or

2. protect the interest of the investing public and creditors. (Section 6 [c], P.D. 902-A.)

These situations are rather serious in nature, requiring the appointment of a management committee or a receiver to preserve the existing assets and property of the corporation in order to protect the interests of its investors and creditors. Thus, in such situations, suspension of actions for claims against a corporation as provided in Paragraph (c) of Section 6, of Presidential Decree No. 902-A is necessary, and here we borrow the words of the late Justice Medialdea, "so as not to render the SEC management Committee irrelevant and inutile and to give it unhampered 'rescue efforts' over the distressed firm" (*Rollo*, p. 265)."

Otherwise, when such circumstances are not obtaining or when the SEC finds no such imminent danger of losing the corporate assets, a management committee or rehabilitation receiver need not be appointed and suspension of actions for claims may not be ordered by the SEC. When the SEC does not deem it necessary to appoint a receiver or to create a management committee, it may be assumed, that there are sufficient assets to sustain the rehabilitation plan, and that the creditors and investors are amply protected.[56]

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[56] *Id.* at 23-24.

However, this case had been promulgated prior to the effectivity of the Interim Rules that took effect on December 15, 2000.

Section 6 of the Interim Rules states explicitly that "[i]f the court finds the petition to be sufficient in form and substance, it shall, not later than five (5) days from the filing of the petition, issue an Order (a) appointing a Rehabilitation Receiver and fixing his bond; (b) staying enforcement of all claims x x x."[57]

Compliant with the rules, the July 13, 2004 stay order was issued not later than five (5) days from the filing of the petition on July 9, 2004 after the rehabilitation court found the petition sufficient in form and substance.

We agree that when a petition filed by a debtor "alleges all the material facts and includes all the documents required by Rule 4-2 [of the Interim Rules],"[58] it is sufficient in form and substance.

Nowhere in the Interim Rules does it require a comprehensive discussion in the stay order on the court's findings of sufficiency in form and substance.

The stay order and appointment of a rehabilitation receiver dated July 13, 2004 is an "extraordinary, preliminary, *ex parte*

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[57] *See* M. BALGOS, INTERIM RULES OF PROCEDURE ON CORPORATE REHABILITATION 80 (2006). Atty. Balgos was part of the Supreme Court's Committee tasked specifically to draft the rules of procedure on corporate rehabilitation and intra-corporate controversies.

> When the Committee met and discussed when stay should be issued so that the arrest of enforcement of claims against the distressed debtor may be immediate, it decided that, ***to satisfy the law and the abandonment of the former RCBC decision***, once a petition for rehabilitation is filed, and not later than five (5) days therefrom, upon its finding that it is sufficient in form and substance, it shall "issue an order (a) appointing a Rehabilitation Receiver and fixing his bond, and (b) staying enforcement of all claims, whether for money or otherwise and whether enforcement is by court action or otherwise, against the debtor, its guarantors and sureties not solidarily liable with the debtor. (Emphasis provided)

[58] F. LIM, *BENCHBOOK ON CORPORATE REHABILITATION* 17 (2004).

remed[y]."[59] The effectivity period of a stay order is only "from the date of its issuance until dismissal of the petition or termination of the rehabilitation proceedings."[60] It is not a final disposition of the case. It is an interlocutory order defined as one that "does not finally dispose of the case, and does not end the Court's task of adjudicating the parties' contentions and determining their rights and liabilities as regards each other, but obviously indicates that other things remain to be done by the Court."[61]

Thus, it is not covered by the requirement under the Constitution that a decision must include a discussion of the facts and laws on which it is based.[62]

Neither does the Interim Rules require a hearing before the issuance of a stay order. What it requires is an initial hearing before it can give due course to[63] or dismiss[64] a petition.

Nevertheless, while the Interim Rules does not require the holding of a hearing before the issuance of a stay order, neither does it prohibit the holding of one. Thus, the trial court has ample discretion to call a hearing when it is not confident that the allegations in the petition are sufficient in form and substance, for so long as this hearing is held within the five (5)-day period from the filing of the petition — the period within which a stay order may issue as provided in the Interim Rules.

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[59] *Id.*

[60] *INTERIM RULES OF PROCEDURE ON CORPORATE REHABILITATION* (2000), Rule 4, Sec. 11.

[61] *Yu v. Reyes-Carpio*, G.R. No. 189207, June 15, 2011, 652 SCRA 341, 349 [Per *J.* Velasco, First Division], citing *Philippine Business Bank v. Chua*, G.R. No. 178899, November 15, 2010, 634 SCRA 635, 648 [Per *J.* Brion, Third Division].

[62] Consti., Art. VIII, Sec. 14. This provides that "No decision shall be rendered by any court without expressing therein clearly and distinctly the facts and the law on which it is based."

[63] *INTERIM RULES OF PROCEDURE ON CORPORATE REHABILITATION* (2000), Rule 4, Sec. 9.

[64] *INTERIM RULES OF PROCEDURE ON CORPORATE REHABILITATION* (2000), Rule 4, Sec. 11.

One of the important objectives of the Interim Rules is "to promote a speedy disposition of corporate rehabilitation cases[,] x x x apparent from the strict time frames, the non-adversarial nature of the proceedings, and the prohibition of certain kinds of pleadings."[65] It is in light of this objective that a court with basis to issue a stay order must do so not later than five (5) days from the date the petition was filed.[66]

Moreover, according to the November 17, 2000 memorandum submitted by the Supreme Court Committee on the Interim Rules of Procedure on Corporate Rehabilitation:

> The Proposed Rules remove the concept of the Interim Receiver and replace it with a rehabilitation receiver. This is to justify the **immediate issuance** of the stay order because under Presidential Decree No. 902-A, as amended, the suspension of actions takes effect only upon appointment of the rehabilitation receiver.[67] (Emphasis provided)

Even without this court going into the procedural issues, addressing the substantive merits of the case will yield the same result.

Respondent China Banking Corporation mainly argues the violation of the constitutional proscription against impairment of contractual obligations[68] in that neither the provisions of Pres. Dec. No. 902-A as amended nor the Interim Rules empower commercial courts "to render without force and effect valid contractual stipulations."[69]

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[65] P. V. Santo, *An Assessment of the Application of the Interim Rules of Procedure on Corporate Rehabilitation*, in F. LIM, *BENCHBOOK ON CORPORATE REHABILITATION* 137 (2004).

[66] *Id.*; *INTERIM RULES OF PROCEDURE ON CORPORATE REHABILITATION* (2000), Rule 4, Sec. 6.

[67] R. LUCILA, *CORPORATE REHABILITATION IN THE PHILIPPINES* 246 (2007).

[68] Consti., Art. III, Sec. 10. No law impairing the obligation of contracts shall be passed.

[69] *Rollo* (vol. 2), p. 870.

The non-impairment clause first appeared in the United States Constitution as a safeguard against the issuance of worthless paper money that disturbed economic stability after the American Revolution.[70] This constitutional provision was designed to promote commercial stability.[71] At its core is "a prohibition of state interference with debtor-creditor relationships."[72]

This clause first became operative in the Philippines through the Philippine Bill of 1902, the fifth paragraph of Section 5 which states "[t]hat no law impairing the obligation of contracts shall be enacted." It was consistently adopted in subsequent Philippine fundamental laws, namely, the Jones Law of 1916,[73] the 1935 Constitution,[74] the 1973 Constitution,[75] and the present Constitution.[76]

Nevertheless, this court has brushed aside invocations of the non-impairment clause to give way to a valid exercise of police power[77] and afford protection to labor.[78]

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[70] See J. G. Hervey, *The Impairment of Obligation of Contracts*, in *ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE*, Vol. 195, 87 (1938).

[71] See *Rediscovering the Contract Clause*, in *HARVARD LAW REVIEW*, Vol. 97, no. 6, 1,414 and 1,420 (1984).

[72] *Id.* at 1,421.

[73] Sec. 3 (c), August 29, 1916 < http://www.gov.ph/the-philippine-constitutions/the-jones-law-of-1916/>.

[74] Consti. (1935), Art. III, Sec. 1 (10).

[75] Consti. (1973), Art. IV, Sec. 11.

[76] Consti., Art. III, Sec. 10.

[77] See *Pacific Wide Realty and Development Corporation v. Puerto Azul Land, Inc.*, G.R. No. 178768 and 180893, November 25, 2009, 605 SCRA 503, 516-517 [Per *J.* Nachura, Third Division]; *Philippine National Bank v. Remigio*, G.R. No. 78508, March 21, 1994, 231 SCRA 362, 368 [Per *J.* Vitug, Third Division]; *Kabiling v. National Housing Authority*, 240 Phil. 585, 590 (1987) [Per *J.* Yap, *En Banc*]; *Alalayan, et al. v. National Power Corporation, et al.*, 133 Phil. 279, 293-294 (1968) [Per *J.* Fernando, *En Banc*].

[78] See *Abella v. National Labor Relations Commission*, 236 Phil. 150, 157 (1987) [Per *J.* Paras, *En Banc*].

In *Pacific Wide Realty and Development Corporation v. Puerto Azul Land, Inc.*[79] which similarly involved corporate rehabilitation, this court found no merit in Pacific Wide's invocation of the non-impairment clause, explaining as follows:

> We also find no merit in PWRDC's contention that there is a violation of the impairment clause. Section 10, Article III of the Constitution mandates that no law impairing the obligations of contract shall be passed. This case does not involve a law or an executive issuance declaring the modification of the contract among debtor PALI, its creditors and its accommodation mortgagors. Thus, the non-impairment clause may not be invoked. Furthermore, as held in *Oposa v. Factoran, Jr.* even assuming that the same may be invoked, the non-impairment clause must yield to the police power of the State. Property rights and contractual rights are not absolute. The constitutional guaranty of non-impairment of obligations is limited by the exercise of the police power of the State for the common good of the general public.
>
> Successful rehabilitation of a distressed corporation will benefit its debtors, creditors, employees, and the economy in general. The court may approve a rehabilitation plan even over the opposition of creditors holding a majority of the total liabilities of the debtor if, in its judgment, the rehabilitation of the debtor is feasible and the opposition of the creditors is manifestly unreasonable. The rehabilitation plan, once approved, is binding upon the debtor and all persons who may be affected by it, including the creditors, whether or not such persons have participated in the proceedings or have opposed the plan or whether or not their claims have been scheduled.[80]

Corporate rehabilitation is one of many statutorily provided remedies for businesses that experience a downturn. Rather than leave the various creditors unprotected, legislation now provides for an orderly procedure of equitably and fairly addressing their concerns. Corporate rehabilitation allows a court-supervised process to rejuvenate a corporation. Its twin, insolvency, provides

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[79] G.R. No. 178768, November 25, 2009, 605 SCRA 503 [Per *J.* Nachura, Third Division].

[80] *Id.* at 516-517.

for a system of liquidation and a procedure of equitably settling various debts owed by an individual or a business. It provides a corporation's owners a sound chance to re-engage the market, hopefully with more vigor and enlightened services, having learned from a painful experience.

Necessarily, a business in the red and about to incur tremendous losses may not be able to pay all its creditors. Rather than leave it to the strongest or most resourceful amongst all of them, the state steps in to equitably distribute the corporation's limited resources.

The cram-down principle adopted by the Interim Rules does, in effect, dilute contracts. When it permits the approval of a rehabilitation plan even over the opposition of creditors,[81] or when it imposes a binding effect of the approved plan on all parties including those who did not participate in the proceedings,[82] the burden of loss is shifted to the creditors to allow the corporation to rehabilitate itself from insolvency.

Rather than let struggling corporations slip and vanish, the better option is to allow commercial courts to come in and apply the process for corporate rehabilitation.

This option is preferred so as to avoid what Garrett Hardin called the Tragedy of Commons. Here, Hardin submits that "coercive government regulation is necessary to prevent the degradation of common-pool resources [since] individual resource appropriators receive the full benefit of their use and bear only a share of their cost."[83] By analogy to the game theory, this is the prisoner's dilemma: "Since no individual has the right to control or exclude others, each appropriator has a very high discount rate [with] little incentive to efficiently manage the

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[81] *INTERIM RULES OF PROCEDURE ON CORPORATE REHABILITATION* (2000), Rule 4, sec. 23.

[82] *INTERIM RULES OF PROCEDURE ON CORPORATE REHABILITATION* (2000), Rule 4, Sec. 24 (a).

[83] *See* N. S. Garnett, *Managing the Urban Commons*, 160 U. Pa. L. Rev. 1995, 2,000-2,001 (2012).

resource in order to guarantee future use."[84] Thus, the cure is an exogenous policy to equitably distribute scarce resources. This will incentivize future creditors to continue lending, resulting in something productive rather than resulting in nothing.

In fact, these corporations exist within a market. The General Theory of Second Best holds that "correction for one market imperfection will not necessarily be efficiency-enhancing unless [there is also] simultaneous [correction] for all other market imperfections."[85] The correction of one market imperfection may adversely affect market efficiency elsewhere, for instance, "a contract rule that corrects for an imperfection in the market for consensual agreements may [at the same time] induce welfare losses elsewhere."[86] This theory is one justification for the passing of corporate rehabilitation laws allowing the suspension of payments so that corporations can get back on their feet.

As in all markets, the environment is never guaranteed. There are always risks. Contracts are indeed sacred as the law between the parties. However, these contracts exist within a society where nothing is risk-free, and the government is constantly being called to attend to the realities of the times.

Corporate rehabilitation is preferred for addressing social costs. Allowing the corporation room to get back on its feet will retain if not increase employment opportunities for the market as a whole. Indirectly, the services offered by the corporation will also benefit the market as "[t]he fundamental impulse that sets and keeps the capitalist engine in motion comes from [the constant entry of] new consumers' goods, the new methods of production or transportation, the new markets, [and] the new forms of industrial organization that capitalist enterprise creates."[87]

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[84] *Id.* at 2,001.

[85] *See* T. S. Ulen, *Courts, Legislatures, and the General Theory of Second Best in Law and Economics*, 73 Chi.-Kent L. Rev. 189, 220 (1998).

[86] *Id.*

[87] *See* T. K. McCraw, *Classics: Joseph Schumpeter on Competition*, 8 Competition Pol'y Int'l. 194, 201 (2012).

As a final note, this is not the first time this court was made to review two separate petitions appealed from two conflicting decisions, rendered by two divisions of the Court of Appeals, and originating from the same case. In *Serrano v. Ambassador Hotel, Inc.*,[88] we ordered the Court of Appeals to adopt immediately a more efficient system in its Internal Rules to avoid situations as this.

In this instance, it is fortunate that this court had the opportunity to correct the situation and prevent conflicting judgments from reaching impending finality with the referral to the En Banc.

We reiterate the need for our courts to be "constantly vigilant in extending their judicial gaze to cases related to the matters submitted for their resolution"[89] as to "ensure against judicial confusion and [any] seeming conflict in the judiciary's decisions."[90]

WHEREFORE, petitioner Pryce Corporation's motion is **GRANTED.** This court's February 4, 2008 decision is **RECONSIDERED** and **SET ASIDE.**

SO ORDERED.

Sereno, C.J., Carpio, Velasco, Jr., Leonardo-de Castro, Peralta, Bersamin, del Castillo, Abad, Villarama, Jr., Perez, Mendoza, and *Reyes, JJ.,* concur.

Perlas-Bernabe, J., no part.

Brion, J., on leave.

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[88] G.R. No. 197003, February 11, 2013, 690 SCRA 226 [Per J. Velasco, Third Division].

[89] *Id.* at 238.

[90] *Id.*

EN BANC

[G.R. No. 203335. February 18, 2014]

JOSE JESUS M. DISINI, JR., ROWENA S. DISINI, LIANNE IVY P. MEDINA, JANETTE TORAL, and ERNESTO SONIDO, JR., *petitioners, vs.* **THE SECRETARY OF JUSTICE, THE SECRETARY OF THE DEPARTMENT OF THE INTERIOR AND LOCAL GOVERNMENT, THE EXECUTIVE DIRECTOR OF THE INFORMATION AND COMMUNICATIONS TECHNOLOGY OFFICE, THE CHIEF OF THE PHILIPPINE NATIONAL POLICE and THE DIRECTOR OF THE NATIONAL BUREAU OF INVESTIGATION,** *respondents.*

[G.R. No. 203299. February 18, 2014]

LOUIS "BAROK" C. BIRAOGO, *petitioner, vs.* **NATIONAL BUREAU OF INVESTIGATION and PHILIPPINE NATIONAL POLICE,** *respondents.*

[G.R. No. 203306. February 18, 2014]

ALAB NG MAMAMAHAYAG (ALAM), HUKUMAN NG MAMAMAYAN MOVEMENT, INC., JERRY S. YAP, BERTENI "TOTO" CAUSING, HERNANI Q. CUARE, PERCY LAPID, TRACY CABRERA, RONALDO E. RENTA, CIRILO P. SABARRE, JR., DERVIN CASTRO, *ET AL.*, *petitioners, vs.* **OFFICE OF THE PRESIDENT, represented by President Benigno Simeon Aquino III, SENATE OF THE PHILIPPINES, and HOUSE OF REPRESENTATIVES,** *respondents*.

[G.R. No. 203359. February 18, 2014]

SENATOR TEOFISTO DL GUINGONA III, *petitioner, vs.* **EXECUTIVE SECRETARY, THE SECRETARY OF JUSTICE, THE SECRETARY OF THE DEPARTMENT**

OF INTERIOR AND LOCAL GOVERNMENT, THE CHIEF OF THE PHILIPPINE NATIONAL POLICE, and DIRECTOR OF THE NATIONAL BUREAU OF INVESTIGATION, *respondents.*

[G.R. No. 203378. February 18, 2014]

ALEXANDER ADONIS, ELLEN TORDESILLAS, MA. GISELA ORDENES-CASCOLAN, H. HARRY L. ROQUE, JR., ROMEL R. BAGARES, and GILBERT T. ANDRES, *petitioners, vs.* **THE EXECUTIVE SECRETARY, THE DEPARTMENT OF BUDGET AND MANAGEMENT, THE DEPARTMENT OF JUSTICE, THE DEPARTMENT OF THE INTERIOR AND LOCAL GOVERNMENT, THE NATIONAL BUREAU OF INVESTIGATION, THE PHILIPPINE NATIONAL POLICE, and THE INFORMATION AND COMMUNICATIONS TECHNOLOGY OFFICE-DEPARTMENT OF SCIENCE AND TECHNOLOGY,** *respondents.*

[G.R. No. 203391. February 18, 2014]

HON. RAYMOND V. PALATINO, HON. ANTONIO TINIO, VENCER MARI CRISOSTOMO OF ANAKBAYAN, MA. KATHERINE ELONA OF THE PHILIPPINE COLLEGIAN, ISABELLE THERESE BAGUISI OF THE NATIONAL UNION OF STUDENTS OF THE PHILIPPINES, *ET AL.*, *petitioners, vs.* **PAQUITO N. OCHOA, JR., in his capacity as Executive Secretary and alter-ego of President Benigno Simeon Aquino III, LEILA DE LIMA in her capacity as Secretary of Justice,** *respondents*.

[G.R. No. 203407. February 18, 2014]

BAGONG ALYANSANG MAKABAYAN SECRETARY GENERAL RENATO M. REYES, JR., National Artist BIENVENIDO L. LUMBERA, Chairperson of Concerned

Artists of the Philippines, ELMER C. LABOG, Chairperson of Kilusang Mayo Uno, CRISTINA E. PALABAY, Secretary General of Karapatan, FERDINAND R. GAITE, Chairperson of COURAGE, JOEL B. MAGLUNSOD, Vice President of Anakpawis Party-List, LANA R. LINABAN, Secretary General Gabriela Women's Party, ADOLFO ARES P. GUTIERREZ, and JULIUS GARCIA MATIBAG, *petitioners, vs.* **BENIGNO SIMEON C. AQUINO III, President of the Republic of the Philippines, PAQUITO N. OCHOA, JR., Executive Secretary, SENATE OF THE PHILIPPINES, represented by SENATE PRESIDENT JUAN PONCE ENRILE, HOUSE OF REPRESENTATIVES, represented by SPEAKER FELICIANO BELMONTE, JR., LEILA DE LIMA, Secretary of the Department of Justice, LOUIS NAPOLEON C. CASAMBRE, Executive Director of the Information and Communications Technology Office, NONNATUS CAESAR R. ROJAS, Director of the National Bureau of Investigation, D/GEN. NICANOR A. BARTOLOME, Chief of the Philippine National Police, MANUEL A. ROXAS II, Secretary of the Department of the Interior and Local Government,** *respondents*.

[G.R. No. 203440. February 18, 2014]

MELENCIO S. STA. MARIA, SEDFREY M. CANDELARIA, AMPARITA STA. MARIA, RAY PAOLO J. SANTIAGO, GILBERT V. SEMBRANO, and RYAN JEREMIAH D. QUAN (all of the Ateneo Human Rights Center), *petitioners, vs.* **HONORABLE PAQUITO OCHOA in his capacity as Executive Secretary, HONORABLE LEILA DE LIMA in her capacity as Secretary of Justice, HONORABLE MANUEL ROXAS in his capacity as Secretary of the Department of Interior and Local Government, The CHIEF of the Philippine National Police, The DIRECTOR of the National Bureau of**

Investigation (all of the Executive Department of Government), *respondents*.

[G.R. No. 203453. February 18, 2014]

NATIONAL UNION OF JOURNALISTS OF THE PHILIPPINES (NUJP), PHILIPPINE PRESS INSTITUTE (PPI), CENTER FOR MEDIA FREEDOM AND RESPONSIBILITY, ROWENA CARRANZA PARAAN, MELINDA QUINTOS-DE JESUS, JOSEPH ALWYN ALBURO, ARIEL SEBELLINO and THE PETITIONERS IN THE e-PETITION http://www.nujp.org/no-to-ra10175/, *petitioners, vs.* **THE EXECUTIVE SECRETARY, THE SECRETARY OF JUSTICE, THE SECRETARY OF THE INTERIOR AND LOCAL GOVERNMENT, THE SECRETARY OF BUDGET AND MANAGEMENT, THE DIRECTOR GENERAL OF THE PHILIPPINE NATIONAL POLICE, THE DIRECTOR OF THE NATIONAL BUREAU OF INVESTIGATION, THE CYBERCRIME INVESTIGATION AND COORDINATING CENTER, and ALL AGENCIES and INSTRUMENTALITIES OF GOVERNMENT and ALL PERSONS ACTING UNDER THEIR INSTRUCTIONS, ORDERS, DIRECTION IN RELATION TO THE IMPLEMENTATION OF REPUBLIC ACT NO. 10175,** *respondents*.

[G.R. No. 203454. February 18, 2014]

PAUL CORNELIUS T. CASTILLO & RYAN D. ANDRES, *petitioners, vs.* **THE HON. SECRETARY OF JUSTICE, THE HON. SECRETARY OF INTERIOR AND LOCAL GOVERNMENT,** *respondents*.

[G.R. No. 203469. February 18, 2014]

ANTHONY IAN M. CRUZ; MARCELO R. LANDICHO; BENJAMIN NOEL A. ESPINA; MARCK RONALD

C. RIMORIN; JULIUS D. ROCAS; OLIVER RICHARD V. ROBILLO; AARON ERICK A. LOZADA; GERARD ADRIAN P. MAGNAYE; JOSE REGINALD A. RAMOS; MA. ROSARIO T. JUAN; BRENDALYN P. RAMIREZ; MAUREEN A. HERMITANIO; KRISTINE JOY S. REMENTILLA; MARICEL O. GRAY; JULIUS IVAN F. CABIGON; BENRALPH S. YU; CEBU BLOGGERS SOCIETY, INC. PRESIDENT RUBEN B. LICERA, JR.; and PINOY EXPAT/OFW BLOG AWARDS, INC. COORDINATOR PEDRO E. RAHON, *petitioners, vs.* **HIS EXCELLENCY BENIGNO S. AQUINO III, in his capacity as President of the Republic of the Philippines; SENATE OF THE PHILIPPINES, represented by HON. JUAN PONCE ENRILE, in his capacity as Senate President; HOUSE OF REPRESENTATIVES, represented by FELICIANO R. BELMONTE, JR., in his capacity as Speaker of the House of Representatives; HON. PAQUITO N. OCHOA, JR., in his capacity as Executive Secretary; HON. LEILA M. DE LIMA, in her capacity as Secretary of Justice; HON. LOUIS NAPOLEON C. CASAMBRE, in his capacity as Executive Director, Information and Communications Technology Office; HON. NONNATUS CAESAR R. ROJAS, in his capacity as Director, National Bureau of Investigation; and P/DGEN. NICANOR A. BARTOLOME, in his capacity as Chief, Philippine National Police,** *respondents*.

[G.R. No. 203501. February 18, 2014]

PHILIPPINE BAR ASSOCIATION, INC., *petitioner, vs.* **HIS EXCELLENCY BENIGNO S. AQUINO III, in his official capacity as President of the Republic of the Philippines; HON. PAQUITO N. OCHOA, JR., in his official capacity as Executive Secretary; HON. LEILA M. DE LIMA, in her official capacity as Secretary of Justice; LOUIS NAPOLEON C. CASAMBRE, in his official capacity as Executive Director, Information and Communications Technology Office; NONNATUS**

CAESAR R. ROJAS, in his official capacity as Director of the National Bureau of Investigation; and DIRECTOR GENERAL NICANOR A. BARTOLOME, in his official capacity as Chief of the Philippine National Police, *respondents*.

[G.R. No. 203509. February 18, 2014]

BAYAN MUNA REPRESENTATIVE NERI J. COLMENARES, *petitioner, vs.* **THE EXECUTIVE SECRETARY PAQUITO OCHOA, JR.,** *respondent*.

[G.R. No. 203515. February 18, 2014]

NATIONAL PRESS CLUB OF THE PHILIPPINES, INC. represented by BENNY D. ANTIPORDA in his capacity as President and in his personal capacity, *petitioner, vs.* **OFFICE OF THE PRESIDENT, PRES. BENIGNO SIMEON AQUINO III, DEPARTMENT OF JUSTICE, DEPARTMENT OF INTERIOR AND LOCAL GOVERNMENT, PHILIPPINE NATIONAL POLICE, NATIONAL BUREAU OF INVESTIGATION, DEPARTMENT OF BUDGET AND MANAGEMENT AND ALL OTHER GOVERNMENT INSTRUMENTALITIES WHO HAVE HANDS IN THE PASSAGE AND/OR IMPLEMENTATION OF REPUBLIC ACT 10175,** *respondents*.

[G.R. No. 203518. February 18, 2014]

PHILIPPINE INTERNET FREEDOM ALLIANCE, composed of DAKILA-PHILIPPINE COLLECTIVE FOR MODERN HEROISM, represented by Leni Velasco, PARTIDO LAKAS NG MASA, represented by Cesar S. Melencio, FRANCIS EUSTON R. ACERO, MARLON ANTHONY ROMASANTA TONSON, TEODORO A. CASIÑO, NOEMI LARDIZABAL-DADO, IMELDA MORALES, JAMES MATTHEW B. MIRAFLOR, JUAN G.M. RAGRAGIO, MARIA

FATIMA A. VILLENA, MEDARDO M. MANRIQUE, JR., LAUREN DADO, MARCO VITTORIA TOBIAS SUMAYAO, IRENE CHIA, ERASTUS NOEL T. DELIZO, CRISTINA SARAH E. OSORIO, ROMEO FACTOLERIN, NAOMI L. TUPAS, KENNETH KENG, ANA ALEXANDRA C. CASTRO, *petitioners, vs.* **THE EXECUTIVE SECRETARY, THE SECRETARY OF JUSTICE, THE SECRETARY OF INTERIOR AND LOCAL GOVERNMENT, THE SECRETARY OF SCIENCE AND TECHNOLOGY, THE EXECUTIVE DIRECTOR OF THE INFORMATION TECHNOLOGY OFFICE, THE DIRECTOR OF THE NATIONAL BUREAU OF INVESTIGATION, THE CHIEF, PHILIPPINE NATIONAL POLICE, THE HEAD OF THE DOJ OFFICE OF CYBERCRIME, and THE OTHER MEMBERS OF THE CYBERCRIME INVESTIGATION AND COORDINATING CENTER,** *respondents*.

SYLLABUS

1. CRIMINAL LAW; THE CYBERCRIME PREVENTION ACT OF 2012 (R.A. NO. 10175); SECTION 4(a)(1) THEREOF WHICH PENALIZES ACCESSING A COMPUTER SYSTEM WITHOUT RIGHT IS VALID AND CONSTITUTIONAL; THE STRICT SCRUTINY STANDARD IS NOT APPLICABLE AS NO FUNDAMENTAL FREEDOM, LIKE SPEECH, IS INVOLVED IN PUNISHING A CONDEMNABLE ACT OF ACCESSING THE COMPUTER SYSTEM OF ANOTHER WITHOUT RIGHT; STRICT SCRUTINY STANDARD, EXPLAINED. — The Court has in a way found the strict scrutiny standard, an American constitutional construct, useful in determining the constitutionality of laws that tend to target a class of things or persons. According to this standard, a legislative classification that impermissibly interferes with the exercise of fundamental right or operates to the peculiar class disadvantage of a suspect class is presumed unconstitutional. The burden is on the government to prove that the classification is necessary to achieve a compelling state interest and that it is the least

restrictive means to protect such interest. Later, the strict scrutiny standard was used to assess the validity of laws dealing with the regulation of speech, gender, or race as well as other fundamental rights, as expansion from its earlier applications to equal protection. In the cases before it, the Court finds nothing in Section 4(a)(1) that calls for the application of the strict scrutiny standard since no fundamental freedom, like speech, is involved in punishing what is essentially a condemnable act – accessing the computer system of another without right. It is a universally condemned conduct.

2. ID.; ID.; SECTION 4(a)(3) WHICH PENALIZES DATA INTERFERENCE, INCLUDING TRANSMISSION OF VIRUSES, DOES NOT SUFFER FROM OVERBREADTH AND THEREFORE VALID AND CONSTITUTIONAL, IT DOES NOT ENCROACH PROTECTED FREEDOMS NOR CREATES TENDENCY TO INTIMIDATE THE FREE EXERCISE OF ONE'S CONSTITUTIONAL RIGHT, BUT IT PUNISHES ONLY THE ACT OF WILLFULLY DESTROYING WITHOUT RIGHT OTHER PEOPLE'S COMPUTER DATA, ELECTRONIC DOCUMENT OR ELECTRONIC DATA MESSAGE.— Under the overbreadth doctrine, a proper governmental purpose, constitutionally subject to state regulation, may not be achieved by means that unnecessarily sweep its subject broadly, thereby invading the area of protected freedoms. But Section 4(a)(3) does not encroach on these freedoms at all. It simply punishes what essentially is a form of vandalism, the act of willfully destroying without right the things that belong to others, in this case their computer data, electronic document, or electronic data message. Such act has no connection to guaranteed freedoms. There is no freedom to destroy other people's computer systems and private documents. All penal laws, like the cybercrime law, have of course an inherent chilling effect, an *in terrorem* effect or the fear of possible prosecution that hangs on the heads of citizens who are minded to step beyond the boundaries of what is proper. But to prevent the State from legislating criminal laws because they instill such kind of fear is to render the state powerless in addressing and penalizing socially harmful conduct. Here, the chilling effect that results in paralysis is an illusion since Section 4(a)(3) clearly describes the evil that it seeks to punish and creates no tendency to intimidate the free exercise of one's constitutional rights. Besides, the

overbreadth challenge places on petitioners the heavy burden of proving that under no set of circumstances will Section 4(a)(3) be valid. Petitioner has failed to discharge this burden.

3. ID.; ID.; SECTION 4(a)(6) THEREOF WHICH PENALIZES CYBER-SQUATTING OR ACQUIRING DOMAIN NAME OVER THE INTERNET IS VALID AND CONSTITUTIONAL AS THE LAW IS REASONABLE IN PUNISHING THE OFFENDER FOR ACQUIRING THE DOMAIN NAME IN BAD FAITH TO PROFIT, MISLEAD, DESTROY REPUTATION, OR DEPRIVE OTHERS WHO ARE NOT ILL-MOTIVATED OF THE RIGHTFUL OPPORTUNITY OF REGISTERING THE SAME.— Petitioners claim that Section 4(a)(6) or cyber-squatting violates the equal protection clause in that, not being narrowly tailored, it will cause a user using his real name to suffer the same fate as those who use aliases or take the name of another in satire, parody, or any other literary device. For example, supposing there exists a well known billionaire-philanthropist named "Julio Gandolfo," the law would punish for cyber-squatting both the person who registers such name because he claims it to be his pseudo-name and another who registers the name because it happens to be his real name. Petitioners claim that, considering the substantial distinction between the two, the law should recognize the difference. But there is no real difference whether he uses "Julio Gandolfo" which happens to be his real name or use it as a pseudo-name for it is the evil purpose for which he uses the name that the law condemns. The law is reasonable in penalizing him for acquiring the domain name in bad faith to profit, mislead, destroy reputation, or deprive others who are not ill-motivated of the rightful opportunity of registering the same. The challenge to the constitutionality of Section 4(a)(6) on ground of denial of equal protection is baseless.

4. ID.; ID.; ID.; ZONES OF PRIVACY, CONCEPT AND RELEVANCE THEREOF TO THE RIGHT OF PRIVACY.— Relevant to any discussion of the right to privacy is the concept known as the "Zones of Privacy." The Court explained in "*In the Matter of the Petition for Issuance of Writ of Habeas Corpus of Sabio v. Senator Gordon*" the relevance of these zones to the right to 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." Two constitutional guarantees create these zones of privacy: (a) the right against unreasonable searches and seizures, which is the basis of the right to be let alone, and (b) the right to privacy of communication and correspondence. In assessing the challenge that the State has impermissibly intruded into these zones of 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.

5. ID.; ID.; SECTION 4 (b)(3) THEREOF WHICH PENALIZES IDENTITY THEFT OR THE USE OR MISUSE OF IDENTIFYING INFORMATION BELONGING TO ANOTHER NOT VIOLATIVE OF THE RIGHT TO PRIVACY AND CORRESPONDENCE AS WELL AS THE RIGHT TO DUE PROCESS, AS THE LAW PUNISHES THOSE WHO ACQUIRE OR USE SUCH IDENTIFYING INFORMATION WITHOUT RIGHT, IMPLICITLY TO CAUSE DAMAGE, FOR THERE IS NO FUNDAMENTAL RIGHT TO ACQUIRE ANOTHER'S PERSONAL DATA.— The usual identifying information regarding a person includes his name, his citizenship, his residence address, his contact number, his place and date of birth, the name of his spouse if any, his occupation, and similar data. The law punishes those who acquire or use such identifying information without right, implicitly to cause damage. Petitioners simply fail to show how government effort to curb computer-related identity theft violates the right to privacy and correspondence as well as the right to due process of law. Also, the charge of invalidity of this section based on the overbreadth doctrine will not hold water since the specific conducts proscribed do not intrude into guaranteed freedoms like speech. Clearly, what this section regulates are specific actions: the acquisition, use, misuse or deletion of personal identifying data of another. There is no fundamental right to acquire another's personal data.

6. ID.; ID.; SECTION 4(b)(3) THEREOF NOT VIOLATIVE OF THE FREEDOM OF THE PRESS AS THE ACT PUNISHES THE THEFT OF IDENTITY INFORMATION FOR AN ILLEGITIMATE PURPOSE OR WITH INTENT TO GAIN; ACQUIRING AND DISSEMINATING INFORMATION MADE PUBLIC BY THE USER HIMSELF, NOT A FORM OF THEFT.— [P]etitioners fear that Section 4(b)(3) violates the freedom of the press in that journalists would be hindered from accessing the unrestricted user account of a person in the news to secure information about him that could be published. But this is not the essence of identity theft that the law seeks to prohibit and punish. Evidently, the theft of identity information must be intended for an illegitimate purpose. Moreover, acquiring and disseminating information made public by the user himself cannot be regarded as a form of theft. The Court has defined intent to gain as an internal act which can be established through the overt acts of the offender, and it may be presumed from the furtive taking of useful property pertaining to another, unless special circumstances reveal a different intent on the part of the perpetrator. As such, the press, whether in quest of news reporting or social investigation, has nothing to fear since a special circumstance is present to negate intent to gain which is required by this Section.

7. ID.; ID.; SECTION 4(c)(1) THEREOF WHICH PENALIZES CYBERSEX OR THE LASCIVIOUS EXHIBITION OF SEXUAL ORGANS OR SEXUAL ACTIVITY FOR FAVOR OR CONSIDERATION IS VALID AND CONSTITUTIONAL AS THE LAW APPLIES ONLY TO PERSONS ENGAGED IN THE BUSINESS OF MAINTAINING, CONTROLLING, OR OPERATING, DIRECTLY OR INDIRECTLY, THE LASCIVIOUS EXHIBITION OF SEXUAL ORGANS OR SEXUAL ACTIVITY WITH THE AID OF A COMPUTER SYSTEM.— Petitioners claim that [Section 4(c)(1)] of the Cybercrime Law violates the freedom of expression clause of the Constitution. They express fear that private communications of sexual character between husband and wife or consenting adults, which are not regarded as crimes under the penal code, would now be regarded as crimes when done "for favor" in cyberspace. x x x But the deliberations of the Bicameral Committee of Congress on this section of the Cybercrime Prevention Act give a proper perspective on the issue. These

deliberations show a lack of intent to penalize a "private showing x x x between and among two private persons x x x although that may be a form of obscenity to some." The understanding of those who drew up the cybercrime law is that the element of "engaging in a business" is necessary to constitute the illegal cybersex. The 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. x x x. The case of *Nogales v. People* shows the extent to which the State can regulate materials that serve no other purpose than satisfy the market for violence, lust, or pornography. The Court weighed the property rights of individuals against the public welfare. Private property, if containing pornographic materials, may be forfeited and destroyed. Likewise, engaging in sexual acts privately through internet connection, perceived by some as a right, has to be balanced with the mandate of the State to eradicate white slavery and the exploitation of women. x x x The Court will not declare Section 4(c)(1) unconstitutional where it stands a construction that makes it apply only to persons engaged in the business of maintaining, controlling, or operating, directly or indirectly, the lascivious exhibition of sexual organs or sexual activity with the aid of a computer system as Congress has intended.

8. ID.; ID.; SECTION 4(c)(2) THEREOF WHICH PENALIZES THE PRODUCTION OF CHILD PORNOGRAPHY THROUGH A COMPUTER SYSTEM IS VALID AND CONSTITUTIONAL; THE IMPOSITION OF PENALTY HIGHER BY ONE DEGREE WHEN THE CRIME OF CHILD PORNOGRAPHY IS COMMITTED THROUGH THE COMPUTER SYSTEM HAS A RATIONAL BASIS AS THE POTENTIAL FOR UNCONTROLLED PROLIFERATION OF A PARTICULAR PIECE OF CHILD PORNOGRAPHY IN CYBERSPACE IS INCALCULABLE.— It seems that [Section 4(c)(2)] of the Cybercrime Law] merely expands the scope of the Anti-Child Pornography Act of 2009 (ACPA) to cover identical activities in cyberspace. In theory, nothing prevents the government from invoking the ACPA when prosecuting persons who commit child pornography using a computer system. Actually, ACPA's definition of child pornography already embraces the use of "electronic, mechanical, digital, optical, magnetic or any other means." Notably, no one has questioned this ACPA provision. Of course,

the law makes the penalty higher by one degree when the crime is committed in cyberspace. But no one can complain since the intensity or duration of penalty is a legislative prerogative and there is rational basis for such higher penalty. The potential for uncontrolled proliferation of a particular piece of child pornography when uploaded in the cyberspace is incalculable.

9. ID.; ID.; SECTION 4(c)(3) THEREOF WHICH PENALIZES POSTING OF UNSOLICITED COMMERCIAL COMMUNICATIONS IS VOID AS UNSOLICITED ADVERTISEMENTS ARE LEGITIMATE FORMS OF EXPRESSION WHICH ARE ALSO ENTITLED TO PROTECTION; COMMERCIAL 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.— [Section 4(c)(3)] of the Cybercrime Law penalizes the transmission of unsolicited commercial communications, also known as "spam." x x x. [T]he government presents no basis for holding that unsolicited electronic ads reduce the "efficiency of computers." Secondly, people, before the arrival of the age of computers, have already been receiving such unsolicited ads by mail. These have never been outlawed as nuisance since people might have interest in such ads. What matters is that the recipient has the option of not opening or reading these mail ads. That is true with spams. Their recipients always have the option to delete or not to read them. To prohibit the transmission of unsolicited ads would deny a person the right to read his emails, even unsolicited commercial ads addressed to him. Commercial 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. The State cannot rob him of this right without violating the constitutionally guaranteed freedom of expression. Unsolicited advertisements are legitimate forms of expression.

10. ID.; ID.; SECTION 4(c)(4) THEREOF AND ARTICLES 353, 354 AND 355 OF THE REVISED PENAL CODE ON LIBEL; ELEMENTS OF LIBEL; "ACTUAL MALICE," DISCUSSED; THE DEFENSE OF ABSENCE OF ACTUAL MALICE,

EVEN WHEN THE STATEMENT TURNS OUT TO BE FALSE, IS AVAILABLE WHERE THE OFFENDED PARTY IS A PUBLIC OFFICIAL OR A PUBLIC FIGURE, BUT WHERE THE OFFENDED PARTY IS A PRIVATE INDIVIDUAL, THE PROSECUTION NEED NOT PROVE THE PRESENCE OF MALICE FOR THE LAW PRESUMES ITS EXISTENCE FROM THE DEFAMATORY CHARACTER OF THE ASSAILED STATEMENT.— The elements of libel are: (a) the allegation of a discreditable act or condition concerning another; (b) publication of the charge; (c) identity of the person defamed; and (d) existence of malice. There is "actual malice" or malice in fact when the offender makes the defamatory statement with the knowledge that it is false or with reckless disregard of whether it was false or not. The reckless disregard standard used here requires a high degree of awareness of probable falsity. There must be sufficient evidence to permit the conclusion that the accused in fact entertained serious doubts as to the truth of the statement he published. Gross or even extreme negligence is not sufficient to establish actual malice. The prosecution bears the burden of proving the presence of actual malice in instances where such element is required to establish guilt. The defense of absence of actual malice, even when the statement turns out to be false, is available where the offended party is a public official or a public figure, as in the cases of *Vasquez* (a *barangay* official) and *Borjal* (the Executive Director, First National Conference on Land Transportation). Since the penal code and implicitly, the cybercrime law, mainly target libel against private persons, the Court recognizes that these laws imply a stricter standard of "malice" to convict the author of a defamatory statement where the offended party is a public figure. Society's interest and the maintenance of good government demand a full discussion of public affairs. x x x. But, where the offended party is a private individual, the prosecution need not prove the presence of malice. The law explicitly presumes its existence (malice in law) from the defamatory character of the assailed statement. For his defense, the accused must show that he has a justifiable reason for the defamatory statement even if it was in fact true.

11. ID.; ID.; SECTION 5 THEREOF THAT PUNISHES "AIDING OR ABETTING" LIBEL ON THE CYBERSPACE IS A NULLITY; A GOVERNMENTAL PURPOSE WHICH

SEEKS TO REGULATE THE USE OF THIS CYBERSPACE COMMUNICATION TECHNOLOGY TO PROTECT A PERSON'S REPUTATION AND PEACE OF MIND, CANNOT ADOPT MEANS THAT WILL UNNECESSARILY AND BROADLY SWEEP, INVADING THE AREA OF PROTECTED FREEDOMS.— Libel in the cyberspace can x x x stain a person's image with just one click of the mouse. Scurrilous statements can spread and travel fast across the globe like bad news. Moreover, cyberlibel often goes hand in hand with cyberbullying that oppresses the victim, his relatives, and friends, evoking from mild to disastrous reactions. Still, a governmental purpose, which seeks to regulate the use of this cyberspace communication technology to protect a person's reputation and peace of mind, cannot adopt means that will unnecessarily and broadly sweep, invading the area of protected freedoms. If such means are adopted, self-inhibition borne of fear of what sinister predicaments await internet users will suppress otherwise robust discussion of public issues. Democracy will be threatened and with it, all liberties. Penal laws should provide reasonably clear guidelines for law enforcement officials and triers of facts to prevent arbitrary and discriminatory enforcement. The terms "aiding or abetting" constitute broad sweep that generates chilling effect on those who express themselves through cyberspace posts, comments, and other messages. Hence, Section 5 of the cybercrime law that punishes "aiding or abetting" libel on the cyberspace is a nullity.

12. ID.; ID.; "FACIAL" CHALLENGE DISTINGUISHED FROM "AS APPLIED" CHALLENGE; PROHIBITION AGAINST THIRD-PARTY STANDING, RULE; EXCEPTION.— When a penal statute encroaches upon the freedom of speech, a facial challenge grounded on the void-for-vagueness doctrine is acceptable. x x x. In an "as applied" challenge, the petitioner who claims a violation of his constitutional right can raise any constitutional ground – absence of due process, lack of fair notice, lack of ascertainable standards, overbreadth, or vagueness. Here, one can challenge the constitutionality of a statute only if he asserts a violation of his own rights. It prohibits one from assailing the constitutionality of the statute based solely on the violation of the rights of third persons not before the court. This rule is also known as the prohibition against third-party standing. But this rule admits of exceptions. A

petitioner may for instance mount a "facial" challenge to the constitutionality of a statute even if he claims no violation of his own rights under the assailed statute where it involves free speech on grounds of overbreadth or vagueness of the statute. The rationale for this exception is to counter the "chilling effect" on protected speech that comes from statutes violating free speech. A person who does not know whether his speech constitutes a crime under an overbroad or vague law may simply restrain himself from speaking in order to avoid being charged of a crime. The overbroad or vague law thus chills him into silence.

13. ID.; ID.; SECTION 5 THEREOF WHICH PENALIZES AIDING OR ABETTING AND ATTEMPT IN THE COMMISSION OF CYBERCRIMES IS VOID AND UNCONSTITUTIONAL WITH RESPECT TO SECTION 4(c)(4) ON ONLINE LIBEL BECAUSE OF ITS CHILLING EFFECT ON THE FREEDOM OF EXPRESSION, 4(c)(3) ON UNSOLICITED COMMERCIAL COMMUNICATIONS, AND 4(c)(2) ON CHILD PORNOGRAPHY, BUT THE CRIME OF AIDING OR ABETTING THE COMMISSION OF CYBERCRIMES UNDER SECTION 5 OF R.A. NO. 10175 SHOULD BE PERMITTED TO APPLY TO OFFENSES WHICH DO NOT INTRUDE ON THE EXERCISE OF THE FREEDOM OF EXPRESSION.— Section 5 with respect to Section 4(c)(4) is unconstitutional. Its vagueness raises apprehension on the part of internet users because of its obvious chilling effect on the freedom of expression, especially since the crime of aiding or abetting ensnares all the actors in the cyberspace front in a fuzzy way. What is more, as the petitioners point out, formal crimes such as libel are not punishable unless consummated. In the absence of legislation tracing the interaction of netizens and their level of responsibility such as in other countries, Section 5, in relation to Section 4(c)(4) on Libel, Section 4(c)(3) on Unsolicited Commercial Communications, and Section 4(c)(2) on Child Pornography, cannot stand scrutiny. But the crime of aiding or abetting the commission of cybercrimes under Section 5 should be permitted to apply to Section 4(a)(1) on Illegal Access, Section 4(a)(2) on Illegal Interception, Section 4(a)(3) on Data Interference, Section 4(a)(4) on System Interference, Section 4(a)(5) on Misuse of Devices, Section 4(a)(6) on Cyber-squatting, Section 4(b)(1) on Computer-related Forgery, Section 4(b)(2)

on Computer-related Fraud, Section 4(b)(3) on Computer-related Identity Theft, and Section 4(c)(1) on Cybersex. None of these offenses borders on the exercise of the freedom of expression. The crime of willfully attempting to commit any of these offenses is for the same reason not objectionable.

14. ID.; ID.; SECTION 6 THEREOF WHICH IMPOSES PENALTIES ONE DEGREE HIGHER WHEN CRIMES DEFINED UNDER THE REVISED PENAL CODE ARE COMMITTED WITH THE USE OF INFORMATION AND COMMUNICATION TECHNOLOGIES (ICT) IS VALID AND CONSTITUTIONAL; AN OFFENDER WHO USES THE INTERNET IN THE COMMISSION OF THE CRIME OFTEN EVADES IDENTIFICATION AND IS ABLE TO REACH FAR MORE VICTIMS OR CAUSE GREATER HARM THAN WHEN SIMILAR CRIME WAS COMMITTED USING OTHER MEANS.— Section 6 merely makes commission of existing crimes through the internet a qualifying circumstance. As the Solicitor General points out, there exists a substantial distinction between crimes committed through the use of information and communications technology and similar crimes committed using other means. In using the technology in question, the offender often evades identification and is able to reach far more victims or cause greater harm. The distinction, therefore, creates a basis for higher penalties for cybercrimes.

15. ID.; ID.; THE APPLICATION OF SECTION 7 THEREOF WHICH AUTHORIZES THE PROSECUTION OF THE OFFENDER UNDER BOTH THE REVISED PENAL CODE AND R.A. 10175 TO THE OFFENSE OF ONLINE LIBEL UNDER SECTION 4(c)(4) OF R.A. NO. 10175 IN RELATION TO THE OFFENSE OF LIBEL UNDER ARTICLE 353 OF THE REVISED PENAL CODE ON LIBEL CONSTITUTES A VIOLATION OF THE PROSCRIPTION AGAINST DOUBLE JEOPARDY; CHARGING THE OFFENDER BOTH FOR THE OFFENSE OF CHILD PORNOGRAPHY COMMITTED ONLINE UNDER SECTION 4(c)(2) OF R.A. NO. 10175 AND FOR VIOLATION OF THE ANTI-CHILD PORNOGRAPHY ACT OF 2009 (ACPA) OR R.A. NO. 9775 IS TANTAMOUNT TO A VIOLATION OF THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE

JEOPARDY.— There should be no question that if the published material on print, said to be libelous, is again posted online or vice versa, that identical material cannot be the subject of two separate libels. The two offenses, one a violation of Article 353 of the Revised Penal Code and the other a violation of Section 4(c)(4) of R.A. 10175 involve essentially the same elements and are in fact one and the same offense. Indeed, the OSG itself claims that online libel under Section 4(c)(4) is not a new crime but is one already punished under Article 353. Section 4(c)(4) merely establishes the computer system as another means of publication. Charging the offender under both laws would be a blatant violation of the proscription against double jeopardy. The same is true with child pornography committed online. Section 4(c)(2) merely expands the ACPA's scope so as to include identical activities in cyberspace. [A]CPA's definition of child pornography in fact already covers the use of "electronic, mechanical, digital, optical, magnetic or any other means." Thus, charging the offender under both Section 4(c)(2) and ACPA would likewise be tantamount to a violation of the constitutional prohibition against double jeopardy.

16. ID.; ID.; SECTION 8 THEREOF WHICH PRESCRIBES THE PENALTIES FOR CYBERCRIMES IS VALID AND CONSTITUTIONAL; THE MATTER OF FIXING PENALTIES FOR THE COMMISSION OF CRIMES IS A LEGISLATIVE PREROGATIVE, AND JUDGES AND MAGISTRATES CAN ONLY INTERPRET AND APPLY THEM BUT HAVE NO AUTHORITY TO MODIFY OR REVISE THEIR RANGE.— Section 8 provides for the penalties for the following crimes: Sections 4(a) on Offenses Against the Confidentiality, Integrity and Availability of Computer Data and Systems; 4(b) on Computer-related Offenses; 4(a)(5) on Misuse of Devices; when the crime punishable under 4(a) is committed against critical infrastructure; 4(c)(1) on Cybersex; 4(c)(2) on Child Pornography; 4(c)(3) on Unsolicited Commercial Communications; and Section 5 on Aiding or Abetting, and Attempt in the Commission of Cybercrime. The matter of fixing penalties for the commission of crimes is as a rule a legislative prerogative. Here the legislature prescribed a measure of severe penalties for what it regards as deleterious cybercrimes. They appear proportionate to the evil sought to be punished. The power to determine penalties for offenses is

not diluted or improperly wielded simply because at some prior time the act or omission was but an element of another offense or might just have been connected with another crime. Judges and magistrates can only interpret and apply them and have no authority to modify or revise their range as determined by the legislative department. The courts should not encroach on this prerogative of the lawmaking body.

17. ID.; ID.; SECTION 12 WHICH AUTHORIZES THE COLLECTION OR RECORDING OF TRAFFIC DATA IN REAL-TIME IS VOID AS THE AUTHORITY GIVEN TO LAW ENFORCEMENT AGENCIES IS TOO SWEEPING, LACKS RESTRAINT AND VIRTUALLY LIMITLESS, AND THEREFORE THREATENS THE RIGHT OF INDIVIDUALS TO PRIVACY; THE GRANT OF THE POWER TO TRACK CYBERSPACE COMMUNICATIONS IN REAL TIME AND DETERMINE THEIR SOURCES AND DESTINATIONS MUST BE NARROWLY DRAWN TO PRECLUDE ABUSES.— Section 12 empowers law enforcement authorities, "with due cause," to collect or record by technical or electronic means traffic data in real-time. x x x But the cybercrime law x x x fails to hint at the meaning it intends for the phrase "due cause." x x x Due cause is also not descriptive of the purpose for which date collection will be used. x x x. The authority that Section 12 gives law enforcement agencies is too sweeping and lacks restraint. While it says that traffic data collection should not disclose identities or content data, such restraint is but an illusion. [N]othing can prevent law enforcement agencies holding these data in their hands from looking into the identity of their sender or receiver and what the data contains. This will unnecessarily expose the citizenry to leaked information or, worse, to extortion from certain bad elements in these agencies. Section 12, x x x, limits the collection of traffic data to those "associated with specified communications." But this supposed limitation is no limitation at all since, evidently, it is the law enforcement agencies that would specify the target communications. The power is virtually limitless, enabling law enforcement authorities to engage in "fishing expedition," choosing whatever specified communication they want. This evidently threatens the right of individuals to privacy. x x x. The grant of the power to track cyberspace communications in real time and determine their sources and destinations must be narrowly drawn to preclude abuses.

18. ID.; ID.; SECTION 13 THEREOF WHICH PERMITS LAW ENFORCEMENT AUTHORITIES TO REQUIRE SERVICE PROVIDERS TO PRESERVE TRAFFIC DATA AND SUBSCRIBER INFORMATION AS WELL AS SPECIFIED CONTENT DATA FOR SIX MONTHS IS VALID AND CONSTITUTIONAL AS THE PROCESS OF PRESERVING DATA WILL NOT UNDULY HAMPER THE NORMAL TRANSMISSION OR USE OF THE SAME.— [T]he contents of materials sent or received through the internet belong to their authors or recipients and are to be considered private communications. But it is not clear that a service provider has an obligation to indefinitely keep a copy of the same as they pass its system for the benefit of users. By virtue of Section 13, however, the law now requires service providers to keep traffic data and subscriber information relating to communication services for at least six months from the date of the transaction and those relating to content data for at least six months from receipt of the order for their preservation. Actually, the user ought to have kept a copy of that data when it crossed his computer if he was so minded. The service provider has never assumed responsibility for their loss or deletion while in its keep. [A]s the Solicitor General correctly points out, the data that service providers preserve on orders of law enforcement authorities are not made inaccessible to users by reason of the issuance of such orders. The process of preserving data will not unduly hamper the normal transmission or use of the same.

19. ID.; ID.; SECTION 14 THEREOF WHICH AUTHORIZES THE DISCLOSURE OF COMPUTER DATA UNDER A COURT-ISSUED WARRANT IS VALID AND CONSTITUTIONAL AS THE PRESCRIBED PROCEDURE FOR DISCLOSURE WOULD NOT CONSTITUTE AN UNLAWFUL SEARCH OR SEIZURE NOR WOULD IT VIOLATE THE PRIVACY OF COMMUNICATIONS AND CORRESPONDENCE FOR DISCLOSURE CAN BE MADE ONLY AFTER JUDICIAL INTERVENTION.— The process envisioned in Section 14 is being likened to the issuance of a subpoena. Petitioners' objection is that the issuance of subpoenas is a judicial function. But it is well-settled that the power to issue subpoenas is not exclusively a judicial function. Executive agencies have the power to issue subpoena as an adjunct of their investigatory powers. Besides, what Section 14 envisions

is merely the enforcement of a duly issued court warrant, a function usually lodged in the hands of law enforcers to enable them to carry out their executive functions. The prescribed procedure for disclosure would not constitute an unlawful search or seizure nor would it violate the privacy of communications and correspondence. Disclosure can be made only after judicial intervention.

20. ID.; ID.; SECTION 15 THEREOF WHICH AUTHORIZES THE SEARCH, SEIZURE, AND EXAMINATION OF COMPUTER DATA UNDER A COURT-ISSUED WARRANT IS VALID AND CONSTITUTIONAL AS THE LAW ENFORCEMENT AUTHORITIES' EXERCISE OF THE POWERS AND DUTIES, AS ENUMERATED THEREIN, TO ENSURE THE PROPER COLLECTION, PRESERVATION, AND USE OF COMPUTER DATA THAT HAVE BEEN SEIZED BY VIRTUE OF A COURT WARRANT, DO NOT POSE ANY THREAT ON THE RIGHTS OF THE PERSON FROM WHOM THEY WERE TAKEN.— Petitioners challenge Section 15 on the assumption that it will supplant established search and seizure procedures. On its face, however, Section 15 merely enumerates the duties of law enforcement authorities that would ensure the proper collection, preservation, and use of computer system or data that have been seized by virtue of a court warrant. The exercise of these duties do not pose any threat on the rights of the person from whom they were taken. Section 15 does not appear to supersede existing search and seizure rules but merely supplements them.

21. ID.; ID.; SECTION 17 THEREOF WHICH AUTHORIZES THE DESTRUCTION OF PREVIOUSLY PRESERVED COMPUTER DATA AFTER THE EXPIRATION OF THE PRESCRIBED HOLDING PERIODS IS VALID AND CONSTITUTIONAL AS THE USER COULD REQUEST THE SERVICE PROVIDER FOR A COPY OF THEM BEFORE IT IS DELETED, OR IF HE WANTS THEM PRESERVED, HE MUST SAVE THEM IN HIS COMPUTER WHEN HE GENERATED THE DATE OR RECEIVED IT.— Section 17 would have the computer data, previous subject of preservation or examination, destroyed or deleted upon the lapse of the prescribed period. The Solicitor General justifies this as necessary to clear up the service

provider's storage systems and prevent overload. It would also ensure that investigations are quickly concluded. Petitioners claim that such destruction of computer data subject of previous preservation or examination violates the user's right against deprivation of property without due process of law. But, x x x, it is unclear that the user has a demandable right to require the service provider to have that copy of the data saved indefinitely for him in its storage system. If he wanted them preserved, he should have saved them in his computer when he generated the data or received it. He could also request the service provider for a copy before it is deleted.

22. ID.; ID.; SECTION 19 THEREOF WHICH AUTHORIZES THE DEPARTMENT OF JUSTICE TO RESTRICT OR BLOCK ACCESS TO SUSPECTED COMPUTER DATA IS VOID FOR BEING VIOLATIVE OF THE CONSTITUTIONAL GUARANTEES TO FREEDOM OF EXPRESSION AND AGAINST UNREASONABLE SEARCHES AND SEIZURES AS IT DISREGARDS THE JURISPRUDENTIAL GUIDELINES ESTABLISHED TO DETERMINE THE VALIDITY OF RESTRICTIONS ON SPEECH, AND THE GOVERNMENT SEIZES AND PLACES THE COMPUTER DATA UNDER ITS DISPOSITION WITHOUT JUDICIAL SEARCH WARRANT.— [I]t is indisputable that computer data, produced or created by their writers or authors may constitute personal property. Consequently, they are protected from unreasonable searches and seizures, whether while stored in their personal computers or in the service provider's systems. Section 2, Article III of the 1987 Constitution provides that the right to be secure in one's papers and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable. Further, it states that no search warrant shall issue except upon probable cause to be determined personally by the judge. Here, the Government, in effect, seizes and places the computer data under its control and disposition without a warrant. The Department of Justice order cannot substitute for judicial search warrant. The content of the computer data can also constitute speech. In such a case, Section 19 operates as a restriction on the freedom of expression over cyberspace. x x x. Not only does Section 19 preclude any judicial intervention, but it also disregards jurisprudential guidelines established to determine the validity of restrictions on speech.

Restraints on free speech are generally evaluated on one of or a combination of three tests: the dangerous tendency doctrine, the balancing of interest test, and the clear and present danger rule. Section 19, however, merely requires that the data to be blocked be found *prima facie* in violation of any provision of the cybercrime law. Taking Section 6 into consideration, this can actually be made to apply in relation to any penal provision. It does not take into consideration any of the three tests mentioned above. The Court is therefore compelled to strike down Section 19 for being violative of the constitutional guarantees to freedom of expression and against unreasonable searches and seizures.

23. ID.; ID.; SECTION 20 THEREOF WHICH PENALIZES OBSTRUCTION OF JUSTICE IN RELATION TO CYBERCRIME INVESTIGATIONS IS VALID AND CONSTITUTIONAL INSOFAR AS IT APPLIES TO THE PROVISIONS OF CHAPTER IV; THERE MUST STILL BE A JUDICIAL DETERMINATION OF GUILT, FOR THE ACT OF NON-COMPLIANCE, TO BE PUNISHABLE, MUST BE DONE KNOWINGLY OR WILLFULLY.— Petitioners challenge Section 20, alleging that it is a bill of attainder. The argument is that the mere failure to comply constitutes a legislative finding of guilt, without regard to situations where non-compliance would be reasonable or valid. But since the non-compliance would be punished as a violation of Presidential Decree (P.D.) 1829, Section 20 necessarily incorporates elements of the offense which are defined therein. If Congress had intended for Section 20 to constitute an offense in and of itself, it would not have had to make reference to any other statue or provision. x x x. Thus, the act of non-compliance, for it to be punishable, must still be done "knowingly or willfully." There must still be a judicial determination of guilt, during which, as the Solicitor General assumes, defense and justifications for non-compliance may be raised. Thus, Section 20 is valid insofar as it applies to the provisions of Chapter IV which are not struck down by the Court.

24. ID.; ID.; SECTONS 24 WHICH ESTABLISHES THE CYBERCRIME INVESTIGATION AND COORDINATING CENTER (CICC) AND 26 (a) WHICH DEFINES THE CICC'S POWERS AND FUNCTIONS ARE VALID AND CONSTITUTIONAL; COMPLETENESS TEST AND THE

SUFFICIENT STANDARD TEST FOR A VALID DELEGATION OF LEGISLATIVE POWER, MET.— In order to determine whether there is undue delegation of legislative power, the Court has adopted two tests: the completeness test and the sufficient standard test. Under the first test, the law must be complete in all its terms and conditions when it leaves the legislature such that when it reaches the delegate, the only thing he will have to do is to enforce it. The second test mandates adequate guidelines or limitations in the law to determine the boundaries of the delegate's authority and prevent the delegation from running riot. Here, the cybercrime law is complete in itself when it directed the CICC to formulate and implement a national cybersecurity plan. Also, contrary to the position of the petitioners, the law gave sufficient standards for the CICC to follow when it provided a definition of cybersecurity. Cybersecurity refers to the collection of tools, policies, risk management approaches, actions, training, best practices, assurance and technologies that can be used to protect cyber environment and organization and user's assets. This definition serves as the parameters within which CICC should work in formulating the cybersecurity plan. Further, the formulation of the cybersecurity plan is consistent with the policy of the law to "prevent and combat such [cyber] offenses by facilitating their detection, investigation, and prosecution at both the domestic and international levels, and by providing arrangements for fast and reliable international cooperation." This policy is clearly adopted in the interest of law and order, which has been considered as sufficient standard. Hence, Sections 24 and 26(a) are likewise valid.

BRION, *J.*, *separate concurring opinion*:

1. CRIMINAL LAW; CYBERCRIME PREVENTION ACT OF 2012 (R.A. NO. 10175); SECTION 4 (c) (4) THEREOF WHICH PENALIZES ONLINE LIBEL IS CONSTITUTIONAL FOR IT DOES NOT, BY ITSELF, REDEFINE LIBEL OR CREATE A NEW CRIME, BUT IT MERELY EXTENDS THE APPLICATION OF ARTICLE 355 OF THE REVISED PENAL CODE TO COMMUNICATIONS COMMITTED THROUGH A COMPUTER SYSTEM, OR ANY OTHER SIMILAR MEANS WHICH MAY BE DEVISED IN THE FUTURE.— Based on facial examination of Section 4(c)(4)

of the Cybercrime Law, [there is] no reason to declare cyber-libel or the application of Section 355 of the Revised Penal Code (that penalizes libel made in print and other forms of media, to Internet communications) unconstitutional. Laws penalizing libel normally pit two competing values against each other – the fundamental right to freedom of speech on one hand, and the state interest's to protect persons against the harmful conduct of others. The latter conduct pertains to scurrilous speech that damages the reputation of the person it addresses. Jurisprudence has long settled this apparent conflict by excluding libelous speech outside the ambit of the constitutional protection. Thus, the question of whether a libelous speech may be penalized by law – criminally or civilly – has already been answered by jurisprudence in the affirmative. Article 355 of the Revised Penal Code penalizes "libel committed by means of writing, printing, lithography, engraving, radio, phonograph, painting, theatrical exhibition, cinematographic exhibition, or any similar means." Section 4(c)(4) of the Cybercrime Law merely extends the application of Article 355 to "communications committed through a computer system, or any other similar means which may be devised in the future." It does not, by itself, redefine libel or create a new crime – it merely adds a medium through which libel may be committed and penalized. Parenthetically, this medium – under the statutory construction principle of *ejusdem generis* – could already be included under Article 355 through the phrase "any similar means."

2. ID.; ID.; SECTIONS 5, 6 & 7 SHOULD NOT APPLY TO CYBER-LIBEL, AS THEY UNDULY INCREASE THE PROHIBITIVE EFFECT OF LIBEL LAW ON ONLINE SPEECH, AND CAN HAVE THE EFFECT OF IMPOSING SELF-CENSORSHIP IN THE INTERNET, AS THEY OPEN THE DOOR TO APPLICATION AND OVERREACH INTO MATTERS OTHER THAN LIBELOUS AND CAN THUS PREVENT PROTECTED SPEECH FROM BEING UTTERED.— [T]he application of [Sections 5, 6, and 7 of the Cybercrime Law] to cyber-libel unduly increases the prohibitive effect of libel law on online speech, and can have the effect of imposing self-censorship in the Internet and of curtailing an otherwise robust avenue for debate and discussion on public issues. In other words, Section 5, 6 and 7 should not apply to cyber-libel, as they open the door to application and overreach into matters other than libelous and can thus

prevent protected speech from being uttered. Neither x x x that there is sufficient distinction between libelous speech committed online and speech uttered in the real, physical world to warrant increasing the prohibitive impact of penal law in cyberspace. The rationale for penalizing defamatory statements is the same regardless of the medium used to communicate it.

3. ID.; ID.; ID.; PENALIZING LIBELOUS SPEECH COMMITTED THROUGH THE INTERNET WITH GRAVER PENALTIES AND REPERCUSSIONS BECAUSE IT ALLEGEDLY REACHES A WIDER AUDIENCE CREATES AN UNREASONABLE CLASSIFICATION BETWEEN COMMUNICATIONS MADE THROUGH THE INTERNET AND IN THE REAL, PHYSICAL WORLD, TO THE DETRIMENT OF ONLINE SPEECH.— Penalizing libelous speech committed through the Internet with graver penalties and repercussions because it allegedly reaches a wider audience creates an unreasonable classification between communications made through the Internet and in the real, physical world, to the detriment of online speech. [There is] no basis to treat online speech and speech in the real world differently on account of the former's cyber-reach because Article 355 of the Revised Penal Code does not treat libel committed through various forms of media differently on account of the varying numbers of people they reach. In other words, since Article 355 of the Revised Penal Code does not distinguish among the means of communications by which libel is published, the Cybercrime Law, which merely adds a medium of communications by which libel may be committed, should also not distinguish and command a different treatment than libel in the real world. x x x. Neither should the ease of publishing a libelous material in the Internet be a consideration in increasing the penalty for cyber-libel. The ease by which a libelous material may be published in the Internet, x x x is counterbalanced by the ease through which a defamed person may defend his reputation in the various platforms provided by the Internet - a means not normally given in other forms of media.

4. ID.; ID.; ARTICLE 354 OF THE REVISED PENAL CODE SHOULD BE DECLARED UNCONSTITUTIONAL IN SO FAR AS IT APPLIES TO LIBELOUS SPEECH AGAINST PUBLIC OFFICERS AND FIGURES.— The petitions against the Cybercrime Law provide [the Court] with the opportunity

to clarify, once and for all, the prevailing doctrine on libel committed against public officers and figures. The possibility of applying the presumed malice rule against this kind of libel hangs like a Damocles sword against the actual malice rule that jurisprudence established for the prosecution of libel committed against public officers and figures. x x x. The presumed malice rule embodied in Article 354 of the Revised Penal Code provides a presumption of malice in every defamatory imputation, except under certain instances. Under this rule, the defamatory statement would still be considered as malicious even if it were true, unless the accused proves that it was made with good and justifiable intentions. Recognizing the importance of freedom of speech in a democratic republic, our jurisprudence has carved out another exception to Article 354 of the Revised Penal Code. Through cases such as *Guingguing v. Court of Appeals* and *Borjal v. Court of Appeals,* the Court has applied the actual malice rule in libel committed against public officers and figures. This means that *malice in fact is necessary* for libel committed against public officers and figures to prosper, *i.e.*, it must be proven that the offender made the defamatory statement with the knowledge that it is false or *with reckless disregard of whether it is false or not*. x x x [The ponente agrees x x x] regarding the necessity of a concrete declaration from the Court regarding Article 354's unconstitutional application to libelous speech against public officers and officials.

5. ID.; ID.; SECTION 12 THEREOF; THE LAW ALLOWING ACCESS OR INTRUSION INTO PRIVATE INFORMATION MUST BE SO NARROWLY DRAWN TO ENSURE THAT OTHER CONSTITUTIONALLY-PROTECTED RIGHTS OUTSIDE THE AMBIT OF THE OVERRIDING STATE INTERESTS ARE FULLY PROTECTED; "REASONABLE EXPECTATION OF PRIVACY," TWO-PRONGED TEST.— The right to privacy essentially means the right to be let alone and to be free from unwarranted government intrusion. To determine whether a violation of this right exists, a first requirement is to ascertain the existence of a reasonable expectation of privacy that the government violates. The ***reasonable expectation of privacy*** can be made through a two-pronged test that asks: (1) whether, by his conduct, the individual has exhibited an expectation of privacy; and (2) whether this expectation is one that society recognizes as reasonable.

Customs, community norms, and practices may, therefore, limit or extend an individual's "reasonable expectation of privacy." The awareness of the need for privacy or confidentiality is the critical point that should dictate whether privacy rights exist. The finding that privacy rights exist, however, is not a recognition that the data shall be considered absolutely private; the recognition must yield when faced with a compelling and fully demonstrated state interest that must be given primacy. In this exceptional situation, the balance undeniably tilts in favor of government access or intrusion into private information. Even then, however, established jurisprudence still requires safeguards to protect privacy rights: the law or rule allowing access or intrusion must be so narrowly drawn to ensure that other constitutionally-protected rights outside the ambit of the overriding state interests are fully protected.

6. ID.; ID.; ID.; THE AUTHORIZING LAW GRANTING COLLECTING AND RECORDING AUTHORITY TO STATE AGENTS MUST NOT ONLY BE BASED ON COMPELLING STATE INTEREST, BUT MUST ALSO PROVIDE SAFEGUARDS TO ENSURE THAT NO UNWARRANTED INTRUSION WOULD TAKE PLACE TO LAY OPEN THE INFORMATION OR ACTIVITIES NOT COVERED BY THE STATE INTEREST INVOLVED.— Section 12 of the Cybercrime Law authorizes law enforcement agents to collect and record in real-time traffic data associated with specified communications x x x. [T]he state interest that this section seeks to protect is a compelling one. This can be gleaned from Section 2 of the Cybercrime Law which clearly sets out the law's objective – to equip the State with the sufficient powers to prevent and combat cybercrime. The means or tools to this objective, Section 12 among them, would enable our law enforcers to investigate incidences of cybercrime, and apprehend and prosecute cybercriminals. x x x. [A] demonstrated and compelling state interest effectively serves only as starting point and basis for the authority to grant collection and recording authority to state agents faced with clearly established right to privacy. In addition to and as equally important as the invoked compelling state interest, is the requirement that the authorizing law or rule must provide safeguards to ensure that no unwarranted intrusion would take place to lay open the information or activities not covered by the state interest involved; the law

or rule must be narrowly drawn to confine access to what the proven state interests require. x x x. [S]ection 12 fails to satisfy this latter constitutional requirement.

7. ID.; ID.; SECTION 12 THEREOF WHICH AUTHORIZES THE COLLECTION OR RECORDING OF TRAFFIC DATA IN REAL-TIME SUFFERS FROM VAGUENESS AS IT DOES NOT PROVIDE A STANDARD OR GUIDING PARTICULARS ON THE REAL-TIME MONITORING OF TRAFFIC DATA SUFFICIENT TO RENDER ENFORCEMENT RULES CERTAIN OR DETERMINABLE, AND OVERBREATH AS IT DOES NOT PROVIDE FOR THE EXTENT AND DEPTH OF THE REAL-TIME COLLECTION AND RECORDING OF TRAFFIC DATA.— [W]hile Section 2 empowers the State to adopt sufficient powers to conduct ***the detection, investigation and prosecution*** of cybercrime as an expressed policy, Section 12, however, does not provide a standard sufficient to render enforcement rules certain or determinable; it also fails to provide guiding particulars on the real-time monitoring of traffic data. xxx. In the absence of standards, guidelines or clean definitions, the 'due cause' requirement of Section 12 fatally opens itself to being vague as it does not even provide the context in which it should be used. It merely provides that the real-time monitoring would be related to 'specified communications' without mentioning as to what these communications pertain to, how these communications will be specified, and as well as the extent of the specificity of the communications. Section 12 likewise does not provide for the extent and depth of the real-time collection and recording of traffic data. It does not limit the length of time law enforcement agents may conduct real-time monitoring and recording of traffic data, as well as the allowable contours by which a specified communication may be monitored and recorded. In other words, it does not state how long the monitoring and recording of the traffic data connected to a specified communication could take place, how specific a specified communication should be, as well as the extent of the association allowable.

8. ID.; ID.; ID.; THE ABSOLUTE LACK OF STANDARDS IN THE COLLECTION AND RECORDING OF TRAFFIC DATA NEGATES THE SAFEGUARDS UNDER SECTION 13 OF THE CYBERCRIME LAW.— The absolute lack of

standards in the collection and recording of traffic data under Section 12 in effect negates the safeguards under Section 13 of the Cybercrime Law. Section 13 obligates internet service providers to collect and store traffic data for six months, which data law enforcement agents can only access based on a judicial order under Section 14. Properly understood, Section 13 is a recognition that traffic data once collected in depth and for a considerable period of time, would produce information that are private. But because Section 12 does not specify the length and extent of the real-time collection, monitoring and storage of traffic data, it in effect skirts the judicial warrant requirement before any data may be viewed under Section 13. x x x. Neither does Section 12 as worded sufficiently limit the information that would be collected and recorded in real-time only to traffic data. The lack of standards in Section 12 regarding the extent and conduct of the real-time collection and recording of traffic data effectively allows for its collection in bulk, which, x x x, reveals information that are private. The lack of standards also does not prevent the possibility of using technologies that translates traffic data collected in real-time to content data or disclose a person's online activities.

9. ID.; ID.; THE UNCONSTITUTIONALITY OF SECTION 12 OF R.A. 10175 DOES NOT REMOVE FROM THE POLICE THE AUTHORITY TO UNDERTAKE REAL-TIME COLLECTION AND RECORDING OF TRAFFIC DATA AS AN INVESTIGATION TOOL THAT LAW ENFORCEMENT AGENTS MAY AVAIL OF IN THE INVESTIGATION AND PROSECUTION OF CRIMINAL OFFENSES, BOTH FOR OFFENSES INVOLVING CYBERCRIME AND ORDINARY CRIMES, BUT THE COLLECTION AND RECORDING OF TRAFFIC DATA MUST BE WITH PRIOR JUDICIAL AUTHORIZATION.— The declaration of the unconstitutionality of Section 12 in the manner framed by the Court , should not tie the hands of Congress in enacting a replacement provision empowering the conduct of warrantless real-time collection of traffic data by law enforcement agents. x x x. [T]he unconstitutionality of Section 12 does not remove from the police the authority to undertake real-time collection and recording of traffic data as an investigation tool that law enforcement agents may avail of in the investigation and prosecution of criminal offenses, both for offenses involving cybercrime and ordinary crimes.

Law enforcement agencies may still conduct these activities under their general powers, but with a prior judicial authorization in light of the nature of the data to be collected.

10. ID.; ID.; CYBERCRIME PREVENTION AND PROSECUTION; DESIGNATION OF SPECIAL CYBERCRIME COURTS TO SPECIFICALLY HANDLE CASES INVOLVING CYBERCRIME, PROPOSED.— In the same manner likewise that our laws and law enforcement have been adapting to the threats posed by cybercrime, we in the judiciary must also rise up to the challenge of competently performing our adjudicative functions in the cyber world. x x x. Due to the highly-technical nature of investigating and prosecuting cybercrimes, as well as the apparent need to expedite our criminal procedure to make it more responsive to cybercrime law enforcement, x x x [a] ***special cybercrime courts be designated to specifically handle cases involving cybercrime. In addition, these cybercrime courts should have their own rules of procedure tailor-fitted to respond to the technical requirements of cybercrime prosecution and adjudication***. The designation of special cybercrime courts x x x is not outside our power to undertake: Section 21 of the Cybercrime Law grants the Regional Trial Courts jurisdiction over any violation of the Cybercrime Law, and provides that special cybercrime courts manned by specially trained judges should be designated. Section 5, Article VIII of the 1987 Constitution, on the other hand, empowers this Court to promulgate rules on the pleading, practice, and procedure in all courts.

SERENO, *C.J., concurring and dissenting*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; JUDICIAL DEPARTMENT; SUPREME COURT; POWER OF JUDICIAL REVIEW; DISCUSSED.— As distinguished from the general notion of judicial power, the power of judicial review especially refers to both the authority and the duty of this Court to determine whether a branch or an instrumentality of government has acted beyond the scope of the latter's constitutional powers. It includes the power to resolve cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question. x x x. The power of

judicial review has since been strengthened in the 1987 Constitution, extending its coverage to the determination of whether there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government. The expansion made the political question doctrine "no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable shield that protects executive and legislative actions from judicial inquiry or review." Thus, aside from the test of constitutionality, this Court has been expressly granted the power and the duty to examine whether the exercise of discretion in those areas that are considered political questions was attended with grave abuse. This moderating power of the Court, however, must be exercised carefully, and only if it cannot be feasibly avoided, as it **involves the delicate exercise of pronouncing an act of a branch or an instrumentality of government unconstitutional, at the risk of supplanting the wisdom of the constitutionally appointed actor with that of the judiciary.**

2. ID.; ID.; ID.; ID.; ID.; REQUISITES; EXPOUNDED.— These are specific safeguards laid down by the Court when it exercises its power of judicial review. Thus, as a threshold condition, the power of judicial review may be invoked only when the following four stringent requirements are satisfied: (a) there must be an actual case or controversy; (b) petitioners must possess *locus standi;* (c) the question of constitutionality must be raised at the earliest opportunity; and (d) the issue of constitutionality must be the *lis mota* of the case. Specifically focusing on the first requisite, it necessitates that there be an existing case or controversy that is appropriate or ripe for determination as opposed to a case that is merely conjectural or anticipatory. The case must involve a definite and concrete issue concerning real parties with conflicting legal rights and opposing legal claims, admitting of a specific relief through a decree conclusive in nature. The "ripeness" for adjudication of the controversy is generally treated in terms of actual injury to the plaintiff. Hence, a question is ripe for adjudication when the act being challenged has had a direct adverse effect on the individual challenging it. The case should not equate with a mere request for an opinion or an advice on what the law would be upon an abstract, hypothetical, or contingent state of facts. x x x. While the actual controversy requirement has been largely interpreted in the light of the implications of

the assailed law *vis-à-vis* the legally demandable rights of real parties and the direct injury caused by the assailed law, **we have also exceptionally recognized the possibility of lodging a constitutional challenge *sans* a pending case involving a directly injured party.**

3. ID.; ID.; ID.; ID.; ID.; POWER OF PRE-ENFORCEMENT JUDICIAL REVIEW, CONDITIONS FOR THE EXERCISE THEREOF.— [A]n anticipatory petition assailing the constitutionality of a criminal statute that is yet to be enforced may be exceptionally given due course by this Court when the following circumstances are shown: (a) the challenged law or provision **forbids a constitutionally protected conduct or activity** that a petitioner seeks to do; (b) a **realistic, imminent, and credible threat or danger of sustaining a direct injury or facing prosecution** awaits the petitioner should the prohibited conduct or activity be carried out; and (c) the **factual circumstances** surrounding the prohibited conduct or activity sought to be carried out are **real, not hypothetical and speculative, and are sufficiently alleged and proven**. It is only when these minimum conditions are satisfied can there be a finding of a justiciable case or actual controversy worthy of this Court's dutiful attention and exercise of pre-enforcement judicial review. Furthermore, since the issue of the propriety of resorting to a pre-enforcement judicial review is subsumed under the threshold requirement of actual case or controversy, we need not go through the merits at this stage. **Instead, the determination of whether or not to exercise this power must hinge solely on the allegations in the petition, regardless of the petitioner's entitlement to the claims asserted.** A review of the petitions before us shows that, save for the Disini Petition, all petitions herein have failed to establish that their claims for this Court's exercise of its power of pre-enforcement judicial review.

4. ID.; ID.; ID.; ID.; ID.; "FACIAL" CHALLENGE DISTINGUISHED FROM "AS APPLIED" CHALLENGE.— A facial challenge refers to the call for the scrutiny of an entire law or provision by identifying its flaws or defects, not only on the basis of its actual operation on the attendant facts raised by the parties, but also on the assumption or prediction that the very existence of the law or provision is repugnant to the Constitution. This kind of challenge has the effect of totally

annulling the assailed law or provision, which is deemed to be unconstitutional *per se*. The challenge is resorted to by courts, especially when there is no instance to which the law or provision can be validly applied. In a way, a facial challenge is a deviation from the general rule that Courts should only decide the invalidity of a law "as applied" to the actual, attending circumstances before it. An as-applied challenge refers to the localized invalidation of a law or provision, limited by the factual milieu established in a case involving real litigants who are actually before the Court. This kind of challenge is more in keeping with the established canon of adjudication that "the court should not form a rule of constitutional law broader than is required by the precise facts to which it is applied." Should the petition prosper, **the unconstitutional aspects of the law will be carved away by invalidating its improper applications on a case-to-case basis**.

5. CRIMINAL LAW; CYBERCRIME PREVENTION ACT OF 2012 (R.A. NO. 10175); THERE IS A GROUND TO INVALIDATE THE PENAL LAW ENACTED BY THE CONGRESS WHERE THE SAME AFFECTS THE FREE SPEECH AND IMPOSES A PENALTY THAT IS SO DISCOURAGING THAT IT EFFECTIVELY CREATES AN INVIDIOUS CHILLING EFFECT, THUS IMPENDING THE EXERCISE OF SPEECH AND EXPRESSION ALTOGETHER.— The *ponencia* correctly holds that libel is not a constitutionally protected conduct. It is also correct in holding that, generally, penal statutes cannot be invalidated on the ground that they produce a "chilling effect," since by their very nature, they are intended to have an *in terrorem* effect (benign chilling effect) to prevent a repetition of the offense and to deter criminality. The "chilling effect" is therefore equated with and justified by the intended *in terrorem* effect of penal provisions. This does not mean, however, that the Constitution gives Congress the *carte blanche* power to indiscriminately impose and increase penalties. While the determination of the severity of a penalty is a prerogative of the legislature, when laws and penalties affect free speech, it is beyond question that the Court may exercise its power of judicial review to determine whether there has been a grave abuse of discretion in imposing or increasing the penalty. The Constitution's command is clear: "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." Thus, **when Congress enacts a penal law affecting free speech and accordingly imposes a penalty that is so discouraging that it effectively creates an invidious chilling effect, thus impeding the exercise of speech and expression altogether, then there is a ground to invalidate the law. In this instance, it will be seen that the penalty provided has gone beyond the *in terrorem* effect needed to deter crimes and has thus reached the point of encroachment upon a preferred constitutional right.**

6. ID.; ID.; SECTION 6 THEREOF WHICH INCREASES THE PENALTY ONE DEGREE HIGHER WHEN CRIMES DEFINED UNDER THE REVISED PENAL CODE ARE COMMITTED WITH THE USE OF INFORMATION AND COMMUNICATION TECHNOLOGIES (ICT) CREATES ADDITIONAL *IN TERROREM* EFFECT BY INTRODUCING A QUALIFYING AGGRAVATING CIRCUMSTANCE ON TOP OF THAT ALREADY CREATED BY ARTICLE 355 OF THE REVISED PENAL CODE.— Our *Revised Penal Code* increases the imposable penalty when there are attending circumstances showing a *greater perversity* or an *unusual criminality* in the commission of a felony. The intensified punishment for these so-called aggravating circumstances is grounded on various reasons, which may be categorized into (1) the motivating power itself, (2) the place of commission, (3) the means and ways employed, (4) the time, or (5) the personal circumstances of the offender or of the offended party. Based on the aforementioned basic postulate of the classical penal system, this is an additional *in terrorem* effect created by the *Revised Penal Code*, which targets the deterrence of a resort to *greater perversity* or to an *unusual criminality* in the commission of a felony. x x x. Section 6 [of the *Cybercrime Prevention Act*] **effectively creates an additional *in terrorem* effect by introducing a qualifying aggravating circumstance: the use of ICT.** This additional burden is on top of that already placed on the crimes themselves, since the *in terrorem* effect of the latter is already achieved through the original penalties imposed by the *Revised Penal Code*. Consequently, another consideration is added to the calculation of penalties by the public. It will now have to weigh not only whether to exercise freedom of speech, but also whether to exercise this freedom through ICT.

7. ID.; ID.; ID.; THE INCREASE IN THE IMPOSABLE PENALTY BY ONE DEGREE FOR LIBEL QUALIFIED BY THE USE OF INFORMATION AND COMMUNICATION TECHNOLOGY (ICT) WILL RESULT IN THE IMPOSITION OF HARSHER ACCESSORY PENALTIES.— Under the Revised Penal Code, there are accessory penalties that are inherent in certain principal penalties. Article 42 thereof provides that the principal (afflictive) penalty of ***prisión mayor*** carries with it the accessory penalty of temporary absolute disqualification. According to Article 30, this accessory penalty shall produce x x x effects x x x. On the other hand, Article 43 provides that when the principal (correctional) penalty of ***prisión correccional*** is meted out, the offender shall suffer the accessory penalty of **suspension from public office and from the right to follow a profession or calling during the term of the sentence**. x x x. Before the *Cybercrime Prevention Act*, the imposable penalty for libel under Art. 355 of the Revised Penal Code, even if committed by means of ICT, is *prisión correccional* in its minimum and medium periods. Under Section 6 of the *Cybercrime Prevention Act*, the imposable penalty for libel qualified by ICT is now increased to *prisión correccional* in its maximum period to *prisión mayor* in its minimum period. Consequently, it is now possible for the x x x harsher accessory penalties for *prisión mayor* to attach depending on the presence of mitigating circumstances. Hence, the public will now have to factor this change into their calculations, which will further burden the exercise of freedom of speech through ICT.

8. ID.; ID.; ID.; THE INCREASE IN THE PENALTY FOR CYBERLIBEL THREATENED THE PUBLIC NOT ONLY WITH THE GUARANTEED IMPOSITION OF IMPRISONMENT BUT ALSO AN INCREASE IN THE DURATION OF IMPRISONMENT AND AN ATTACHMENT OF ACCESSORY PENALTIES TO THE PRINCIPAL PENALTIES.— Pursuant to Article 355 of the Revised Penal Code, libel is punishable by *prisión correccional* in its minimum (from 6 months and 1 day to 2 years and 4 months) and medium (from 2 years, 4 months, and 1 day to 4 years and 2 months) periods. However, in the light of the increase in penalty by one degree under the *Cybercrime Prevention Act*, libel qualified by the use of ICT is now punishable by *prisión correccional* in its maximum period (from 4 years, 2 months and 1 day to

6 years) to *prisión mayor* in its minimum period (from 6 years and 1 day to 8 years). This increased penalty means that if libel is committed through the now commonly and widely used means of communication, ICT, libel becomes a non-probationable offense. x x x. It is not unthinkable that some people may risk a conviction for libel, considering that they may avail themselves of the privilege of probation for the sake of exercising their cherished freedom to speak and to express themselves. **But when this seemingly neutral technology is made a qualifying aggravating circumstance to a point that a guaranteed imprisonment would ensue, it is clear that the *in terrrorem* effect of libel is further magnified, reaching the level of an invidious chilling effect.** x x x. Furthermore, it should be noted that one of the effects of probation is the suspension not only of the penalty of imprisonment, but also of the accessory penalties attached thereto. Hence, in addition to the *in terrorem* effect supplied by the criminalization of a socially intolerable conduct and the *in terrorem* effect of an increase in the duration of imprisonment in case of the presence of an aggravating circumstance, the *Revised Penal Code* threatens further by attaching accessory penalties to the principal penalties.

9. CRIMINAL LAW; PRESCRIPTIONS; PRESCRIPTION OF CRIMES DISTINGUISHED FROM PRESCRIPTION OF PENALTIES.— Crimes and their penalties prescribe. The *prescription of a crime* refers to the loss or waiver by the State of its right to *prosecute* an act prohibited and punished by law. It commences from the day on which the crime is discovered by the offended party, the authorities or their agents. On the other hand, the *prescription of the penalty* is the loss or waiver by the State of its right to *punish* the convict. It commences from the date of evasion of service after final sentence. Hence, in the *prescription of crimes*, it is the penalty prescribed by law that is considered; in the *prescription of penalties*, it is the penalty imposed. By setting a prescription period for crimes, the State by an act of grace surrenders its right to *prosecute* and declares the offense as no longer subject to prosecution after a certain period. It is an amnesty that casts the offense into oblivion and declares that the offenders are now at liberty to return home and freely resume their activities as citizens. They may now rest from having to preserve the proofs of their

innocence, because the proofs of their guilt have been blotted out.

10. ID.; CYBERCRIME PREVENTION ACT OF 2012 (R.A. NO. 10175); SECTION 6 THEREOF INCREASES THE PRESCRIPTION PERIOD FOR THE CRIME OF CYBERLIBEL AND ITS PENALTY TO FIFTEEN (15) YEARS.— [B]efore the passage of the *Cybercrime Prevention Act*, the state effectively waives its right to prosecute crimes involving libel. x x x. With the increase of penalty by one degree pursuant to Section 6 of the *Cybercrime Prevention Act*, however, the penalty for libel through ICT becomes *afflictive* under Article 25 of the Revised Penal Code. Accordingly, under the above-quoted provision, the crime of libel through ICT shall now possibly prescribe in 15 years – a 15-fold increase in the prescription period. In effect, the State's grant of amnesty to the offender will now be delayed by 14 years more. x x x. Similarly, under Article 92, the prescription period for the *penalty* of libel through ICT is also increased from 10 years – the prescription period for correctional penalties – to 15 years, the prescription for afflictive penalties other than *reclusión perpetua*. These twin increases in both the prescription period for the crime of libel through ICT and in that for its penalty are additional factors in the public's rational calculation of whether or not to exercise their freedom of speech and whether to exercise that freedom through ICT.

11. ID.; ID.; ID.; THE USE OF ICT AS A QUALIFYING AGGRAVATING CIRCUMSTANCE IN THE CRIME OF LIBEL CANNOT BE OFFSET BY ANY MITIGATING CIRCUMSTANCE.— A qualifying aggravating circumstance has the effect not only of giving the crime its proper and exclusive name, but also of placing the offender in such a situation as to deserve no other penalty than that especially prescribed for the crime. Hence, a qualifying aggravating circumstance increases the penalty by degrees. x x x. It is unlike a generic aggravating circumstance, which increases the penalty only to the maximum period of the penalty prescribed by law, and not to an entirely higher degree. x x x. Also, a generic aggravating circumstance may be offset by a generic mitigating circumstance, while a qualifying aggravating circumstance cannot be. Hence, before the *Cybercrime Prevention Act*, libel – even if committed through ICT – was punishable only by

prisión correccional from its minimum (6 months and 1 day to 2 years and 4 months) to its medium period (2 years, 4 months, and 1 day to 4 years and 2 months). Under Section 6 however, the offender is now punished with a new range of penalty – *prisión correccional* in its maximum period (from 4 years, 2 months and 1 day to 6 years) to *prisión mayor* in its minimum period (from 6 years and 1 day to 8 years). And since the use of ICT as a qualifying aggravating circumstance cannot be offset by any mitigating circumstance, such as voluntary surrender, the penalty will remain within the new range of penalties.

12. ID.; ID.; SECTION 6 THEREOF IS FACIALLY INVALID FOR IT MUTES THE FREEDOM OF SPEECH; FACIAL CHALLENGES MAY BE ENTERTAINED WHEN, IN THE JUDGMENT OF THE COURT, THE POSSIBILITY THAT THE FREEDOM OF SPEECH MAY BE MUTED AND PERCEIVED GRIEVANCES LEFT TO FESTER OUTWEIGHS THE HARM TO SOCIETY THAT MAYBE BROUGHT ABOUT BY ALLOWING SOME UNPROTECTED SPEECH OR CONDUCT TO GO UNPUNISHED.— Facial challenges have been entertained when, in the judgment of the Court, the possibility that the freedom of speech may be muted and perceived grievances left to fester outweighs the harm to society that may be brought about by allowing some unprotected speech or conduct to go unpunished. In the present case, it is not difficult to see how the increase of the penalty under Section 6 mutes freedom of speech. It creates a domino effect that effectively subjugates the exercise of the freedom – longer prison terms, harsher accessory penalties, loss of benefits under the Probation Law, extended prescription periods, and ineligibility of these penalties to be offset by mitigating circumstances. Thus, x x x Section 6, as far as libel is concerned, is facially invalid.

13. POLITICAL LAW; CONSTITUTIONAL LAW; BILL OF RIGHTS; RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE IS INVIOLABLE; DISCUSSED.— The inviolable right against unreasonable search and seizure is enshrined in Article III of the Constitution x x x. [T]he constitutional guarantee does not prohibit all searches and seizures, but only *unreasonable* ones. As a general rule, a search and seizure is reasonable when probable cause has been

established. Probable cause is the most restrictive of all thresholds. It has been broadly defined as those facts and circumstances that would lead a reasonably discreet and prudent man to believe that an offense has been committed, and that the objects sought in connection with the offense are in the place sought to be searched. It has been characterized as referring to "*factual* and *practical* considerations of *everyday life* on which reasonable and prudent men, *not legal technicians*, act." Furthermore, probable cause is to be determined by a judge *prior* to allowing a search and seizure. The judge's determination shall be contained in a warrant, which shall particularly describe the place to be searched and the things to be seized. Thus, when no warrant is issued, it is assumed that there is no probable cause to conduct the search, making that act unreasonable. For the constitutional guarantee to apply, however, there must first be a search in the constitutional sense. It is only when there is a search that a determination of probable cause is required. x x x. In recent years, the Court has had occasion to rule that a search occurs when the government violates a person's "reasonable expectation of privacy."

14. CRIMINAL LAW; CYBERCRIME PREVENTION ACT OF 2012 (R.A. NO. 10175); SECTION 12 THEREOF; COLLECTION OR RECORDING OF TRAFFIC DATA IN REAL-TIME; NO REASONABLE EXPECTATION OF PRIVACY IN TRAFFIC DATA *PER SE*; HENCE, THE REAL-TIME COLLECTION THEREOF MAY BE DONE WITHOUT THE NECESSITY OF A WARRANT.— The very public structure of the Internet and the nature of traffic data *per se* undermine any *reasonable* expectation of privacy in the latter. The Internet is custom-designed to frustrate claims of reasonable expectation of privacy in traffic data *per se*, since the latter are necessarily disclosed to the public in the process of communication. x x x. [I]nternet users have no reasonable expectation of privacy in traffic data *per se* or in those pieces of information that users necessarily provide to the ISP, a third party, in order for their communication to be transmitted. This position is further bolstered by the fact that such communication passes through as many ISPs as needed in order to reach its intended destination. Thus, the collection and recording of these data do not constitute a search in the constitutional sense. As such, the collection thereof may be done without the necessity of a warrant. x x x. [C]onsidering that the Internet highway

is so public, and that non-content traffic data, unlike content data, are necessarily exposed as they pass through the Internet before reaching the recipient, there cannot be any reasonable expectation of privacy in non-content traffic data *per se*.

15. ID.; ID.; ID.; ID.; TRAFFIC DATA TO BE COLLECTED EXPLICITLY EXCLUDE CONTENT DATA AND IS RESTRICTED TO NON-CONTENT AND NON-IDENTIFYING PUBLIC INFORMATION WHICH ARE NOT CONSTITUTIONALLY PROTECTED.— Traffic data are of course explicitly restricted to non-content and non-identifying data as defined in Section 12 of the Cybercrime Prevention Act itself. As such, it is plain that traffic data *per se* are not constitutionally protected. The distinction between content and non-content data, such as traffic data, is important because it keeps the balance between protecting privacy and maintaining public order through effective law enforcement. That is why our Congress made sure to specify that the traffic data to be collected are limited to non-content data. For good measure, it additionally mandated that traffic data be non-identifying. xxx. [G]iven the very public nature of the Internet and the nature of traffic data as non-content and non-identifying information, individuals cannot have legitimate expectations of privacy in traffic data *per se*.

16. ID.; ID.; SECTION 12 THEREOF SUFFERS FROM SERIOUS DEFICIENCY AS IT LACKS PROCEDURAL SAFEGUARDS TO ENSURE THAT THE TRAFFIC DATA TO BE OBTAINED ARE LIMITED TO NON-CONTENT AND NON-IDENTIFYING DATA, AND THAT THEY ARE OBTAINED ONLY FOR THE LIMITED PURPOSE OF INVESTIGATING SPECIFIC INSTANCES OF CRIMINALITY.— [S]ection 12 suffers from a serious deficiency. The narrow definition of traffic data *per se* as non-content and non-identifying data is not supported by equally narrow procedural criteria for the exercise of the authority to obtain them. The government asserts that Section 12 provides for some protection against abuse. While this may be true, the safeguards provided are not sufficient to protect constitutional guarantees. Firstly, the provision does not indicate what the purpose of the collection would be, since it only provides for "due cause" as a trigger for undertaking the activity. While the government has explained the limited purpose of the

collection of traffic data, which purportedly can only go as far as providing an initial lead to an ongoing criminal investigation primarily in the form of an IP address, this limited purpose is not explicit in the assailed provision. Moreover, there is no assurance that the collected traffic data would not be used for preventive purposes as well. x x x .Secondly, Section 12 does not indicate who will determine "due cause." This failure to assign the determination of due cause to a specific and independent entity opens the floodgates to possible abuse of the authority to collect traffic data in real-time, since the measure will be undertaken virtually unchecked. Also, while Section 12 contemplates the collection only of data "associated with specified communications," it does not indicate who will make the specification and how specific it will be. Finally, the collection of traffic data under Section 12 is not time-bound. This lack of limitation on the period of collection undoubtedly raises concerns about the possibility of unlimited collection of traffic data in bulk for purposes beyond the simple investigation of specific instances of criminality.

17. ID.; ID.; ID.; GENERAL GUIDELINES TO STRENGTHEN THE SAFEGUARD AGAINST POSSIBLE ABUSE IN THE COLLECTION OF TRAFFIC DATA.— [T]he following general guidelines could be considered to strengthen the safeguards against possible abuse. **First, the relevance or necessity of the collection of traffic data to an ongoing criminal investigation must be established.** This requirement to specify the purpose of the collection (to aid ongoing criminal investigation) will have the effect of limiting the usage of the collected traffic data to exclude dossier building, profiling and other purposes not explicitly sanctioned by the law. It will clarify that the intention for the collection of traffic data is not to create a historical data base for a comprehensive analysis of the personal life of an individual whose traffic data is collected, but only for investigation of specific instances of criminality. More important, it is not enough that there be an ongoing criminal investigation; the real-time collection must be shown to be necessary or at least relevant to the investigation. Finally, it should be explicitly stated that the examination of traffic data will not be for the purpose of preventive monitoring which, x x x, would necessarily entail a greater scope than that involved in a targeted collection of traffic data for the investigation of a specific criminal act. **Second, there must**

be an independent authority – judicial or otherwise – who shall review compliance with the relevance and necessity threshold. The designation of this authority will provide additional assurance that the activity will be employed only in specific instances of criminal investigation and will be necessary or relevant. The designation of an authorizing entity will also inhibit the unjustified use of real-time collection of traffic data. The position of this person should be sufficiently high to ensure greater accountability. x x x. **Third, there must be a limitation on the period of collection**. The restriction on the time period will further prevent the indiscriminate and bulk collection of traffic data beyond what is necessary for a regular criminal investigation.

CARPIO, *J., concurring and dissenting*:

1. CRIMINAL LAW; THE CYBERCRIME PREVENTION ACT OF 2012 (R.A. NO. 10175); SECTION 4 (c)(4) THEREOF PENALIZING ONLINE LIBEL; ACTUAL MALICE RULE UNDER THE FREE SPEECH CLAUSE DISTINGUISHED FROM ARTICLE 354, IN RELATION TO ARTICLES 361 AND 362 OF THE REVISED PENAL CODE.— The actual malice rule enunciates three principles, namely: 1) Malice is *not presumed* even in factually false and defamatory statements against public officers and public figures; it must be proven as a fact for civil and criminal liability to lie; 2) Report on official proceedings or conduct of an officer *may contain fair comment*, including factually erroneous and libelous criticism; and 3) *Truth* or lack of reckless disregard for the truth or falsity of a defamatory statement *is an absolute defense* against public officers and public figures. In contrast, Article 354, in relation to Article 361 and Article 362 of the Code, operates on the following principles: 1) Malice is *presumed* in every defamatory imputation, even if true (unless good intention and justifiable motives are shown); 2) Report on official proceedings or conduct of an officer must be made *without comment or remarks*, or, alternatively, must be made without malice; and 3) In defamatory allegations made against a public official, *truth is a defense only if the imputed act or omission constitutes a crime or if the imputed act or omission relates to official duties*. The actual malice rule and Article 354 of the Code impose contradictory rules on (1) the necessity of proof of malice in

defamatory imputations involving public proceedings or conduct of a public officer or public figure; and (2) the availability of truth as a defense in defamatory imputations against public officials or public figures. The former requires proof of malice and allows truth as a defense unqualifiedly, while the latter presumes malice and allows truth as a defense selectively. **The repugnancy between the actual malice rule and Article 354 is clear, direct and absolute**.

2. **ID.; ID.; ID.; ID.; ALLOWING A CRIMINAL STATUTORY PROVISION CLEARLY REPUGNANT TO THE CONSTITUTION, AND DIRECTLY ATTACKED FOR SUCH REPUGNANCY, TO NEVERTHELESS REMAIN IN THE STATUTE BOOKS, IS A GROSS CONSTITUTIONAL ANOMALY WHICH, IF TOLERATED, WEAKENS THE FOUNDATION OF CONSTITUTIONALISM.—** Allowing a criminal statutory provision clearly repugnant to the Constitution, and directly attacked for such repugnancy, to nevertheless remain in the statute books is a gross constitutional anomaly which, if tolerated, weakens the foundation of constitutionalism in this country. "The Constitution is either a superior, paramount law, x x x or it is on a level with ordinary legislative acts," and if it is superior, as we have professed ever since the Philippines operated under a Constitution, then "a law repugnant to the Constitution is void." Neither does the x x x claim that Article 354 (and the other provisions in the Code penalizing libel) "mainly target libel against private persons" furnish justification to let Article 354 stand. First, it is grossly incorrect to say that Article 354 "mainly target[s] libel against private persons." Article 354 expressly makes reference to news reports of "any judicial, legislative or other official proceedings" which necessarily involve *public officers* as principal targets of libel. Second, the proposition that this Court ought to refrain from exercising its power of judicial review because a law is constitutional when applied to one class of persons but unconstitutional when applied to another class is fraught with mischief. It stops this Court from performing its duty, as the highest court of the land, to "say what the law is" whenever a law is attacked as repugnant to the Constitution. Indeed, it is not only the power **but also the duty** of the Court to declare such law unconstitutional as to one class, and constitutional

as to another, if valid and substantial class distinctions are present.

3. ID.; ID.; SECTION 4(c)(4) THEREOF IMPLIEDLY RE-ADOPTS ARTICLE 354 OF THE REVISED PENAL CODE WITHOUT QUALIFICATION, GIVING RISE TO A CLEAR AND DIRECT CONFLICT BETWEEN THE RE-ADOPTED ARTICLE 354 AND THE FREE SPEECH CLAUSE BASED ON PREVAILING JURISPRUDENCE; HENCE, THE COURT MUST STRIKE DOWN ARTICLE 354, INSOFAR AS IT APPLIES TO PUBLIC OFFICERS AND PUBLIC FIGURES; RAMIFICATIONS THEREOF.— [T]here is a direct and absolute repugnancy between Article 354, on one hand, and the actual malice rule under the Free Speech Clause, on the other hand. Section 4(c)(4) of RA 10175 impliedly re-adopts Article 354 *without qualification*, giving rise to a clear and direct conflict between the re-adopted Article 354 and the Free Speech Clause based on prevailing jurisprudence. It now becomes imperative for this Court to strike down Article 354, insofar as it applies to public officers and public figures. The ramifications of thus striking down Article 354 are: (1) for cases filed by public officers or public figures, civil or criminal liability will lie only if the complainants prove, through the relevant quantum of proof, that the respondent made the false defamatory imputation with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not; and (2) for cases filed by private individuals, the respondent cannot raise truth as a defense to avoid liability if there is no good intention and justifiable motive.

4. ID.; ID.; SECTION 4 (c)(1) THEREOF, AS A CONTENT-BASED REGULATION, FAILS THE STRICT SCRUTINY TEST.— As Section 4(c) of RA 10175 itself states, the crimes defined under that part of RA 10175, including Section 4(c)(1), are "*Content-related* Offenses," penalizing the *content* of categories of online speech or expression. As a content-based regulation, Section 4(c)(1) triggers the most stringent standard of review for speech restrictive laws – strict scrutiny – to test its validity. Under this heightened scrutiny, a regulation will pass muster only if the government shows (1) a compelling state interest justifying the suppression of speech; and (2) that the law is narrowly-tailored to further such state interest. On

both counts, the government in this case failed to discharge its burden.

5. ID.; ID.; ID.; SECTION 4(c)(1) THEREOF WHICH PENALIZES 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" IS BOTH OVERINCLUSIVE IN ITS REACH OF THE PERSONS EXPLOITED TO COMMIT THE OFFENSE OF CYBERSEX AND UNDERINCLUSIVE IN ITS MODE OF COMMISSION.— The state interests the OSG appears to advance as bases for Section 4(c)(1) are: (1) the protection of children "as cybersex operations x x x are most often committed against children," and (2) the cleansing of cyber traffic by penalizing the online publication of pornographic images. Although legitimate or even substantial, these interests fail to rise to the level of compelling interests because Section 4(c)(1) is both (1) *overinclusive* in its reach of the persons exploited to commit the offense of cybersex, and (2) *underinclusive* in its mode of commission. These defects expose a legislative failure to narrowly tailor Section 4(c)(1) to tightly fit its purposes. On the first interest identified by the government, the overinclusivity of this provision rests on the lack of a narrowing clause limiting its application to *minors*. As a result, Section 4(c)(1) penalizes the "lascivious exhibition of sexual organs of, or sexual activity" involving *minors and adults*, betraying a loose fit between the state interest and the means to achieve it.

6. ID.; ID.; SECTION 4(c)(1) THEREOF IS UNCONSTITUTIONAL BECAUSE IT EXPANDS THE PROHIBITION TO CYBERSEX ACTS INVOLVING BOTH MINORS AND ADULTS WHEN THE JUSTIFICATION FOR THE PROHIBITION IS TO PROTECT MINORS ONLY, WHILE SECTION 4(c)(2) IS CONSTITUTIONAL BECAUSE IT NARROWLY PROHIBITS CYBERSEX ACTS INVOLVING MINORS ONLY; APPLICATION OF THE "MILLER TEST." — [I]t is Section 4(c)(2), not Section 4(c)(1), that narrowly furthers the state interest of protecting minors by punishing the "representation x x x by electronic means" of sexually explicit conduct including the exhibition

of sexual organs of, or sexual acts, involving *minors*. Section 4(c)(1) does not advance such state interest narrowly because it is broadly drawn to cover both minors *and* adults. Section 4(c)(2) is constitutional because it narrowly prohibits cybersex acts involving minors only, while Section 4(c)(1) is unconstitutional because it expands the prohibition to cybersex acts involving both minors and adults when the justification for the prohibition is to protect minors only. The overinclusivity of Section 4(c)(1) *vis-a-vis* the second state interest the government invokes results from the broad language Congress employed to define "cybersex." Congress could have narrowly tailored Section 4(c)(1) to cover only online pornography by hewing closely to the *Miller* test – the prevailing standard for such category of unprotected speech, namely, "an average person, applying contemporary standards would find [that] the work, taken as a whole, appeals to the prurient interest by depict[ing] or describ[ing] in a patently offensive way, sexual conduct specifically defined by the applicable x x x law and x x x, taken as a whole, lacks serious literary, artistic, political, or scientific value."

7. ID.; ID.; SECTION 4(c)(1) THEREOF IS VIOLATIVE OF THE FREE SPEECH CLAUSE FOR BEING OVER-INCLUSIVE; BY LIMITING THE AMBIT OF ITS PROHIBITION TO FEE-BASED WEBSITES EXHIBITING SEXUAL ORGANS OR SEXUAL ACTIVITY, SECTION 4(c)(1) WILL TRIGGER THE PROLIFERATION OF FREE AND OPEN PORN WEBSITES WHICH ARE ACCESSIBLE TO ALL MINORS AND ADULTS ALIKE.— The loose fit between the government interests of cleansing the Internet channels of immoral content and of protecting minors, on the one hand, and the means employed to further such interests, on the other hand, is highlighted by the underinclusivity of Section 4(c)(1) insofar as the manner by which it regulates content of online speech. Section 4(c)(1) limits the ambit of its prohibition to fee-based websites exhibiting sexual organs or sexual activity. In doing so, it leaves **outside its scope and unpunished under Section 4(c)(1) non-fee based porn websites,** such as those generating income through display advertisements. The absence of regulation under Section 4(c)(1) of undeniably unprotected online speech in free and open porn websites defeats the advancement of the state interests behind the enactment of Section 4(c)(1) because unlike fee-based online

porn websites where the pool of viewers is narrowed down to credit card-owning subscribers who affirm they are adults, free and open porn websites are accessible to all, minors and adults alike. Instead of purging the Internet of pornographic content, Section 4(c)(1) will trigger the proliferation of free and open porn websites which, unlike their fee-based counterparts, are not subject to criminal regulation under Section 4(c)(1). What Section 4(c)(1) should have prohibited and penalized are free and open porn websites which are accessible by minors, and not fee-based porn websites which are accessible only by credit card-owning adults, unless such fee-based websites cater to child pornography, in which case they should also be prohibited and penalized.

8. ID.; ID.; SECTION 4 (c)(3) THEREOF WHICH PENALIZES UNSOLICITED COMMERCIAL SPEECH IN CYBERSPACE IS REPUGNANT TO THE FREE SPEECH CLAUSE AS IT PENALIZES THE TRANSMISSION ONLINE OF COMMERCIAL SPEECH WITH NO "OPT-OUT" FEATURE TO NON-SUBSCRIBERS, EVEN IF TRUTHFUL AND NON-MISLEADING, AND OF COMMERCIAL SPEECH WHICH DOES NOT RELAY ANNOUNCEMENTS TO SUBSCRIBERS, EVEN IF TRUTHFUL AND NON-MISLEADING; THE FREE FLOW OF TRUTHFUL AND NON-MISLEADING COMMERCIAL SPEECH ONLINE SHOULD REMAIN UNHAMPERED TO ASSURE FREEDOM OF EXPRESSION OF PROTECTED SPEECH.— Section 4(c)(3) impermissibly restricts the flow of truthful and non-misleading commercial speech in cyberspace that does not fall under any of the exceptions in Section 4(c)(3), lowering the protection it enjoys under the Free Speech Clause. Section 4(c)(3) would be constitutional if it allowed the free transmission of truthful and non-misleading commercial speech, even though not falling under any of the exceptions in Section 4(c)(3). There is no legitimate government interest in criminalizing *per se* the transmission in cyberspace of truthful and nonmisleading commercial speech. Under the exception clauses of Section 4(c)(3), commercial speech may be transmitted online only when (1) the recipient has subscribed to receive it ("opted-in"); or (2) the commercial speech, directed to its "users, subscribers or customers," contains announcements; or (3) the undisguised, non-misleading commercial speech has an "opt-out" feature. The combination of these exceptions results

in penalizing the transmission online (1) of commercial speech with no "opt-out" feature to non-subscribers, **even if truthful and non-misleading**; and (2) of commercial speech which does not relay "announcements" to subscribers, **even if truthful and non-misleading**. Penalizing the transmission of these protected categories of commercial speech is devoid of any legitimate government interest and thus violates the Free Speech Clause. Indeed, the free flow of truthful and non-misleading commercial speech online should remain unhampered to assure freedom of expression of protected speech.

9. ID.; ID.; THE APPLICATION OF SECTION 7 THEREOF WHICH ALLOWS MULTIPLE PROSECUTIONS POST-CONVICTION TO THE OFFENSE OF ONLINE LIBEL UNDER SECTION 4(c)(4) OF RA 10175 IN RELATION TO THE OFFENSE OF LIBEL UNDER ARTICLE 353 OF THE REVISED PENAL CODE IS UNCONSTITUTIONAL FOR TRENCHING THE DOUBLE JEOPARDY AND FREE SPEECH CLAUSES; CONVICTION OR ACQUITTAL UNDER EITHER SECTION 4(c)(4) OF RA 10175 OR ARTICLE 353 IN RELATION TO ARTICLE 355 OF THE REVISED PENAL CODE CONSTITUTES A BAR TO ANOTHER PROSECUTION FOR THE SAME OFFENSE OF LIBEL.— Although RA 10175 defines and punishes a number of offenses to which Section 7 applies, its application to the offense of online libel under Section 4(c)(4) of RA 10175, in relation to the offense of libel under Article 353 of the Code, suffices to illustrate its unconstitutionality for trenching the Double Jeopardy and Free Speech Clauses. x x x. RA 10175 *adopts the Code's definition of libel* by describing online libel under Section 4(c)(4)as "[t]he unlawful or prohibited acts *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. By adopting the Code's definition of libel, Section 4(c) (4) also adopts the elements of libel as defined in Article 353 in relation to Article 355 of the Code. Section 4(c)(4) merely adds the media of "computer system or any other similar means which may be devised in the future " to the list of media enumerated in Article 355. x x x. **For purposes of double jeopardy analysis, therefore, Section 4(c)(4) of RA 10175 and Article 353 in relation to Article 355 of the Code *define and penalize the same offense* of libel**. Under the Double Jeopardy Clause,

conviction or acquittal under either Section 4(c)(4) or Article 353 in relation to Article 355 constitutes a bar to another prosecution *for the **same** offense* of libel.

10. ID.; ID.; SECTION 7 THEREOF; CONVICTION OR ACQUITTAL UNDER SECTION 4(a) OF RA 9775 OR USE OF A CHILD TO CREATE CHILD PORNOGRAPHY CONSTITUTES A BAR TO THE PROSECUTION FOR VIOLATION OF SECTION 4(c)(2) OF RA 10175 OR ONLINE CHILD PORNOGRAPHY AND *VICE VERSA*.— The xxx analysis applies to all other offenses defined and penalized under the Code or special laws which (1) are penalized as the same offense under RA 10175 committed through the use of a computer system; or (2) are considered aggravated offenses under RA 10175. Conviction or acquittal under the Code or such special laws constitutes a bar to the prosecution for the commission of any of the offenses defined under RA 10175. Thus, for instance, conviction or acquittal under Section 4 (a) of RA 9775 (use of a child o create pornography) constitutes a bar to the prosecution for violation of Section 4(c)(2) of RA 10175 (online child pornography) and *vice versa.* This is because the offense of child pornography under RA 9775 is the same offense of child pornography under RA 10175 committed through the use of a computer system.

11. ID.; ID.; SECTION 7 THEREOF, AS APPLIED TO SECTION 4(C)(4), OFFENDS THE FREE SPEECH CLAUSE AS IT DETERS NOT ONLY THE ONLINE PUBLICATION OF DEFAMATORY SPEECH AGAINST PRIVATE INDIVIDUALS BUT ALSO THE ONLINE DISSEMINATION OF SCATHING, FALSE, AND DEFAMATORY STATEMENTS AGAINST PUBLIC OFFICIALS AND PUBLIC FIGURES WHICH, UNDER THE ACTUAL MALICE RULE, ARE CONDITIONALLY PROTECTED.— Section 7 of RA 10175 also offends the Free Speech Clause by assuring multiple prosecutions of those who fall under the ambit of Section 4(c)(4). The specter of multiple trials and sentencing, even after conviction under RA 10175, creates a significant and not merely incidental chill on online speech. Section 7 stifles speech in much the same way that excessive prison terms for libel, subpoenas to identify anonymous online users or high costs of libel litigation do. It has the effect of making Internet users "steer far wide of the unlawful zone"

by practicing self-censorship, putting to naught the democratic and inclusive culture of the Internet where anyone can be a publisher and everyone can weigh policies and events from anywhere in the world in real time. Although Section 7, as applied to Section 4(c)(4), purports to strengthen the protection to private reputation that libel affords, its sweeping ambit deters not only the online publication of defamatory speech against private individuals but also the online dissemination of scathing, false, and defamatory statements against public officials and public figures which, under the actual malice rule, are conditionally protected. This chilling effect on online communication stifles robust and uninhibited debate on public issues, the constitutional value lying at the core of the guarantees of free speech, free expression and free press.

12. ID.; ID.; SECTION 12 THEREOF WHICH GRANTS AUTHORITY TO THE GOVERNMENT TO RECORD IN BULK AND IN REAL TIME ELECTRONIC DATA TRANSMITTED BY MEANS OF A COMPUTER SYSTEM IS REPUGNANT TO THE GUARANTEE AGAINST WARRANTLESS SEARCHES AND SEIZURES AS IT VESTS THE GOVERNMENT WITH AUTHORITY TO UNDERTAKE HIGHLY INTRUSIVE SEARCH AND COLLECTION IN BULK OF PERSONAL DIGITAL DATA WITHOUT BENEFIT OF A JUDICIAL WARRANT.— Section 12 of RA 10175 is the statutory basis for intelligence agencies of the government to undertake warrantless electronic data surveillance and collection in bulk to investigate and prosecute violations of RA 10175. Section 12 fails constitutional scrutiny. Collection in bulk of private and personal electronic data transmitted through telephone and the Internet allows the government to create profiles of the surveilled individuals' close social associations, personal activities and habits, political and religious interests, and lifestyle choices expressed through these media. The intrusion into their private lives is as extensive and thorough as if their houses, papers and effects are physically searched. **As such, collection in bulk of such electronic data rises to the level of a search and seizure within the meaning of the Search and Seizure Clause, triggering the requirement for a judicial warrant grounded on probable cause.** By vesting the government with authority to undertake such highly intrusive search and collection in bulk of personal digital data without benefit of a judicial warrant, Section 12 is unquestionably

repugnant to the guarantee under the Search and Seizure Clause against warrantless searches and seizures.

13. ID.; ID.; ID.; BULK DATA SURVEILLANCE AND COLLECTION IS A "SEARCH AND SEIZURE" WITHIN THE MEANING OF THE SEARCH AND SEIZURE CLAUSE; BULK DATA AND CONTENT-BASED SURVEILLANCE AND COLLECTION ARE FUNCTIONALLY IDENTICAL IN THEIR ACCESS TO PERSONAL AND PRIVATE INFORMATION; HENCE, UNIFORMLY SUBJECT TO THE CONSTITUTIONAL REQUIREMENT OF A JUDICIAL WARRANT GROUNDED ON PROBABLE CAUSE.— Government collection of data readily available (or exposed) to the public, even when obtained using devices facilitating access to the information, does not implicate constitutional concerns of privacy infringement. It is when government, to obtain private information, intrudes into domains over which an individual holds legitimate privacy expectation that a "search" takes place within the meaning of the Search and Seizure Clause. x x x. [B]ulk data surveillance and collection is a "search and seizure" within the meaning of the Search and Seizure Clause not only because it enables maximum intrusion into the private lives of the surveilled individuals but also because such individuals do not forfeit their privacy expectations over the traffic data they generate by transacting with service providers. Bulk data and content-based surveillance and collection are functionally identical in their access to personal and private information. It follows that the distinction Section 12 of RA 10175 draws between content- based and bulk traffic data surveillance and collection, requiring judicial warrant for the former and a mere administrative "due cause" for the latter, is unconstitutional. As "searches and seizures" within the contemplation of Search and Seizure Clause, bulk data and content-based surveillance and collection are uniformly subject to the constitutional requirement of a judicial warrant grounded on probable cause.

14. ID.; ID.; SECTION 12 THEREOF IMPERMISSIBLY NARROWS THE SPHERE OF PRIVACY AFFORDED BY THE PRIVACY OF COMMUNICATION CLAUSE.— The grant under Section 12 of authority to the government to undertake bulk data surveillance and collection without benefit of a judicial warrant enables the government to access private

and personal details on the surveilled individuals' close social associations, personal activities and habits, political and religious interests, and lifestyle choices. This impermissibly narrows the sphere of privacy afforded by the Privacy of Communication Clause. It opens a backdoor for government to pry into their private lives as if it obtained access to their phones, computers, letters, books, and other papers and effects. Since Section 12 does not require a court warrant for government to undertake such surveillance and data collection, law enforcement agents can access these information anytime they want to, for whatever purpose they may deem as amounting to "due cause."

15. ID.; ID.; SECTION 12 THEREOF IS NOT A "LAW" WITHIN THE CONTEMPLATION OF THE PRIVACY OF COMMUNICATION CLAUSE UNDER THE CONSTITUTION; SECTION 12 CAN NEVER NEGATE THE CONSTITUTIONAL REQUIREMENT UNDER THE SEARCH AND SEIZURE CLAUSE THAT WHEN THE INTRUSION INTO THE PRIVACY OF COMMUNICATION AND CORRESPONDENCE RISES TO THE LEVEL OF A SEARCH AND SEIZURE OF PERSONAL EFFECTS, A WARRANT ISSUED BY A JUDGE BECOMES MANDATORY FOR SUCH SEARCH AND SEIZURE.— [T]he protection afforded by the Constitution under the Privacy of Communication Clause is not absolute. It exempts from the guarantee intrusions "upon lawful order of the court, or *when public safety or order requires otherwise, as prescribed by* ***law***." x x x. Under RA 10175, the categories of crimes defined and penalized relate to (1) offenses against the confidentiality, integrity and availability of computer data and systems (Section 4[a]); (2) computer-related offenses (Section 4[b]); (3) content-related offenses (Section 4[c]); and (4) other offenses (Section 5). None of these categories of crimes are limited to public safety or public order interests (akin to the crimes exempted from the coverage of the Anti-Wiretapping Law). They relate to crimes committed in the cyberspace which have no stated public safety or even national security dimensions. Such fact takes Section 12 outside of the ambit of the Privacy of Communication Clause. [E]ven assuming that Section 12 of RA 10175 is such a "law," such "law" can never negate the constitutional requirement under the Search and Seizure Clause that when the intrusion into the privacy of communication

and correspondence rises to the level of a search and seizure of personal effects, then a warrant issued by a judge becomes **mandatory** for such search and seizure.

16. ID.; ID.; SECTION 12 THEREOF IMPERMISSIBLY TILTS THE BALANCE IN FAVOR OF STATE SURVEILLANCE AT THE EXPENSE OF COMMUNICATIVE AND EXPRESSIVE PRIVACY; THE GOVERNMENT, CONSISTENT WITH ITS NATIONAL SECURITY NEEDS, MAY ENACT LEGISLATION ALLOWING SURVEILLANCE AND DATA COLLECTION IN BULK ONLY IF BASED ON INDIVIDUALIZED SUSPICION AND SUBJECT TO MEANINGFUL JUDICIAL OVERSIGHT.— Allowing the state to undertake extrajudicial, unilateral surveillance and collection of electronic data in bulk which, in the aggregate, is just as revealing of a person's mind as the content of his communication, impermissibly tilts the balance in favor of state surveillance at the expense of communicative and expressive privacy. More than an imbalance in the treatment of equally important societal values, however, such government policy gives rise to fundamental questions on the place of human dignity in civilized society. xxx. The Government must maintain fidelity to the 1987 Constitution's guarantee against warrantless searches and seizures, as well as the guarantee of privacy of communication and correspondence. Thus, the Government, consistent with its national security needs, may enact legislation allowing surveillance and data collection in bulk only if **based on individualized suspicion and subject to meaningful judicial oversight**.

17. ID.; ID.; SECTION 19 THEREOF WHICH AUTHORIZES THE DEPARTMENT OF JUSTICE TO RESTRICT OR BLOCK ACCESS TO SUSPECTED COMPUTER DATA IS VIOLATIVE OF THE FREE SPEECH, FREE EXPRESSION AND FREE PRESS AND THE RIGHTS OF PRIVACY OF COMMUNICATION AND AGAINST UNREASONABLE SEARCHES AND SEIZURES, AS IT ALLOWS THE GOVERNMENT TO ELECTRONICALLY SEARCH WITHOUT WARRANT THE CONTENT OF PRIVATE ELECTRONIC DATA AND ADMINISTRATIVELY CENSOR ALL CATEGORIES OF SPEECH SPECIFICALLY SPEECH WHICH IS NON-PORNOGRAPHIC, NOT COMMERCIALLY MISLEADING

AND NOT A DANGER TO NATIONAL SECURITY, WHICH CANNOT BE SUBJECTED TO CENSORSHIP OR PRIOR RESTRAINT.— Section 19 allows the government to search without warrant the content of private electronic data *and administratively* censor *all* categories of speech. Although censorship or prior restraint is permitted on speech which is pornographic, commercially misleading or dangerous to national security, only pornographic speech is covered by RA 10175 (under Section 4(c)(2) on online child pornography). Moreover, a court order is required to censor or effect prior restraint on protected speech. By allowing the government to electronically search without warrant and administratively censor all categories of speech, specifically speech which is non-pornographic, not commercially misleading and not a danger to national security, which cannot be subjected to censorship or *prior* restraint, Section 19 is unquestionably repugnant to the guarantees of free speech, free expression and free press and the rights to privacy of communication and against unreasonable searches and seizures. Indeed, as a system of *prior* restraint on *all* categories of speech, Section 19 is glaringly unconstitutional.

LEONEN, *J.*, *dissenting and concurring opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; JUDICIAL DEPARTMENT; JUDICIAL REVIEW; EXPLAINED; 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; REQUISITES OF JUSTICIABILITY.— Judicial review — the power to declare a law, ordinance, or treaty as unconstitutional or invalid — is inherent in judicial power. It includes the power to "settle actual controversies involving rights which are legally demandable" 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." The second aspect of judicial review articulated in the 1987 Constitution nuances the political question doctrine. 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." 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.

2. ID.; ID.; ID.; ACTUAL CASE OR CONTROVERSY; 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.— It is essential that there be an *actual case or controversy*. "There must be existing conflicts ripe for judicial determination — not conjectural or anticipatory. Otherwise, the decision of the Court will amount to an advisory opinion." xxx. 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.

3. ID.; ID.; ID.; THE COURT'S POWER SHOULD BE INVOKED ONLY WHEN PRIVATE SECTORS OR OTHER PUBLIC INSTRUMENTALITIES FAIL TO COMPLY WITH THE LAW OR THE PROVISIONS OF THE CONSTITUTION.— 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.***

4. ID.; ID.; ID.; FACIAL CHALLENGE 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; "FACIAL" CHALLENGE DISTINGUISHED FROM "AS APPLIED" CHALLENGE.— 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." x x x. [T]he latest pronouncement of this court on the doctrine was the case of *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council.* 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. x x x. 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.

5. ID.; ID.; ID.; PENAL STATUTES CANNOT BE SUBJECTED TO FACIAL ATTACKS; EXCEPTION; REQUISITES.— *[T]he 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.

6. ID.; ID.; ID.; ID.; ID.; RATIONALE FOR THE EXCEPTION.— The reason for [the] 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. x x x. 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 x x x. The power of the State is derived from the authority and mandate given to it by the people, through their representatives elected in the 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. x x x. 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.

7. ID.; ID.; ID.; A FACIAL CHALLENGE CAN ONLY BE RAISED ON THE BASIS OF OVERBREADTH, NOT VAGUENESS; VAGUENESS DOCTRINE DISTINGUISHED FROM OVERBREADTH DOCTRINE.— 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.

8. CRIMINAL LAW; CYBERCRIME PREVENTION ACT OF 2012 (R.A. NO. 10175); SECTION 19 THEREOF WHICH AUTHORIZES THE DEPARTMENT OF JUSTICE TO RESTRICT OR BLOCK ACCESS TO SUSPECTED COMPUTER DATA IS UNCONSTITUTIONAL BECAUSE IT ALLOWS PRIOR RESTRAINT WITHIN VAGUE PARAMETERS.— Section 19 of Republic Act No. 10175 is unconstitutional because it clearly allows prior restraint. x x x. 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 blatantly unconstitutional. x x x. 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.

9. ID.; ID.; SECTION 4(c)(4) THEREOF ON ONLINE LIBEL AND ARTICLES 353, 354 AND 355 OF THE REVISED PENAL CODE ON LIBEL DECLARED UNCONSTITUTIONAL FOR BEING OVERBROAD AS THESE PROVISIONS PRESCRIBE A DEFINITION AND PRESUMPTION THAT HAVE BEEN REPEATEDLY STRUCK DOWN BY THE COURT; THESE PROVISIONS PRODUCE A CHILLING EFFECT ON SPEECH BY IMPOSING CRIMINAL LIABILITY IN ADDITION TO CIVIL ONES; OVERBREADTH DOCTRINE, EXPLAINED.— *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." 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 over an alleged infringement of privacy or defamation. x x x. 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. 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, 20, 21, and even 26. There is, thus, no cogent reason that a penal statute would overbroadly subsume the primordial right of freedom of speech provided for in the constitution.

10. ID.; ID.; ID.; THERE IS NO STATE INTEREST IN CRIMINALIZING LIBEL; THE STATE'S INTEREST TO PROTECT PRIVATE DEFAMATION IS BETTER SERVED WITH LAWS PROVIDING FOR CIVIL REMEDIES FOR THE AFFECTED PARTY.— 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. x x x. 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. x x x. 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. x x x. The state's interest to protect private defamation is better served with laws providing for civil remedies for the affected party.

11. ID.; ID.; SECTION 4(c)(1) THEREOF WHICH PENALIZES CYBERSEX IS OVERBROAD; HENCE, UNCONSTITUTIONAL; IT PRODUCES A CHILLING EFFECT AS IT PROVIDES FOR NO RESTRICTIONS TO THE POWER AND ALLOW POWER TO DETERMINE WHAT IS "LASCIVIOUS" AND WHAT IS NOT.— Section 4(c)(1) of Rep. Act No. 10175 is also overbroad and, therefore, unconstitutional. x x x. 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 partriarchal control over what is acceptable intimate expression. This provision, thus, produces a chilling effect. It provides for no restrictions to power and allow power to determine what is "lascivious" and what is not.

12. ID.; ID.; ID.; STANDARDS FOR OBSCENITY; NOT MET.— [A]t present, we follow *Miller v. California*, a United States case, as the latest authority on the guidelines in characterizing obscenity. 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. xxx. 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" properly defined by law. Instead, it simply requires "exhibition of sexual organs or sexual activity" without reference to its impact on its audience. Third, there is no reference to a judgment of the "work taken as a whole" and that this work "lacks serious literary, artistic, political or scientific" value. Rather, it simply needs to be "lascivious."

13. ID.; ID.; ID.; THE CYBERSEX PROVISIONS STIFLE SPEECH, AGGRAVATE INEQUALITIES BETWEEN GENDERS, AND WILL ONLY SUCCEED TO ENCRUST THE VIEWS OF THE POWERFUL.—Punishing or even threatening to punish "lascivious exhibition of sexual organs or sexual activity" through "the aid of a computer system" for "favour 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 stifle speech, aggravate 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.

14. ID.; ID.; SECTION 12 THEREOF ON WARRANTLESS REAL-TIME TRAFFIC DATA SURVEILLANCE SHOULD BE STRICKEN DOWN AS UNCONSTITUTIONAL BECAUSE THE UNLIMITED BREADTH OF DISCRETION GIVEN TO LAW ENFORCERS TO ACQUIRE TRAFFIC DATA FOR "DUE CAUSE" CHILLS EXPRESSION IN THE INTERNET; IT FOISTS UPON THE PUBLIC A STANDARD THAT WILL ONLY BE DEFINED BY THOSE WHO WILL EXECUTE THE LAW, WHICH AMOUNTS TO A *CARTE BLANCHE* AND ROVING AUTHORITY WHOSE LIMITS ARE NOT STATUTORILY LIMITED.— [T]he 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. x x x. 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.

15. ID.; ID.; SECTION 4 (c)(3) THEREOF WHICH PENALIZES POSTING OF UNSOLICITED COMMERCIAL COMMUNICATION SHOULD NOT BE DECLARED UNCONSTITUTIONAL FOR IT WILL NOT CHILL SPEECH OF FUNDAMENTAL VALUE. — In Iglesia ni Cristo, this court stated that commercial speech is "low value" speech to which the clear and present danger test is not applicable. x x x. [T]he basis of protection accorded to commercial speech rests in its informative character: "[t]the First Amendment's concern for commercial speech is based on the informational function of advertising" x x x. 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. x x x. 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. x x x. 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.

16. ID.; ID.; SECTION 4 (c)(3) THEREOF WHICH PENALIZES POSTING OF UNSOLICITED COMMERCIAL COMMUNICATIONS CURTAILS SPAMMING AND ITS DELETERIOUS EFFECTS.— [S]ection 4(c)(3) refers to what,

in contemporary language, has been referred to as "spam." x x x. 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. x x x. 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. x x x. 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," unless falling under any of the enumerated exceptions, as Section 4(c)(3) does.

17. ID.; ID.; SECTION 4 (c)(3) THEREOF IS NOT A BLANKET PROHIBITION BUT IT MERELY PROVIDES PARAMETERS TO ENSURE THAT THE DISSEMINATION OF COMMERCIAL INFORMATION ONLINE IS DONE IN A MANNER THAT IS NOT INJURIOUS TO OTHERS; COMMERCIAL INFORMATION, WHEN MAYBE VALIDLY DISSEMINATED THROUGH CYBERSPACE.— 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." 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. 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.

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D E C I S I O N

ABAD, *J.*:

These consolidated petitions seek to declare several provisions of Republic Act (R.A.) 10175, the Cybercrime Prevention Act of 2012, unconstitutional and void.

The Facts and the Case

The cybercrime law aims to regulate access to and use of the cyberspace. Using his laptop or computer, a person can connect to the internet, a system that links him to other computers and enable him, among other things, to:

1. Access virtual libraries and encyclopedias for all kinds of information that he needs for research, study, amusement, upliftment, or pure curiosity;

2. Post billboard-like notices or messages, including pictures and videos, for the general public or for special audiences like associates, classmates, or friends and read postings from them;

3. Advertise and promote goods or services and make purchases and payments;

4. Inquire and do business with institutional entities like government agencies, banks, stock exchanges, trade houses, credit card companies, public utilities, hospitals, and schools; and

5. Communicate in writing or by voice with any person through his e-mail address or telephone.

This is cyberspace, a system that accommodates millions and billions of simultaneous and ongoing individual accesses to and uses of the internet. The cyberspace is a boon to the need of the current generation for greater information and facility of communication. But all is not well with the system since it could not filter out a number of persons of ill will who would want to use cyberspace technology for mischiefs and crimes. One of them can, for instance, avail himself of the system to unjustly ruin the reputation of another or bully the latter by posting defamatory statements against him that people can read.

And because linking with the internet opens up a user to communications from others, the ill-motivated can use the cyberspace for committing theft by hacking into or surreptitiously accessing his bank account or credit card or defrauding him through false representations. The wicked can use the cyberspace, too, for illicit trafficking in sex or for exposing to pornography guileless children who have access to the internet. For this reason, the government has a legitimate right to regulate the use of cyberspace and contain and punish wrongdoings.

Notably, there are also those who would want, like vandals, to wreak or cause havoc to the computer systems and networks of indispensable or highly useful institutions as well as to the

laptop or computer programs and memories of innocent individuals. They accomplish this by sending electronic viruses or virtual dynamites that destroy those computer systems, networks, programs, and memories. The government certainly has the duty and the right to prevent these tomfooleries from happening and punish their perpetrators, hence the Cybercrime Prevention Act.

But petitioners claim that the means adopted by the cybercrime law for regulating undesirable cyberspace activities violate certain of their constitutional rights. The government of course asserts that the law merely seeks to reasonably put order into cyberspace activities, punish wrongdoings, and prevent hurtful attacks on the system.

Pending hearing and adjudication of the issues presented in these cases, on February 5, 2013 the Court extended the original 120-day temporary restraining order (TRO) that it earlier issued on October 9, 2012, enjoining respondent government agencies from implementing the cybercrime law until further orders.

The Issues Presented

Petitioners challenge the constitutionality of the following provisions of the cybercrime law that regard certain acts as crimes and impose penalties for their commission as well as provisions that would enable the government to track down and penalize violators. These provisions are:

a. Section 4(a)(1) on Illegal Access;
b. Section 4(a)(3) on Data Interference;
c. Section 4(a)(6) on Cyber-squatting;
d. Section 4(b)(3) on Identity Theft;
e. Section 4(c)(1) on Cybersex;
f. Section 4(c)(2) on Child Pornography;
g. Section 4(c)(3) on Unsolicited Commercial Communications;
h. Section 4(c)(4) on Libel;
i. Section 5 on Aiding or Abetting and Attempt in the Commission of Cybercrimes;
j. Section 6 on the Penalty of One Degree Higher;

k. Section 7 on the Prosecution under both the Revised Penal Code (RPC) and R.A. 10175;
l. Section 8 on Penalties;
m. Section 12 on Real-Time Collection of Traffic Data;
n. Section 13 on Preservation of Computer Data;
o. Section 14 on Disclosure of Computer Data;
p. Section 15 on Search, Seizure and Examination of Computer Data;
q. Section 17 on Destruction of Computer Data;
r. Section 19 on Restricting or Blocking Access to Computer Data;
s. Section 20 on Obstruction of Justice;
t. Section 24 on Cybercrime Investigation and Coordinating Center (CICC); and
u. Section 26(a) on CICC's Powers and Functions.

Some petitioners also raise the constitutionality of related Articles 353, 354, 361, and 362 of the RPC on the crime of libel.

The Rulings of the Court

Section 4(a)(1)

Section 4(a)(1) provides:

> Section 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.

Petitioners contend that Section 4(a)(1) fails to meet the strict scrutiny standard required of laws that interfere with the fundamental rights of the people and should thus be struck down.

The Court has in a way found the strict scrutiny standard, an American constitutional construct,[1] useful in determining

[1] The US Supreme Court first suggested the standard by implication in footnote 4 of *United States v. Carolene Products* (304 U.S. 144, 152 n.4

the constitutionality of laws that tend to target a class of things or persons. According to this standard, a legislative classification that impermissibly interferes with the exercise of fundamental right or operates to the peculiar class disadvantage of a suspect class is presumed unconstitutional. The burden is on the government to prove that the classification is necessary to achieve a compelling state interest and that it is the least restrictive means to protect such interest.[2] Later, the strict scrutiny standard was used to assess the validity of laws dealing with the regulation of speech, gender, or race as well as other fundamental rights, as expansion from its earlier applications to equal protection.[3]

In the cases before it, the Court finds nothing in Section 4(a)(1) that calls for the application of the strict scrutiny standard since no fundamental freedom, like speech, is involved in punishing what is essentially a condemnable act – accessing the computer system of another without right. It is a universally condemned conduct.[4]

Petitioners of course fear that this section will jeopardize the work of ethical hackers, professionals who employ tools and techniques used by criminal hackers but would neither damage

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(1938). See *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*. Winkler, A. UCLA School of Law, Public Law & Legal Theory Research Paper Series, Research Paper No. 06-14, http://ssrn.com/abstract=897360 (last accessed April 10, 2013).

[2] *Serrano v. Gallant Maritime Services, Inc.*, G.R. No. 167614, March 24, 2009, 582 SCRA 254, 278.

[3] *White Light Corporation v. City of Manila*, G.R. No. 122846, January 20, 2009, 576 SCRA 416, 437.

[4] All 50 states of the United States have passed individual state laws criminalizing hacking or unauthorized access, http://www.ncsl.org/issues-research/telecom/computer-hacking-and-unauthorized-access-laws.aspx (last accessed May 16, 2013). The United States Congress has also passed the Computer Fraud and Abuse Act 18 U.S.C. § 1030 that penalizes, among others, hacking. The Budapest Convention on Cybercrime considers hacking as an offense against the confidentiality, integrity and availability of computer data and systems and 29 countries have already ratified or acceded, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=&DF=&CL=ENG (last accessed May 16, 2013).

the target systems nor steal information. Ethical hackers evaluate the target system's security and report back to the owners the vulnerabilities they found in it and give instructions for how these can be remedied. Ethical hackers are the equivalent of independent auditors who come into an organization to verify its bookkeeping records.[5]

Besides, a client's engagement of an ethical hacker requires an agreement between them as to the extent of the search, the methods to be used, and the systems to be tested. This is referred to as the "*get out of jail free card*."[6] Since the ethical hacker does his job with prior permission from the client, such permission would insulate him from the coverage of Section 4(a)(1).

Section 4(a)(3) of the Cybercrime Law

Section 4(a)(3) provides:

> Section 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:
>
> x x x x x x x x x
>
> (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.

Petitioners claim that Section 4(a)(3) suffers from overbreadth in that, while it seeks to discourage data interference, it intrudes into the area of protected speech and expression, creating a chilling and deterrent effect on these guaranteed freedoms.

Under the overbreadth doctrine, a proper governmental purpose, constitutionally subject to state regulation, may not be achieved by means that unnecessarily sweep its subject broadly,

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[5] *Ethical Hacking*. Palmer, C. IBM Systems Journal, Vol. 40, No. 3, 2001, p. 770, http://pdf.textfiles.com/security/palmer.pdf (last accessed April 10, 2013).

[6] *Id.* at 774.

thereby invading the area of protected freedoms.[7] But Section 4(a)(3) does not encroach on these freedoms at all. It simply punishes what essentially is a form of vandalism,[8] the act of willfully destroying without right the things that belong to others, in this case their computer data, electronic document, or electronic data message. Such act has no connection to guaranteed freedoms. There is no freedom to destroy other people's computer systems and private documents.

All penal laws, like the cybercrime law, have of course an inherent chilling effect, an *in terrorem* effect[9] or the fear of possible prosecution that hangs on the heads of citizens who are minded to step beyond the boundaries of what is proper. But to prevent the State from legislating criminal laws because they instill such kind of fear is to render the state powerless in addressing and penalizing socially harmful conduct.[10] Here, the chilling effect that results in paralysis is an illusion since Section 4(a)(3) clearly describes the evil that it seeks to punish and creates no tendency to intimidate the free exercise of one's constitutional rights.

Besides, the overbreadth challenge places on petitioners the heavy burden of proving that under no set of circumstances will Section 4(a)(3) be valid.[11] Petitioner has failed to discharge this burden.

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[7] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, G.R. Nos. 178552, 178554, 178581, 178890, 179157 & 179461, October 5, 2010, 632 SCRA 146, 185.

[8] The intentional destruction of property is popularly referred to as vandalism. It includes behavior such as breaking windows, slashing tires, spray painting a wall with graffiti, and **destroying a computer system through the use of a computer virus**, http://legal-dictionary.thefree dictionary.com/Vandalism (last accessed August 12, 2013).

[9] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, *supra* note 7, at 186; *Estrada v. Sandiganbayan*, 421 Phil. 290, 354 (2001).

[10] *Id.*

[11] *Id.*, citing the Opinion of Justice Vicente V. Mendoza in *Estrada v. Sandiganbayan*.

Section 4(a)(6) of the Cybercrime Law

Section 4(a)(6) provides:

> Section 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:
>
> x x x x x x x x x
>
> (6) Cyber-squatting. – The acquisition of domain name over the internet in bad faith to profit, mislead, destroy the 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.

Petitioners claim that Section 4(a)(6) or cyber-squatting violates the equal protection clause[12] in that, not being narrowly tailored, it will cause a user using his real name to suffer the same fate as those who use aliases or take the name of another in satire, parody, or any other literary device. For example, supposing there exists a well known billionaire-philanthropist named "Julio Gandolfo," the law would punish for cyber-squatting both the person who registers such name because he claims it to be his pseudo-name and another who registers the name because it happens to be his real name. Petitioners claim that, considering the substantial distinction between the two, the law should recognize the difference.

But there is no real difference whether he uses "Julio Gandolfo" which happens to be his real name or use it as a pseudo-name

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[12] 1987 CONSTITUTION, Article III, Section 1.

for it is the evil purpose for which he uses the name that the law condemns. The law is reasonable in penalizing him for acquiring the domain name in bad faith to profit, mislead, destroy reputation, or deprive others who are not ill-motivated of the rightful opportunity of registering the same. The challenge to the constitutionality of Section 4(a)(6) on ground of denial of equal protection is baseless.

Section 4(b)(3) of the Cybercrime Law

Section 4(b)(3) provides:

> Section 4. *Cybercrime Offenses*. – The following acts constitute the offense of cybercrime punishable under this Act:
>
> x x x x x x x x x
>
> b) Computer-related Offenses:
>
> x x x x x x x x x
>
> (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.

Petitioners claim that Section 4(b)(3) violates the constitutional rights to due process and to privacy and correspondence, and transgresses the freedom of the press.

The right to privacy, or the right to be let alone, was institutionalized in the 1987 Constitution as a facet of the right protected by the guarantee against unreasonable searches and seizures.[13] But the Court acknowledged its existence as early as 1968 in *Morfe v. Mutuc*,[14] it ruled that the right to privacy exists independently of its identification with liberty; it is in itself fully deserving of constitutional protection.

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[13] *Pollo v. Constantino-David*, G.R. No. 181881, October 18, 2011, 659 SCRA 189, 204-205.

[14] 130 Phil. 415 (1968)

Relevant to any discussion of the right to privacy is the concept known as the "Zones of Privacy." The Court explained in "*In the Matter of the Petition for Issuance of Writ of Habeas Corpus of Sabio v. Senator Gordon*"[15] the relevance of these zones to the right to 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."

Two constitutional guarantees create these zones of privacy: (a) the right against unreasonable searches[16] and seizures, which is the basis of the right to be let alone, and (b) the right to privacy of communication and correspondence.[17]

In assessing the challenge that the State has impermissibly intruded into these zones of 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.[18]

The usual identifying information regarding a person includes his name, his citizenship, his residence address, his contact number, his place and date of birth, the name of his spouse if any, his occupation, and similar data.[19] The law punishes those

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[15] 535 Phil. 687, 714-715 (2006).

[16] *Supra* note 12, Article II, Section 2.

[17] *Supra* note 12, Article III, Section 3.

[18] *In the Matter of the Petition for Issuance of Writ of Habeas Corpus of Sabio v. Senator Gordon*, *supra* note 15.

[19] Section 3(g) of Republic Act 10173 or the Data Privacy Act of 2012 defines personal information as "any information whether recorded in a material

who acquire or use such identifying information without right, implicitly to cause damage. Petitioners simply fail to show how government effort to curb computer-related identity theft violates the right to privacy and correspondence as well as the right to due process of law.

Also, the charge of invalidity of this section based on the overbreadth doctrine will not hold water since the specific conducts proscribed do not intrude into guaranteed freedoms like speech. Clearly, what this section regulates are specific actions: the acquisition, use, misuse or deletion of personal identifying data of another. There is no fundamental right to acquire another's personal data.

Further, petitioners fear that Section 4(b)(3) violates the freedom of the press in that journalists would be hindered from accessing the unrestricted user account of a person in the news to secure information about him that could be published. But this is not the essence of identity theft that the law seeks to prohibit and punish. Evidently, the theft of identity information must be intended for an illegitimate purpose. Moreover, acquiring and disseminating information made public by the user himself cannot be regarded as a form of theft.

The Court has defined intent to gain as an internal act which can be established through the overt acts of the offender, and it may be presumed from the furtive taking of useful property pertaining to another, unless special circumstances reveal a different intent on the part of the perpetrator.[20] As such, the press, whether in quest of news reporting or social investigation, has nothing to fear since a special circumstance is present to negate intent to gain which is required by this Section.

Section 4(c)(1) of the Cybercrime Law

Section 4(c)(1) provides:

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form or not, from which the identity of an individual is apparent or can be reasonably and directly ascertained by the entity holding the information, or when put together with other information would directly and certainly identify an individual."

[20] *People v. Uy*, G.R. No. 174660, May 30, 2011, 649 SCRA 236.

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

x x x x x x x x x

(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.

Petitioners claim that the above violates the freedom of expression clause of the Constitution.[21] They express fear that private communications of sexual character between husband and wife or consenting adults, which are not regarded as crimes under the penal code, would now be regarded as crimes when done "for favor" in cyberspace. In common usage, the term "favor" includes "gracious kindness," "a special privilege or right granted or conceded," or "a token of love (as a ribbon) usually worn conspicuously."[22] This meaning given to the term "favor" embraces socially tolerated trysts. The law as written would invite law enforcement agencies into the bedrooms of married couples or consenting individuals.

But the deliberations of the Bicameral Committee of Congress on this section of the Cybercrime Prevention Act give a proper perspective on the issue. These deliberations show a lack of intent to penalize a "private showing x x x between and among two private persons x x x although that may be a form of obscenity to some."[23] The understanding of those who drew up the cybercrime law is that the element of "engaging in a business" is necessary to constitute the illegal cybersex.[24] The Act actually seeks to punish cyber prostitution, white slave trade, and

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[21] *Supra* note 17 (G.R. No. 203359 [*Guingona*]; G.R. No. 203518 [*PIFA*]).

[22] Merriam-Webster, http://www.merriam-webster.com/dictionary/favor (last accessed May 30, 2013).

[23] Bicameral Conference Committee, pp. 5-6.

[24] *Id*.

pornography for favor and consideration. This includes interactive prostitution and pornography, *i.e.*, by webcam.[25]

The subject 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." The Anti-Trafficking in Persons Act of 2003 penalizes those who "maintain or hire a person to engage in prostitution or pornography."[26] The law defines prostitution as any act, transaction, scheme, or design involving the use of a person by another, for sexual intercourse or lascivious conduct in exchange for money, profit, or any other consideration.[27]

The case of *Nogales v. People*[28] shows the extent to which the State can regulate materials that serve no other purpose than satisfy the market for violence, lust, or pornography.[29] The Court weighed the property rights of individuals against the public welfare. Private property, if containing pornographic materials, may be forfeited and destroyed. Likewise, engaging in sexual acts privately through internet connection, perceived by some as a right, has to be balanced with the mandate of the State to eradicate white slavery and the exploitation of women.

In any event, consenting adults are protected by the wealth of jurisprudence delineating the bounds of obscenity.[30] The Court will not declare Section 4(c)(1) unconstitutional where it stands a construction that makes it apply only to persons engaged in the business of maintaining, controlling, or operating, directly or indirectly, the lascivious exhibition of sexual organs or sexual activity with the aid of a computer system as Congress has intended.

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[25] Office of the Solicitor General, comment, p. 71.

[26] REPUBLIC ACT 9208, Section 4(e).

[27] *Id.*, Section 3(c).

[28] G.R. No. 191080, November 21, 2011, 660 SCRA 475.

[29] REVISED PENAL CODE, Article 201 (2)(b)(2), as amended by Presidential Decree 969.

[30] *Pita v. Court of Appeals*, 258-A Phil. 134 (1989).

Section 4(c)(2) of the Cybercrime Law

Section 4(c)(2) provides:

> Sec. 4. *Cybercrime Offenses.* – The following acts constitute the offense of cybercrime punishable under this Act:
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> x x x x x x x x x
>
> (c) Content-related Offenses:
>
> x x x x x x x x x
>
> (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.

It seems that the above merely expands the scope of the Anti-Child Pornography Act of 2009[31] (ACPA) to cover identical activities in cyberspace. In theory, nothing prevents the government from invoking the ACPA when prosecuting persons who commit child pornography using a computer system. Actually, ACPA's definition of child pornography already embraces the use of "electronic, mechanical, digital, optical, magnetic or any other means." Notably, no one has questioned this ACPA provision.

Of course, the law makes the penalty higher by one degree when the crime is committed in cyberspace. But no one can complain since the intensity or duration of penalty is a legislative prerogative and there is rational basis for such higher penalty.[32] The potential for uncontrolled proliferation of a particular piece of child pornography when uploaded in the cyberspace is incalculable.

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[31] REPUBLIC ACT 9775 entitled AN ACT DEFINING THE CRIME OF CHILD PORNOGRAPHY, PRESCRIBING PENALTIES THEREFOR AND FOR OTHER PURPOSES.

[32] *Sto. Tomas v. Salac*, G.R. No. 152642, November 13, 2012, 685 SCRA 245, citing *People v. Ventura*, 114 Phil. 162, 167 (1962).

Petitioners point out that the provision of ACPA that makes it unlawful for any person to "produce, direct, manufacture or create any form of child pornography"[33] clearly relates to the prosecution of persons who aid and abet the core offenses that ACPA seeks to punish.[34] Petitioners are wary that a person who merely doodles on paper and imagines a sexual abuse of a 16-year-old is not criminally liable for producing child pornography but one who formulates the idea on his laptop would be. Further, if the author bounces off his ideas on Twitter, anyone who replies to the tweet could be considered aiding and abetting a cybercrime.

The question of aiding and abetting the offense by simply commenting on it will be discussed elsewhere below. For now the Court must hold that the constitutionality of Section 4(c)(2) is not successfully challenged.

Section 4(c)(3) of the Cybercrime Law

Section 4(c)(3) provides:

Sec. 4. Cybercrime Offenses. – The following acts constitute the offense of cybercrime punishable under this Act:

x x x x x x x x x

(c) Content-related Offenses:

x x x x x x x x x

(3) *Unsolicited Commercial Communications*. — The transmission of commercial electronic communication with the use of computer system which seeks 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

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[33] *Supra* note 31, Section 4(b).

[34] G.R. No. 203407 (*Bagong Alyansang Makabayan*), MEMORANDUM, pp. 34-37.

(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.

The above penalizes the transmission of unsolicited commercial communications, also known as "spam." The term "spam" surfaced in early internet chat rooms and interactive fantasy games. One who repeats the same sentence or comment was said to be making a "spam." The term referred to a Monty Python's Flying Circus scene in which actors would keep saying "Spam, Spam, Spam, and Spam" when reading options from a menu.[35]

The Government, represented by the Solicitor General, points out that unsolicited commercial communications or spams are a nuisance that wastes the storage and network capacities of internet service providers, reduces the efficiency of commerce and technology, and interferes with the owner's peaceful enjoyment of his property. Transmitting spams amounts to trespass to one's privacy since the person sending out spams enters the recipient's domain without prior permission. The OSG contends that commercial speech enjoys less protection in law.

But, firstly, the government presents no basis for holding that unsolicited electronic ads reduce the "efficiency of computers." Secondly, people, before the arrival of the age of computers, have already been receiving such unsolicited ads by mail. These have never been outlawed as nuisance since people might have interest in such ads. What matters is that the recipient

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[35] *White Buffalo Ventures, LLC v. Univ. of Tex. at Austin*, 2004 U.S. Dist. LEXIS 19152 (W.D. Tex. Mar. 22, 2004).

has the option of not opening or reading these mail ads. That is true with spams. Their recipients always have the option to delete or not to read them.

To prohibit the transmission of unsolicited ads would deny a person the right to read his emails, even unsolicited commercial ads addressed to him. Commercial 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.[36] The State cannot rob him of this right without violating the constitutionally guaranteed freedom of expression. Unsolicited advertisements are legitimate forms of expression.

Articles 353, 354, and 355 of the Penal Code Section 4(c)(4) of the Cyber Crime Law

Petitioners dispute the constitutionality of both the penal code provisions on libel as well as Section 4(c)(4) of the Cybercrime Prevention Act on cyberlibel.

The RPC provisions on libel read:

> 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:
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> 1. A private communication made by any person to another in the performance of any legal, moral or social duty; and
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> 2. A fair and true report, made in good faith, without any comments or remarks, of any judicial, legislative or other official

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[36] Concurring Opinion of Chief Justice Reynato S. Puno in *Pharmaceutical and Health Care Association of the Philippines v. Duque III*, 561 Phil. 387, 449 (2007).

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 libel provision of the cybercrime law, on the other hand, merely incorporates to form part of it the provisions of the RPC on libel. Thus Section 4(c)(4) reads:

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

x x x x x x x x x

(c) Content-related Offenses:

x x x x x x x x x

(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.

Petitioners lament that libel provisions of the penal code[37] and, in effect, the libel provisions of the cybercrime law carry with them the requirement of "presumed malice" even when the latest jurisprudence already replaces it with the higher standard of "actual malice" as a basis for conviction.[38] Petitioners argue that inferring "presumed malice" from the accused's defamatory statement by virtue of Article 354 of the penal code infringes on his constitutionally guaranteed freedom of expression.

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[37] *Supra* note 29, Article 362.

[38] *Borjal v. Court of Appeals*, 361 Phil. 1 (1999); *Vasquez v. Court of Appeals*, 373 Phil. 238 (1999).

Petitioners would go further. They contend that the laws on libel should be stricken down as unconstitutional for otherwise good jurisprudence requiring "actual malice" could easily be overturned as the Court has done in *Fermin v. People*[39] even where the offended parties happened to be public figures.

The elements of libel are: (a) the allegation of a discreditable act or condition concerning another; (b) publication of the charge; (c) identity of the person defamed; and (d) existence of malice.[40]

There is "actual malice" or malice in fact[41] when the offender makes the defamatory statement with the knowledge that it is false or with reckless disregard of whether it was false or not.[42] The reckless disregard standard used here requires a high degree of awareness of probable falsity. There must be sufficient evidence to permit the conclusion that the accused in fact entertained serious doubts as to the truth of the statement he published. Gross or even extreme negligence is not sufficient to establish actual malice.[43]

The prosecution bears the burden of proving the presence of actual malice in instances where such element is required to establish guilt. The defense of absence of actual malice, even when the statement turns out to be false, is available where the offended party is a public official or a public figure, as in the cases of *Vasquez* (a *barangay* official) and *Borjal* (the Executive Director, First National Conference on Land Transportation). Since the penal code and implicitly, the cybercrime law, mainly target libel against private persons, the Court recognizes that these laws imply a stricter standard of "malice" to convict the author of a defamatory statement where the offended party is

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[39] 573 Phil. 278 (2008).

[40] *Vasquez v. Court of Appeals*, *supra* note 38.

[41] L. BOADO, *COMPACT REVIEWER IN CRIMINAL LAW* 403-404 (2d ed. 2007).

[42] *Vasquez v. Court of Appeals*, *supra* note 38, citing *New York Times v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686 (1964).

[43] *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1151 (Cal. App. 4th Dist. 2004).

a public figure. Society's interest and the maintenance of good government demand a full discussion of public affairs.[44]

Parenthetically, the Court cannot accept the proposition that its ruling in *Fermin* disregarded the higher standard of actual malice or malice in fact when it found Cristinelli Fermin guilty of committing libel against complainants who were public figures. Actually, the Court found the presence of malice in fact in that case. Thus:

> It can be gleaned from her testimony that petitioner had the motive to make defamatory imputations against complainants. Thus, petitioner cannot, by simply making a general denial, convince us that there was no malice on her part. Verily, **not only was there malice in law**, the article being malicious in itself, **but there was also malice in fact**, as there was motive to talk ill against complainants during the electoral campaign. (Emphasis ours)

Indeed, the Court took into account the relatively wide leeway given to utterances against public figures in the above case, cinema and television personalities, when it modified the penalty of imprisonment to just a fine of ₱6,000.00.

But, where the offended party is a private individual, the prosecution need not prove the presence of malice. The law explicitly presumes its existence (malice in law) from the defamatory character of the assailed statement.[45] For his defense, the accused must show that he has a justifiable reason for the defamatory statement even if it was in fact true.[46]

Petitioners peddle the view that both the penal code and the Cybercrime Prevention Act violate the country's obligations under the International Covenant of Civil and Political Rights (ICCPR). They point out that in *Adonis v. Republic of the Philippines*,[47] the United Nations Human Rights Committee

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[44] *Borjal v. Court of Appeals*, *supra* note 38, citing *United States v. Bustos*, 37 Phil. 731 (1918).

[45] *Supra* note 41, at 403.

[46] *Supra* note 29, Article 354.

[47] Communication 1815/2008.

(UNHRC) cited its General Comment 34 to the effect that penal defamation laws should include the defense of truth.

But General Comment 34 does not say that the truth of the defamatory statement should constitute an all-encompassing defense. As it happens, Article 361 recognizes truth as a defense but under the condition that the accused has been prompted in making the statement by good motives and for justifiable ends. Thus:

> Art. 361. Proof of the truth. — In every criminal prosecution for libel, the truth may be given in evidence to the court and if it appears that the matter charged as libelous is true, and, moreover, that it was published with good motives and for justifiable ends, the defendants shall be acquitted.
>
> Proof of the truth of an imputation of an act or omission not constituting a crime shall not be admitted, unless the imputation shall have been made against Government employees with respect to facts related to the discharge of their official duties.
>
> In such cases if the defendant proves the truth of the imputation made by him, he shall be acquitted.

Besides, the UNHRC did not actually enjoin the Philippines, as petitioners urge, to decriminalize libel. It simply suggested that defamation laws be crafted with care to ensure that they do not stifle freedom of expression.[48] Indeed, the ICCPR states that although everyone should enjoy freedom of expression, its exercise carries with it special duties and responsibilities. Free speech is not absolute. It is subject to certain restrictions, as may be necessary and as may be provided by law.[49]

The Court agrees with the Solicitor General that libel is not a constitutionally protected speech and that the government has an obligation to protect private individuals from defamation. Indeed, cyberlibel is actually not a new crime since Article 353, in relation to Article 355 of the penal code, already punishes

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[48] General Comment 34, ICCPR, par. 47.

[49] ICCPR, Article 19(2) and (3).

it. In effect, Section 4(c)(4) above merely affirms that online defamation constitutes "similar means" for committing libel.

But the Court's acquiescence goes only insofar as the cybercrime law penalizes the author of the libelous statement or article. Cyberlibel brings with it certain intricacies, unheard of when the penal code provisions on libel were enacted. The culture associated with internet media is distinct from that of print.

The internet is characterized as encouraging a freewheeling, anything-goes writing style.[50] In a sense, they are a world apart in terms of quickness of the reader's reaction to defamatory statements posted in cyberspace, facilitated by one-click reply options offered by the networking site as well as by the speed with which such reactions are disseminated down the line to other internet users. Whether these reactions to defamatory statement posted on the internet constitute aiding and abetting libel, acts that Section 5 of the cybercrime law punishes, is another matter that the Court will deal with next in relation to Section 5 of the law.

Section 5 of the Cybercrime Law

Section 5 provides:

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.

Petitioners assail the constitutionality of Section 5 that renders criminally liable any person who willfully abets or aids in the commission or attempts to commit any of the offenses enumerated

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[50] *Sandals Resorts Int'l. Ltd. v. Google, Inc.*, 86 A.D.3d 32 (N.Y. App. Div. 1st Dep't 2011).

as cybercrimes. It suffers from overbreadth, creating a chilling and deterrent effect on protected expression.

The Solicitor General contends, however, that the current body of jurisprudence and laws on aiding and abetting sufficiently protects the freedom of expression of "netizens," the multitude that avail themselves of the services of the internet. He points out that existing laws and jurisprudence sufficiently delineate the meaning of "aiding or abetting" a crime as to protect the innocent. The Solicitor General argues that plain, ordinary, and common usage is at times sufficient to guide law enforcement agencies in enforcing the law.[51] The legislature is not required to define every single word contained in the laws they craft.

Aiding or abetting has of course well-defined meaning and application in existing laws. When a person aids or abets another in destroying a forest,[52] smuggling merchandise into the country,[53] or interfering in the peaceful picketing of laborers,[54] his action is essentially physical and so is susceptible to easy assessment as criminal in character. These forms of aiding or abetting lend themselves to the tests of common sense and human experience.

But, when it comes to certain cybercrimes, the waters are muddier and the line of sight is somewhat blurred. The idea of "aiding or abetting" wrongdoings online threatens the heretofore popular and unchallenged dogmas of cyberspace use.

According to the 2011 Southeast Asia Digital Consumer Report, 33% of Filipinos have accessed the internet within a year, translating to about 31 million users.[55] Based on a recent survey, the Philippines ranks 6th in the top 10 most engaged countries for social networking.[56] Social networking sites build

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[51] Office of the Solicitor General, MEMORANDUM, pp. 69-70.

[52] REPUBLIC ACT 3701, Section 1.

[53] REPUBLIC ACT 4712, Section 5.

[54] LABOR CODE, Article 264.

[55] G.R. No. 203440 (*Sta. Maria*), PETITION, p. 2.

[56] http://www.statisticbrain.com/social-networking-statistics/(last accessed January 14, 2013).

social relations among people who, for example, share interests, activities, backgrounds, or real-life connections.[57]

Two of the most popular of these sites are Facebook and Twitter. As of late 2012, 1.2 billion people with shared interests use Facebook to get in touch.[58] Users register at this site, create a personal profile or an open book of who they are, add other users as friends, and exchange messages, including automatic notifications when they update their profile.[59] A user can post a statement, a photo, or a video on Facebook, which can be made visible to anyone, depending on the user's privacy settings.

If the post is made available to the public, meaning to everyone and not only to his friends, anyone on Facebook can react to the posting, clicking any of several buttons of preferences on the program's screen such as "Like," "Comment," or "Share." "Like" signifies that the reader likes the posting while "Comment" enables him to post online his feelings or views about the same, such as "This is great!" When a Facebook user "Shares" a posting, the original "posting" will appear on his own Facebook profile, consequently making it visible to his down-line Facebook Friends.

Twitter, on the other hand, is an internet social networking and microblogging service that enables its users to send and read short text-based messages of up to 140 characters. These are known as "Tweets." Microblogging is the practice of posting small pieces of digital content—which could be in the form of text, pictures, links, short videos, or other media—on the internet. Instead of friends, a Twitter user has "Followers," those who subscribe to this particular user's posts, enabling them to read the same, and "Following," those whom this particular user is subscribed to, enabling him to read their posts. Like Facebook, a Twitter user can make his tweets available only to his Followers, or to the general public. If a post is available to the public, any

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[57] http://en.wikipedia.org/wiki/Social_networking_service (last accessed January 14, 2013).

[58] http://www.statisticbrain.com/social-networking-statistics/(last accessed January 14, 2013).

[59] http://en.wikipedia.org/wiki/Facebook (last accessed January 14, 2013).

Twitter user can "Retweet" a given posting. Retweeting is just reposting or republishing another person's tweet without the need of copying and pasting it.

In the cyberworld, there are many actors: a) the blogger who originates the assailed statement; b) the blog service provider like Yahoo; c) the internet service provider like PLDT, Smart, Globe, or Sun; d) the internet café that may have provided the computer used for posting the blog; e) the person who makes a favorable comment on the blog; and f) the person who posts a link to the blog site.[60] Now, suppose Maria (a blogger) maintains a blog on WordPress.com (blog service provider). She needs the internet to access her blog so she subscribes to Sun Broadband (Internet Service Provider).

One day, Maria posts on her internet account the statement that a certain married public official has an illicit affair with a movie star. Linda, one of Maria's friends who sees this post, comments online, "Yes, this is so true! They are so immoral." Maria's original post is then multiplied by her friends and the latter's friends, and down the line to friends of friends almost *ad infinitum*. Nena, who is a stranger to both Maria and Linda, comes across this blog, finds it interesting and so shares the link to this apparently defamatory blog on her Twitter account. Nena's "Followers" then "Retweet" the link to that blog site.

Pamela, a Twitter user, stumbles upon a random person's "Retweet" of Nena's original tweet and posts this on her Facebook account. Immediately, Pamela's Facebook Friends start Liking and making Comments on the assailed posting. A lot of them even press the Share button, resulting in the further spread of the original posting into tens, hundreds, thousands, and greater postings.

The question is: are online postings such as "Liking" an openly defamatory statement, "Commenting" on it, or "Sharing" it with others, to be regarded as "aiding or abetting?" In libel in the

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[60] G.R. No. 203378 (*Adonis*) and G.R. No. 203391 (*Palatino*), CONSOLIDATED MEMORANDUM, p. 34.

physical world, if Nestor places on the office bulletin board a small poster that says, "Armand is a thief!," he could certainly be charged with libel. If Roger, seeing the poster, writes on it, "I like this!," that could not be libel since he did not author the poster. If Arthur, passing by and noticing the poster, writes on it, "Correct!," would that be libel? No, for he merely expresses agreement with the statement on the poster. He still is not its author. Besides, it is not clear if aiding or abetting libel in the physical world is a crime.

But suppose Nestor posts the blog, "Armand is a thief!" on a social networking site. Would a reader and his Friends or Followers, availing themselves of any of the "Like," "Comment," and "Share" reactions, be guilty of aiding or abetting libel? And, in the complex world of cyberspace expressions of thoughts, when will one be liable for aiding or abetting cybercrimes? Where is the venue of the crime?

Except for the original author of the assailed statement, the rest (those who pressed Like, Comment and Share) are essentially knee-jerk sentiments of readers who may think little or haphazardly of their response to the original posting. Will they be liable for aiding or abetting? And, considering the inherent impossibility of joining hundreds or thousands of responding "Friends" or "Followers" in the criminal charge to be filed in court, who will make a choice as to who should go to jail for the outbreak of the challenged posting?

The old parameters for enforcing the traditional form of libel would be a square peg in a round hole when applied to cyberspace libel. Unless the legislature crafts a cyber libel law that takes into account its unique circumstances and culture, such law will tend to create a chilling effect on the millions that use this new medium of communication in violation of their constitutionally-guaranteed right to freedom of expression.

The United States Supreme Court faced the same issue in *Reno v. American Civil Liberties Union*,[61] a case involving the

[61] 521 U.S. 844 (1997).

constitutionality of the Communications Decency Act of 1996. The law prohibited (1) the knowing transmission, by means of a telecommunications device, of "obscene or indecent" communications to any recipient under 18 years of age; and (2) the knowing use of an interactive computer service to send to a specific person or persons under 18 years of age or to display in a manner available to a person under 18 years of age communications that, in context, depict or describe, in terms "patently offensive" as measured by contemporary community standards, sexual or excretory activities or organs.

Those who challenged the Act claim that the law violated the First Amendment's guarantee of freedom of speech for being overbroad. The U.S. Supreme Court agreed and ruled:

> The vagueness of the Communications Decency Act of 1996 (CDA), 47 U.S.C.S. §223, is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The **vagueness of such a regulation** raises special U.S. Const. amend. I concerns because of its **obvious chilling effect on free speech**. Second, the CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. **The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.** As a practical matter, this increased deterrent effect, coupled with the risk of discriminatory enforcement of vague regulations, poses greater U.S. *Const. amend. I concerns than those implicated by certain civil regulations.*
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> x x x x x x x x x
>
> The Communications Decency Act of 1996 (CDA), 47 U.S.C.S. § 223, **presents a great threat of censoring speech that, in fact, falls outside the statute's scope. Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection**. That danger provides further reason for insisting that the statute not be overly broad. **The CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute**. (Emphasis ours)

Libel in the cyberspace can of course stain a person's image with just one click of the mouse. Scurrilous statements can spread and travel fast across the globe like bad news. Moreover, cyberlibel often goes hand in hand with cyberbullying that oppresses the victim, his relatives, and friends, evoking from mild to disastrous reactions. Still, a governmental purpose, which seeks to regulate the use of this cyberspace communication technology to protect a person's reputation and peace of mind, cannot adopt means that will unnecessarily and broadly sweep, invading the area of protected freedoms.[62]

If such means are adopted, self-inhibition borne of fear of what sinister predicaments await internet users will suppress otherwise robust discussion of public issues. Democracy will be threatened and with it, all liberties. Penal laws should provide reasonably clear guidelines for law enforcement officials and triers of facts to prevent arbitrary and discriminatory enforcement.[63] The terms "aiding or abetting" constitute broad sweep that generates chilling effect on those who express themselves through cyberspace posts, comments, and other messages.[64] Hence, Section 5 of the cybercrime law that punishes "aiding or abetting" libel on the cyberspace is a nullity.

When a penal statute encroaches upon the freedom of speech, a facial challenge grounded on the void-for-vagueness doctrine is acceptable. The inapplicability of the doctrine must be carefully delineated. As Justice Antonio T. Carpio explained in his dissent in *Romualdez v. Commission on Elections*,[65] "we must view these statements of the Court on the inapplicability of the overbreadth and vagueness doctrines to penal statutes as appropriate only insofar as these doctrines are used to mount 'facial' challenges to penal statutes not involving free speech."

In an "as applied" challenge, the petitioner who claims a violation of his constitutional right can raise any constitutional

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[62] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[63] G.R. No. 203378 (*Adonis*), FIRST AMENDED PETITION, pp. 35-36.

[64] *Supra* note 55, at 33.

[65] 576 Phil. 357 (2008).

ground – absence of due process, lack of fair notice, lack of ascertainable standards, overbreadth, or vagueness. Here, one can challenge the constitutionality of a statute only if he asserts a violation of his own rights. It prohibits one from assailing the constitutionality of the statute based solely on the violation of the rights of third persons not before the court. This rule is also known as the prohibition against third-party standing.[66]

But this rule admits of exceptions. A petitioner may for instance mount a "facial" challenge to the constitutionality of a statute even if he claims no violation of his own rights under the assailed statute where it involves free speech on grounds of overbreadth or vagueness of the statute. The rationale for this exception is to counter the "chilling effect" on protected speech that comes from statutes violating free speech. A person who does not know whether his speech constitutes a crime under an overbroad or vague law may simply restrain himself from speaking in order to avoid being charged of a crime. The overbroad or vague law thus chills him into silence.[67]

As already stated, the cyberspace is an incomparable, pervasive medium of communication. It is inevitable that any government threat of punishment regarding certain uses of the medium creates a chilling effect on the constitutionally-protected freedom of expression of the great masses that use it. In this case, the particularly complex web of interaction on social media websites would give law enforcers such latitude that they could arbitrarily or selectively enforce the law.

Who is to decide when to prosecute persons who boost the visibility of a posting on the internet by liking it? Netizens are not given "fair notice" or warning as to what is criminal conduct and what is lawful conduct. When a case is filed, how will the court ascertain whether or not one netizen's comment aided and abetted a cybercrime while another comment did not?

Of course, if the "Comment" does not merely react to the original posting but creates an altogether new defamatory story

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[66] *Id.*

[67] *Id.*

against Armand like "He beats his wife and children," then that should be considered an original posting published on the internet. Both the penal code and the cybercrime law clearly punish authors of defamatory publications. Make no mistake, libel destroys reputations that society values. Allowed to cascade in the internet, it will destroy relationships and, under certain circumstances, will generate enmity and tension between social or economic groups, races, or religions, exacerbating existing tension in their relationships.

In regard to the crime that targets child pornography, when "Google procures, stores, and indexes child pornography and facilitates the completion of transactions involving the dissemination of child pornography," does this make Google and its users aiders and abettors in the commission of child pornography crimes?[68] Byars highlights a feature in the American law on child pornography that the Cybercrimes law lacks—the exemption of a provider or notably a plain user of interactive computer service from civil liability for child pornography as follows:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider and cannot be held civilly liable for any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene...whether or not such material is constitutionally protected.[69]

When a person replies to a Tweet containing child pornography, he effectively republishes it whether wittingly or unwittingly. Does this make him a willing accomplice to the distribution of child pornography? When a user downloads the Facebook mobile application, the user may give consent to Facebook to access

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[68] A contention found in Bruce Byars, Timothy O'Keefe, and Thomas Clement "Google, Inc.: Procurer, Possessor, Distributor, Aider and Abettor in Child Pornography," http://forumonpublicpolicy.com/archivespring08/byars.pdf (last accessed May 25, 2013).

[69] *Id.*, citing 47 U.S.C. 230.

his contact details. In this way, certain information is forwarded to third parties and unsolicited commercial communication could be disseminated on the basis of this information.[70] As the source of this information, is the user aiding the distribution of this communication? The legislature needs to address this clearly to relieve users of annoying fear of possible criminal prosecution.

Section 5 with respect to Section 4(c)(4) is unconstitutional. Its vagueness raises apprehension on the part of internet users because of its obvious chilling effect on the freedom of expression, especially since the crime of aiding or abetting ensnares all the actors in the cyberspace front in a fuzzy way. What is more, as the petitioners point out, formal crimes such as libel are not punishable unless consummated.[71] In the absence of legislation tracing the interaction of netizens and their level of responsibility such as in other countries, Section 5, in relation to Section 4(c)(4) on Libel, Section 4(c)(3) on Unsolicited Commercial Communications, and Section 4(c)(2) on Child Pornography, cannot stand scrutiny.

But the crime of aiding or abetting the commission of cybercrimes under Section 5 should be permitted to apply to Section 4(a)(1) on Illegal Access, Section 4(a)(2) on Illegal Interception, Section 4(a)(3) on Data Interference, Section 4(a)(4) on System Interference, Section 4(a)(5) on Misuse of Devices, Section 4(a)(6) on Cyber-squatting, Section 4(b)(1) on Computer-related Forgery, Section 4(b)(2) on Computer-related Fraud, Section 4(b)(3) on Computer-related Identity Theft, and Section 4(c)(1) on Cybersex. None of these offenses borders on the exercise of the freedom of expression.

The crime of willfully attempting to commit any of these offenses is for the same reason not objectionable. A hacker may

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[70] Bianca Bosker, Facebook To Share Users' Home Addresses, Phone Numbers With External Sites, http://www.huffingtonpost.com/2011/02/28/facebook-home-addresses-phone-numbers_n_829459.html (last accessed July 18, 2013).

[71] G.R. No. 203440 (*Sta Maria*), MEMORANDUM, p. 14, citing Luis B. Reyes, *The Revised Penal Code*, Book 1, 118 (17th ed. 2008).

for instance have done all that is necessary to illegally access another party's computer system but the security employed by the system's lawful owner could frustrate his effort. Another hacker may have gained access to usernames and passwords of others but fail to use these because the system supervisor is alerted.[72] If Section 5 that punishes any person who willfully attempts to commit this specific offense is not upheld, the owner of the username and password could not file a complaint against him for attempted hacking. But this is not right. The hacker should not be freed from liability simply because of the vigilance of a lawful owner or his supervisor.

Petitioners of course claim that Section 5 lacks positive limits and could cover the innocent.[73] While this may be true with respect to cybercrimes that tend to sneak past the area of free expression, any attempt to commit the other acts specified in Section 4(a)(1), Section 4(a)(2), Section 4(a)(3), Section 4(a)(4), Section 4(a)(5), Section 4(a)(6), Section 4(b)(1), Section 4(b)(2), Section 4(b)(3), and Section 4(c)(1) as well as the actors aiding and abetting the commission of such acts can be identified with some reasonable certainty through adroit tracking of their works. Absent concrete proof of the same, the innocent will of course be spared.

Section 6 of the Cybercrime Law

Section 6 provides:

Sec. 6. All crimes defined and penalized by the Revised Penal Code, as amended, and special laws, if committed by, through and with the use of information and communications technologies shall be covered by the relevant provisions of this Act: *Provided*, That the penalty to be imposed shall be one (1) degree higher than that

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[72] Shiresee Bell, Man Pleads Guilty to Attempted USC Website Hacking, Email Accounts, http://columbia-sc.patch.com/groups/police-and-fire/p/man-pleaded-guilty-to-hacking-usc-website-email-accounts (last accessed July 18, 2013); Peter Ryan, Hackers target Bureau of Statistics data, http://www.abc.net.au/news/2013-04-26/abs-targeted-by-hackers/4652758 (last accessed July 18, 2013).

[73] *Supra* note 34, at 32.

provided for by the Revised Penal Code, as amended, and special laws, as the case may be.

Section 6 merely makes commission of existing crimes through the internet a qualifying circumstance. As the Solicitor General points out, there exists a substantial distinction between crimes committed through the use of information and communications technology and similar crimes committed using other means. In using the technology in question, the offender often evades identification and is able to reach far more victims or cause greater harm. The distinction, therefore, creates a basis for higher penalties for cybercrimes.

Section 7 of the Cybercrime Law

Section 7 provides:

> Sec. 7. *Liability under Other Laws.* — A prosecution under this Act shall be without prejudice to any liability for violation of any provision of the Revised Penal Code, as amended, or special laws.

The Solicitor General points out that Section 7 merely expresses the settled doctrine that a single set of acts may be prosecuted and penalized simultaneously under two laws, a special law and the Revised Penal Code. When two different laws define two crimes, prior jeopardy as to one does not bar prosecution of the other although both offenses arise from the same fact, if each crime involves some important act which is not an essential element of the other.[74] With the exception of the crimes of online libel and online child pornography, the Court would rather leave the determination of the correct application of Section 7 to actual cases.

Online libel is different. There should be no question that if the published material on print, said to be libelous, is again posted online or vice versa, that identical material cannot be the subject of two separate libels. The two offenses, one a violation of Article 353 of the Revised Penal Code and the other a violation of Section 4(c)(4) of R.A. 10175 involve essentially the same

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[74] *Supra* note 51, at 49, citing *People v. Doriquez*, 133 Phil. 295 (1968).

elements and are in fact one and the same offense. Indeed, the OSG itself claims that online libel under Section 4(c)(4) is not a new crime but is one already punished under Article 353. Section 4(c)(4) merely establishes the computer system as another means of publication.[75] Charging the offender under both laws would be a blatant violation of the proscription against double jeopardy.[76]

The same is true with child pornography committed online. Section 4(c)(2) merely expands the ACPA's scope so as to include identical activities in cyberspace. As previously discussed, ACPA's definition of child pornography in fact already covers the use of "electronic, mechanical, digital, optical, magnetic or any other means." Thus, charging the offender under both Section 4(c)(2) and ACPA would likewise be tantamount to a violation of the constitutional prohibition against double jeopardy.

Section 8 of the Cybercrime Law

Section 8 provides:

> Sec. 8. *Penalties.* — Any person found guilty of any of the punishable acts enumerated in Sections 4(a) and 4(b) of this Act shall be punished with imprisonment of *prision mayor* or a fine of at least Two hundred thousand pesos (PhP200,000.00) up to a maximum amount commensurate to the damage incurred or both.
>
> Any person found guilty of the punishable act under Section 4(a)(5) shall be punished with imprisonment of *prision mayor* or a fine of not more than Five hundred thousand pesos (PhP500,000.00) or both.
>
> If punishable acts in Section 4(a) are committed against critical infrastructure, the penalty of *reclusion temporal* or a fine of at least Five hundred thousand pesos (PhP500,000.00) up to maximum amount commensurate to the damage incurred or both, shall be imposed.

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[75] Office of the Solicitor General, MEMORANDUM, p. 49.

[76] Section 21, Article III, 1987 CONSTITUTION: "No person shall be twice put in jeopardy of punishment for the same offense. If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act."

Any person found guilty of any of the punishable acts enumerated in Section 4(c)(1) of this Act shall be punished with imprisonment of *prision mayor* or a fine of at least Two hundred thousand pesos (PhP200,000.00) but not exceeding One million pesos (PhP1,000,000.00) or both.

Any person found guilty of any of the punishable acts enumerated in Section 4(c)(2) of this Act shall be punished with the penalties as enumerated in Republic Act No. 9775 or the "Anti-Child Pornography Act of 2009:" *Provided*, That the penalty to be imposed shall be one (1) degree higher than that provided for in Republic Act No. 9775, if committed through a computer system.

Any person found guilty of any of the punishable acts enumerated in Section 4(c)(3) shall be punished with imprisonment of *arresto mayor* or a fine of at least Fifty thousand pesos (PhP50,000.00) but not exceeding Two hundred fifty thousand pesos (PhP250,000.00) or both.

Any person found guilty of any of the punishable acts enumerated in Section 5 shall be punished with imprisonment one (1) degree lower than that of the prescribed penalty for the offense or a fine of at least One hundred thousand pesos (PhP100,000.00) but not exceeding Five hundred thousand pesos (PhP500,000.00) or both.

Section 8 provides for the penalties for the following crimes: Sections 4(a) on Offenses Against the Confidentiality, Integrity and Availability of Computer Data and Systems; 4(b) on Computer-related Offenses; 4(a)(5) on Misuse of Devices; when the crime punishable under 4(a) is committed against critical infrastructure; 4(c)(1) on Cybersex; 4(c)(2) on Child Pornography; 4(c)(3) on Unsolicited Commercial Communications; and Section 5 on Aiding or Abetting, and Attempt in the Commission of Cybercrime.

The matter of fixing penalties for the commission of crimes is as a rule a legislative prerogative. Here the legislature prescribed a measure of severe penalties for what it regards as deleterious cybercrimes. They appear proportionate to the evil sought to be punished. The power to determine penalties for offenses is not diluted or improperly wielded simply because at some prior time the act or omission was but an element of another offense

or might just have been connected with another crime.[77] Judges and magistrates can only interpret and apply them and have no authority to modify or revise their range as determined by the legislative department. The courts should not encroach on this prerogative of the lawmaking body.[78]

Section 12 of the Cybercrime Law

Section 12 provides:

> Sec. 12. *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.

Petitioners assail the grant to law enforcement agencies of the power to collect or record traffic data in real time as tending

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[77] *Baylosis v. Hon. Chavez, Jr.*, 279 Phil. 448 (1991).

[78] *People v. Dela Cruz*, G.R. No. 100386, December 11, 1992, 216 SCRA 476, citing *People v. Millora*, 252 Phil. 105 (1989).

to curtail civil liberties or provide opportunities for official abuse. They claim that data showing where digital messages come from, what kind they are, and where they are destined need not be incriminating to their senders or recipients before they are to be protected. Petitioners invoke the right of every individual to privacy and to be protected from government snooping into the messages or information that they send to one another.

The first question is whether or not Section 12 has a proper governmental purpose since a law may require the disclosure of matters normally considered private but then only upon showing that such requirement has a rational relation to the purpose of the law,[79] that there is a compelling State interest behind the law, and that the provision itself is narrowly drawn.[80] In assessing regulations affecting privacy rights, courts should balance the legitimate concerns of the State against constitutional guarantees.[81]

Undoubtedly, the State has a compelling interest in enacting the cybercrime law for there is a need to put order to the tremendous activities in cyberspace for public good.[82] To do

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[79] *Supra* note 14, at 436-437.

[80] *Ople v. Torres*, 354 Phil. 948, 974-975 (1998).

[81] *In the Matter of the Petition for Habeas Corpus of Capt. Alejano v. Gen. Cabuay*, 505 Phil. 298, 322 (2005); *Gamboa v. Chan*, G.R. No. 193636, July 24, 2012, 677 SCRA 385.

[82] SEC. 2. *Declaration of Policy*. — The State recognizes the vital role of information and communications industries such as content production, telecommunications, broadcasting electronic commerce, and data processing, in the nation's overall social and economic development. The State also recognizes the importance of providing an environment conducive to the development, acceleration, and rational application and exploitation of information and communications technology (ICT) to attain free, easy, and intelligible access to exchange and/or delivery of information; and the need to protect and safeguard the integrity of computer, computer and communications systems, networks, and databases, and the confidentiality, integrity, and availability of information and data stored therein, from all forms of misuse, abuse, and illegal access by making punishable under the law such conduct or conducts. In this light, the State shall adopt sufficient powers to effectively prevent and combat such offenses by facilitating their detection, investigation, and prosecution at both

this, it is within the realm of reason that the government should be able to monitor traffic data to enhance its ability to combat all sorts of cybercrimes.

Chapter IV of the cybercrime law, of which the collection or recording of traffic data is a part, aims to provide law enforcement authorities with the power they need for spotting, preventing, and investigating crimes committed in cyberspace. Crime-fighting is a state business. Indeed, as Chief Justice Sereno points out, the Budapest Convention on Cybercrimes requires signatory countries to adopt legislative measures to empower state authorities to collect or record "traffic data, in real time, associated with specified communications."[83] And this is precisely what Section 12 does. It empowers law enforcement agencies in this country to collect or record such data.

But is not evidence of yesterday's traffic data, like the scene of the crime after it has been committed, adequate for fighting cybercrimes and, therefore, real-time data is superfluous for that purpose? Evidently, it is not. Those who commit the crimes of accessing a computer system without right,[84] transmitting viruses,[85] lasciviously exhibiting sexual organs or sexual activity for favor or consideration;[86] and producing child pornography[87] could easily evade detection and prosecution by simply moving the physical location of their computers or laptops from day to day. In this digital age, the wicked can commit cybercrimes from virtually anywhere: from internet cafés, from kindred places that provide free internet services, and from unregistered mobile internet connectors. Criminals using cellphones under pre-paid

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the domestic and international levels, and by providing arrangements for fast and reliable international cooperation.

[83] Convention on Cybercrime, Art. 20, *opened for signature November 23, 2001*, ETS 185.

[84] Cybercrime Law, Section 4(a)(1).

[85] *Id.*, Section 4(a)(3).

[86] *Id.*, Section 4(c)(1).

[87] *Id.*, Section 4(c)(2).

arrangements and with unregistered SIM cards do not have listed addresses and can neither be located nor identified. There are many ways the cyber criminals can quickly erase their tracks. Those who peddle child pornography could use relays of computers to mislead law enforcement authorities regarding their places of operations. Evidently, it is only real-time traffic data collection or recording and a subsequent recourse to court-issued search and seizure warrant that can succeed in ferreting them out.

Petitioners of course point out that the provisions of Section 12 are too broad and do not provide ample safeguards against crossing legal boundaries and invading the people's right to privacy. The concern is understandable. Indeed, the Court recognizes in *Morfe v. Mutuc*[88] that certain constitutional guarantees work together to create zones of privacy wherein governmental powers may not intrude, and that there exists an independent constitutional right of privacy. Such right to be left alone has been regarded as the beginning of all freedoms.[89]

But that right is not unqualified. In *Whalen v. Roe*,[90] the United States Supreme Court classified privacy into two categories: decisional privacy and informational privacy. Decisional privacy involves the right to independence in making certain important decisions, while informational privacy refers to the interest in avoiding disclosure of personal matters. It is the latter right—the right to informational privacy—that those who oppose government collection or recording of traffic data in real-time seek to protect.

Informational privacy has two aspects: the right not to have private information disclosed, and the right to live freely without surveillance and intrusion.[91] In determining whether or not a matter is entitled to the right to privacy, this Court has laid down a two-fold test. The first is a subjective test, where one

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[88] *Supra* note 14.

[89] *Id.* at 433-437.

[90] 429 U.S. 589 (1977).

[91] *Id.* at 599.

claiming the right must have an actual or legitimate expectation of privacy over a certain matter. The second is an objective test, where his or her expectation of privacy must be one society is prepared to accept as objectively reasonable.[92]

Since the validity of the cybercrime law is being challenged, not in relation to its application to a particular person or group, petitioners' challenge to Section 12 applies to all information and communications technology (ICT) users, meaning the large segment of the population who use all sorts of electronic devices to communicate with one another. Consequently, the expectation of privacy is to be measured from the general public's point of view. Without reasonable expectation of privacy, the right to it would have no basis in fact.

As the Solicitor General points out, an ordinary ICT user who courses his communication through a service provider, must of necessity disclose to the latter, a third person, the traffic data needed for connecting him to the recipient ICT user. For example, an ICT user who writes a text message intended for another ICT user must furnish his service provider with his cellphone number and the cellphone number of his recipient, accompanying the message sent. It is this information that creates the traffic data. Transmitting communications is akin to putting a letter in an envelope properly addressed, sealing it closed, and sending it through the postal service. Those who post letters have no expectations that no one will read the information appearing outside the envelope.

Computer data—messages of all kinds—travel across the internet in packets and in a way that may be likened to parcels of letters or things that are sent through the posts. When data is sent from any one source, the content is broken up into packets and around each of these packets is a wrapper or header. This header contains the traffic data: information that tells computers where the packet originated, what kind of data is in the packet (SMS, voice call, video, internet chat messages, email, online browsing data, *etc*.), where the packet is going, and how the

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[92] *Supra* note 13, at 206.

packet fits together with other packets.[93] The difference is that traffic data sent through the internet at times across the ocean do not disclose the actual names and addresses (residential or office) of the sender and the recipient, only their coded internet protocol (IP) addresses. The packets travel from one computer system to another where their contents are pieced back together. Section 12 does not permit law enforcement authorities to look into the contents of the messages and uncover the identities of the sender and the recipient.

For example, when one calls to speak to another through his cellphone, the service provider's communication's system will put his voice message into packets and send them to the other person's cellphone where they are refitted together and heard. The latter's spoken reply is sent to the caller in the same way. To be connected by the service provider, the sender reveals his cellphone number to the service provider when he puts his call through. He also reveals the cellphone number to the person he calls. The other ways of communicating electronically follow the same basic pattern.

In *Smith v. Maryland*,[94] cited by the Solicitor General, the United States Supreme Court reasoned that telephone users in the '70s must realize that they necessarily convey phone numbers to the telephone company in order to complete a call. That Court ruled that even if there is an expectation that phone numbers one dials should remain private, such expectation is not one that society is prepared to recognize as reasonable.

In much the same way, ICT users must know that they cannot communicate or exchange data with one another over cyberspace except through some service providers to whom they must submit certain traffic data that are needed for a successful cyberspace communication. The conveyance of this data takes them out of the private sphere, making the expectation to privacy in regard

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[93] Jonathan Strickland, How IP Convergence Works, http://computer.howstuffworks.com/ip-convergence2.htm (last accessed May 10, 2013).

[94] 442 U.S. 735 (1979).

to them an expectation that society is not prepared to recognize as reasonable.

The Court, however, agrees with Justices Carpio and Brion that when seemingly random bits of traffic data are gathered in bulk, pooled together, and analyzed, they reveal patterns of activities which can then be used to create profiles of the persons under surveillance. With enough traffic data, analysts may be able to determine a person's close associations, religious views, political affiliations, even sexual preferences. Such information is likely beyond what the public may expect to be disclosed, and clearly falls within matters protected by the right to privacy. But has the procedure that Section 12 of the law provides been drawn narrowly enough to protect individual rights?

Section 12 empowers law enforcement authorities, "with due cause," to collect or record by technical or electronic means traffic data in real-time. Petitioners point out that the phrase "due cause" has no precedent in law or jurisprudence and that whether there is due cause or not is left to the discretion of the police. Replying to this, the Solicitor General asserts that Congress is not required to define the meaning of every word it uses in drafting the law.

Indeed, courts are able to save vague provisions of law through statutory construction. But the cybercrime law, dealing with a novel situation, fails to hint at the meaning it intends for the phrase "due cause." The Solicitor General suggests that "due cause" should mean "just reason or motive" and "adherence to a lawful procedure." But the Court cannot draw this meaning since Section 12 does not even bother to relate the collection of data to the probable commission of a particular crime. It just says, "with due cause," thus justifying a general gathering of data. It is akin to the use of a general search warrant that the Constitution prohibits.

Due cause is also not descriptive of the purpose for which data collection will be used. Will the law enforcement agencies use the traffic data to identify the perpetrator of a cyber attack? Or will it be used to build up a case against an identified suspect? Can the data be used to prevent cybercrimes from happening?

The authority that Section 12 gives law enforcement agencies is too sweeping and lacks restraint. While it says that traffic data collection should not disclose identities or content data, such restraint is but an illusion. Admittedly, nothing can prevent law enforcement agencies holding these data in their hands from looking into the identity of their sender or receiver and what the data contains. This will unnecessarily expose the citizenry to leaked information or, worse, to extortion from certain bad elements in these agencies.

Section 12, of course, limits the collection of traffic data to those "associated with specified communications." But this supposed limitation is no limitation at all since, evidently, it is the law enforcement agencies that would specify the target communications. The power is virtually limitless, enabling law enforcement authorities to engage in "fishing expedition," choosing whatever specified communication they want. This evidently threatens the right of individuals to privacy.

The Solicitor General points out that Section 12 needs to authorize collection of traffic data "in real time" because it is not possible to get a court warrant that would authorize the search of what is akin to a "moving vehicle." But warrantless search is associated with a police officer's determination of probable cause that a crime has been committed, that there is no opportunity for getting a warrant, and that unless the search is immediately carried out, the thing to be searched stands to be removed. These preconditions are not provided in Section 12.

The Solicitor General is honest enough to admit that Section 12 provides minimal protection to internet users and that the procedure envisioned by the law could be better served by providing for more robust safeguards. His bare assurance that law enforcement authorities will not abuse the provisions of Section 12 is of course not enough. The grant of the power to track cyberspace communications in real time and determine their sources and destinations must be narrowly drawn to preclude abuses.[95]

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[95] *Supra* note 80, at 983.

Petitioners also ask that the Court strike down Section 12 for being violative of the void-for-vagueness doctrine and the overbreadth doctrine. These doctrines however, have been consistently held by this Court to apply only to free speech cases. But Section 12 on its own neither regulates nor punishes any type of speech. Therefore, such analysis is unnecessary.

This Court is mindful that advances in technology allow the government and kindred institutions to monitor individuals and place them under surveillance in ways that have previously been impractical or even impossible. "All the forces of a technological age x x x operate to narrow the area of privacy and facilitate intrusions into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society."[96] The Court must ensure that laws seeking to take advantage of these technologies be written with specificity and definiteness as to ensure respect for the rights that the Constitution guarantees.

Section 13 of the Cybercrime Law

Section 13 provides:

> Sec. 13. *Preservation of Computer Data*. — The integrity of traffic data and subscriber information relating to communication services provided by a service provider shall be preserved for a minimum period of six (6) months from the date of the transaction. Content data shall be similarly preserved for six (6) months from the date of receipt of the order from law enforcement authorities requiring its preservation.
>
> Law enforcement authorities may order a one-time extension for another six (6) months: Provided, That once computer data preserved, transmitted or stored by a service provider is used as evidence in a case, the mere furnishing to such service provider of the transmittal document to the Office of the Prosecutor shall be deemed a notification to preserve the computer data until the termination of the case.
>
> The service provider ordered to preserve computer data shall keep confidential the order and its compliance.

[96] *Supra* note 14, at 437, citing Emerson, *Nine Justices in Search of a Doctrine*, 64 Mich. Law Rev. 219, 229 (1965).

Petitioners in G.R. 203391[97] claim that Section 13 constitutes an undue deprivation of the right to property. They liken the data preservation order that law enforcement authorities are to issue as a form of garnishment of personal property in civil forfeiture proceedings. Such order prevents internet users from accessing and disposing of traffic data that essentially belong to them.

No doubt, the contents of materials sent or received through the internet belong to their authors or recipients and are to be considered private communications. But it is not clear that a service provider has an obligation to indefinitely keep a copy of the same as they pass its system for the benefit of users. By virtue of Section 13, however, the law now requires service providers to keep traffic data and subscriber information relating to communication services for at least six months from the date of the transaction and those relating to content data for at least six months from receipt of the order for their preservation.

Actually, the user ought to have kept a copy of that data when it crossed his computer if he was so minded. The service provider has never assumed responsibility for their loss or deletion while in its keep.

At any rate, as the Solicitor General correctly points out, the data that service providers preserve on orders of law enforcement authorities are not made inaccessible to users by reason of the issuance of such orders. The process of preserving data will not unduly hamper the normal transmission or use of the same.

Section 14 of the Cybercrime Law

Section 14 provides:

Sec. 14. *Disclosure of Computer Data*. — Law enforcement authorities, upon securing a court warrant, shall issue an order requiring any person or service provider to disclose or submit subscriber's information, traffic data or relevant data in his/its

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[97] G.R. No. 203391 (*Palatino v. Ochoa*).

possession or control within seventy-two (72) hours from receipt of the order in relation to a valid complaint officially docketed and assigned for investigation and the disclosure is necessary and relevant for the purpose of investigation.

The process envisioned in Section 14 is being likened to the issuance of a subpoena. Petitioners' objection is that the issuance of subpoenas is a judicial function. But it is well-settled that the power to issue subpoenas is not exclusively a judicial function. Executive agencies have the power to issue subpoena as an adjunct of their investigatory powers.[98]

Besides, what Section 14 envisions is merely the enforcement of a duly issued court warrant, a function usually lodged in the hands of law enforcers to enable them to carry out their executive functions. The prescribed procedure for disclosure would not constitute an unlawful search or seizure nor would it violate the privacy of communications and correspondence. Disclosure can be made only after judicial intervention.

Section 15 of the Cybercrime Law

Section 15 provides:

Sec. 15. *Search, Seizure and Examination of Computer Data*. — Where a search and seizure warrant is properly issued, the law enforcement authorities shall likewise have the following powers and duties.

Within the time period specified in the warrant, to conduct interception, as defined in this Act, and:

(a) To secure a computer system or a computer data storage medium;

(b) To make and retain a copy of those computer data secured;

(c) To maintain the integrity of the relevant stored computer data;

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[98] *Biraogo v. Philippine Truth Commission*, G.R. Nos. 192935 and 193036, December 7, 2010, 637 SCRA 78, 143; ADMINISTRATIVE CODE of 1987, Book I, Chapter 9, Section 37, and Book VII, Chapter 1, Section 13.

(d) To conduct forensic analysis or examination of the computer data storage medium; and

(e) To render inaccessible or remove those computer data in the accessed computer or computer and communications network.

Pursuant thereof, the law enforcement authorities may order any person who has knowledge about the functioning of the computer system and the measures to protect and preserve the computer data therein to provide, as is reasonable, the necessary information, to enable the undertaking of the search, seizure and examination.

Law enforcement authorities may request for an extension of time to complete the examination of the computer data storage medium and to make a return thereon but in no case for a period longer than thirty (30) days from date of approval by the court.

Petitioners challenge Section 15 on the assumption that it will supplant established search and seizure procedures. On its face, however, Section 15 merely enumerates the duties of law enforcement authorities that would ensure the proper collection, preservation, and use of computer system or data that have been seized by virtue of a court warrant. The exercise of these duties do not pose any threat on the rights of the person from whom they were taken. Section 15 does not appear to supersede existing search and seizure rules but merely supplements them.

Section 17 of the Cybercrime Law

Section 17 provides:

Sec. 17. *Destruction of Computer Data*. — Upon expiration of the periods as provided in Sections 13 and 15, service providers and law enforcement authorities, as the case may be, shall immediately and completely destroy the computer data subject of a preservation and examination.

Section 17 would have the computer data, previous subject of preservation or examination, destroyed or deleted upon the lapse of the prescribed period. The Solicitor General justifies this as necessary to clear up the service provider's storage systems and prevent overload. It would also ensure that investigations are quickly concluded.

Petitioners claim that such destruction of computer data subject of previous preservation or examination violates the user's right against deprivation of property without due process of law. But, as already stated, it is unclear that the user has a demandable right to require the service provider to have that copy of the data saved indefinitely for him in its storage system. If he wanted them preserved, he should have saved them in his computer when he generated the data or received it. He could also request the service provider for a copy before it is deleted.

Section 19 of the Cybercrime Law

Section 19 empowers the Department of Justice to restrict or block access to computer data:

> 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.

Petitioners contest Section 19 in that it stifles freedom of expression and violates the right against unreasonable searches and seizures. The Solicitor General concedes that this provision may be unconstitutional. But since laws enjoy a presumption of constitutionality, the Court must satisfy itself that Section 19 indeed violates the freedom and right mentioned.

Computer data[99] may refer to entire programs or lines of code, including malware, as well as files that contain texts, images, audio, or video recordings. Without having to go into a lengthy discussion of property rights in the digital space, it is indisputable that computer data, produced or created by their writers or authors

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[99] Computer data is defined by R.A. 10175 as follows:

"SEC. 3. Definition of Terms. x x x

x x x x x x x x x

(e) Computer data refers to any representation of facts, information, or concepts in a form suitable for processing in a computer system including a program suitable to cause a computer system to perform a function and includes electronic documents and/or electronic data messages whether stored in local computer systems or online."

may constitute personal property. Consequently, they are protected from unreasonable searches and seizures, whether while stored in their personal computers or in the service provider's systems.

Section 2, Article III of the 1987 Constitution provides that the right to be secure in one's papers and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable. Further, it states that no search warrant shall issue except upon probable cause to be determined personally by the judge. Here, the Government, in effect, seizes and places the computer data under its control and disposition without a warrant. The Department of Justice order cannot substitute for judicial search warrant.

The content of the computer data can also constitute speech. In such a case, Section 19 operates as a restriction on the freedom of expression over cyberspace. Certainly not all forms of speech are protected. Legislature may, within constitutional bounds, declare certain kinds of expression as illegal. But for an executive officer to seize content alleged to be unprotected without any judicial warrant, it is not enough for him to be of the opinion that such content violates some law, for to do so would make him judge, jury, and executioner all rolled into one.[100]

Not only does Section 19 preclude any judicial intervention, but it also disregards jurisprudential guidelines established to determine the validity of restrictions on speech. Restraints on free speech are generally evaluated on one of or a combination of three tests: the dangerous tendency doctrine, the balancing of interest test, and the clear and present danger rule.[101] Section 19, however, merely requires that the data to be blocked be found *prima facie* in violation of any provision of the cybercrime law. Taking Section 6 into consideration, this can actually be made to apply in relation to any penal provision. It does not take into consideration any of the three tests mentioned above.

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[100] *Pita v. Court of Appeals*, *supra* note 30, at 151.

[101] *Chavez v. Gonzales*, 569 Phil. 155 (2008).

The Court is therefore compelled to strike down Section 19 for being violative of the constitutional guarantees to freedom of expression and against unreasonable searches and seizures.

Section 20 of the Cybercrime Law

Section 20 provides:

> Sec. 20. *Noncompliance*. — Failure to comply with the provisions of Chapter IV hereof specifically the orders from law enforcement authorities shall be punished as a violation of Presidential Decree No. 1829 with imprisonment of *prision correccional* in its maximum period or a fine of One hundred thousand pesos (Php100,000.00) or both, for each and every noncompliance with an order issued by law enforcement authorities.

Petitioners challenge Section 20, alleging that it is a bill of attainder. The argument is that the mere failure to comply constitutes a legislative finding of guilt, without regard to situations where non-compliance would be reasonable or valid.

But since the non-compliance would be punished as a violation of Presidential Decree (P.D.) 1829,[102] Section 20 necessarily incorporates elements of the offense which are defined therein. If Congress had intended for Section 20 to constitute an offense in and of itself, it would not have had to make reference to any other statue or provision.

P.D. 1829 states:

> Section 1. The penalty of *prision correccional* in its maximum period, or a fine ranging from 1,000 to 6,000 pesos, or both, shall be imposed upon any person who knowingly or willfully obstructs, impedes, frustrates or delays the apprehension of suspects and the investigation and prosecution of criminal cases by committing any of the following acts: x x x.

Thus, the act of non-compliance, for it to be punishable, must still be done "knowingly or willfully." There must still be a judicial determination of guilt, during which, as the Solicitor

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[102] Entitled PENALIZING OBSTRUCTION OF APPREHENSION AND PROSECUTION OF CRIMINAL OFFENDERS.

General assumes, defense and justifications for non-compliance may be raised. Thus, Section 20 is valid insofar as it applies to the provisions of Chapter IV which are not struck down by the Court.

Sections 24 and 26(a) of the Cybercrime Law

Sections 24 and 26(a) provide:

> Sec. 24. *Cybercrime Investigation and Coordinating Center*.– There is hereby created, within thirty (30) days from the effectivity of this Act, an inter-agency body to be known as the Cybercrime Investigation and Coordinating Center (CICC), under the administrative supervision of the Office of the President, for policy coordination among concerned agencies and for the formulation and enforcement of the national cybersecurity plan.
>
> Sec. 26. *Powers and Functions*.– The CICC shall have the following powers and functions:
>
> (a) To formulate a national cybersecurity plan and extend immediate assistance of real time commission of cybercrime offenses through a computer emergency response team (CERT); x x x.

Petitioners mainly contend that Congress invalidly delegated its power when it gave the Cybercrime Investigation and Coordinating Center (CICC) the power to formulate a national cybersecurity plan without any sufficient standards or parameters for it to follow.

In order to determine whether there is undue delegation of legislative power, the Court has adopted two tests: the completeness test and the sufficient standard test. Under the first test, the law must be complete in all its terms and conditions when it leaves the legislature such that when it reaches the delegate, the only thing he will have to do is to enforce it. The second test mandates adequate guidelines or limitations in the law to determine the boundaries of the delegate's authority and prevent the delegation from running riot.[103]

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[103] *Gerochi v. Department of Energy*, 554 Phil. 563 (2007).

Here, the cybercrime law is complete in itself when it directed the CICC to formulate and implement a national cybersecurity plan. Also, contrary to the position of the petitioners, the law gave sufficient standards for the CICC to follow when it provided a definition of cybersecurity.

Cybersecurity refers to the collection of tools, policies, risk management approaches, actions, training, best practices, assurance and technologies that can be used to protect cyber environment and organization and user's assets.[104] This definition serves as the parameters within which CICC should work in formulating the cybersecurity plan.

Further, the formulation of the cybersecurity plan is consistent with the policy of the law to "prevent and combat such [cyber] offenses by facilitating their detection, investigation, and prosecution at both the domestic and international levels, and by providing arrangements for fast and reliable international cooperation."[105] This policy is clearly adopted in the interest of law and order, which has been considered as sufficient standard.[106] Hence, Sections 24 and 26(a) are likewise valid.

WHEREFORE, the Court *DECLARES*:

1. *VOID* for being *UNCONSTITUTIONAL*:

a. Section 4(c)(3) of Republic Act 10175 that penalizes posting of unsolicited commercial communications;
b. Section 12 that authorizes the collection or recording of traffic data in real-time; and
c. Section 19 of the same Act that authorizes the Department of Justice to restrict or block access to suspected Computer Data.

2. *VALID* and *CONSTITUTIONAL*:

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[104] REPUBLIC ACT 10175, Section 3(k).

[105] *Supra* note 94.

[106] *Gerochi v. Department of Energy*, *supra* note 103, at 586, citing *Rubi v. Provincial Board of Mindoro*, 39 Phil. 660 (1919).

a. Section 4(a)(1) that penalizes accessing a computer system without right;
b. Section 4(a)(3) that penalizes data interference, including transmission of viruses;
c. Section 4(a)(6) that penalizes cyber-squatting or acquiring domain name over the internet in bad faith to the prejudice of others;
d. Section 4(b)(3) that penalizes identity theft or the use or misuse of identifying information belonging to another;
e. Section 4(c)(1) that penalizes cybersex or the lascivious exhibition of sexual organs or sexual activity for favor or consideration;
f. Section 4(c)(2) that penalizes the production of child pornography;
g. Section 6 that imposes penalties one degree higher when crimes defined under the Revised Penal Code are committed with the use of information and communications technologies;
h. Section 8 that prescribes the penalties for cybercrimes;
i. Section 13 that permits law enforcement authorities to require service providers to preserve traffic data and subscriber information as well as specified content data for six months;
j. Section 14 that authorizes the disclosure of computer data under a court-issued warrant;
k. Section 15 that authorizes the search, seizure, and examination of computer data under a court-issued warrant;
l. Section 17 that authorizes the destruction of previously preserved computer data after the expiration of the prescribed holding periods;
m. Section 20 that penalizes obstruction of justice in relation to cybercrime investigations;
n. Section 24 that establishes a Cybercrime Investigation and Coordinating Center (CICC);
o. Section 26(a) that defines the CICC's Powers and Functions; and
p. Articles 353, 354, 361, and 362 of the Revised Penal Code that penalizes libel.

Further, the Court *DECLARES*:

1. Section 4(c)(4) that penalizes online libel as *VALID* and *CONSTITUTIONAL* with respect to the original author of the post; but *VOID* and *UNCONSTITUTIONAL* with respect to others who simply receive the post and react to it; and

2. Section 5 that penalizes aiding or abetting and attempt in the commission of cybercrimes as *VALID* and *CONSTITUTIONAL* only in relation to Section 4(a)(1) on Illegal Access, Section 4(a)(2) on Illegal Interception, Section 4(a)(3) on Data Interference, Section 4(a)(4) on System Interference, Section 4(a)(5) on Misuse of Devices, Section 4(a)(6) on Cybersquatting, Section 4(b)(1) on Computer-related Forgery, Section 4(b)(2) on Computer-related Fraud, Section 4(b)(3) on Computer-related Identity Theft, and Section 4(c)(1) on Cybersex; but *VOID* and *UNCONSTITUTIONAL* with respect to Sections 4(c)(2) on Child Pornography, 4(c)(3) on Unsolicited Commercial Communications, and 4(c)(4) on online Libel.

Lastly, the Court *RESOLVES* to *LEAVE THE DETERMINATION* of the correct application of Section 7 that authorizes prosecution of the offender under both the Revised Penal Code and Republic Act 10175 to actual cases, *WITH THE EXCEPTION* of the crimes of:

1. Online libel as to which, charging the offender under both Section 4(c)(4) of Republic Act 10175 and Article 353 of the Revised Penal Code constitutes a violation of the proscription against double jeopardy; as well as

2. Child pornography committed online as to which, charging the offender under both Section 4(c)(2) of Republic Act 10175 and Republic Act 9775 or the Anti-Child Pornography Act of 2009 also constitutes a violation of the same proscription, and, in respect to these, is *VOID* and *UNCONSTITUTIONAL*.

SO ORDERED.

Leonardo-de Castro, Peralta, Bersamin, del Castillo, Villarama, Jr., Perez, and *Reyes, JJ.,* concur.

Brion, J., see separate concurring opinion.

Mendoza, J., joins Justice Brion in all his positions.

Sereno, C.J., Carpio, and *Leonen, JJ.,* see concurring & dissenting opinions.

Velasco, Jr., J., no part due to prior case.

Perlas-Bernabe, J., no part.

SEPARATE CONCURRING OPINION

BRION, *J.*:

A. Concurrences & Dissents

Technology and its continued rapid development in the 21st century have been pushing outward the boundaries of the law, compelling new responses and the redefinition of fundamental rights from their original formulation; enlarging the need for, and the means of, governmental regulation; and more importantly, sharpening the collision between the individual's exercise of fundamental rights and governmental need for intervention.

In this kind of collision, the Court – as constitutionally designed – finds itself in the middle, balancing its duty to ***protect individuals***' exercise of fundamental rights, with the ***State's intervention*** (through regulation and implementation) in the performance of its duty ***to protect society***. It is from this vantage point that the Court, through the *ponencia*, closely examined the Cybercrime prevention Act (*Cybercrime Law*) and the validity of the various provisions the petitioners challenged.

I write this Separate Concurring Opinion ***to generally support the ponencia,*** although my vote may be ***qualified in some provisions*** or ***in dissent with respect to others***. In line with the Court's "per provision" approach and for ease of reference, I have tabulated my votes and have attached the tabulation and explanation as Annex "A" of this Separate Opinion.

This Opinion likewise fully explains my vote with a full discussion of *my own reasons and qualifications* in the areas

where I feel a full discussion is called for. I am taking this approach in ***Section 12*** of the Cybercrime Law in my vote for its unconstitutionality. My qualifications come, among others, in terms of my alternative view that would balance cybercrime law enforcement with the protection of our citizenry's right to privacy.

I concur with the *ponencia's* finding that ***cyber-libel*** as defined in Section 4(c)(4) of the Cybercrime Law does not offend the Constitution. I do not agree, however, with the *ponencia's* ultimate conclusion that the validity is *"only with respect to the original author of the post"* and that cyber-libel is unconstitutional *"with respect to others who simply receive the post and react to it."*

I believe that the constitutional status of cyber-libel hinges, not on Section 4(c)(4), but on the provisions that add to and qualify libel in its application to Internet communications. For example, as the *ponencia* does, I find that **Section 5**[1] **of the Cybercrime Law** (which penalizes aiding, abetting or attempting to commit a cybercrime) is unconstitutional for the reasons fully explained below, and should not apply to cyber-libel.

I likewise agree with Chief Justice Sereno's point on the unconstitutionality of applying **Section 6 of the Cybercrime Law** (which penalizes crimes committed through information communications technology) and impose on libel a penalty one degree higher.

Further, I join Justice Carpio's call to declare **Article 354 of the Revised Penal Code** unconstitutional when applied to

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[1] Section 5. Other Offenses. — The following acts shall also constitute an offense:

(a) Aiding or Abetting in the Commission of Cybercrime. — Any person who wilfully 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 wilfully attempts to commit any of the offenses enumerated in this Act shall be held liable.

libelous statements committed against public officers and figures, and to nullify the application of **Section 7 of the Cybercrime Law** to cyber-libel.

On the other content-related offenses in the Cybercrime Law, I concur with the *ponencia* in upholding the constitutionality of **Section 4(c)(1)** on cybersex and Section **4(c)(2)** on child pornography committed through computer systems, and in striking down as unconstitutional **Section 4(c)(3)** for violating the freedom of speech.

I also agree that **Section 5**[2] **of the Cybercrime Law**, in so far as it punishes aiding, abetting or attempting to commit online commercial solicitation, cyber-libel and online child pornography, violates the Constitution.

Lastly, I partially support the *ponencia's* position that **Section 19**[3] of the Cybercrime Law (which empowers the Secretary of the Department of Justice to restrict or block access to computer data found to be in violation of its provisions) is unconstitutional for violating the right to freedom of expression.

B. <u>My Positions on Cyber-libel</u>

B.1. The Core Meaning and Constitutionality of Section 4(c)(4)

Based on a ***facial examination*** of Section 4(c)(4) of the Cybercrime Law, I find no reason to declare cyber-libel or the

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[2] Section 5. Other Offenses. — The following acts shall also constitute an offense:

(a) Aiding or Abetting in the Commission of Cybercrime. — Any person who wilfully 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 wilfully attempts to commit any of the offenses enumerated in this Act shall be held liable.

[3] Section 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.

application of Section 355 of the Revised Penal Code (that penalizes libel made in print and other forms of media, to Internet communications) unconstitutional.

Laws penalizing libel normally pit two competing values against each other – the fundamental right to freedom of speech on one hand, and the state interest's to protect persons against the harmful conduct of others. The latter conduct pertains to scurrilous speech that damages the reputation of the person it addresses. Jurisprudence has long settled this apparent conflict by excluding libelous speech outside the ambit of the constitutional protection.[4] Thus, the question of whether a libelous speech may be penalized by law – criminally or civilly – has already been answered by jurisprudence in the affirmative.

Article 355 of the Revised Penal Code penalizes "libel[5] committed by means of writing, printing, lithography, engraving, radio, phonograph, painting, theatrical exhibition, cinematographic exhibition, or any similar means." Section 4(c)(4) of the Cybercrime Law merely extends the application of Article 355 to "communications committed through a computer system, or any other similar means which may be devised in the future." It does not, by itself, redefine libel or create a new crime – it merely adds a medium through which libel may be committed and penalized. Parenthetically, this medium – under the statutory

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[4] *Guingguing v. Court of Appeals*, 508 Phil. 193, 197-198 (2005).

See: Joaquin Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary*, 2003 Edition, p. 272;

In as early as 1909, our jurisprudence in *US v. Sedano* has recognized the constitutionality of libel, noting that "the provisions of the Constitution of the United States guaranteeing the liberty of the press, from which the provisions of the Philippine Bill were adopted, have never been held to secure immunity to the person responsible for the publication of libelous defamatory matter in a newspaper."

[5] Libel, as defined by Article 353 of the Revised Penal Code as a public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead.

construction principle of *ejusdem generis* – could already be included under Article 355 through the phrase "any similar means."

Thus, I fully support the constitutionality of **Section 4(c)(4)** as it stands by itself; its intended effect is merely to erase any doubt that libel may be committed through Internet communications.[6] However, my support stops there in light of the qualifications under the law's succeeding provisions.

B.2. Sections 5, 6 & 7 of the Cybercrime Law

In the process of declaring internet defamatory statements within the reach of our libel law, the Cybercrime Law also makes the consequences of cyber-libel far graver than libelous speech in the real world. These consequences result from the application of other provisions in the Cybercrime Law that Congress, in the exercise of its policy-making power, chose to impose upon cybercrimes.

Thus, the law, through **Section 5**, opts to penalize the acts of aiding, abetting, and attempting to commit a cybercrime; increases the penalty for crimes committed by, through and with the use of information and communications technologies in **Section 6**; and clarifies that a prosecution under the Cybercrime Law does not *ipso facto* bar a prosecution under the Revised Penal Code and other special laws in **Section 7**.

In my view, the application of these provisions to cyber-libel unduly increases the prohibitive effect of libel law on online speech, and can have the effect of imposing self-censorship in the Internet and of curtailing an otherwise robust avenue for debate and discussion on public issues. In other words, **Sections 5, 6 and 7** should not apply to cyber-libel, as they open the

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[6] During the interpellations of the cybercrime bill before the Senate, Senator Edgardo J. Angara, the bill's principal sponsor, pointed out that cyberspace is just a new avenue for publicizing or communicating a libelous statement which is subject to prosecution and punishment as defined by the Revised Penal Code. Senate Journal, December 12, 2011, available at http://www.gov.ph/2012/10/03/for-the-record-public-records-of-senate-deliberations-on-the-cybercrime-prevention-bill/.

door to application and overreach into matters other than libelous and can thus prevent protected speech from being uttered.

Neither do I believe that there is sufficient distinction between libelous speech committed online and speech uttered in the real, physical world to warrant increasing the prohibitive impact of penal law in cyberspace communications.

The rationale for penalizing defamatory statements is the same regardless of the medium used to communicate it. It springs from the state's interest and duty to protect a person's enjoyment of his private reputation.[7] The law recognizes the value of private reputation and imposes upon him who attacks it – by slanderous words or libelous publications – the liability to fully compensate for the damages suffered by the wronged party.[8]

I submit that this rationale did not change when libel was made to apply to Internet communications. Thus, cyber-libel should be considered as the State's attempt to broaden the protection for a person's private reputation, and its recognition that a reputation can be slandered through the Internet in the same way that it can be damaged in the real world.[9]

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[7] American Jurisprudence (Vol. 33, p. 292) explains that "Under the common-law theory, which is embodied in some of the statutory provisions on the subject, the criminality of a defamatory statement consist in the tendency thereof to provoke a breach of the peace," but, it adds, **"many of the modern enactments, . . . ignore this aspect altogether and make a libelous publication criminal if its tendency is to injure the person defamed, regardless of its effect upon the public."**

The present Philippine law on libel conforms to this modern tendency. For a little digression on the present law of libel or defamation, let it be noted that the Revised Penal Code has absorbed libel under Act No. 277 and calumny and insult under the old Penal Code. (*Commentaries on the Revised Penal Code, Guevarra*, p. 764.) The new Penal Code includes "All kinds of attacks against honor and reputation, thereby eliminating once and for all the idle distinction between calumny, insult and libel." (*Idem*, p. 765.) *People v. del Rosario*, 86 Phil. 163, 165-166 (1950).

[8] *Worcester v. Ocampo*, 22 Phil. 42, 73-74 (1912).

[9] During the senate's deliberations on the cybercrime bill, Senator Sotto asked Senator Angara if the bill also addresses internet libel or internet defamation. Senator Angara answered that the bill includes it as a crime, an

A key characteristic of online speech is its potential to reach a wider number of people than speech uttered in the real world. The Internet empowers persons, both public and private, to reach a wider audience – a phenomenon some legal scholars pertain to as "cyber-reach."[10] Cyber-reach increases the number of people who would have knowledge of a defamatory statement – a post published by a person living in the Philippines, for instance, can reach millions of people living in the United States, and *vice versa*. It could thus be argued that an increase in the audience of a libelous statement made online justifies the inhibitive effect of Sections 5, 6, and 7 on online speech.

I find this proposition to be flawed. Online speech has varying characteristics, depending on the platform of communications

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actionable offense, because one can be defamed through Twitter or social media.

To the comment that one's reputation can easily be ruined and damaged by posts and comments in social network sites, Senator Angara stated that under the proposed law, the offended party can sue the person responsible for posting such comments. Senate Journal, December 12, 2011, available at http://www.gov.ph/2012/10/03/for-the-record-public-records-of-senate-deliberations-on-the-cybercrime-prevention-bill/.

[10] One of the most striking aspects of cyberspace is that it "provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions." n1 This characteristic sharply contrasts with traditional forms of mass communication, such as television, radio, newspapers, and magazines, which require significant start-up and operating costs and therefore tend to concentrate communications power in a limited number of hands. Anyone with access to the Internet, however, can communicate and interact with a vast and rapidly expanding cyberspace audience. n2 As the Supreme Court opined in its recent landmark decision, *Reno v. ACLU*, n3 the Internet enables any person with a phone line to "become a pamphleteer" or "a town crier with a voice that resonates farther than it could from any soapbox." n4 Indeed, the Internet is "a unique and wholly new medium of worldwide human communication" n5 that contains content "as diverse as human thought." n6

The term "cyber-reach" can be used to describe cyberspace's ability to extend the reach of an individual's voice. Cyber-reach makes the Internet unique, accounts for much of its explosive growth and popularity, and perhaps holds the promise of a true and meaningful "free trade in ideas" that Justice Holmes imagined eighty years ago. Bill Mcswain, *Developments in the Law — The Long Arm of Cyber-reach*, 112 Harv. L. Rev. 1610 (1998).

used in the Internet. It does not necessarily mean, for instance, that a libelous speech has reached the public or a wider audience just because it was communicated through the Internet. A libelous statement could have been published through an e-mail, or through a private online group, or through a public website – each with varying degrees in the number of people reached.

I also find it notable that the publicity element of libel in the Revised Penal Code does not take into consideration the amount of audience reached by the defamatory statement. For libel prosecution purposes, a defamatory statement is considered published when a third person, other than the speaker or the person defamed, is informed of it.[11] Libelous speech may be penalized when, for instance, it reaches a third person by mail,[12] or through a television program,[13] or through a newspaper article published nationwide.[14] A ll these defamatory imputations are punishable with the same penalty of *prision correccional* in its minimum and medium periods or a fine ranging from 200 to 6,000 pesos or both.[15]

Penalizing libelous speech committed through the Internet with graver penalties and repercussions because it allegedly reaches a wider audience creates an unreasonable classification between communications made through the Internet and in the real, physical world, to the detriment of online speech. I find no basis to treat online speech and speech in the real world differently on account of the former's cyber-reach because Article 355 of the Revised Penal Code does not treat libel committed through various forms of media differently on account of the varying numbers of people they reach.

In other words, since Article 355 of the Revised Penal Code does not distinguish among the means of communications by

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[11] *Alcantara v. Ponce*, 545 Phil. 678, 683 (2007).

[12] *US v. Grino*, 36 Phil. 738 (1917); *People v. Silvela*, 103 Phil. 773 (1958).

[13] *People v. Casten*, CA-G.R. No. 07924-CR, December 13, 1974.

[14] *Fermin v. People of the Philippines*, 573 Phil. 12 (2008).

[15] Article 355 of the Revised Penal Code.

which libel is published, the Cybercrime Law, which merely adds a medium of communications by which libel may be committed, should also not distinguish and command a different treatment than libel in the real world.

Notably, the enumeration of media in Article 355 of the Revised Penal Code have for their common characteristic, not the audience a libelous statement reaches, but their permanent nature as a means of publication.[16] Thus, cyber-libel's addition of communications through the Internet in the enumeration of media by which libel may be committed is a recognition that it shares this common characteristic of the media enumerated in Article 355 of the RPC, and that its nature as a permanent means of publication injures private reputation in the same manner as the enumeration in Article 355 does.

Neither should the ease of publishing a libelous material in the Internet be a consideration in increasing the penalty for cyber-libel. The ease by which a libelous material may be published in the Internet, to me, is counterbalanced by the ease through which a defamed person may defend his reputation in the various platforms provided by the Internet — a means not normally given in other forms of media.

Thus, I agree with the *ponencia* that **Section 5**[17] **of the Cybercrime Law**, which penalizes aiding, abetting, or attempting to commit any of the cybercrimes enumerated therein, is unconstitutional in so far as it applies to the crime of cyber-libel. As the *ponente* does, I believe that the provision, when

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[16] *People v. Santiago*, G.R. No. L-17663, May 30, 1962, 5 SCRA 231, 233-234.

[17] Section 5. Other Offenses. — The following acts shall also constitute an offense:

(a) Aiding or Abetting in the Commission of Cybercrime. — Any person who wilfully 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 wilfully attempts to commit any of the offenses enumerated in this Act shall be held liable.

applied to cyber-libel, is ***vague*** and can have a chilling effect on otherwise legitimately free speech in cyberspace.

I further agree with the Chief Justice's argument that it would be constitutionally improper to apply the higher penalty that **Section 6** imposes to libel.

Section 6[18] qualifies the crimes under the Revised Penal Code and special laws when committed by, through and with the use of information and communications technologies, and considers ICT use as an aggravating circumstance that raises the appropriate penalties one degree higher. As Chief Justice Sereno points out, Section 6 not only considers ICT use to be a qualifying aggravating circumstance, but also has the following effects: ***first***, it increases the accessory penalties of libel; ***second***, it disqualifies the offender from availing of the privilege of probation; ***third***, it increases the prescriptive period for the crime of libel from one year to fifteen years, and the prescriptive period for its penalty from ten years to fifteen years; and ***fourth***, its impact cannot be offset by mitigating circumstances.

These effects, taken together, unduly burden the freedom of speech because the inhibiting effect of the crime of libel is magnified beyond what is necessary to prevent its commission.

I also agree with Justice Carpio that the application of **Section 7** to cyberlibel should be declared unconstitutional. By adopting the definition of libel in the Revised Penal Code, Section 4(c)(4)'s definition of cyberlibel penalizes the same crime, except that it is committed through another medium enumerated in Article 355. Thus, Section 7 exposes a person accused of uttering a defamatory statement to multiple prosecutions under the Cybercrime Law and the Revised Penal Code for the same utterance. This creates a significant chill on online speech, because

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[18] Section 6. All crimes defined and penalized by the Revised Penal Code, as amended, and special laws, if committed by, through and with the use of information and communications technologies shall be covered by the relevant provisions of this Act: Provided, That the penalty to be imposed shall be one (1) degree higher than that provided for by the Revised Penal Code, as amended, and special laws, as the case may be.

the gravity of the penalties involved could possibly compel Internet users towards self- censorship, and deter otherwise lawful speech.

B.3. Article 354 of the Revised Penal Code

Lastly, I join in Justice Carpio's call for the Court to declare Article 354 of the Revised Penal Code as unconstitutional in so far as it applies to public officers and figures.

The petitions against the Cybercrime Law provide us with the opportunity to clarify, once and for all, the prevailing doctrine on libel committed against public officers and figures. The possibility of applying the presumed malice rule against this kind of libel hangs like a Damocles sword against the actual malice rule that jurisprudence established for the prosecution of libel committed against public officers and figures.

The presumed malice rule embodied in A rticle 354[19] of the Revised Penal Code provides a presumption of malice in every defamatory imputation, except under certain instances. Under this rule, the defamatory statement would still be considered as malicious even if it were true, unless the accused proves that it was made with good and justifiable intentions.

Recognizing the importance of freedom of speech in a democratic republic, our jurisprudence has carved out another exception to Article 354 of the Revised Penal Code. Through cases such as *Guingguing v. Court of Appeals*[20] and *Borjal v. Court of Appeals*,[21] the Court has applied the actual malice

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[19] 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.

[20] 508 Phil. 193 (2005).

[21] 361 Phil. 3 (1999).

rule in libel committed against public officers and figures. This means that *malice in fact is necessary* for libel committed against public officers and figures to prosper, *i.e.*, it must be proven that the offender made the defamatory statement with the knowledge that it is false or *with reckless disregard of whether it is false or not*. A s the Court held in *Guinguing*, adopting the words in *New York Times v. Sullivan*:[22] "[w]e have adopted the principle that debate on public issues should be uninhibited, robust, and wide open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."

I agree with Justice Carpio's point regarding the necessity of a concrete declaration from the Court regarding Article 354's unconstitutional application to libelous speech against public officers and officials. To neglect our duty to clarify what the law would amount to and leave a gap in the implementation of our laws on libel, in the words of Justice Carpio, would "leave[s] fundamental rights of citizens to freedom of expression to the mercy of the Executive's prosecutorial arm whose decision to press charges depends on its own interpretation of the penal provision's adherence to the Bill of Rights."

This need for a clear signal from the Court has become even more pronounced given the current nature of the Internet – now a vibrant avenue for dialogue and discussion on matters involving governance and other public issues, with the capacity to allow ordinary citizens to voice out their concerns to both the government and to the public in general.

B.4. Summation of Constitutionality of Section 4(c)(4)

With the four provisions – *i.e.*, **Section 5, Section 6** and **Section 7** of the **Cybercrime Law** and **Article 354 of the Revised Penal Code**, ***removed*** from cyber-libel, Section 4(c)(4) would present a proper balance between encouraging freedom of expression and preventing the damage to the reputation of members of society. Conversely, the presence of either one of

[22] 376 US 254.

these three provisions could tilt this delicate balance against freedom of expression, and unduly burden the exercise of our fundamental right. Thus, ***hand in hand with the recognition of the constitutionality of Section 4(c)(4) of the Cybercrime Law under a facial challenge, the four mentioned provisions should likewise be struck down as unconstitutional.***

C. *My Positions on Section 12 of the Cybercrime Law*

In agreeing with the *ponencia's* conclusion regarding the unconstitutionality of Section 12, I begin by emphasizing the point that no ***all-encompassing constitutional right to privacy exists in traffic data***. I stress the need to be sensitive and discerning in appreciating traffic data as we cannot gloss over the distinctions between content data and traffic data, if only because of the importance of these distinctions for law enforcement purposes.

The right to privacy over the ***content*** of internet communications is a given, as recognized in many jurisdictions.[23]

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[23] 209. The type of data that can be collected is of two types: traffic data and content data. 'Traffic data' is defined in Article 1d to mean any computer data relating to a communication made by means of a computer system, which is generated by the computer system and which formed a part in the chain of communication, indicating the communication's origin, destination, route, time, date, size and duration or the type of service. 'Content data' is not defined in the Convention but refers to the communication content of the communication; *i.e.*, the meaning or purport of the communication, or the message or information being conveyed by the communication (other than traffic data).

210. In many States, a distinction is made between the real-time interception of content data and real-time collection of traffic data in terms of both the legal prerequisites required to authorize such investigative measure and the offences in respect of which this measure can be employed. ***While recognizing that both types of data may have associated privacy interests, many States consider that the privacy interests in respect of content data are greater due to the nature of the communication content or message.*** Greater limitations may be imposed with respect to the real-time collection of content data than traffic data. To assist in recognizing this distinction for these States, the Convention, while operationally acknowledging that the data is collected or recorded in both situations, refers normatively in

Traffic data should likewise be recognized for what they are – information necessary for computer and communication use and, in this sense, are practically ***open and freely-disclosed information that law enforcers may examine.***

But beyond all these are ***information generated from raw traffic data*** on people's activities in the Internet, that are collected through real-time extended surveillance and which may be as private and confidential as content data. To my mind, the grant to law enforcement agents of the authority to access these data require a very close and discerning examination to determine the grant's constitutionality.

I justify my position on the unconstitutionality of Section 12 as it ***patently lacks proper standards*** guaranteeing the protection of data that should be constitutionally-protected. In more concrete terms, ***Section 12 should not be allowed – based solely on***

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the titles of the articles to the collection of traffic data as 'real-time collection' and the collection of content data as 'real-time interception.'

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215. The conditions and safeguards regarding the powers and procedures related to real-time interception of content data and real-time collection of traffic data are subject to Articles 14 and 15. ***As interception of content data is a very intrusive measure on private life, stringent safeguards are required to ensure an appropriate balance between the interests of justice and the fundamental rights of the individual.*** In the area of interception, the present Convention itself does not set out specific safeguards other than limiting authorisation of interception of content data to investigations into serious criminal offences as defined in domestic law. Nevertheless, the following important conditions and safeguards in this area, applied in domestic laws, are: judicial or other independent supervision; specificity as to the communications or persons to be intercepted; necessity, subsidiarity and proportionality (*e.g.*, legal predicates justifying the taking of the measure; other less intrusive measures not effective); limitation on the duration of interception; right of redress. Many of these safeguards reflect the European Convention on Human Rights and its subsequent case-law (see judgements in Klass (5), Kruslin (6), Huvig (7), Malone (8), Halford (9), Lambert (10) cases). Some of these safeguards are applicable also to the collection of traffic data in real-time.

Explanatory Report on the Budapest Convention on Cybercrime, [2001] COETSER 8 (November 23, 2001), available at http://conventions.coe.int/Treaty/en/Reports/Html/185.htm.

law enforcement agents' finding of 'due cause' – to serve as authority for the warrantless real-time collection and recording of traffic data.

Lastly, I clarify that the nullification of Section 12 does not absolutely bar the real-time collection of traffic data, as such collection can be undertaken upon proper application for a judicial warrant. Neither should my recommended approach in finding the unconstitutionality of Section 12 prevent Congress, by subsequent legislation, from authorizing the conduct of warrantless real-time collection of traffic data provided that proper constitutional safeguards are in place for the protection of affected constitutional rights.

C.1 *The constitutional right to privacy in Internet communications data*

The right to privacy essentially means the right to be let alone and to be free from unwarranted government intrusion.[24] To determine whether a violation of this right exists, a first requirement is to ascertain the existence of a reasonable expectation of privacy that the government violates. The ***reasonable expectation of privacy*** can be made through a two-pronged test that asks: (1) whether, by his conduct, the individual has exhibited an expectation of privacy; and (2) whether this expectation is one that society recognizes as reasonable. Customs, community norms, and practices may, therefore, limit or extend an individual's "reasonable expectation of privacy."[25] The awareness of the need for privacy or confidentiality is the critical point that should dictate whether privacy rights exist.

The finding that privacy rights exist, however, is not a recognition that the data shall be considered absolutely private;[26]

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[24] *Morfe v. Mutuc*, 130 Phil. 415, 436 (1968).

[25] *Ople v. Torres*, 354 Phil. 948, 970 (1998).

[26] See, for instance, the following cases where the Court upheld the governmental action over the right to privacy: *Kilusang Mayo Uno v. NEDA*, 521 Phil. 732 (2006) (regarding the validity of Executive Order No. 420,

the recognition must yield when faced with a compelling and fully demonstrated state interest that must be given primacy. In this exceptional situation, the balance undeniably tilts in favor of government access or intrusion into private information. Even then, however, established jurisprudence still requires safeguards to protect privacy rights: the law or rule allowing access or intrusion must be so narrowly drawn to ensure that other constitutionally-protected rights outside the ambit of the overriding state interests are fully protected.[27]

The majority of the Court in *Ople v. Torres*,[28] for instance, found the repercussions and possibilities of using biometrics and computer technologies in establishing a National Computerized Identification Reference System to be too invasive to allow Section 4 of Administrative No. 308 (the assailed regulation which established the ID system) to pass constitutional muster. According to the majority, the lack of sufficient standards in Section 4 renders it vague and overly broad, and in so doing, was not narrowly fitted to accomplish the state's objective. Thus,

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which established the unified multi-purpose identification (ID) system for government); *Standard Chartered Bank v. Senate Committee on Banks*, 565 Phil. 744 (2007) (regarding the Senate's resolution compelling petitioners who are officers of petitioner SCB-Philippines to attend and testify before any further hearing to be conducted by the Senate); *Gamboa v. Chan*, G.R. No. 193636, July 24, 2012, 677 SCRA 385, 395-399 (regarding the Regional Trial Court of Laoag's decision denying the petitioner's petition for the privilege of the writ of *habeas* data).

[27] See, for instance, the following cases where the Court nullified governmental actions and upheld the right to privacy: *City of Manila v. Laguio, Jr.*, 495 Phil. 289, 317-319 (2005) (regarding a city ordinance barring the operation of motels and inns, among other establishments, within the Ermita-Malate area); *Social Justice Society v. Dangerous Drugs Board*, 591 Phil. 393, 413-417 (2008) (regarding mandatory drug-testing for of candidates for public office and persons charged with a crime having an imposable penalty of imprisonment of not less than six (6) years and one (1) day before the prosecutor's office); *White Light Corporation v. City of Manila*, 596 Phil. 444, 464-467 (2009) (regarding a city ordinance prohibiting motels and inns from offering short-time admission, as well as pro-rated or "wash up" rates).

[28] *Ople v. Torres*, 354 Phil. 948, 970 (1998).

it was unconstitutional for failing to ensure the protection of other constitutionally-protected privacy rights.

Other governmental actions that had been declared to be constitutionally infirm for failing the compelling state interest test discussed above include the city ordinance barring the operation of motels and inns within the Ermita-Malate area in *City of Manila v. Laguio Jr.*,[29] and the city ordinance prohibiting motels and inns from offering short-time admission and pro-rated or "wash up" rates in *White Light Corporation v. City of Manila*.[30] In both cases, the Court found that the city ordinance overreached and violated the right to privacy of motel patrons, both single and married.

C.2 ***Traffic and Content Data***

The Internet serves as a useful technology as it facilitates communication between people through the application programs they use. More precisely, the Internet is "*an electronic communications network that connects computer networks and organizational computer facilities around the world.*"[31] These connections result in various activities online, such as simple e-mails between people, watching and downloading of videos, making and taking phone calls, and other similar activities, done through the medium of various devices such as computers, laptops, tablets and mobile phones.[32]

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[29] *City of Manila v. Laguio Jr.*, 495 Phil. 289 (2005).

[30] *White Light Corporation v. City of Manila*, 596 Phil. 444 (2009).

[31] Internet definition, Merriam Webster Online Dictionary, http://www.merriam-webster.com/dictionary/internet.

[32] As the technology exists now, data is usually sent through the Internet through a packet-switching network. Under this system, data sent through the Internet is first broken down into tiny packets of data which pass through different networks until it reaches its destination, where it is reassembled into the data sent. These tiny packets of data generally contain a header and a payload. The header keeps overhead information about the packet, the service and other transmission-related information. This includes the source and destination of the data, the sequence number of the packets, and the type of service, among others. The payload, on the other hand, is the actual data carried by the packet. Traffic data may be monitored, recorded and collected from the headers of packets.

Traffic data refer to the computer data generated by computers in communicating to each other to indicate a communication's origin, destination, route, time, date, size, duration or type of underlying service.[33] These data should be distinguished from ***content data*** which contain the body or message of the communications sent.[34] Traffic data do not usually indicate on their face the actual identity of the sender of the communication; the content data, on the other hand, usually contain the identity of sender and recipient and the actual communication between them.

It must also be appreciated that as the technology now exists, data (both traffic and content) are usually sent through the Internet through a packet-switching network. The system first breaks down the materials sent into tiny ***packets of data*** which then *pass through different networks* until they reach their destination where they are reassembled into the ***original*** data sent.

These tiny packets of data generally contain a header and a payload. The ***header*** contains the overhead information about the packet, the service and other transmission-related information. It includes the source and destination of the data, the sequence number of the packets, and the type of service, among others. The ***payload***, on the other hand, contains the actual data carried by the packet.[35] Traffic data may be monitored, recorded and collected from the headers of packets.[36]

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[33] Chapter 1, Article 1 (d) of the Cybercrime Convention; see also Section 3 (p) of Republic Act No. 10175.

[34] Chapter 1, Article 1 (b) of the Cybercrime Convention.

[35] *What is a packet*?, HowStuffWorks.com (Dec. 01, 2000) http://computer.howstuffworks.com/question525.htm. See also: *Structure of the Internet: Packet switching*, in A-level Computing/AQA, http://en. wikibooks.org/wiki/A-level_Computing/AQA/Computer_Components,_The_Stored_Program_Concept_and_the_Internet/Structure_of_the_Internet/Packet_switching; and What is Packet Switching?, Teach-ICT.com http://www.teach-ict.com/technology_explained/packet_switching/packet_switching.html.

[36] Edward J. Wegman and David J. Marchette, *On Some Techniques for Streaming Data: A Case Study of Internet Packet Headers*, p. 7, http://www.dmarchette.com/Papers/VisPacketHeadersRev1.pdf.

I hold the view, based on the above distinctions and as the *ponencia* did, that no reasonable expectation of privacy exists in traffic data *as they appear in the header*, as these are data generated in the course of communications between or among the participating computers or devices and intermediary networks. The absence of any expectation is based on the reality that the traffic data: are open as they pass through different unknown networks;[37] cannot be expected to be private as they transit on the way to their intended destination; and are necessarily identified as they pass from network to network. In contrast, the content data they contain remain closed and undisclosed, and do not have to be opened at all in order to be transmitted. The unauthorized opening of the content data is in fact a crime penalized under the Cybercrime Law.[38]

For a clearer analogy, traffic data can be likened to the address that a person sending an ordinary mail would provide in the

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[37] 167. Often more than one service provider may be involved in the transmission of a communication. Each service provider may possess some traffic data related to the transmission of the specified communication, which either has been generated and retained by that service provider in relation to the passage of the communication through its system or has been provided from other service providers. Sometimes traffic data, or at least some types of traffic data, are shared among the service providers involved in the transmission of the communication for commercial, security, or technical purposes. In such a case, any one of the service providers may possess the crucial traffic data that is needed to determine the source or destination of the communication. Often, however, no single service provider possesses enough of the crucial traffic data to be able to determine the actual source or destination of the communication. Each possesses one part of the puzzle, and each of these parts needs to be examined in order to identify the source or destination. Explanatory Report on the Budapest Convention on Cybercrime, [2001] COETSER 8 (Nov. 23, 2001), available at http://conventions.coe.int/Treaty/en/Reports/Html/185.htm.

[38] A law enforcement agent's unauthorized access to content data may constitute illegal interception, which is penalized by Section 4, paragraph 2 of the Cybercrime Law:

(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.

mailing envelope, while the size of the communication may be compared to the size of the envelope or package mailed through the post office. There can be no reasonable expectation of the privacy in the address appearing in the envelope and in the size of the package as it is sent through a public network of intermediary post offices; they must necessarily be read in these intermediary locations for the mail to reach its destination.

A closer comparison can be drawn from the number dialed in using a telephone, a situation that the US Supreme Court had the opportunity to pass upon in *Smith v. Maryland*[39] when it considered the constitutionality of the Pen Register Act.[40] The US Court held that the Act does not violate the Fourth Amendment (the right to privacy) because no search is involved; there could be no reasonable expectation of privacy in the telephone numbers that a person dials. All telephone users realize that they must "convey" phone numbers to the telephone company whose switching equipment serve as medium for the completion of telephone calls.

As in the case of the regular mail and the use of numbers in communicating by telephone, privacy cannot be reasonably expected from traffic data *per se*, because their basic nature – data generated in the course of sending communications from a computer as communications pass through a public network of intermediate computers.

To complete the comparison between transfer data and content data, an individual sending an e-mail through the Internet would expect at least the same level of privacy in his email's content

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[39] 442 U.S. 735 (1979).

[40] In *Smith v. Maryland*, 442 U.S. 735 (1979), the petitioner had been charged with robbery, and prior to his trial, moved that the evidence acquired by the police through the installation of a pen register at a telephone company's central offices. This allowed the police to record the numbers dialed from the telephone at the petitioner's home. The US Supreme Court eventually held that this act did not violate the petitioner's right to privacy, as it does not constitute a search. The petitioner did not entertain an actual, legitimate and reasonable expectation of privacy to the phone numbers he dialed.

as that enjoyed by the mail sent through the post office or in what is said during a telephone conversation. Expectations regarding the confidentiality of emails may in fact be higher since their actual recipients are not identified by their actual names but by their email addresses, in contrast with regular mails where the addresses in the envelopes identify the actual intended recipients and are open to the intermediary post offices through which they pass.

At the same level of privacy are the information that an Internet subscriber furnishes the Internet provider. These are also private data that current data privacy laws[41] require to be accurate under the guarantee that the provider would keep them secure, protected, and for use only for the purpose for which they have been collected.

For instance, a customer buying goods from a website used as a medium for purchase or exchange, can expect that the personal information he/she provides the website would only be used for facilitating the sales transaction.[42] The service provider

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[41] In the Philippines, data privacy is governed by Republic Act 10173 or The Data Privacy Act of 2012. RA 10173 established the country's data privacy framework. It recognizes the individual's rights to his personal information and sensitive information, and fines the unlawful processing of these kinds of information and the violation of the rights of a data subject.

[42] Section 16 of the Data Privacy Act provides:

Section 16. Rights of the Data Subject. — The data subject is entitled to:

(a) Be informed whether personal information pertaining to him or her shall be, are being or have been processed;

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(e) Suspend, withdraw or order the blocking, removal or destruction of his or her personal information from the personal information controller's filing system upon discovery and substantial proof that the personal information are incomplete, outdated, false, unlawfully obtained, used for unauthorized purposes or are no longer necessary for the purposes for which they were collected. In this case, the personal information controller may notify third parties who have previously received such processed personal information; and

(f) Be indemnified for any damages sustained due to such inaccurate, incomplete, outdated, false, unlawfully obtained or unauthorized use of personal information.

needs the customer's consent before it can disclose the provided information to others; otherwise, criminal and civil liability can result.[43] This should be a reminder to service providers and their staff who sell telephone numbers and addresses to commercial companies for their advertising mailing lists.

Notably, social networking websites allow its subscribers to determine who would view the information the subscribers provide, *i.e.*, whether the information may be viewed by the public in general, or by a particular group of persons, or only by the subscriber.[44] Like the contents of Internet communications, the user and the public in general expect these information to be private and confidential.

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[43] Sections 31 and 32 of the Data Privacy Act provide:

Section 31. Malicious Disclosure. — Any personal information controller or personal information processor or any of its officials, employees or agents, who, with malice or in bad faith, discloses unwarranted or false information relative to any personal information or personal sensitive information obtained by him or her, shall be subject to imprisonment ranging from one (1) year and six (6) months to five (5) years and a fine of not less than Five hundred thousand pesos (Php500,000.00) but not more than One million pesos (Php1,000,000.00).

Section 32. Unauthorized Disclosure. — (a) Any personal information controller or personal information processor or any of its officials, employees or agents, who discloses to a third party personal information not covered by the immediately preceding section without the consent of the data subject, shall he subject to imprisonment ranging from one (1) year to three (3) years and a fine of not less than Five hundred thousand pesos (Php500,000.00) but not more than One million pesos (Php1,000,000.00).

(b) Any personal information controller or personal information processor or any of its officials, employees or agents, who discloses to a third party sensitive personal information not covered by the immediately preceding section without the consent of the data subject, shall be subject to imprisonment ranging from three (3) years to five (5) years and a fine of not less than Five hundred thousand pesos (Php500,000.00) but not more than Two million pesos (Php2,000,000.00).

[44] Mindi McDowell, *Staying Safe on Social Network Sites*, US-CERT, (Feb. 6, 2013) http://www.us-cert.gov/ncas/tips/ST06-003; See Adam Tanner, *Users more savvy about social media privacy than thought*, poll says, Forbes Magazine, (Nov. 11, 2013) *http://www.forbes.com/sites/adamtanner/2013/11/13/users-more-savvy-about-social-media-privacy-than-thought-poll-finds*.

In the context of the present case where the right to privacy is pitted against government intrusion made in the name of public interest, the intrinsic nature of traffic data should be fully understood and appreciated because a miscalibration may carry profound impact on one or the other.

In concrete terms, casting a net of protection wider than what is necessary to protect the right to privacy in the Internet can unduly hinder law enforcement efforts in combating cybercrime. Raw traffic data raise no expectation of privacy and should not be beyond the reach of law enforcers. At the opposite end, constitutionally allowing the unregulated inspection of Section 12 may unwittingly allow government access or intrusion into data greater than what the public recognizes or would allow, resulting in the violation of privacy rights.

A miscalibration may immediately affect congressional action addressing the balancing between the privacy rights of individuals and investigative police action. The recognition of the right to privacy over raw traffic data may curtail congressional action by practically requiring Congress to increase the required governmental interest not only for the real-time surveillance and collection of traffic data, but also for simple police investigative work. The effect would of course be most felt at the level of field law enforcement where officers would be required to secure a higher level of compelling governmental interest simply to look at raw traffic data even on a non-surveillance situation. Using the above email analogy, it may amount to requiring probable cause to authorize law enforcement to look at an address in a mailing envelope coursed through the public post office.

Not to be forgotten is the reality that information and communication technology – particularly on the transmission, monitoring and encryption of data – is continuously evolving with no foreseeable end in sight. In the words of Justice Scalia in *Kyllo v. United States*,[45] a case pitting the right to privacy with the law enforcement's use of thermal imaging devices: "the

[45] 533 U.S. 27 (2001).

rule we adopt must take account of more sophisticated systems that are already in use or in development."[46]

This Court, made aware of this reality, must similarly proceed with caution in exercising its duty to examine whether a law involving the regulation of computers and cyber communications transgresses the Constitution. If we must err, we should do so in favor of slow and carefully calibrated steps, keeping in mind the possible and foreseeable impact of our decisions on future technology scenarios and on our jurisprudence. After all, our constitutionally-designed role is merely to interpret policy as expressed in the law and rules, not to create policy.

C.3 ***Data collected from Online Activities – the midway point between traffic data and content data.***

While traffic data can practically be considered as disclosed (and consequently, open and non-confidential) data, they can – ***once collected and recorded over a period of time, or when used with other technologies*** – reveal information that the sender and even the general public expect to be private and confidential.

This potential use of raw traffic data serves as the limit for the analogy between traffic data and the addresses found in envelopes of regular mails. Mailed letters exist in the physical world and, unless coursed through one central post office, can hardly be monitored for a recognizable pattern of activities that can yield significant data about the writer or the recipient.

In contrast, the Internet allows the real-time sending and receiving of information at any given time, to multiple recipients who may be sending and receiving their own information as well. This capability and the large amount of traffic that ensues in real time open wide windows of opportunity for analysis of the ensuing traffic for trends and patterns that reveal information beyond the originally collected and recorded raw traffic data. For example, the analysis may provide leads or even specifically disclose the actual geographical location of the sender or recipient

[46] 533 U.S. 27, 37 (2001).

of the information, his online activity, the websites he is currently browsing, and even possibly the content of the information itself.

It is at this point that the originally raw traffic data mass cross over and partake of the nature of content data that both the individual and the public expect to be private. Evidently, privacy interests arise, not from the raw data themselves, but from the resulting conclusions that their collection and recording yield. Thus, violation of any existing constitutional right starts at this point. From the point of view of effective constitutional protection, the trigger is not at the point of the private information end result, but at the point of real-time collection and recording of data that, over time and with analysis, yield private and confidential end result. In other words, it is at the earliest point that safeguards must be in place.

That this aspect of Internet use may no longer simply be an awaited potential but is already a reality now with us, can be discerned from what computer pundits say about the application of proper traffic analysis techniques to the traffic data of phone calls conducted through the Internet (also known as Voice Over Internet Protocol or VOIP). They claim that this analysis can reveal the language spoken and the identity of the speaker, and may even be used to reconstruct the actual words spoken during the phone conversation.[47] Others, on the other hand, have tested the possibility of inferring a person's online activities for short periods of time through traffic data analysis.[48]

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[47] Riccardo Bettatti, *Traffic Analysis and its Capabilities*, (Sept. 10, 2008)http://usacac.army.mil/cac2/cew/repository/papers/Modern_Traffic_Analysis_and_its_Capabilities.pdf; Fan Zhang, Wenbo He, Xue Liu and Patrick Bridges, *Inferring Users' Online Activities Through Traffic Analysis* (June 2011) http://www.math.unipd.it/~conti/teaching/CNS1213/atpapers/Profiling/profiling.pdf citing C.V. Wright, L. Ballard, F. Monrose, and G. M. Masson, *Language identification of encrypted VoIP traffic: Alejandra y roberto or alice and bob in Proceedings of USENIX Security Symposium*, 2007 and C.V. Wright, L. Ballard, S. E. Coull, F. Monrose, and G. M. Masson, *Spot me if you can: Uncovering spoken phrases in encrypted VoIP conversations*, In Proceedings of IEEE Symposium on Security and Privacy, 2008.

[48] Fan Zhang, Wenbo He, Xue Liu and Patrick Bridges, *Inferring Users' Online Activities Through Traffic Analysis* (June 2011) http://www.math.unipd.it/~conti/teaching/CNS1213/atpapers/Profiling/profiling.pdf.

Recent developments in the Internet, such as the rise of Big Data[49] and the Internet of Things,[50] also serve as evidence of the realization of these possibilities, as people share more and more information on how they conduct their daily activities in the Internet and on how these information are used to perform other tasks. Right now, wireless signal strength in multiple monitoring locations may be used to accurately estimate a user's location and motion behind walls.[51] With the advent of the Internet of Things, which equips devices with sensors that allow the direct gathering of information in the physical world for transmission to the Internet, even seemingly innocuous traffic data, when collected, may possibly reveal even personal and intimate details about a person and his activities.

Thus, I believe it indisputable that information gathered from purposively collected and analyzed raw traffic data, now disclose information that the Internet user *never intended to reveal when he used the Internet*. These include the language used in a phone conversation in the Internet, the identity of the speaker, the content of the actual conversation, as well as a person's exact location inside his home. From this perspective, these data, as collected and/or analyzed from online activities, are no different from

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[49] See: James Manyika, Michael Chui, Brad Brown, Jacques Bughin, Richard Dobbs, Charles Roxburgh, Angela Hung Byers, Big data: *The next frontier for innovation, competition, and productivity*, Mckinsey Global Institute, (May 2011) http://www.mckinsey.com/insights/business_technology/big_data_the_next_frontier_for_innovation.

[50] More objects are becoming embedded with sensors and gaining the ability to communicate. The resulting information networks promise to create new business models, improve business processes, and reduce costs and risks. Michael Chui, Markus Löffler, and Roger Roberts, *The Internet of Things, Mckinsey Global Institute*, (March 2010) http://www.mckinsey.com/insights/high_tech_telecoms_internet/the_internet_of_things.

[51] Fan Zhang, Wenbo He, Xue Liu and Patrick Bridges, *Inferring Users' Online Activities Through Traffic Analysis* (June 2011) http://www.math.unipd.it/~conti/teaching/CNS1213/atpapers/Profiling/profiling.pdf citing T. Jiang, H.J. Wang, and Y. Hu. *Preserving location privacy in wireless LANs*. In Proceedings of MobiSys, pages 246-257, 2007 and J. Wilson and N. Patwari, *See through walls: Motion tracking using variance-based radio tomography networks*, IEEE Transactions on Mobile Computing, 2010.

content data and should likewise be protected by the right to privacy.

C.4 ***Deficiencies of Section 12***

Section 12 of the Cybercrime Law authorizes law enforcement agents to collect and record in real-time traffic data associated with specified communications, under the following terms:

> Section 12. 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.

I have no doubt that the state interest that this section seeks to protect is a compelling one. This can be gleaned from Section 2 of the Cybercrime Law which clearly sets out the law's objective – to equip the State with sufficient powers to prevent and combat cybercrime. The means or tools to this objective, Section 12 among them, would enable our law enforcers to investigate incidences of cybercrime, and apprehend and prosecute cybercriminals.

According to the Department of Justice, nearly nine out of ten Filipino Internet users had been victims of crimes and malicious activities committed online. Contrast this to the mere 2,778 cases of computer crimes referred to the Anti-Transnational Crime Division (ATCD) of the Criminal Investigation and Detection Group (CIDG) of the Philippine National Police (PNP) from 2003 to 2012,[52] to get a picture of just how vulnerable the citizenry is to computer-related crimes.

But bad might the situation be and as already mentioned in passing above, a demonstrated and compelling state interest effectively serves only as starting point and basis for the authority to grant collection and recording authority to state agents faced with clearly established right to privacy. In addition to and as equally important as the invoked compelling state interest, is the requirement that the authorizing law or rule must provide safeguards to ensure that no unw arranted intrusion would take place to lay open the information or activities not covered by the state interest involved; the law or rule must be narrowly drawn to confine access to what the proven state interests require.

I submit that, on its face, Section 12 fails to satisfy this latter constitutional requirement. In Section 12 terms, its "due cause" requirement does not suffice as the safeguard that the Constitution requires.

My examination of Section 12 shows that it properly deals with the various types of data that computer communication generates, *i.e.*, with traffic data *per se*, with data other than the defined traffic data (thus, of content data), and with the real-time collection of these data over time. The law, however, is wanting on the required safeguards when private data are accessed.

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[52] Department of Justice Primer on Cybercrime, available at http://www.upm.edu.ph/downloads/announcement/DOJ%20Primer%20on%20Cybercrime%20Law.pdf; see also "Quashing Cybercrime," Senator Edgardo Angara's sponsorship speech on the Cybercrime Prevention Act (May 11, 2011) http://www.senate.gov.ph/press_release/2011/0511_angara3.asp.

True, traffic data *per se* does not require any safeguard or measure stricter than the "due cause" that the law already requires, while content data can be accessed only on the basis of a judicial warrant. The real time collection and recording of traffic data and its "due cause" basis, however, suffer from fatal flaws.

The law's "due cause" standard is vague in terms of the substance of what is "due cause" and the procedure to be followed in determining the required "cause." The law is likewise overly broad so that real-time monitoring of traffic data can effectively overreach its allowable coverage and encroach into the realm of constitutionally-protected activities of Internet users, specifically, data that a cybercrime may not even address.

Consider, in this regard, that as worded, law enforcement agents, *i.e.*, members of the National Bureau Investigation (*NBI*) and the Philippine National Police (*PNP*),[53] practically have *carte blanche* authority to conduct the real-time collection and recording of traffic data at anytime and on any Internet user, given that the law does not specifically define or give the parameters of the purpose for which law enforcement authorities are authorized to conduct these intrusive activities. Without sufficient guiding standards, the "due cause" basis in effect allows law enforcement agents to monitor all traffic data. This approach, to my mind, may even allow law enforcement to conduct constitutionally-prohibited fishing expeditions for violations and their supporting evidence.

Additionally, while Section 2 empowers the State to adopt sufficient powers to conduct ***the detection, investigation and prosecution*** of cybercrime as an expressed policy, Section 12, however, does not provide a standard sufficient to render enforcement rules certain or determinable; it also fails to provide

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[53] Section 10 of the Cybercrime Law provides:

Section 10. Law Enforcement Authorities. — The National Bureau of Investigation (NBI) and the Philippine National Police (PNP) shall be responsible for the efficient and effective law enforcement of the provisions of this Act. The NBI and the PNP shall organize a cybercrime unit or center manned by special investigators to exclusively handle cases involving violations of this Act.

guiding particulars on the real-time monitoring of traffic data. Assuming that the Cybercrime Law contemplates that real-time collection of traffic data would assist in criminal investigations, the provision does not provide any specified or determinable trigger for this activity — should collection and recording be connected with criminal investigation in general? Is it necessary that a cybercrime has already been committed, or could it be used to prevent its commission? Would it only apply to investigations on cybercrime, or would it include investigations on crimes in the physical world whose aspects have seeped into the Internet?

In the absence of standards, guidelines or clean definitions, the 'due cause' requirement of Section 12 fatally opens itself to being vague as it does not even provide the context in which it should be used. It merely provides that the real-time monitoring would be related to 'specified communications' without mentioning as to what these communications pertain to, how these communications will be specified, and as well as the extent of the specificity of the communications.

Section 12 likewise does not provide for the extent and depth of the real-time collection and recording of traffic data. It does not limit the length of time law enforcement agents may conduct real-time monitoring and recording of traffic data, as well as the allowable contours by which a specified communication may be monitored and recorded. In other words, it does not state how long the monitoring and recording of the traffic data connected to a specified communication could take place, how specific a specified communication should be, as well as the extent of the association allowable.

The absolute lack of standards in the collection and recording of traffic data under Section 12 in effect negates the safeguards under Section 13 of the Cybercrime Law. Section 13 obligates internet service providers to collect and store traffic data for six months, which data law enforcement agents can only access based on a judicial order under Section 14. Properly understood, Section 13 is a recognition that traffic data once collected in depth and for a considerable period of time, would produce

information that are private. But because Section 12 does not specify the length and extent of the real-time collection, monitoring and storage of traffic data, it in effect skirts the judicial warrant requirement before any data may be viewed under Section 13. The limitation in this section also does not also apply if the law enforcement agency has its own collection and recording facilities, a possibility that in these days is not farfetched.

Neither does Section 12 as worded sufficiently limit the information that would be collected and recorded in real-time only to traffic data. The lack of standards in Section 12 regarding the extent and conduct of the real- time collection and recording of traffic data effectively allows for its collection in bulk, which, as earlier pointed out, reveals information that are private. The lack of standards also does not prevent the possibility of using technologies that translates traffic data collected in real-time to content data or disclose a person's online activities.

Significantly, the Cybercrime Law's omissions in limiting the scope and conduct of the real-time collection and recording of traffic data cannot be saved by statutory construction; neither could it be filled-in by implementing rules and regulations. We can only construe what the law provides, harmonize its provisions and interpret its language. We cannot, no matter how noble the cause, add to what is not provided in the law.

The same limitation applies to law enforcement agents in the implementation of a law – assuming they have been delegated to provide for its rules and regulations. They cannot, in fixing the details of a law's implementation, legislate and add to the law that they seek to implement.

Given the importance of Section 12 in cybercrime prevention and its possible impact on the right to privacy, we cannot, in interpreting a law, usurp what is rightfully the Congress's duty and prerogative to ensure that the real-time collection of traffic data does not overreach into constitutionally-protected activities. In other words, it is Congress, through law, which should draw the limits of traffic data collection. Our duty in the Court comes only in determining whether these limits suffice to meet the principles enshrined in the Constitution.

In sum, as worded, the authorization for a warrantless real-time collection and recording of traffic data is not narrowly drawn to ensure that it would not encroach upon the privacy of Internet users online. Like A .O. No. 308 in *Ople v. Torres*, Section 12 of the Cybercrime threatens the right to privacy of our people, and should thus be struck down as unconstitutional.

D. Implications for law enforcement of the unconstitutionality of Sec. 12

The Court has, in addition to its constitutional duty to decide cases and correct jurisdictional errors, the duty to provide guidance to the bench and bar.[54] It is in consideration of this duty, as well as the pressing need for balance between the investigation and prosecution of cybercrimes and the right to privacy, that I discuss the repercussions of my proposed ruling on law enforcement.

The declaration of the unconstitutionality of Section 12 in the manner framed by the Court, should not tie the hands of Congress in enacting a replacement provision empowering the conduct of warrantless real-time collection of traffic data by law enforcement agents. This grant of power should of course avoid the infirmities of the present unconstitutional provision by providing for standards and safeguards to protect private data and activities from unwarranted intrusion.

I clarify as well that the unconstitutionality of Section 12 does not remove from the police the authority to undertake real-time collection and recording of traffic data as an investigation tool that law enforcement agents may avail of in the investigation and prosecution of criminal offenses, both for offenses involving cybercrime and ordinary crimes. Law enforcement agencies may still conduct these activities under their general powers, but

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[54] See for instance, *Fernandez v. Comelec*, 579 Phil. 235, 240 (2008) and *Villanueva v. Adre*, 254 Phil. 882, 887 (1989), where the Court declared a petition moot and academic, but proceeded to rule on the issue of jurisdiction for the guidance of the bench and the bar; or *Altres v. Empleo*, 594 Phil. 246, 261-262 (2008), where the Court restated in capsule form the jurisprudential pronouncements on forum-shopping; or *Republic v. CA and Molina*, 335 Phil. 664, 676-680 (1997), where the Court formulated guidelines in the interpretation and application of Art. 36 of the Family Code.

with a prior judicial authorization in light of the nature of the data to be collected. To cite an example in today's current crime situation, this tool may effectively be ***used against the drug menace*** whose leadership has so far evaded arrest and whose operations continue despite police interdiction efforts.

Notably, Section 24 of Republic Act No. 6975 empowers the Philippine National Police to enforce all laws and ordinances relative to the protection of lives and properties; maintain peace and order and take all necessary steps to ensure public safety; investigate and prevent crimes, effect the arrest of criminal offenders, bring offenders to justice and assist in their prosecution; and to exercise the general powers to make arrest, search and seizure in accordance with the Constitution and pertinent laws.

Section 1 of Republic Act No. 157 as amended, on the other hand, mandates the National Bureau of Investigation to investigate crimes and other offenses against Philippine laws, assist, upon request, in the investigation or detection of crimes, and to establish and maintain an up-to-date scientific crime laboratory and to conduct researches in furtherance of scientific knowledge in criminal investigation.

These laws sufficiently empower the PNP and the NBI to make use of up-to-date equipment in the investigation of crimes and in the apprehension and prosecution of criminals, including cybercriminals. The PNP is particularly empowered to undertake search and seizure under RA 6975. The need for a judicial warrant does not need be a stumbling block in these efforts in the sensitive area of Internet data, as the grant of warrant is merely a question of the existence of a probable cause, proven of course according to the requirements of the Constitution.

E. The role of the courts in cybercrime prevention and prosecution

Internet has significantly changed the way crimes are committed, and has paved the way for the emergence of new crimes committed in a totally different plane: from the previous real, physical world, to the abstract, borderless plane of interconnected computers linked through the Internet.

In the same manner that technology unleashed these new threats to security and peace, it also devised new means to detect, apprehend and prosecute those who threaten society. The Cybercrime Law is notable in its aim to penalize these new threats, and in giving clear signals and actually empowering our law enforcement agents in the investigation of these cybercrimes, in the apprehension of cybercriminals, and in the prosecution of cases against them.

In the same manner likewise that our laws and law enforcement have been adapting to the threats posed by cybercrime, we in the judiciary must also rise up to the challenge of competently performing our adjudicative functions in the cyber world.

The judicial steps in cybercrime prosecution start as early as the investigation of cybercrimes, through the issuance of warrants necessary for real-time collection of traffic data, as well as the issuance of the orders for the disclosure of data retained by internet service providers.[55] After these, courts also

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[55] Sections 14 and 16 of the Cybercrime Law provides:

Section 14. Disclosure of Computer Data. — Law enforcement authorities, ***upon securing a court warrant, shall issue an order requiring any person or service provider to disclose or submit subscriber's information, traffic data or relevant data in his/its possession or control*** within seventy-two (72) hours from receipt of the order in relation to a valid complaint officially docketed and assigned for investigation and the disclosure is necessary and relevant for the purpose of investigation.

Section 16. Custody of Computer Data. — ***All computer data, including content and traffic data, examined under a proper warrant*** shall, within forty-eight (48) hours after the expiration of the period fixed therein, be deposited with the court in a sealed package, and shall be accompanied by an affidavit of the law enforcement authority executing it stating the dates and times covered by the examination, and the law enforcement authority who may access the deposit, among other relevant data. The law enforcement authority shall also certify that no duplicates or copies of the whole or any part thereof have been made, or if made, that all such duplicates or copies are included in the package deposited with the court. The package so deposited shall not be opened, or the recordings replayed, or used in evidence, or then contents revealed, except upon order of the court, which shall not be granted except upon motion, with due notice and opportunity to be heard to the person or persons whose conversation or communications have been recorded.

determine the probable cause for the arrest of suspects accused of committing cybercrimes. The suspect's arrest would then lead to a trial that, depending on the suspect's conviction or acquittal, could then go through the judiciary appellate process. During trial, pieces of evidence would be presented and testimonies heard, and trial courts would then exercise their constitutional duty to adjudicate the cases brought before them.

Judicial involvement in all these processes requires the handling members of the Judiciary to be computer literate, at the very least. We cannot fully grasp the methodologies and intricacies of cybercrimes unless we have a basic understanding of how the world of computers operates. From the point of law, basic knowledge must be there to grasp how cybercrimes may be proven before us during trial, and what constitutes the evidentiary threshold that would allow us to determine, beyond reasonable doubt, that the person accused really did commit a cybercrime.

For instance, I agree with the Solicitor General's observation that time is of the utmost essence in cybercrime law enforcement, as the breadth and speed of technology make the commission of these crimes and the subsequent destruction of its evidence faster and easier. To my mind, our current rules of procedure for the issuance of search warrants might not be responsive enough to effectively track down cybercriminals and obtain evidence of their crimes. Search warrants for instance, might be issued too late to seize evidence of the commission of a cybercrime, or may not properly describe what should be seized, among others.

Due to the highly-technical nature of investigating and prosecuting cybercrimes, as well as the apparent need to expedite our criminal procedure to make it more responsive to cybercrime law enforcement, ***I propose that special cybercrime courts be designated to specifically handle cases involving cybercrime. In addition, these cybercrime courts should have their own rules of procedure tailor-fitted to respond to the technical requirements of cybercrime prosecution and adjudication***.

The designation of special cybercrime courts of course is not outside our power to undertake: Section 21[56] of the Cybercrime Law grants the Regional Trial Courts jurisdiction over any violation of the Cybercrime Law, and provides that special cybercrime courts manned by specially trained judges should be designated. Section 5, Article VIII of the 1987 Constitution,[57] on the other hand, empowers this Court to promulgate rules on the pleading, practice, and procedure in all courts.

As with every petition involving the constitutionality of a law, we seek to find the proper balance between protecting a society where each individual may lawfully enjoy his or her fundamental freedoms, and where the safety and security of the members of society are assured through proper regulation and enforcement. In the present petition, I agree with the *ponencia* that the Cybercrime Law is improperly tilted towards strengthening law enforcement, to the detriment of our society's fundamental right to privacy. This is highlighted by the law's position under Section 12 which, as discussed, goes beyond what is constitutionally

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[56] Section 21 of the Cybercrime Law provides:

Section 21. Jurisdiction. — The Regional Trial Court shall have jurisdiction over any violation of the provisions of this Act, including any violation committed by a Filipino national regardless of the place of commission. Jurisdiction shall lie if any of the elements was committed within the Philippines or committed with the use of any computer system wholly or partly situated in the country, or when by such commission any damage is caused to a natural or juridical person who, at the time the offense was committed, was in the Philippines. There shall be designated special cybercrime courts manned by specially trained judges to handle cybercrime cases.

[57] Article VIII, Section 5, paragraph 5 of the 1987 Constitution provides:

Section 5. The Supreme Court shall have the following powers:

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5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the integrated bar, and legal assistance to the under-privileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.

permissible. Beyond this finding, however, we need to provide — within the limits of our judicial power, remedies that will still allow effective law enforcement in the cyber world. It is in these lights that I urge my colleagues in this Court to consider the immediate training and designation of specialized cybercrime courts and the drafting of their own rules of procedure.

As I mentioned in the opening statements of this Concurring Opinion, I have prepared a table for easy reference to my votes. This table is attached as Annex "A" and is made an integral part this Opinion.

Annex A - Submitted Votes and Explanation on Cybercrime *J.* Arturo D. Brion

Cybercrime Law provision	***J.* Brion's Vote and Explanation**
Section 4(a)(l) penalizing **illegal access** as a cybercrime offense. Illegal access is defined as "[t]he access to the whole or any part of a computer system **without a right**."	**Constitutional - concur with the *ponencia*** According to the petitioners, Section 4(a) (1) fails the strict scrutiny test because it is not narrowly fitted to exclude the ethical hacker, who hack computer systems to test its vulnerability to threats. What **Section 4(a)(l) penalizes is harmful conduct** in the Internet. It does not infringe upon the exercise of fundamental rights, and hence does not trigger a facial examination and the strict scrutiny of Section 4(a) (1). Even assuming that the strict scrutiny test applies, **what the law punishes is the act of accessing a computer WITHOUT RIGHT; this excludes the ethical hacker** who has been presumably contracted by the owner of the computer systems.

Section 4(a)(3) penalizes **data interference** which is defined as "[t]he 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."	**Constitutional - concur with the *ponencia*** What **Section 4(a)(3) penalizes is harmful conduct** in the Internet. It does not infringe upon the exercise of fundamental rights, and hence does not trigger a facial examination and the strict scrutiny of Section 4(a)(3). Even if a facial examination of Section 4(a)(3) is warranted, the petitioners failed to show sufficient reason for the law's unconstitutionality. Contrary to the petitioners' claim, this provision does not suffer from overbreadth. As elucidated by the *ponencia*, all penal laws have an inherent chilling effect or the fear of possible prosecution. To prevent the state from legislating criminal laws because they instill this kind of fear is to render the state powerless to penalize a socially harmful conduct. Moreover, this provision clearly describes the evil that it seeks to punish.
Section 4(a)(6) punishes **cyber-squatting** which is defined as "[t]he acquisition of domain name over the internet in bad faith to profit, mislead, destroy the 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	**Constitutional - concur with the *ponencia*** – Petitioners contend that Section 4(a)(6) violates the equal protection clause because a user using his real name will suffer the same fate as those who use aliases or take the name of another in satire, parody or any other literary device. The law would be punishing both a person who registers a name in satire and the person who uses this name as it is his real name.

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."	Section 4(a)(6) does not violate the equal protection clause because it appears to exclude the situation that the petitioners fear. The law punishes the bad faith use of a domain name; there can be no bad faith if the person registering the domain name uses his own name.
Section 4(b)(3) which penalizes **identity-theft,** defined as "[t]he intentional acquisition, use, misuse, transfer, possession, alteration, or deletion of identifying information belonging to another, whether natural or juridical, without right."	**Constitutional - concur with the *ponencia*** What **Section 4(b)(3) penalizes is harmful conduct** in the Internet. It does not infringe upon the exercise of fundamental rights, and hence does not trigger a facial examination and the strict scrutiny of Section 4(b) (3). **Even assuming that a facial examination may be conducted,** the petitioners **failed to show how the government's effort to curb this crime violates the right to privacy and correspondence,** and the right to due process of law. According to the *ponencia*, the **overbreadth doctrine does not apply because there is no restriction on the freedom of speech.** What this provision regulates are specific actions: the acquisition, use, misuse or deletion of personal identifying data of another. Moreover, there is no fundamental right to acquire another's personal data.

	This provision **does not violate the freedom of the press. Journalists would not be prevented from accessing a person's unrestricted user account in order to secure information about him.** This is not the essence of identity theft that the law seeks to punish. The theft of identity information must be intended for an illegitimate purpose. Moreover, acquiring and disseminating information made public by the user himself cannot be regarded as a form of theft.
Section 4(c)(l) penalizing cybersex, *i.e.*, "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."	**Constitutional - concur with the *ponencia*** Obscene speech is not protected speech, and thus does not trigger the strict scrutiny test for content-based regulations. Cybersex is defined as: (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 qualification that the exhibition be 'lascivious' takes it outside the protective mantle of free speech.
Section 4(c)(2) penalizing **child pornography** as defined in Republic Act No. 9975 (*RA 9975*) or the Anti-Child Pornography Act of 2009	**Constitutional - concur with the *ponencia*** According to the *ponencia*, this provision merely expanded the

when committed through computer systems	scope of RA 9975 (The Anti-Child Pornography Act of 2009). The resulting penalty increase is the legislature's prerogative. Moreover, the potential for uncontrolled proliferation of a pornographic material when uploaded in the cyberspace is incalculable. There is thus a rational basis for a higher penalty.
Section 4(c)(3). Unsolicited commercial communications, punishes the act of transmitting commercial electronic communications which seek to advertise, sell or offer for sale products and services (SPAM)	**Unconstitutional for infringing on commercial speech.** According to the *ponencia*, SPAM is a legitimate form of expression, *i.e.*, commercial speech, which is still entitled to protection even if at a lower level. The government failed to present basis to hold that SPAM reduces the efficiency of computers, which is allegedly the reason for punishing the act of transmitting them. I do not agree with the *ponencia*'s argument that Section 4(c)(3) should be declared unconstitutional because it denies a person the right to read his emails. Whether a person would be receiving SPAM is not a certainty; neither is it a right.
Section 4(c)(4) application of libel articles of Articles 353, 354, 361 and 362 of the Revised Penal Code when committed through a computer system	**Constitutional, but the other provisions of the Cybercrime Law that qualify cyber-libel should all be declared unconstitutional for unduly increasing the prohibitive effect of the libel law on speech. The prohibitive effect encourages self-censorship and creates a chilling effect on speech.**

	I concur with *J.* Carpio in declaring Article 354 of the Revised Penal Code unconstitutional in so far as it cyber-libel involving public officers and public figures. Section 7 of the Cybercrime Law is likewise unconstitutional insofar as it applies to cyber-libel. ➢ The 'presumed malice' found in Article 354, in relation to Article 361 and 362 of the Revised Penal Code (which the Cybercrime Act adopted) is contrary to subsequent US rulings on freedom of speech which have been transplanted when the Philippines adopted the Bill of Rights under the 1935, 1973 and 1987 Constitutions. He noted that the RPC was enacted in 1930, before the adoption of a Bill of Rights under the 1935 Constitution. Since then, jurisprudence has developed to apply 'the actual malice' rule against public officials. ➢ It is the duty of this Court to strike down Article 354, insofar as it applies the presumed malice rule to public officers and public figures. ➢ Section 4(c)(4) of the Cybercrime Law, which adopted the definition of libel in the Revised Penal Code, and added only another means by which libel may be committed. Thus, for purposes of double jeopardy analysis,

	Section 4(c)(4) and Article 353 of the RPC define and penalize the same offense of libel. ➢ Further, Section 7 also offends the Free Speech clause by assuring multiple prosecutions of those who fall under the ambit of Section 4(c)(4). The spectre of multiple trials and sentencing, even after a conviction under the Cybercrime Law, creates a significant and not merely incidental chill on online speech. – the application of Section 6 (which increases its penalty) of the Cybercrime Law to libel, should, as CJ Sereno pointed out, be declared unconstitutional (*discussed below*) – the application of Section 5, in so far as it applies to cyberlibel, should be declared as unconstitutional (*discussed below*)
Section 5 on aiding or abetting and attempt in the commission of cybercrimes	**Unconstitutional - concur with the *ponencia*. It is unconstitutional in so far as it applies to unsolicited commercial communications, cyberlibel and child pornography committed online.** According to the *ponencia*, Section 5 is unconstitutional in so far as it applies to unsolicited commercial communications, cyberlibel and child pornography committed online.

	The law has not provided reasonably clear guidelines for the law enforcement authorities and the trier of facts to prevent their arbitrary and discriminatory enforcement. This vagueness in the law creates a chilling effect on free speech in cyberspace. For example, it is not clear from the wording of the law whether the act of 'liking' or 'commenting' on a libelous article shared through a social networking site constitutes aiding or abetting in cyberlibel. As regards aiding or abetting child pornography, the law is vague because it could also punish an internet service provider or plain user of a computer service who are not acting together with the author of the child pornography material online.
Section 6, which provides that **all crimes penalized by the Revised Penal Code, and special laws, if committed by, through and with the use of information and communications technologies shall be covered by RA 10175.** It further states that the **imposable penalty shall be one degree higher** than that provided for by the Revised Penal Code, and special laws.	**Unconstitutional - concurs with CJ Sereno, it is unconstitutional in so far as it increases the penalty for cyber-libel one degree higher.** According to CJ Sereno, Section 6 creates an additional *in terrorem* effect on top of that already created by Article 355 of the RPC: 1) The increase in penalty also results in the imposition of harsher accessory penalties 2) The increase in penalty neutralizes the full benefits of the

	Law on probation. Effectively threatening the public with the guaranteed imposition of imprisonment and its accessory penalties 3) It appears that Section 6 increases the prescription periods for the crime of cyberlibel and for its penalty to fifteen years 4) ICT as a qualifying aggravating circumstance cannot be offset by any mitigating circumstances For providing that the use of ICT *per se*, even without malicious intent, aggravates the crime of libel, Section 6 is seriously flawed and burdens free speech.
Section 7, which provides that "[a] prosecution under this Act shall be without prejudice to any liability for violation of any provision of the Revised Penal Code, as amended or special laws."	**Unconstitutional - concur with the *ponencia* and Justice Carpio, unconstitutional insofar as it applies to cyberlibel and child pornography** According to Justice Carpio, Section 7 is unconstitutional in so far as it applies to libel because it assures multiple prosecutions of those who fall under the ambit of Section 4(c)(4). The spectre of multiple trials and sentencing, even after a conviction under the Cybercrime Law, creates a significant and not merely incidental chill on online speech. Further, Section 4(c)(4) of the Cybercrime Law, which adopted the definition of libel in the Revised Penal Code, only added another means by which libel is

	committed. Thus, for purposes of double jeopardy analysis, Section 4(c)(4) and Article 353 of the RPC define and penalize the same offense of libel The same reasoning applies for striking down as unconstitutional the application of Section 7 to Section 4(c)(2) or child pornography. It merely expands the Anti-Child Pornography Act's scope to include identical activities in cyberspace.
Section 8, which provides for **penalties for the cybercrimes** committed under the Cybercrime Law	**Constitutional - concur with the *ponencia*** According to the *ponencia*, it is the legislature's prerogative to fix penalties for the commission of crimes. The penalties in Section 8 appear proportionate to the evil sought to be punished
Section 12 on the real time collection and recording of traffic data	**Unconstitutional because it violates the right to privacy.** While traffic data *per se* does not raise any reasonable expectation of privacy, the lack of standards in Section 12 in effect allows the real time collection and recording of traffic data of online activities and content data. Content data is indisputably private information. The collection of traffic data, over time, yields information that the internet user considers to be private. Thus, Section 12 suffers from vagueness and overbreadth that renders it unconstitutional.

	This ruling does not totally disallow the real-time collection and recording of traffic data. Until Congress enacts a law that provides sufficient standards for the warrantless real-time collection of traffic data, this may still be performed by law enforcement authorities, subject to a judicial warrant.
Section 13, which requires Internet Service providers to retain traffic data and subscriber data for a period of 6 months; and for ISPs to retain content data upon order from law enforcement agents	**Constitutional - concur with the *ponencia*** The petitioners argued that Section 13 constitutes an undue deprivation of the right to property. The data preservation order is a form of garnishment of personal property in civil forfeiture proceedings, as it prevents internet users from accessing and disposing of traffic data that essentially belong to them. The *ponencia* maintained that there was no undue deprivation of property because the user has the obligation to keep a copy of his data, and the service provider has never assumed responsibility for the data's loss or deletion while in its keep. Further, the data that service providers preserve are not made inaccessible to users by reason of the issuance of the preservation order. The process of preserving the data will not unduly hamper the normal transmission or use of these data.

Section 14 on **Disclosure of Computer Data,** which provides that "[l]aw enforcement authorities, upon securing a court warrant, shall issue an order requiring any person or service provider to disclose or submit subscriber's information, traffic data or relevant data in his/its possession or control within seventy-two (72) hours from receipt of the order in relation to a valid complaint officially docketed and assigned for investigation and the disclosure is necessary and relevant for the purpose of investigation."	**Constitutional - concur with the *ponencia*** The petitioners argued that it is beyond the law enforcement authorities' power to issue subpoenas. They asserted that issuance of subpoenas is a judicial function. The *ponencia* clarified that the power to issue subpoenas is not exclusively a judicial function. Executive agencies have the power to issue subpoenas as part of their investigatory powers. Further, **what Section 14 envisions is merely the enforcement of a duly-issued court warrant.** The prescribed procedure for disclosure would not constitute an unlawful search and seizure, nor would it violate the privacy of communications and correspondence. Disclosure can be made only after judicial intervention.
Section 15 provides that the law enforcement authorities shall have the following **powers and duties in enforcing a search and seizure warrant:** (a) To conduct interception; (b) To secure a computer system or a computer data storage medium; (c) To make and retain a copy of those computer data secured; (d) To maintain the integrity of the relevant stored computer data;	**Constitutional – concur with the *ponencia*** As the *ponencia* explained, Section 15 does not supplant, but **merely supplements, the established search and seizure procedures.** It merely enumerates the duties of law enforcement authorities that would ensure the proper collection, preservation, and use of computer system or data that have been seized by virtue of a court warrant. The exercise of these duties does not pose any

(e) To conduct forensic analysis or examination of the computer data storage medium; and (f) To render inaccessible or remove those computer data in the accessed computer or computer and communications network. Furthermore, the law enforcement authorities may order any person who has knowledge about the functioning of the computer system and the measures to protect and preserve the computer data therein to provide, as is reasonable, the necessary information, to enable the undertaking of the search, seizure and examination.	threat on the rights of the person from whom they were taken.
Section 17 provides that "[u]pon expiration of the periods as provided in Sections 13 and 15, service providers and law enforcement authorities, as the case may be, shall immediately and completely destroy the computer data subject of a preservation and examination."	**Constitutional - concur with the *ponencia*** According to the *ponencia*, Section 17 does not amount to deprivation of property without due process. The user has no demandable right to require the service provider to have the copy of data saved indefinitely for him in its storage system. He should have saved them in his computer if he wanted them preserved. He could also request the service provider for a copy before it is deleted.
Section 19 empowering the Department of Justice (DOJ) Secretary to restrict or block	**Unconstitutional – partially concur with the *ponencia* in holding Section 19 unconstitutional**

access to computer data when it is found to have *prima facie* violated the provisions of the Cybercrime Law	**because it restricts freedom of speech** According to the *ponencia*, the content of the computer data can also constitute speech. Section 19 constitutes an undue restraint on free speech because it allows the DOJ Secretary to block access to computer data only upon a *prima facie* finding that it violates the Cybercrime Act. Thus, it disregards established jurisprudence on the evaluation of restraints on free speech, *i.e.*, the dangerous tendency doctrine, the balancing of interest test, and the clear and present danger rule
Section 20, which provides that non-compliance with the orders from the law enforcement authorities shall be punished as a violation of Presidential Decree No. 1829 (PD 1829) (Obstruction of Justice Law).	**Constitutional - concur with the *ponencia*** According to the *ponencia*, Section 20 is not a bill of attainder; **it necessarily incorporates the elements of the offense of PD 1829.** The act of non-compliance must still be done knowingly or willfully. There must still be a judicial determination of guilt.
Section 24 on the creation of a Cybercrime Investigation and Coordinating Center (CICC); and Section 26(a) on CICC's Powers and Functions.	**Constitutional - concur with the *ponencia*** The petitioners contended that the legislature invalidly delegated the power to formulate a national cybersecurity plan to the CICC. The *ponencia* ruled that there is no invalid delegation of legislative power for the following reasons:

	(1) The cybercrime law is complete in itself. The law gave sufficient standards for the CICC to follow when it provided for the definition of cyber-security. This definition serves as the parameters within which CICC should work in formulating the cyber-security plan. (2) The formulation of the cyber-security plan is consistent with the policy of the law to prevent and combat such cyber-offenses by facilitating their detection, investigation and prosecution at both the domestic and international levels, and by providing arrangements for fast and reliable international cooperation.

CONCURRING AND DISSENTING OPINION

SERENO, *C.J.*:

> *The true role of Constitutional Law is to effect an equilibrium between authority and liberty so that rights are exercised within the framework of the law and the laws are enacted with due deference to rights.*
>
> Justice Isagani A. Cruz[1]

When the two other branches of government transgress their inherent powers, often out of a well-intentioned zeal that causes an imbalance between authority and liberty, it is the Court's solemn duty to restore the delicate balance that has been upset.

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[1] ISAGANI A. CRUZ, *CONSTITUTIONAL LAW*, 1 (2000).

This is the difficult task before us now, involving as it does our power of judicial review over acts of a coequal branch.

The task is complicated by the context in which this task is to be discharged: a rapidly evolving information and communications technology, which has been an enormous force for good as well as for evil. Moreover, the Court is forced to grapple with the challenge of applying, to the illimitable cyberspace, legal doctrines that have heretofore been applied only to finite physical space. Fortunately, we have the Constitution as our North Star as we try to navigate carefully the uncharted terrain of cyberspace as the arena of the conflict between fundamental rights and law enforcement.

I concur with the *ponencia* in finding unconstitutional Section 12 of *Cybercrime Prevention Act* on the real-time collection of traffic data and Section 19 on the restriction or blocking of access to computer data. I also adopt the *ponencia*'s discussion of Sections 12 and 19. **I write this Separate Opinion, however, to explain further why real-time collection of traffic data may be indispensable in certain cases, as well as to explain how the nature of traffic data *per s*e undercuts any expectation of privacy in them.**

I also concur with the *ponencia*'s partial invalidation of Section 4(c)(4) on libel insofar as it purports to create criminal liability on the part of persons who receive a libelous post and merely react to it; **and of Section 7, in so far as it applies to libel.**

However, I dissent from the *ponencia*'s upholding of Section 6 as not unconstitutional in all its applications. I find Section 6 to be unconstitutional insofar as it applies to cyberlibel because of its "chilling effect." Hence, I am writing this Separate Opinion also to explain my dissent on this issue.

I find the rest of the constitutional challenges not proper for a pre-enforcement judicial review and therefore dismissible.

I.

THIS COURT MAY EMPLOY A PRE-ENFORCEMENT JUDICIAL REVIEW OF THE *CYBERCRIME PREVENTION ACT*.

As distinguished from the general notion of judicial power, the power of judicial review especially refers to both the authority and the duty of this Court to determine whether a branch or an instrumentality of government has acted beyond the scope of the latter's constitutional powers.[2] It includes the power to resolve cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.[3] This power, first verbalized in the seminal case *Marbury v. Madison*,[4] has been exercised by the Philippine Supreme Court since 1902.[5] The 1936 case *Angara v. Electoral Commission* exhaustively discussed the concept as follows:[6]

> The separation of powers is a fundamental principle in our system of government. It obtains not through express provision but by actual division in our Constitution. **Each department of the government has exclusive cognizance of matters within its jurisdiction, and is supreme within its own sphere.** But it does not follow from the fact that the three powers are to be kept separate and distinct that the Constitution intended them to be absolutely unrestrained and independent of each other. **The Constitution has provided for an elaborate system of checks and balances to secure coordination**

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[2] See: *Chavez v. Judicial and Bar Council*, G.R. No. 202242, 17 July 2012, 676 SCRA 579; *Tagolino v. House of Representatives Electoral Tribunal*, G.R. No. 202202, 19 March 2013; *Gutierrez v. House of Representatives Committee on Justice*, G.R. No. 193459, 15 February 2011, 643 SCRA 198; *Francisco v. House of Representatives*, 460 Phil. 830 (2003); *Demetria v. Alba*, 232 Phil. 222 (1987).

[3] CONSTITUTION, Art. VIII, Sec. 2(a).

[4] 5 U.S. 137 (1803).

[5] *Francisco v. House of Representatives*, *supra* note 2 (citing *U.S. v. Ang Tang Ho*, 43 Phil. 1 [1922]; *McDaniel v. Apacible*, 42 Phil. 749 [1922]; *Concepcion v. Paredes*, 42 Phil. 599 [1921]; *In re Prautch*, 1 Phil. 132 [1902]; and *Casanovas v. Hord*, 8 Phil. 125 [1907]).

[6] *Angara v. Electoral Commission*, 63 Phil. 139, 156-158 (1936).

in the workings of the various departments of the government. x x x. **And the judiciary in turn, with the Supreme Court as the final arbiter, effectively checks the other departments in the exercise of its power to determine the law, and hence to declare executive and legislative acts void if violative of the Constitution.**

x x x x x x x x x

As any human production, **our Constitution** is of course lacking perfection and perfectibility, but as much as it was within the power of our people, acting through their delegates to so provide, that instrument **which is the expression of their sovereignty however limited, has established a republican government intended to operate and function as a harmonious whole, under a system of checks and balances, and subject to specific limitations and restrictions provided in the said instrument. The Constitution sets forth in no uncertain language the restrictions and limitations upon governmental powers and agencies. If these restrictions and limitations are transcended it would be inconceivable if the Constitution had not provided for a mechanism by which to direct the course of government along constitutional channels, for then the distribution of powers would be mere verbiage, the bill of rights mere expressions of sentiment, and the principles of good government mere political apothegms.** Certainly, the limitations and restrictions embodied in our Constitution are real as they should be in any living constitution. In the United States where no express constitutional grant is found in their constitution, the possession of this moderating power of the courts, not to speak of its historical origin and development there, has been set at rest by popular acquiescence for a period of more than one and a half centuries. In our case, **this moderating power is granted, if not expressly, by clear implication from Section 2 of Article VIII of our Constitution.**

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

in truth all that is involved in what is termed "judicial supremacy" **which properly is the power of judicial review under the Constitution.** (Emphases supplied)

The power of judicial review has since been strengthened in the 1987 Constitution, extending its coverage to the determination of whether there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government.[7] The expansion made the political question doctrine "no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable shield that protects executive and legislative actions from judicial inquiry or review."[8] Thus, aside from the test of constitutionality, this Court has been expressly granted the power and the duty to examine whether the exercise of discretion in those areas that are considered political questions was attended with grave abuse.[9]

This moderating power of the Court, however, must be exercised carefully, and only if it cannot be feasibly avoided, as it **involves the delicate exercise of pronouncing an act of a branch or an instrumentality of government unconstitutional, at the risk of supplanting the wisdom of the constitutionally appointed actor with that of the judiciary.**[10] It cannot be overemphasized that our Constitution was so incisively designed

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[7] *Francisco v. House of Representatives, supra* note 2; *Gutierrez v. House of Representatives Committee on Justice, supra* note 2; CONSTITUTION, Art. VIII, Sec. 1.

[8] *Oposa v. Factoran*, G.R. No. 101083, 30 July 1993, 224 SCRA 792, 809.

[9] *Francisco v. House of Representatives, supra* note 2; *Tañada v. Angara*, 338 Phil. 546 (1997); *Oposa v. Factoran, supra* (citing *Llamas v. Orbos*, 279 Phil. 920 [1991]; *Bengzon v. Senate Blue Ribbon Committee*, 203 SCRA 767 [1991]); *Gonzales v. Macaraig*, 191 SCRA 452 [1990]; *Coseteng v. Mitra*, 187 SCRA 377 [1990]; *Daza v. Singson*, 259 Phil. 980 [1989]; and I RECORD, CONSTITUTIONAL COMMISSION 434-436 [1986].

[10] See: *Francisco v. House of Representatives, supra* note 2; *United States v. Raines*, 362 U.S. 17 (1960); and *Angara v. Electoral Commission, supra* note 6.

that the different branches of government were made the respective experts in their constitutionally assigned spheres.[11] Hence, even as the Court dutifully exercises its power of judicial review to check – in this case, the legislature – it must abide by the strict requirements of its exercise under the Constitution. Indeed, "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people."[12]

Demetria v. Alba[13] and *Francisco v. House of Representatives*[14] cite the "seven pillars" of the limitations of the power of judicial review, enunciated in the concurring opinion of U.S. Supreme Court Justice Louis Brandeis in *Ashwander v. Tennessee Valley Authority*[15] as follows:

1. The **Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding**, declining because to decide such questions "is **legitimate only in the last resort**, and as **a necessity in the determination of real, earnest and vital controversy between individuals**. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." x x x.

2. The Court **will not "anticipate a question of constitutional law in advance of the necessity of deciding it."** x x x. "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."

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[11] *Morfe v. Mutuc*, 130 Phil. 415 (1968); *Angara v. Electoral Commission*, *supra*.

[12] *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (citing *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 329 [2006]; and *Regan v. Time, Inc.*, 468 U. S. 641, 652 [1984]).

[13] *Supra* note 2.

[14] *Supra* note 2, at 922-923.

[15] *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

3. The Court **will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."** x x x.

4. The Court **will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.** This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. x x x.

5. The Court **will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.** x x x. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained. x x x.

6. The Court **will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits**. x x x.

7. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that **this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.**" (Citations omitted, emphases supplied)

These are specific safeguards laid down by the Court when it exercises its power of judicial review. Thus, as a threshold condition, the power of judicial review may be invoked only when the following four stringent requirements are satisfied: (a) there must be an actual case or controversy; (b) petitioners must possess *locus standi;* (c) the question of constitutionality must be raised at the earliest opportunity; and (d) the issue of constitutionality must be the *lis mota* of the case.[16]

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[16] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, G.R. No. 178552, 5 October 2010, 632 SCRA 146; *David v.*

Specifically focusing on the first requisite, it necessitates that there be an existing case or controversy that is appropriate or ripe for determination as opposed to a case that is merely conjectural or anticipatory.[17] The case must involve a definite and concrete issue concerning real parties with conflicting legal rights and opposing legal claims, admitting of a specific relief through a decree conclusive in nature.[18] The "ripeness" for adjudication of the controversy is generally treated in terms of actual injury to the plaintiff.[19] Hence, a question is ripe for adjudication when the act being challenged has had a direct adverse effect on the individual challenging it. The case should not equate with a mere request for an opinion or an advice on what the law would be upon an abstract, hypothetical, or contingent state of facts.[20] As explained in *Angara v. Electoral Commission*:[21]

> [The] power of **judicial review is limited to actual cases and controversies 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. **Any attempt at abstraction could only lead to dialectics and barren legal questions and to sterile conclusions of wisdom, justice or expediency of legislation.**

Macapagal-Arroyo, 522 Phil. 705, 753 (2006); *Francisco v. House of Representatives*, *supra* note 2, at 923-924; *Angara v. Electoral Commission*, *supra* note 6.

[17] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, *supra*.

[18] *Information Technology Foundation of the Philippines v. Commission on Elections*, 499 Phil. 281 (2005) (citing *Aetna Life Insurance Co. v. Hayworth*, 300 U.S. 227 [1937]); *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, *supra*; *David v. Macapagal-Arroyo*, *supra* note 16; *Francisco v. House of Representatives*, *supra* note 2; *Angara v. Electoral Commission*, *supra* note 6.

[19] *Lozano v. Nograles*, G.R. Nos. 187883 & 187910, 16 June 2009, 589 SCRA 356.

[20] *Information Technology Foundation of the Philippines v. Commission on Elections*, *supra* note 18; *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, *supra*; *Lozano v. Nograles*, *supra*.

[21] *Angara v. Electoral Commission*, *supra* note 6, at 158-159.

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.** (Emphases supplied)

According to one of the most respected authorities in American constitutional law, Professor Paul A. Freund, the actual case or controversy requirement is a crucial restraint on the power of unelected judges to set aside the acts of the people's representative to Congress.[22] Furthermore, he explains:[23]

The rules of "case and controversy" can be seen as the necessary corollary of this vast power – necessary for its wise exercise and its popular acceptance. **By declining to give advisory opinions, the Court refrains from intrusion into the lawmaking process. By requiring a concrete case with litigants adversely affected, the Court helps itself to avoid premature, abstract, ill-informed judgments.** By placing a decision on a non-constitutional ground whenever possible, the **Court gives the legislature an opportunity for sober second thought, an opportunity to amend the statue to obviate the constitutional question, a chance to exercise that spirit of self-scrutiny and self-correction** which is the essence of a successful democratic system. (Emphases supplied)

While the actual controversy requirement has been largely interpreted in the light of the implications of the assailed law *vis-à-vis* the legally demandable rights of real parties and the direct injury caused by the assailed law, **we have also exceptionally recognized the possibility of lodging a constitutional challenge *sans* a pending case involving a directly injured party.** In *Southern Hemisphere Engagement*

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[22] VICENTE V. MENDOZA, *JUDICIAL REVIEW OF CONSTITUTIONAL QUESTIONS: CASES AND MATERIALS* 91 (2nd Ed. 2013) (MENDOZA) (citing Paul A. Freund, "The Supreme Court," *in* TALKS ON AMERICAN LAW 81 [H. J. Berman Rev. Ed. 1972]).

[23] Paul A. Freund, "The Supreme Court," in *TALKS ON AMERICAN LAW* 81 (H. J. Berman Rev. Ed. 1972) (quoted in MENDOZA, *supra*)

Network, Inc. v. Anti-Terrorism Council,[24] we conceded the possibility of a **pre-enforcement judicial review** of a penal statute, **so long as there is a real and credible threat of prosecution involving the exercise of a constitutionally protected conduct or activity**.[25] We noted that the petitioners therein **should not be required to expose themselves to criminal prosecution before they could assail the constitutionality of a statute, especially in the face of an imminent and credible threat of prosecution.**[26]

On 5 February 2013, this Court extended indefinitely the temporary restraining order enjoining the government from implementing and enforcing the *Cybercrime Prevention Act of 2012*. As the assailed law is yet to be enforced, I believe that in order to give due course to the Petitions, we would have to test their qualification for pre-enforcement judicial review of the assailed law and its provisions.

In discussing the requirements of a pre-enforcement judicial review, we refer to our ruling in *Southern Hemisphere*. We declined to perform a pre-enforcement judicial review of the assailed provisions of the *Human Security Act of 2007*, because petitioners failed to show that the law forbade them from exercising or performing a constitutionally protected conduct or activity that they sought to do. We also explained that the obscure and speculative claims of the petitioners therein that they were being subjected to sporadic "surveillance" and tagged

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[24] See: *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, *supra* note 16.

[25] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, *supra* note 16.

[26] Nevertheless, we ultimately found that the petitioners therein failed to show their entitlement to a pre-enforcement judicial review of the *Human Security Act of 2007*. *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, *supra* note 16 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. [unpaginated] [2010]); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007); See also: *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979); *Doe v. Bolton*, 410 U.S. 179, 188-189 (1973) (citing *Epperson v. Arkansas*, 393 U.S. 97 [1968]);

as "communist fronts" were insufficient to reach the level of a credible threat of prosecution that would satisfy the actual-controversy requirement. Thus, from the facts they had shown, we ruled that the Court was merely "being lured to render an advisory opinion, which [was] not its function."[27]

We then drew a distinction between the facts in *Southern Hemisphere* and those in *Holder v. Humanitarian Law Project*, a case decided by the United States Supreme Court. We noted that in *Holder*, a pre-enforcement judicial review of the assailed criminal statue was entertained because the plaintiffs therein had successfully established that there was a genuine threat of imminent prosecution against them, thereby satisfying the actual-controversy requirement. The case concerned a new law prohibiting the grant of material support or resources to certain foreign organizations engaged in terrorist activities. Plaintiffs showed that they had been providing material support to those declared as foreign terrorist organizations; and that, should they continue to provide support, there would be a credible threat of prosecution against them pursuant to the new law. The plaintiffs therein insisted that they only sought to facilitate the lawful, nonviolent purposes of those groups – such as the latter's political and humanitarian activities – and that the material-support law would prevent the plaintiffs from carrying out their rights to free speech and to association. Based on the foregoing considerations, the U.S. Supreme Court concluded that the claims of the plaintiffs were suitable for judicial review, as there was a justiciable case or controversy.

We may thus cull from the foregoing cases that an anticipatory petition assailing the constitutionality of a criminal statute that is yet to be enforced may be exceptionally given due course by this Court when the following circumstances are shown: (a) the challenged law or provision **forbids a constitutionally protected conduct or activity** that a petitioner seeks to do; (b) a **realistic, imminent, and credible threat or danger of sustaining a direct**

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[27] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, *supra* note 16.

injury or facing prosecution awaits the petitioner should the prohibited conduct or activity be carried out; and (c) the **factual circumstances** surrounding the prohibited conduct or activity sought to be carried out are **real, not hypothetical and speculative, and are sufficiently alleged and proven**.[28] It is only when these minimum conditions are satisfied can there be a finding of a justiciable case or actual controversy worthy of this Court's dutiful attention and exercise of pre-enforcement judicial review. Furthermore, since the issue of the propriety of resorting to a pre-enforcement judicial review is subsumed under the threshold requirement of actual case or controversy, we need not go through the merits at this stage. **Instead, the determination of whether or not to exercise this power must hinge solely on the allegations in the petition, regardless of the petitioner's entitlement to the claims asserted.**

A review of the petitions before us shows that, save for the Disini Petition,[29] all petitions herein have failed to establish that their claims call for this Court's exercise of its power of pre-enforcement judicial review.

Petitioners allege that they are users of various information and communications technologies (ICT) as media practitioners, journalists, lawyers, businesspersons, writers, students, Internet and social media users, and duly elected legislators. **However, except for the Petition of *Disini*, none of the other petitioners**

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[28] See: *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, *supra* note 16; *De Castro v. Judicial and Bar Council*, G.R. No. 202242, 17 July 2012, 676 SCRA 579 (citing *Buckley v. Valeo*, 424 U.S. 1, 113-118 [1976]; Regional Rail Reorganization Act Cases, 419 U.S. 102, 138-148 [1974]); *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007); *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979) (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102 [1974]; *Steffel v. Thompson*, 415 U.S. 452 [1974]; *O'Shea v. Littleton*, 414 U.S. 488 [1974]; *Doe v. Bolton*, 410 U.S. 179 [1973]; *Younger v. Harris*, 401 U.S. 37 [1971]; *Golden v. Zwickler*, 394 U.S. 103 [1969]; *Epperson v. Arkansas*, 393 U.S. 97 [1968]; *Evers v. Dwyer*, 358 U.S. 202 [1958]; *Pierce v. Society of Sisters*, 268 U.S. 510 [1925]; *Pennsylvania v. West Virginia*, 262 U.S. 553 [1923]).

[29] G.R. No. 203325, *Jose Jesus M. Disini, Jr. v. The Secretary of Justice*.

have been able to show that they are facing an imminent and credible threat of prosecution or danger of sustaining a direct injury. Neither have they established any real, factual circumstances in which they are at risk of direct injury or prosecution, should those acts continue to be carried out.

They have simply posed hypothetical doomsday scenarios and speculative situations, such as round-the-clock, Big-Brother-like surveillance; covert collection of digital and personal information by the government; or a wanton taking down of legitimate websites.[30] Others have made outright legal queries on how the law would be implemented in various circumstances, such as when a person disseminates, shares, affirms, "likes," "retweets," or comments on a potentially libelous article.[31] A considerable number of them have merely raised legal conclusions on the implication of the new law, positing that the law would *per se* prevent them from freely expressing their views or comments on intense national issues involving public officials and their official acts.[32] **While these are legitimate concerns of the public, giving in to these requests for advisory opinion would amount to an exercise of the very same function withheld from this Court by the actual controversy requirement entrenched in Section 1, Article III of our Constitution.**

The Petition of *Disini* is the only pleading before the Court that seems to come close to the actual-controversy requirement

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[30] See Petition of Disini (G.R. No. 203335), pp. 22-23, 26-27; Petition of Reyes (G.R. No. 203407), p. 25; Petition of Castillo, (G.R. No. 203454), pp. 10-11; Petition of Cruz (G.R. No. 203469), pp. 39-40; Petition of Philippine Internet Freedom Alliance (G.R. No. 203518), p. 9.

[31] See Petition of Adonis (G.R. No. 203378), p. 29; Petition of Sta. Maria (G.R. No. 203440), p. 22; Petition of Cruz (G.R. No. 203469), pp. 60-61; Petition of Philippine Bar Association (GRN 203501), p. 19; Petition of Colmenares (G.R. No. 203509), p. 15; Petition of National Press Club of the Philippines (G.R. No. 203515), pp. 16-17.

[32] See Petition of Adonis (G.R. No. 203378), p. 33; Petition of National Union of Journalists of the Philippines (G.R. No. 203453), p. 11; Petition of National Press Club of the Philippines (G.R. No. 203515), p. 9; Petition of Philippine Internet Freedom Alliance (G.R. No. 203518), pp. 47-48; Petition of Philippine Bar Association (G.R.No. 203501), p. 19.

under the Constitution. What sets the Petition apart is that it does not merely allege that petitioners therein are ICT users who have posted articles and blogs on the Internet. The Petition also cites particular blogs or online articles of one of the petitioners who was critical of a particular legislator.[33] Furthermore, it refers to a newspaper article that reported the legislator's intent to sue under the new law, once it takes effect. The pertinent portion of the Petition reads:[34]

> 5. Petitioners are all users of the Internet and social media. **Petitioner Ernesto Sonido, Jr. ("Petitioner Sonido"), in particular, maintains the blog "Baratillo Pamphlet"** over the Internet.
>
> 6. **On August 22, 2012 and September 7, 2012, Petitioner Sonido posted 2 blogs entitled "Sotto Voce: Speaking with Emphasis" and "Sotto and Lessons on Social Media" in which he expressed his opinions regarding Senator Vicente "Tito" Sotto III's ("Senator Sotto") alleged plagiarism of online materials** for use in his speech against the Reproductive Health Bill.
>
> 7. **On August 30, 2012, Senator Sotto disclosed that the Cybercrime Bill was already approved** by the Senate and the House of Representatives and was merely awaiting the President's signature. **He then warned his critics that once signed into law, the Cybercrime Bill will penalize defamatory statements made online.** To quote Senator Sotto:
>
> > "*Walang ginawa yan* [internet users] *umaga, hapon, nakaharap sa* computer, *target nuon* anything about the [Reproductive Health] Bill. ***Ganun ang* strategy *nun* and unfortunately, *di panapipirmahan ang* Cybercrime bill. *Pwede na sana sila tanungin sa pagmumura at pagsasabi ng di maganda. Sa* Cybercrime bill, *magkakaroon ng accountability sa kanilang pinagsasabi,* penalties *na haharapin,* same penalties as legitimate journalists, anything that involves the internet**," he said.

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[33] See Petition of Disini (G.R. No. 203335), pp. 10-12.

[34] Petition of Disini (G.R. No. 203335), pp. 10-12.

8. The threat of criminal prosecution that was issued by Senator Sotto affected not only bloggers like Petitioner Sonido but all users of the Internet and social media as the other Petitioners herein who utilize online resources to post comments and express their opinions about social issues.

9. The President finally signed the Cybercrime Act into law on September 12, 2012.

10. **With the passage of the Cybercrime Act, the threat that was issued by Senator Sotto against his online critics has become real**. (Emphases and italics supplied)

The Petition of *Disini* appears to allege sufficient facts to show a realistic, imminent, and credible danger that at least one of its petitioners may sustain a direct injury should respondents proceed to carry out the prohibited conduct or activity. First, there was a citation not only of a particular blog, but also of two potentially libelous entries in the blog. Second, the plausibly libelous nature of the articles was specifically described. Third, the subject of the articles, Senator Vicente Sotto III, was alleged to have made threats of using the assailed statute to sue those who had written unfavorably about him; a verbatim quote of the legislator's threat was reproduced in the Petition. Fourth, the person potentially libeled is a nationally elected legislator.

This combination of factual allegations seems to successfully paint a realistic possibility of criminal prosecution under Section 4(c)(4) of a specific person under the assailed law. Consequently, there is now also a possibility of the writer being penalized under Section 6, which raises the penalty for crimes such as libel by one degree when committed through ICT. The alleged facts would also open the possibility of his being charged twice under Section 4(c)(4) and Article 353 of the Revised Penal Code by virtue of Section 7. Furthermore, since he might become a suspect in the crime of libel, his online activities might be in danger of being investigated online by virtue of Section 12 or his access to computer data might be restricted under Section 19.

Therefore, it is submitted that the Court must limit its discussion of the substantive merits of the cases to the Petition of *Disini*, at the most and only on the provisions questioned therein.

II.

PARTICULAR PROVISIONS OF THE *CYBERCRIME PREVENTION ACT* MAY BE FACIALY INVALIDATED.

A facial challenge refers to the call for the scrutiny of an entire law or provision by identifying its flaws or defects, not only on the basis of its actual operation on the attendant facts raised by the parties, but also on the assumption or prediction that the very existence of the law or provision is repugnant to the Constitution.[35] This kind of challenge has the effect of totally annulling the assailed law or provision, which is deemed to be unconstitutional *per se*. The challenge is resorted to by courts, especially when there is no instance to which the law or provision can be validly applied.[36]

In a way, a facial challenge is a deviation from the general rule that Courts should only decide the invalidity of a law "as applied" to the actual, attending circumstances before it.[37] An as-applied challenge refers to the localized invalidation of a law or provision, limited by the factual milieu established in a case involving real litigants who are actually before the Court.[38] This kind of challenge is more in keeping with the established canon of adjudication that "the court should not form a rule of constitutional law broader than is required by the precise facts to which it is applied."[39] Should the petition prosper, **the unconstitutional aspects of the law will be carved away by**

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[35] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, *supra* note 16 (citing *David v. Macapagal-Arroyo*, *supra* note 16; *Romualdez v. Commission on Elections*, 576 Phil. 357 (2008).

[36] *Estrada v. Sandiganbayan*, 421 Phil. 290 (2001); *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, *supra* note 16.

[37] *Id.*

[38] *See*: *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, G.R. No. 178552, *supra* note 16.

[39] *Francisco v. House of Representatives*, *supra* note 2 (citing *Estrada v. Desierto*, [Sep. Op. of J. Mendoza], 406 Phil. 1 [2001]; *Demetria v. Alba*, *supra* note 2; *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 [1936]).

invalidating its improper applications on a case-to-case basis.[40] For example, in *Ebralinag v. Division of Superintendent of Schools of Cebu*,[41] the Court exempted petitioner-members of the religious group Jehovah's Witness from the application of the *Compulsory Flag Ceremony in Educational Institutions Act* on account of their religious beliefs. The Court ruled that the law requiring them to salute the flag, sing the national anthem, and recite the patriotic pledge cannot be enforced against them at the risk of expulsion, because the law violated their freedom of religious expression. In effect, the law was deemed unconstitutional insofar as their religious beliefs were concerned.

Because of its effect as a total nullification, the facial invalidation of laws is deemed to be a "manifestly strong medicine" that must be used sparingly and only as a last resort.[42] The general disfavor towards it is primarily due to 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."[43] Claims of facial invalidity "raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'"[44]

A. Section 6 – Increase of Penalty by One Degree

Section 6 was worded to apply to all existing penal laws in this jurisdiction. Due to the sheer extensiveness of the applicability of this provision, I believe it unwise to issue a wholesale facial

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[40] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, *supra* note 16; *David v. Macapagal-Arroyo*, *supra* note 16.

[41] G.R. No. 95770, 1 March 1993, 219 SCRA 256.

[42] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, *supra* note 16; *David v. Macapagal-Arroyo*, *supra* note 16; *Estrada v. Sandiganbayan*, 421 Phil. 290 (2001).

[43] *Id.*

[44] *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (citing *Sabri v. United States*, 541 U. S. 600, 609 [2004]).

invalidation thereof, especially because of the insufficiency of the facts that would allow the Court to make a conclusion that the provision has no valid application.

Alternatively, the discussion can be limited to the allegations raised in the Petition of *Disini* concerning the right to free speech. The Petition asserts that Section 6 (on the increase of penalty by one degree), in conjunction with the provision on cyberlibel, has the combined chilling effect of curtailing the right to free speech. The Petition posits that the law "imposes heavier penalties for online libel than paper-based libel" in that the imposable penalty for online libel is now increased from *prisión correccional* in its minimum and medium periods (6 months and 1 day to 4 years and 2 months) to *prisión mayor* in its minimum and medium periods (6 years and 1 day to 10 years).[45]

The *ponencia* correctly holds that libel is not a constitutionally protected conduct. It is also correct in holding that, generally, penal statutes cannot be invalidated on the ground that they produce a "chilling effect," since by their very nature, they are intended to have an *in terrorem* effect (benign chilling effect)[46] to prevent a repetition of the offense and to deter criminality.[47] The "chilling effect" is therefore equated with and justified by the intended *in terrorem* effect of penal provisions.

This does not mean, however, that the Constitution gives Congress the *carte blanche* power to indiscriminately impose and increase penalties. While the determination of the severity of a penalty is a prerogative of the legislature, when laws and penalties affect free speech, it is beyond question that the Court may exercise its power of judicial review to determine whether

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[45] Petition of Disini, pp. 9-10. The computation of the imposable penalty in the Petition seems to be erroneous. Insofar as the crime of libel is concerned, I have discussed below that the imposable penalty in libel qualified by the use of ICT should be *prisión correccional* in its maximum period to *prisión mayor* in its minimum period.

[46] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, *supra* note 16.

[47] *The Philippine Railway Co. v. Geronimo Paredes*, 64 Phil. 129 (1936).

there has been a grave abuse of discretion in imposing or increasing the penalty. The Constitution's command is clear: "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." Thus, **when Congress enacts a penal law affecting free speech and accordingly imposes a penalty that is so discouraging that it effectively creates an invidious chilling effect, thus impeding the exercise of speech and expression altogether, then there is a ground to invalidate the law. In this instance, it will be seen that the penalty provided has gone beyond the *in terrorem* effect needed to deter crimes and has thus reached the point of encroachment upon a preferred constitutional right.** I thus vote to facially invalidate Section 6 insofar as it applies to the crime of libel.

As will be demonstrated below, the confluence of the effects of the increase in penalty under this seemingly innocuous provision, insofar as it is applied to libel, will practically result in chilling the right of the people to free speech and expression.

Section 6 creates an additional in terrorem effect on top of that already created by Article 355 of the Revised Penal Code

The basic postulate of the classical penal system on which our *Revised Penal Code* is based is that humans are rational and calculating beings who guide their actions by the principles of pleasure and pain.[48] They refrain from criminal acts if threatened with punishment sufficient to cancel the hope of possible gain or advantage in committing the crime.[49] This consequence is what is referred to as the *in terrorem* effect sought to be created by the *Revised Penal Code* in order to deter the commission of a crime.[50] Hence, in the exercise of the

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[48] RAMON C. AQUINO, *THE REVISED PENAL CODE* – Vol. 1, 3 (1961) (AQUINO).

[49] *Id.*

[50] *See* AQUINO, at 8-11.

people's freedom of speech, they carefully decide whether to risk publishing materials that are potentially libelous by weighing the severity of the punishment "if and when the speech turns out to be libelous "against the fulfillment and the benefits to be gained by them.

Our *Revised Penal Code* increases the imposable penalty when there are attending circumstances showing a *greater perversity* or an *unusual criminality* in the commission of a felony.[51] The intensified punishment for these so-called aggravating circumstances is grounded on various reasons, which may be categorized into (1) the motivating power itself, (2) the place of commission, (3) the means and ways employed, (4) the time, or (5) the personal circumstances of the offender or of the offended party.[52] Based on the aforementioned basic postulate of the classical penal system, this is an additional *in terrorem* effect created by the *Revised Penal Code*, which targets the deterrence of a resort to *greater perversity* or to an *unusual criminality* in the commission of a felony.

Section 4(c)(4) of the *Cybercrime Prevention Act* expressly amended Article 355 of the *Revised Penal Code*, thereby clarifying that the use of a "computer system or any other similar means" is a way of committing libel. On the other hand, Section 6 of the *Cybercrime Prevention Act* introduces a qualifying aggravating circumstance, which reads:

> Sec. 6. All crimes defined and penalized by the Revised Penal Code, as amended, and special laws, **if committed by, through and with the use of information and communications technologies** shall be covered by the relevant provisions of this Act: *Provided*, That the **penalty to be imposed shall be one (1) degree higher than that provided for by the Revised Penal Code**, as amended, and special laws, as the case may be. (Emphases supplied)

A perfunctory application of the aforementioned sections would thus suggest the amendment of the provision on libel in the

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[51] *Id.* at 277; LUIS B. REYES, *THE REVISED PENAL CODE – CRIMINAL LAW, BOOK ONE*, 328 (2008) (Reyes).

[52] *People v. Lab-eo*, 424 Phil. 482 (2002); REYES, *supra*.

Revised Penal Code, which now appears to contain a graduated scale of penalties as follows:

> ARTICLE 355. *Libel by Means 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 *prisión 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.
>
> [Libel **committed by, through and with the use of a computer system or any other similar means which may be devised in the future** shall be punished by[53] ***prisión correccional*** **in its maximum period to** ***prisión mayor*** **in its minimum period**]. (Emphases supplied)

Section 6 effectively creates an additional *in terrorem* effect by introducing a qualifying aggravating circumstance: the use of ICT. This additional burden is on top of that already placed on the crimes themselves, since the *in terrorem* effect of the latter is already achieved through the original penalties imposed by the *Revised Penal Code*. Consequently, another consideration is added to the calculation of penalties by the public. It will now have to weigh not only whether to exercise freedom of speech, but also whether to exercise this freedom through ICT.

One begins to see at this point how the exercise of freedom of speech is clearly burdened. The Court can take judicial notice of the fact that ICTs are fast becoming the most widely used and accessible means of communication and of expression. Educational institutions encourage the study of ICT and the acquisition of the corresponding skills. Businesses, government institutions and civil society organizations rely so heavily on ICT that it is no exaggeration to say that, without it, their operations may grind to a halt. News organizations are

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[53] *See* REVISED PENAL CODE, Art. 61 (on rules for graduating penalties); REYES, *supra*, at 705-706 (2008); *Cf.*: *People v. Medroso*, G.R. No. L-37633, 31 January 1975, 62 SCRA 245.

increasingly shifting to online publications, too. The introduction of social networking sites has increased public participation in socially and politically relevant issues. In a way, the Internet has been transformed into "freedom parks." Because of the inextricability of ICT from modern life and the exercise of free speech and expression, I am of the opinion that the increase in penalty *per se* effectively chills a significant amount of the exercise of this preferred constitutional right.

The chill does not stop there. As will be discussed below, **this increase in penalty has a domino effect on other provisions in the *Revised Penal Code* thereby further affecting the public's calculation of whether or not to exercise freedom of speech.** It is certainly disconcerting that these effects, in combination with the increase in penalty *per se*, clearly operate to tilt the scale heavily against the exercise of freedom of speech.

The increase in penalty also results in the imposition of harsher accessory penalties.

Under the Revised Penal Code, there are accessory penalties that are inherent in certain principal penalties. Article 42 thereof provides that the principal (afflictive) penalty of ***prisión mayor*** carries with it the accessory penalty of temporary absolute disqualification. According to Article 30, this accessory penalty shall produce the following effects:

1. The **deprivation of the public offices and employments** which the offender may have held, even if conferred by popular election.
2. The **deprivation of the right to vote** in any election for any popular elective office or to be elected to such office.
3. The **disqualification for the offices or public employments** and for the exercise of any of the rights mentioned.

   In case of temporary disqualification, such disqualification as is comprised in **paragraphs 2 and 3 of this article shall last during the term of the sentence**.

4. The **loss of all right to retirement pay or other pension for any office formerly held**. (Emphases supplied)

Furthermore, the accessory penalty of **perpetual** special disqualification from the right of suffrage shall be meted out to the offender. Pursuant to Article 32, this penalty means that the offender shall be **perpetually** deprived of the right (a) to vote in any popular election for any public office; (b) to be elected to that office; and (c) to hold any public office.[54] This perpetual special disqualification will only be wiped out if expressly remitted in a pardon.

On the other hand, Article 43 provides that when the principal (correctional) penalty of ***prisión correccional*** is meted out, the offender shall also suffer the accessory penalty of **suspension from public office and from the right to follow a profession or calling during the term of the sentence**. While the aforementioned principal penalty may carry with it the accessory penalty of perpetual special disqualification from the right of suffrage, it will only be imposed upon the offender if the duration of imprisonment exceeds 18 months.

Before the *Cybercrime Prevention Act*, the imposable penalty for libel under Art. 355 of the Revised Penal Code, even if committed by means of ICT, is *prisión correccional* in its minimum and medium periods. Under Section 6 of the *Cybercrime Prevention Act*, the imposable penalty for libel qualified by ICT is now increased to *prisión correccional* in its maximum period to *prisión mayor* in its minimum period.[55] Consequently, it is now possible for the above-enumerated harsher accessory penalties for *prisión mayor* to attach depending on the presence of mitigating circumstances.

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[54] *See*: *Jalosjos v. Commission on Elections*, G.R. Nos. 193237 and 193536, 9 October 2012, 683 SCRA 1 (citing *Lacuna v. Abes*, 133 Phil. 770, 773-774 [1968]); *Aratea v. Commission on Elections*, G.R. No. 195229, 9 October 2012, 683 SCRA 105.

[55] *See* REVISED PENAL CODE, Art. 61 (on rules for graduating penalties); REYES, *supra* note 51, at 705-706; *Cf.*: *People v. Medroso*, G.R. No. L-37633, 31 January 1975, 62 SCRA 245.

Hence, the public will now have to factor this change into their calculations, which will further burden the exercise of freedom of speech through ICT.

The increase in penalty neutralizes the full benefits of the law on probation, effectively threatening the public with the guaranteed imposition of imprisonment and the accessory penalties thereof.

Probation[56] is a special privilege granted by the State to penitent, qualified offenders who immediately admit to their liability and thus renounce the right to appeal. In view of their acceptance of their fate and willingness to be reformed, the State affords them a chance to avoid the stigma of an incarceration record by making them undergo rehabilitation outside prison.

Section 9 of Presidential Decree No. (P.D.) 968, as amended — otherwise known as the *Probation Law* — provides as follows:

Sec. 9. *Disqualified Offenders*. — The benefits of this Decree shall not be extended to those:

(a) sentenced to serve a maximum term of imprisonment of more than six years;
(b) convicted of subversion or any crime against the national security or the public order;
(c) who have previously been convicted by final judgment of an offense punished by imprisonment of not less than one month and one day and/or a fine of not less than Two Hundred Pesos;
(d) who have been once on probation under the provisions of this Decree; and
(e) who are already serving sentence at the time the substantive provisions of this Decree became applicable pursuant to Section 33 hereof. (Emphasis supplied)

Pursuant to Article 355 of the Revised Penal Code, libel is punishable by *prisión correccional* in its minimum (from 6 months

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[56] Probation Law; *Francisco v. Court of Appeals*, 313 Phil. 241 (1995); and *Baclayon v. Mutia*, 241 Phil. 126 (1984). See: *Del Rosario v. Rosero*, 211 Phil. 406 (1983).

and 1 day to 2 years and 4 months) and medium (from 2 years, 4 months, and 1 day to 4 years and 2 months) periods. However, in the light of the increase in penalty by one degree under the *Cybercrime Prevention Act*, libel qualified by the use of ICT is now punishable by *prisión correccional* in its maximum period (from 4 years, 2 months and 1 day to 6 years) to *prisión mayor* in its minimum period (from 6 years and 1 day to 8 years).[57] This increased penalty means that if libel is committed through the now commonly and widely used means of communication, ICT, libel becomes a non-probationable offense.

One of the features of the *Probation Law* is that it suspends the execution of the sentence imposed on the offender.[58] In *Moreno v. Commission on Elections*,[59] we reiterated our discussion in *Baclayon v. Mutia*[60] and explained the effect of the suspension as follows:

> In *Baclayon v. Mutia*, the Court declared that an order placing defendant on probation is not a sentence but is rather, in effect, a suspension of the imposition of sentence. We held that the **grant of probation to petitioner suspended the imposition of the principal penalty of imprisonment, as well as the accessory penalties of suspension from public office and from the right to follow a profession or calling, and that of perpetual special disqualification from the right of suffrage.** We thus deleted from the order granting probation the paragraph which required that petitioner refrain from continuing with her teaching profession.
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> Applying this doctrine to the instant case, **the accessory penalties of suspension from public office, from the right to follow a profession or calling, and that of perpetual special disqualification from the right of suffrage**, attendant to the penalty of *arresto mayor*

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[57] *See* REVISED PENAL CODE, Art. 61 (on rules for graduating penalties); REYES, *supra* note 51, at 705-706; *Cf.*: *People v. Medroso*, G.R. No. L-37633, 31 January 1975, 62 SCRA 245.

[58] Probation Law, Sec. 4.

[59] *Moreno v. Commission on Elections*, G.R. No. 168550, 10 August 2006, 498 SCRA 547.

[60] *Baclayon v. Mutia*, 241 Phil. 126 (1984).

in its maximum period to *prisión correccional* in its minimum period imposed upon Moreno **were similarly suspended upon the grant of probation.**

It appears then that **during the period of probation, the probationer is not even disqualified from running for a public office because the accessory penalty of suspension from public office is put on hold for the duration of the probation.** (Emphases supplied)

It is not unthinkable that some people may risk a conviction for libel, considering that they may avail themselves of the privilege of probation for the sake of exercising their cherished freedom to speak and to express themselves. **But when this seemingly neutral technology is made a qualifying aggravating circumstance to a point that a guaranteed imprisonment would ensue, it is clear that the *in terrrorem* effect of libel is further magnified, reaching the level of an invidious chilling effect.** The public may be forced to forego their prized constitutional right to free speech and expression in the face of as much as eight years of imprisonment, like the sword of Damocles hanging over their heads.

Furthermore, it should be noted that one of the effects of probation is the suspension not only of the penalty of imprisonment, but also of the accessory penalties attached thereto. Hence, in addition to the *in terrorem* effect supplied by the criminalization of a socially intolerable conduct and the *in terrorem* effect of an increase in the duration of imprisonment in case of the presence of an aggravating circumstance, the *Revised Penal Code* threatens further[61] by attaching accessory penalties to the principal penalties.

Section 6 increases the prescription periods for the crime of cyberlibel and its penalty to 15 years.

Crimes and their penalties prescribe. The *prescription of a crime* refers to the loss or waiver by the State of its right to

[61] See generally: *Monsanto v. Factoran*, G.R. No. 78239, 9 February 1989, 170 SCRA.

prosecute an act prohibited and punished by law.[62] It commences from the day on which the crime is discovered by the offended party, the authorities or their agents.[63] On the other hand, the *prescription of the penalty* is the loss or waiver by the State of its right to *punish* the convict.[64] It commences from the date of evasion of service after final sentence. Hence, in the *prescription of crimes*, it is the penalty prescribed by law that is considered; in the *prescription of penalties*, it is the penalty imposed.[65]

By setting a prescription period for crimes, the State by an act of grace surrenders its right to *prosecute* and declares the offense as no longer subject to prosecution after a certain period.[66] It is an amnesty that casts the offense into oblivion and declares that the offenders are now at liberty to return home and freely resume their activities as citizens.[67] They may now rest from having to preserve the proofs of their innocence, because the proofs of their guilt have been blotted out.[68]

The Revised Penal Code sets prescription periods for crimes according to the following classification of their penalties:

ARTICLE 90. *Prescription of Crimes*. — Crimes punishable by death, *reclusión perpetua* or *reclusión temporal* shall prescribe in twenty years.

Crimes punishable by other afflictive penalties shall prescribe in fifteen years.

Those punishable by a correctional penalty shall prescribe in ten years; with the exception of those punishable by *arresto mayor*, which shall prescribe in five years.

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[62] AQUINO, *supra* note 48, at 695-696 (citing *People v. Montenegro*, 68 Phil. 659 [1939]; *People v. Moran*, 44 Phil. 387, 433 [1923]; *Santos v. Superintendent*, 55 Phil. 345 [1930]).

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

The crime of libel or other similar offenses shall prescribe in one year.

The offenses of oral defamation and slander by deed shall prescribe in six months.

Light offenses prescribe in two months.

When the penalty fixed by law is a compound one the highest penalty shall be made the basis of the application of the rules contained in the first, second and third paragraphs of this article. (Emphases supplied)

On the other hand, Article 92 on the prescription of penalties states:

ARTICLE 92. *When and How Penalties Prescribe.* — The penalties imposed by final sentence prescribe as follows:

1. Death and *reclusión perpetua*, in twenty years;
2. **Other afflictive penalties, in fifteen years**;
3. **Correctional penalties, in ten years**; with the exception of the penalty of *arresto mayor*, which prescribes in five years;
4. Light penalties, in one year. (Emphases supplied)

As seen above, before the passage of the *Cybercrime Prevention Act*, the state effectively waives its right to prosecute crimes involving libel. Notably, the prescription period for libel used to be two years, but was reduced to one year through Republic Act No. 4661 on 18 June 1966.[69] Although the law itself does not state the reason behind the reduction, we can surmise that it was made in recognition of the harshness of the previous period, another act of grace by the State.

With the increase of penalty by one degree pursuant to Section 6 of the *Cybercrime Prevention Act*, however, the penalty for libel through ICT becomes *afflictive* under Article 25 of the Revised Penal Code. Accordingly, under the above-quoted provision, the crime of libel through ICT shall now possibly

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[69] REYES, *supra* note 51, at 845.

prescribe in 15 years "a 15-fold increase in the prescription period.[70] In effect, the State's grant of amnesty to the offender will now be delayed by 14 years more. Until a definite ruling from this Court in a proper case is made, there is uncertainty as to whether the one-year prescription period for ordinary libel will also apply to libel through ICT.

Similarly, under Article 92, the prescription period for the *penalty* of libel through ICT is also increased from 10 years — the prescription period for correctional penalties — to 15 years, the prescription for afflictive penalties other than *reclusión perpetua*.

These twin increases in both the prescription period for the crime of libel through ICT and in that for its penalty are additional factors in the public's rational calculation of whether or not to exercise their freedom of speech and whether to exercise that freedom through ICT. Obviously, the increased prescription periods — yet again — tilt the scales, heavily against the exercise of this freedom.

Regrettably, the records of the Bicameral Conference Committee deliberation do not show that the legislators took into careful consideration this domino effect that, when taken as a whole, clearly discourages the exercise of free speech. This, despite the fact that the records of the committee deliberations show that the legislators became aware of the need to carefully craft the application of the one-degree increase in penalty and "to review again the Revised Penal Code and see what ought to be punished, if committed through the computer." But against their better judgment, they proceeded to make an all-encompassing application of the increased penalty sans *any* careful study, as the proceedings show:

> THE CHAIRMAN (REP. TINGA). With regard to some of these offenses, the reason why they were not included in the House version initially is that, the assumption that the acts committed that would make it illegal in the real world would also be illegal in the cyberworld, '*no*.

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[70] *See also* TSN dated 15 January 2013, pp. 80-81.

For example, libel *po*. When we discussed this again with the Department of Justice, it was their suggestion to include an all-encompassing paragraph...

THE CHAIRMAN (SEN. ANGARA). (Off-mike) A catch all–

THE CHAIRMAN (SEN. TINGA). ...a catch all, wherein all crimes defined and penalized by the Revised Penal Code as amended and special criminal laws committed by, through, and with the use of information and communications technology shall be covered by the relevant provisions of this act. By so doing, Mr. Chairman, we are saying that if we missed out on any of these crimes – we did not specify them, point by point – they would still be covered by this act, '*no*.

So it would be up to you, Mr. Chairman...

THE CHAIRMAN (SEN. ANGARA). Yeah.

x x x x x x x x x

THE CHAIRMAN (REP. TINGA). ...**do we specify this and then or do we just use an all-encompassing paragraph to cover them.**

THE CHAIRMAN (SEN. ANGARA). Well, as you know, the Penal Code is really a very, very old code. In fact, it dates back to the Spanish time and we amend it through several Congresses. So like child pornography, this is a new crime, cybersex is a new crime. Libel through the use of computer system is a novel way of slandering and maligning people. So we thought that we must describe it with more details and specificity as required by the rules of the Criminal Law. **We've got to be specific and not general in indicting a person so that he will know in advance what he is answering for. But we can still include and let-anyway, we have a separability clause,** a catch all provision that you just suggested and make it number five. Any and all crimes punishable under the Revised Penal Code not heretofore enumerated above but are committed through the use of computer or computer system shall also be punishable **but we should match it with a penalty schedule as well**.

So we've got to review. *Mukhang mahirap gawin yun*, huh. We have to review again the Revised Penal Code and see what ought to be punished, if committed through the computer. Then we've got to review the penalty, huh.

THE CHAIRMAN (REP. TINGA). I agree, Mr. Chairman, that you are defining the newer crimes. But I also agree as was suggested earlier that **there should be an all-encompassing phrase to cover these crimes in the Penal Code, '*no*. Can that not be matched with a penalty clause that would cover it as well? Instead of us going line by line through the–**

THE CHAIRMAN (SEN. ANGARA). **So you may just have to do that by a reference. The same penalty imposed under the Revised Penal Code shall be imposed on these crimes committed through computer or computer systems.**

x x x x x x x x x

THE CHAIRMAN (REP. TINGA). Okay.

And may we recommend, Mr. Chairman, that your definition of the penalty be added as well where it will be one degree higher...

THE CHAIRMAN (SEN. ANGARA). Okay.

THE CHAIRMAN (REP. TINGA). ...**than the relevant penalty as prescribed in the Revised Penal Code.**

So, we agree with your recommendation, Mr. Chairman.

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THE CHAIRMAN (SEN. ANGARA). Okay, provided that the penalty shall be one degree higher than that imposed under the Revised Penal Code.

Okay, so–

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REP. C. SARMIENTO. **Going by that ruling, if one commits libel by email, then the penalty is going to be one degree higher...**

THE CHAIRMAN (SEN. ANGARA). **One degree higher.**

REP. C. SARMIENTO. **...using email?**

THE CHAIRMAN (SEN. ANGARA). **Yes.**

REP. C. SARMIENTO. **As compared with libel through media or distributing letters or faxes.**

THE CHAIRMAN (SEN. ANGARA). **I think so, under our formulation. Thank you.** (Emphases supplied)[71]

ICT as a qualifying aggravating circumstance cannot be offset by any mitigating circumstance.

A qualifying aggravating circumstance has the effect not only of giving the crime its proper and exclusive name, but also of placing the offender in such a situation as to deserve no other penalty than that especially prescribed for the crime.[72] Hence, a qualifying aggravating circumstance increases the penalty by degrees. For instance, homicide would become murder if attended by the qualifying circumstance of treachery, thereby increasing the penalty from *reclusión temporal* to *reclusión perpetua*.[73] It is unlike a generic aggravating circumstance, which increases the penalty only to the maximum period of the penalty prescribed by law, and not to an entirely higher degree.[74] For instance, if the generic aggravating circumstance of dwelling or nighttime attends the killing of a person, the penalty will remain the same as that for homicide (*reclusión temporal*), but applied to its maximum period. Also, a generic aggravating circumstance may be offset by a generic mitigating circumstance, while a qualifying aggravating circumstance cannot be.[75]

Hence, before the *Cybercrime Prevention Act*, libel — even if committed through ICT — was punishable only by *prisión correccional* from its minimum (6 months and 1 day to 2 years

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[71] Senate Transcript of the Bicameral Conference Committee on the Disagreeing Provisions of SBN 2796 and HBN 5808 (Cybercrime Prevention Act of 2012) (31 May 2012) 15th Congress, 2nd Regular Sess. at 43-47, 52-56 [hereinafter Bicameral Conference Committee Transcript].

[72] AQUINO, *supra* note 48, at 277 (citing *People v. Bayot*, 64 Phil. 269 [1937]). *See also* VICENTE J. FRANCISCO, *THE REVISED PENAL CODE: ANNOTATED AND COMMENTED*, BOOK I, 414 (2nd Ed. 1954).

[73] LEONOR D. BOADO, *NOTES AND CASES ON THE REVISED PENAL CODE*, 147 (2008)

[74] *Id.* at 146.

[75] AQUINO, *supra* note 48, at 277.

and 4 months) to its medium period (2 years, 4 months, and 1 day to 4 years and 2 months).

Under Section 6 however, the offender is now punished with a new range of penalty — *prisión correccional* in its maximum period (from 4 years, 2 months and 1 day to 6 years) to *prisión mayor* in its minimum period (from 6 years and 1 day to 8 years). And since the use of ICT as a qualifying aggravating circumstance cannot be offset by any mitigating circumstance, such as voluntary surrender, the penalty will remain within the new range of penalties.

As previously discussed, qualifying aggravating circumstances, by themselves, produce an *in terrorem* effect. A twofold increase in the maximum penalty – from 4 years and 2 months to 8 years – for the use of an otherwise beneficial and commonly used means of communication undeniably creates a heavier invidious chilling effect.

The Court has the duty to restore the balance and protect the exercise of freedom of speech.

Undeniably, there may be substantial distinctions between ICT and other means of committing libel that make ICT a more efficient and accessible means of committing libel. However, it is that same efficiency and accessibility that has made ICT an inextricable part of people's lives and an effective and widely used tool for the exercise of freedom of speech, a freedom that the Constitution protects and that this Court has a duty to uphold.

Facial challenges have been entertained when, in the judgment of the Court, the possibility that the freedom of speech may be muted and perceived grievances left to fester outweighs the harm to society that may be brought about by allowing some unprotected speech or conduct to go unpunished.[76]

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[76] *Quinto v. COMELEC*, G.R. No. 189698, 22 February 2010 (citing *Broadrick v. Oklahoma* 413 U.S. 601, 93 S.Ct. 2908 [1973]).

In the present case, it is not difficult to see how the increase of the penalty under Section 6 mutes freedom of speech. It creates a domino effect that effectively subjugates the exercise of the freedom – longer prison terms, harsher accessory penalties, loss of benefits under the Probation Law, extended prescription periods, and ineligibility of these penalties to be offset by mitigating circumstances. What this Court said in *People v. Godoy*,[77] about "mankind's age-old observation" on capital punishment, is appropriate to the penalty in the present case: "If it is justified, it serves as a deterrent; if injudiciously imposed, it generates resentment."[78] Thus, I am of the opinion that Section 6, as far as libel is concerned, is facially invalid.

B. Section 12 – Real-Time Collection of Traffic Data.

Real-time collection of traffic data may be indispensable to law enforcement in certain instances. Also, traffic data *per se* may be examined by law enforcers, since there is no privacy expectation in them. However, the authority given to law enforcers must be circumscribed carefully so as to safeguard the privacy of users of electronic communications. **Hence, I support the *ponencia* in finding the first paragraph of Section 12 unconstitutional because of its failure to provide for strong safeguards against intrusive real-time collection of traffic data. I clarify, however, that this declaration should not be interpreted to mean that Congress is now prevented from going back to the drawing board in order to fix the first paragraph of Section 12. Real-time collection of traffic data is not invalid *per se*. There may be instances in which a warrantless real-time collection of traffic data may be allowed when robust safeguards against possible threats to privacy are provided.** Nevertheless, I am of the opinion that there is a need to explain why real-time collection of traffic data may be vital at times, as well as to explain the nature of traffic data.

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[77] 321 Phil. 279 (1995).

[78] *Id.*, at 346.

Indispensability of Real-time Collection of Traffic Data

In order to gain a contextual understanding of the provision under the *Cybercrime Prevention Act* on the real-time collection of traffic data, it is necessary to refer to the *Budapest Convention on Cybercrime*, which the Philippine Government requested[79] to be invited to accede to in 2007. The Cybercrime Prevention Act was patterned after this convention.[80]

The Budapest Convention on Cybercrime is an important treaty, because it is the first and only multinational agreement on cybercrime.[81] It came into force on 1 July 2004[82] and, to date, has been signed by 45 member states of the Council of Europe (COE), 36 of which have ratified the agreement.[83] Significantly, the COE is the leading human rights organization of Europe.[84] Moreover, two important non-member states or "partner countries"[85] have likewise ratified it — the United States on 29

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[79] Undersecretary of the Department of Justice Ernesto L. Pineda sent a letter to the Secretary General of the Council of Europe dated 31 August 2007, expressing the wish of the Philippine government to be invited to accede to the Convention on Cybercrime. The Council of Europe granted the request in 2008. *See* Decision of the Council of Europe on the Request by the Philippines to be invited to accede to the Convention on Cybercrime, 1021st Meeting of the Ministers' Deputies, dated 12 March 2008. Available at <https://wcd.coe.int/ViewDoc.jsp?id=1255665&Site=CM>, accessed on 12 September 2013.

[80] Committee Report No. 30 on Senate Bill No. 2796 (12 September 2011), pp. 280-281; Committee Report No. 30 on Senate Bill No. 2796 (13 December 2011), p. 804.

[81] JONATHAN CLOUGH, *PRINCIPLES OF CYBERCRIME*, 22 (2010);

[82] *Id.*

[83] <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=8&DF=&CL=ENG>, accessed on 20 October 2013.

[84] Twenty-eight of COE's members also belong to the European Union (EU). All its member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. <http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en> accessed on 20 October 2013.

[85] Canada, Japan, South Africa, and the United States.

September 2006 and Japan on 3 July 2012. Australia and the Dominican Republic have also joined by accession.[86]

The Convention "represents a comprehensive international response to the problems of cybercrime"[87] and is the product of a long process of careful expert studies and international consensus. From 1985 to 1989, the COE's Select Committee of Experts on Computer-Related Crime debated issues before drafting Recommendation 89(9). This Recommendation stressed the need for a quick and adequate response to the cybercrime problems emerging then and noted the need for an international consensus on criminalizing specific computer-related offenses.[88] In 1995, the COE adopted Recommendation No. R (95)13, which detailed principles addressing search and seizure, technical surveillance, obligations to cooperate with the investigating authorities, electronic evidence, and international cooperation.[89] In 1997, the new Committee of Experts on Crime in Cyberspace was created to examine, "in light of Recommendations No. R (89)9 and No. R (95)13," the problems of "cyberspace offenses and other substantive criminal law issues where a common approach may be necessary for international cooperation." It was also tasked with the drafting of "a binding legal instrument" to deal with these issues. The preparation leading up to the Convention entailed 27 drafts over four years.[90]

As mentioned earlier, the Philippines was one of the countries that requested to be invited to accede to this very important treaty in 2007, and the Cybercrime Prevention Act was patterned after the convention.[91]

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[86] <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=8&DF=&CL=ENG.> accessed on 20 October 2013.

[87] *Supra* note 28.

[88] SUMIT GHOSH *ET AL.*, *EDITORS*, *CYBERCRIMES: A MULTIDISCIPLINARY ANALYSIS*, 330 (2010).

[89] *Id.* at 330-331.

[90] *Id.* at 331.

[91] Committee Report No. 30 on Senate Bill No. 2796 (12 September 2011), pp. 280-281; Committee Report No. 30 on Senate Bill No. 2796 (13 December 2011), p. 804.

Article 1 of the *Budapest Convention on Cybercrime* defines "traffic data" as follows:

> d. "traffic data" means any computer data relating to a communication by means of a computer system, generated by a computer system that formed a part in the chain of communication, indicating the communication's origin, destination, route, time, date, size, duration, or type of underlying service.

Section 3 of the *Cybercrime Prevention Act* has a starkly similar definition of "traffic data":

> (p) *Traffic data* or *non-content data* refers to any computer data **other than the content** of the communication including, but not limited to, the communication's origin, destination, route, time, date, size, duration, or type of underlying service.

However, the definition in the *Cybercrime Prevention Act* improves on that of the Convention by clearly restricting traffic data to those that are *non-content* in nature. On top of that, Section 12 further restricts traffic data to *exclude* those that refer to the *identity* of persons. The provision states:

> 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.** (Emphasis supplied)

Undoubtedly, these restrictions were made because Congress wanted to ensure the protection of the privacy of users of electronic communication. Congress must have also had in mind the *1965 Anti-Wiretapping Act*, as well as the *Data Privacy Act* which was passed only a month before the *Cybercrime Prevention Act*. However, as will be shown later, the restrictive definition is not coupled with an equally restrictive procedural safeguard. This deficiency is the Achilles' heel of the provision.

One of the obligations under the *Budapest Convention on Cybercrime* is for state parties to enact laws and adopt measures concerning the real-time collection of traffic data, *viz*:

Article 20 – Real-time collection of traffic data

1. Each Party shall adopt such legislative and other measures as may be necessary **to empower its competent authorities** to:

   a. **collect or record** through the **application of technical means** on the territory of that Party, **and**

   b. **compel a service provider**, within its existing technical capability:

      i. **to collect or record** through the application of technical means on the territory of that Party; or

      ii. **to co-operate and assist the competent authorities in the collection or recording of, traffic data, in real-time,** associated with specified communications in its territory transmitted by means of a computer system.

2. **Where a Party, due to the established principles of its domestic legal system, cannot adopt the measures referred to in paragraph 1.a, it may instead adopt legislative and other measures as may be necessary to ensure the real-time collection or recording of traffic data associated with specified communications transmitted in its territory**, through the application of technical means on that territory.

3. Each Party shall adopt such legislative and other measures as may be necessary **to oblige a service provider to keep confidential the fact of the execution of any power provided for in this article and any information relating to it.**

4. The powers and procedures referred to in this article shall be subject to Articles 14 and 15. (Emphases supplied)

The Explanatory Report on the *Budapest Convention on Cybercrime* explains the ephemeral and volatile nature of traffic data, which is the reason why it has to be collected in real-time if it is to be useful in providing a crucial lead to investigations of criminality online as follows:[92]

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[92] *Explanatory Report to the Convention on Cybercrime*, [2001] COETSER 8 (23 November 2001), available at <http://conventions.coe.int/Treaty/en/Reports/Html/185.htm>, accessed on 12 September 2013.

29. In case of an investigation of a criminal offence committed in relation to a computer system, **traffic data is needed to trace the source of a communication as a starting point for collecting further evidence or as part of the evidence of the offence. Traffic data might last only ephemerally, which makes it necessary to order its expeditious preservation. Consequently, its rapid disclosure may be necessary to discern the communication's route in order to collect further evidence before it is deleted or to identify a suspect. The ordinary procedure for the collection and disclosure of computer data might therefore be insufficient.** Moreover, the **collection of this data is regarded in principle to be less intrusive since as such it doesn't reveal the content of the communication** which is regarded to be more sensitive.

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133. One of the major challenges in combating crime in the networked environment is the **difficulty in identifying the perpetrator and assessing the extent and impact of the criminal act.** A further problem is caused by the **volatility of electronic data, which may be altered, moved or deleted in seconds.** For example, **a user who is in control of the data may use the computer system to erase the data that is the subject of a criminal investigation, thereby destroying the evidence. Speed and, sometimes, secrecy are often vital for the success of an investigation.**

134. The Convention adapts traditional procedural measures, such as search and seizure, to the new technological environment. Additionally, new measures have been created, such as expedited preservation of data, in order to ensure that traditional measures of collection, such as search and seizure, remain effective in the volatile technological environment. **As data in the new technological environment is not always static, but may be flowing in the process of communication, other traditional collection procedures relevant to telecommunications, such as real-time collection of traffic data and interception of content data, have also been adapted in order to permit the collection of electronic data that is in the process of communication.** Some of these measures are set out in Council of Europe Recommendation No. R (95) 13 on problems of criminal procedural law connected with information technology.

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214. For some States, the offences established in the Convention would normally not be considered serious enough to permit

interception of content data or, in some cases, even the collection of traffic data. **Nevertheless, such techniques are often crucial for the investigation of some of the offences established in the Convention, such as those involving illegal access to computer systems, and distribution of viruses and child pornography. The source of the intrusion or distribution, for example, cannot be determined in some cases without real-time collection of traffic data. In some cases, the nature of the communication cannot be discovered without real-time interception of content data. These offences, by their nature or the means of transmission, involve the use of computer technologies. The use of technological means should, therefore, be permitted to investigate these offences.** xxx.

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216. **Often, historical traffic data may no longer be available or it may not be relevant as the intruder has changed the route of communication. Therefore, the real-time collection of traffic data is an important investigative measure.** Article 20 addresses the subject of real-time collection and recording of traffic data for the purpose of specific criminal investigations or proceedings.

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218. x x x. **When an illegal distribution of child pornography, illegal access to a computer system or interference with the proper functioning of the computer system or the integrity of data, is committed, particularly from a distance such as through the Internet, it is necessary and crucial to trace the route of the communications back from the victim to the perpetrator. Therefore, the ability to collect traffic data in respect of computer communications is just as, if not more, important as it is in respect of purely traditional telecommunications.** This investigative technique can correlate the time, date and source and destination of the suspect's communications with the time of the intrusions into the systems of victims, identify other victims or show links with associates.

219. Under this article, the traffic data concerned must be associated with specified communications in the territory of the Party. The specified 'communications' are in the plural, as traffic data in respect of several communications may need to be collected in order to determine the human source or destination (for example, in a household where several different persons have the use of the same

telecommunications facilities, it may be necessary to correlate several communications with the individuals' opportunity to use the computer system). The communications in respect of which the traffic data may be collected or recorded, however, must be specified. **Thus, the Convention does not require or authorise the general or indiscriminate surveillance and collection of large amounts of traffic data. It does not authorise the situation of 'fishing expeditions' where criminal activities are hopefully sought to be discovered, as opposed to specific instances of criminality being investigated. The judicial or other order authorising the collection must specify the communications to which the collection of traffic data relates.**

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225. Like real-time interception of content data, **real-time collection of traffic data is only effective if undertaken without the knowledge of the persons being investigated. Interception is surreptitious and must be carried out in such a manner that the communicating parties will not perceive the operation. Service providers and their employees knowing about the interception must, therefore, be under an obligation of secrecy in order for the procedure to be undertaken effectively.** (Emphases supplied)

We can gather from the Explanatory Note that there are two seemingly conflicting ideas before us that require careful balancing – the fundamental rights of individuals, on the one hand, and the interests of justice (which may also involve the fundamental rights of another person) on the other. There is no doubt that privacy is vital to the existence of a democratic society and government such as ours. It is also critical to the operation of our economy. Citizens, governments, and businesses should be able to deliberate and make decisions in private, away from the inhibiting spotlight.[93] Certainly, this privacy should be maintained in the electronic context as social, governmental and economic transactions are made in this setting.[94] At the same time however, law enforcers must be equipped with up-to-date tools necessary

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[93] Richard W. Downing, *Columbia Journal of Transnational Law*, Vol. 43, p. 743 (2005).

[94] *Id.*

to protect society and the economy from criminals who have also taken advantage of electronic technology. These enforcers must be supplied with investigative instruments to solve crimes and punish the criminals.[95]

What is beyond debate, however, is that real-time collection of traffic data may be absolutely necessary in criminal investigations such that, without it, authorities may not be able to probe certain crimes at all. In fact, it has been found that crucial electronic evidence may never be stored at all, as it may exist only in transient communications.[96] The UN Office on Drugs and Crime requires real-time collection of data because of the urgency, sensitivity, or complexity of a law enforcement investigation.[97]

Hence, it is imprudent to precipitately make (1) an absolute declaration that *all* kinds of traffic data from *all* types of sources are protected by the constitutional right to privacy; and (2) a blanket pronouncement that the real-time collection thereof may *only* be conducted upon a *prior* lawful order of the court to constitute a valid search and seizure. Rather, the Court should impose a strict interpretation of Section 12 in the light of existing constitutional, jurisprudential and statutory guarantees and safeguards.

The Constitutional guarantee against unreasonable search and seizure is inviolable.

The inviolable right against unreasonable search and seizure is enshrined in Article III of the Constitution, which states:

> Section 2. 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 shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable

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[95] *Id.*

[96] UNITED NATIONS OFFICE ON DRUGS AND CRIME, COMPREHENSIVE STUDY ON CYBERCRIME (DRAFT), 130 (2013).

[97] *Id.*

cause 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.

It is clear from the above that the constitutional guarantee does not prohibit all searches and seizures, but only *unreasonable* ones.[98] As a general rule, a search and seizure is reasonable when probable cause has been established. Probable cause is the most restrictive of all thresholds. It has been broadly defined as those facts and circumstances that would lead a reasonably discreet and prudent man to believe that an offense has been committed, and that the objects sought in connection with the offense are in the place sought to be searched.[99] It has been characterized as referring to "*factual* and *practical* considerations of *everyday life* on which reasonable and prudent men, *not legal technicians*, act."[100] Furthermore, probable cause is to be determined by a judge *prior* to allowing a search and seizure. The judge's determination shall be contained in a warrant, which shall particularly describe the place to be searched and the things to be seized. Thus, when no warrant is issued, it is assumed that there is no probable cause to conduct the search, making that act unreasonable.

For the constitutional guarantee to apply, however, there must first be a search in the constitutional sense.[101] It is only when there is a search that a determination of probable cause is required. In *Valmonte v. De Villa*, the Court said that the constitutional rule cannot be applied when mere routine checks consisting of "a brief question or two" are involved.[102] The Court said that if

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[98] JOAQUIN BERNAS, *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY*, 162 (2003).

[99] *Tan v. Sy Tiong Gue*, G.R. No. 174570, 17 February 2010, 613 SCRA 98, 106;

[100] *Supra* note 1 at 163, citing *Brinegar v. United States*, 338 U.S. 160, 175 (1949)

[101] *Supra* note 44.

[102] *Id.*

neither the vehicle nor its occupants are subjected to a search — the inspection of the vehicle being limited to a visual search — there is no violation of an individual's right against unreasonable searches and seizures. Hence, for as long as there is no *physical* intrusion upon a constitutionally protected area, there is no search.[103]

In recent years, the Court has had occasion to rule[104] that a search occurs when the government violates a person's "reasonable expectation of privacy," a doctrine first enunciated in *Katz v. United States*.[105] *Katz* signalled a paradigm shift, as the inquiry into the application of the constitutional guarantee was now expanded beyond "the presence or absence of a physical intrusion into any given enclosure" and deemed to "[protect] people, not places."[106] Under this expanded paradigm, the "reasonable expectation of privacy" can be established if the person claiming it can show that (1) by his conduct, he exhibited an expectation of privacy and (2) his expectation is one that society recognizes as reasonable. In *People v. Johnson*,[107] which cited *Katz*, the seizure and admissibility of the dangerous drugs found during a routine airport inspection were upheld by the Court, which explained that "[p]ersons may lose the protection of the search and seizure clause by exposure of their persons or property to the public in a manner reflecting a **lack of subjective expectation of privacy**, which expectation society is prepared to recognize as reasonable."[108]

Traffic data per se do not enjoy privacy protection; hence, no determination of probable cause

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[103] See: *United States v. Jones* 132 S. Ct. 945, 950 n.3 (2012).

[104] *Pollo v. Constantino-David*, G.R. No. 181881, 18 October 2011, 659 SCRA 189; *People v. Johnson*, 401 Phil. 734 (2000).

[105] 389 U.S. 347 (1967).

[106] *Id.*

[107] *Supra* note 104.

[108] *Id.*

is needed for the real-time collection thereof.

The very public structure of the Internet and the nature of traffic data *per se* undermine any *reasonable* expectation of privacy in the latter. The Internet is custom-designed to frustrate claims of reasonable expectation of privacy in traffic data *per se*, since the latter are necessarily disclosed to the public in the process of communication.

Individuals have no legitimate expectation of privacy in the data they disclose to the public and should take the risks for that disclosure. This is the holding of the U.S. Supreme Court in *Smith v. Maryland*.[109] The 1979 case, which has stood the test of time and has been consistently applied by American courts in various communications cases — including recent ones in the electronic setting — arose from a police investigation of robbery. The woman who was robbed gave the police a description of the robber and of a car she had observed near the scene of the crime. After the robbery, she began receiving threatening phone calls from a man identifying himself as the robber. The car was later found to be registered in the name of the petitioner, Smith. The next day, the telephone company, upon police request, installed a pen register at its central offices to record the numbers dialled from the telephone at the home of Smith. The register showed that he had indeed been calling the victim's house. However, since the installation of the pen register was done without a warrant, he moved to suppress the evidence culled from the device. In affirming **the warrantless collection and recording of phone numbers dialled** by Smith, the U.S. Supreme Court said:

> This claim must be rejected. First, we doubt that people in general entertain any actual expectation of privacy in the numbers they dial. **All telephone users realize that they must "convey" phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed**. All subscribers realize, moreover, that **the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills.** x x x.

[109] 442 U.S. 735 (1979).

x x x x x x x x x

Second, **even if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not "one that society is prepared to recognize as 'reasonable.'"** *Katz v. United States*, 389 U. S., at 361. **This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.** *E.g., United States v. Miller*, 425 U. S., at 442-444; x x x.[110] (Emphases supplied)

I am of the opinion that this Court may find the ruling in *United States v. Forrester*,[111] persuasive. In that case, the U.S. 9th Circuit Court of Appeals applied the doctrine in *Smith* to electronic communications, and ruled that Internet users have no expectation of privacy in the to/from addresses of their messages or in the IP addresses of the websites they visit. According to the decision, users should know that these bits of information are provided to and used by Internet service providers for the specific purpose of directing the routing of information. **It then emphasized that this examination of traffic data is "conceptually indistinguishable from government surveillance of physical mail," and that the *warrantless* search of envelope or routing information has been deemed valid as early as the 19th century.** The court therein held:

We conclude that the [electronic] surveillance techniques the government employed here are constitutionally indistinguishable from the use of a pen register that the Court approved in *Smith*. First, e-mail and Internet users, like the telephone users in *Smith*, rely on third-party equipment in order to engage in communication. *Smith* based its holding that telephone users have no expectation of privacy in the numbers they dial on the users' imputed knowledge that their calls are completed through telephone company switching equipment. x x x. **Analogously, e-mail and Internet users have no expectation of privacy in the to/from addresses of their messages or the IP addresses of the websites they visit because they should know that this information is provided to and used by Internet**

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[110] *Supra* note 55.

[111] 512 F.3d 500 (2007).

service providers for the specific purpose of directing the routing of information. Like telephone numbers, which provide instructions to the "switching equipment that processed those numbers," e-mail to/from addresses and IP addresses are not merely passively conveyed through third party equipment, but rather are voluntarily turned over in order to direct the third party's servers. x x x.

Second, e-mail to/from addresses and IP addresses constitute addressing information and do not necessarily reveal any more about the underlying contents of communication than do phone numbers. When the government obtains the to/from addresses of a person's e-mails or the IP addresses of websites visited, it does not find out the contents of the messages or know the particular pages on the websites the person viewed. At best, the government may make educated guesses about what was said in the messages or viewed on the websites based on its knowledge of the e-mail to/from addresses and IP addresses — but this is no different from speculation about the contents of a phone conversation on the basis of the identity of the person or entity that was dialed. x x x. Nonetheless, **the Court in *Smith* and *Katz* drew a clear line between unprotected addressing information and protected content information** that the government did not cross here.

The government's surveillance of e-mail addresses also may be technologically sophisticated, but it is conceptually indistinguishable from government surveillance of physical mail. In a line of cases dating back to the nineteenth century, the Supreme Court has held that the government cannot engage in a warrantless search of the contents of sealed mail, but can observe whatever information people put on the outside of mail, because that information is voluntarily transmitted to third parties. x x x. E-mail, like physical mail, has an outside address "visible" to the third-party carriers that transmit it to its intended location, and also a package of content that the sender presumes will be read only by the intended recipient. **The privacy interests in these two forms of communication are identical. The contents may deserve Fourth Amendment protection, but the address and size of the package do not**.[112] (Emphases and underscoring supplied)

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[112] 512 F.3d 500 (2007).

Based on the cogent logic explained above, I share the view that Internet users have no reasonable expectation of privacy in traffic data *per se* or in those pieces of information that users necessarily provide to the ISP, a third party, in order for their communication to be transmitted. This position is further bolstered by the fact that such communication passes through as many ISPs as needed in order to reach its intended destination. Thus, the collection and recording of these data do not constitute a search in the constitutional sense. As such, the collection thereof may be done without the necessity of a warrant.

Indeed, Professor Orin Kerr,[113] a prominent authority on electronic privacy, observes that in the U.S., **statutory rather than constitutional protections provide the essential rules governing Internet surveillance law. He explains that the very nature of the Internet requires the disclosure of non-content information,** not only to the ISP contracted by the user, but also to other computers in order for the communication to reach the intended recipient. Professor Kerr explains thus:

> Recall that **the Fourth Amendment effectively carves out private spaces where law enforcement can't ordinarily go without a warrant and separates them from public spaces where it can.** One important corollary of this structure is that **when a person sends out property or information from her private space into a public space, the exposure to the public space generally eliminates the Fourth Amendment protection.** If you put your trash bags out on the public street, or leave your private documents in a public park, the police can inspect them without any Fourth Amendment restrictions.
>
> The Supreme Court's cases interpreting **this so-called "disclosure principle" have indicated that the principle is surprisingly broad. For example, the exposure need not be to the public. Merely sharing the information or property with another person allows the government to go to that person to obtain it without Fourth Amendment protection.** x x x.

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[113] Fred C. Stevenson Research Professor, George Washington University Law School.

Why does this matter to Internet surveillance? It matters because **the basic design of the Internet harnesses the disclosure, sharing, and exposure of information to many machines connected to the network. The Internet seems almost custom-designed to frustrate claims of broad Fourth Amendment protection: the Fourth Amendment does not protect information that has been disclosed to third-parties, and the Internet works by disclosing information to third-parties.** Consider what happens when an Internet user sends an e-mail. By pressing "send" on the user's e-mail program, the user sends the message to her ISP, disclosing it to the ISP, with instructions to deliver it to the destination. The ISP computer looks at the e-mail, copies it, and then **sends a copy across the Internet where it is seen by many other computers before it reaches the recipient's ISP**. The copy sits on the ISP's server until the recipient requests the e-mail; at that point, the ISP runs off a copy and sends it to the recipient. While the e-mail may seem like a postal mail, it is sent more like a post card, exposed during the course of delivery.[114] (Emphases and underscoring supplied.)

Clearly, considering that the Internet highway is so public, and that non-content traffic data, unlike content data, are necessarily exposed as they pass through the Internet before reaching the recipient, there cannot be any reasonable expectation of privacy in non-content traffic data *per se*.

Traffic data to be collected are explicitly limited to non-content and non-identifying public information which, unlike content data, are not constitutionally protected.

The U.S. Supreme Court and Court of Appeals in the above cases emphasized the distinction between content and non-content data, with only content data enjoying privacy protection. In *Smith* the Court approved of the use of pen registers, pointing out that "a pen register differs significantly from [a] listening device . . .

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[114] Orin S. Kerr, *Enforcing Privacy Rights: Communications Privacy: Lifting the "Fog" of Internet Surveillance: How a Suppression Remedy Would Change Computer Crime Law*, 54 HASTINGS L.J. 805 (2003).

for pen registers do not acquire the contents of communications."[115] Hence, the information derived from the pen register, being non-content, is not covered by the constitutional protection. In *Forrester,* it was held that **while the content of both e-mail and traditional mail are constitutionally protected, the non-content or envelope information is not**. On the other hand, in the 2007 case *Warshak v. United States*,[116] the Sixth Circuit Court of Appeals held that the contents of emails are protected. It employed the content/non-content distinction in saying that the "combined precedents of Katz and Smith" required a "heightened protection for the *content* of the communications."[117] Consequently, it found a strong "*content*-based privacy interest" in e-mails.[118]

Traffic data are of course explicitly restricted to non-content and non-identifying data as defined in Section 12 of the Cybercrime Prevention Act itself. As such, it is plain that traffic data *per se* are not constitutionally protected.

The distinction between content and non-content data, such as traffic data, is important because it keeps the balance between protecting privacy and maintaining public order through effective law enforcement. That is why our Congress made sure to specify that the traffic data to be collected are limited to non-content data. For good measure, it additionally mandated that traffic data be non-identifying.

Kerr explains how the distinction between *content* and *non-content* information in electronic communication mirrors perfectly and logically the established *inside* and *outside* distinction in physical space, as far as delineating the investigative limitations

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[115] 442 U.S. 735 (1979).

[116] 490 F.3d 455, 470-71 (6th Cir. 2007).

[117] Matthew J. Tokson, *The Content/Envelope Distinction in Internet Law*, 50 WM. & MARY L. REV. 2105, 2115 (2009).

[118] *Id.* The Sixth Circuit later granted a petition for rehearing *en banc* and skirted the constitutional issue. It vacated the Decision upon a finding that the case was unripe.

of law enforcers is concerned. *Inside* space is constitutionally protected, and intrusion upon it requires a court warrant; in contrast, surveillance of *outside* space does not require a warrant because it is not a constitutionally cognizable search. He explains thus:

Whereas the inside/outside distinction is basic to physical world investigations, the content/non-content distinction is basic to investigations occurring over communications networks. Communications networks are tools that allow their users to send and receive communications from other users and services that are also connected to the network. This role requires a distinction between addressing information and contents. The addressing (or "envelope") information is the data that the network uses to deliver the communications to or from the user; the content information is the payload that the user sends or receives.

x x x x x x x x x

We can see the same distinctions at work with the telephone network. The telephone network permits users to send and receive live phone calls. The addressing information is the number dialed ("to"), the originating number ("from"), the time of the call, and its duration. Unlike the case of letters, this calling information is not visible in the same way that the envelope of a letter is. At the same time, it is similar to the information derived from the envelope of a letter. In contrast, the contents are the call itself, the sound sent from the caller's microphone to the receiver's speaker and from the receiver's microphone back to the caller's speaker.

Drawing the content/non-content distinction is somewhat more complicated because the Internet is multifunctional. x x x. Still, the content/non-content distinction holds in the Internet context as well. The easiest cases are human-to-human communications like e-mail and instant messages. The addressing information is the "to" and "from" e-mail address, the instant message to and from account names, and the other administrative information the computers generate in the course of delivery. As in the case of letters and phone calls, the addressing information is the information that the network uses to deliver the message. In contrast, the actual message itself is the content of the communication.

x x x x x x x x x

The content/non-content distinction provides a natural replacement for the inside/outside distinction. To apply the Fourth Amendment to the Internet in a technologically neutral way, access to the contents of communications should be treated like access to evidence located inside. Accessing the contents of communications should ordinarily be a search. In contrast, access to non-content information should be treated like access to evidence found outside. Collection of this information should presumptively not be a search.

This translation is accurate because the distinction between content and non-content information serves the same function online that the inside/outside distinction serves in the physical world. Non-content information is analogous to outside information; it concerns where a person is and where a person is going. Consider what the police can learn by watching a suspect in public. Investigating officers can watch the suspect leave home and go to different places. They can watch him go to lunch, go to work, and go to the park; they can watch him drive home; and they can watch him park the car and go inside. In effect, this is to/from information about the person's own whereabouts.

On the other hand, content information is analogous to inside information. The contents of communications reveal the substance of our thinking when we assume no one else is around. It is the space for reflection and self-expression when we take steps to limit the audience to a specific person or even just to ourselves. The contents of Internet communications are designed to be hidden from those other than the recipients, much like property stored inside a home is hidden from those who do not live with us. x x x.

The connection between content/non-content on the Internet and inside/outside in the physical world is not a coincidence. Addressing information is itself a network substitute for outside information, and contents are a network substitute for inside information. Recall the basic function of communications networks: they are systems that send and receive communications remotely so that its users do not have to deliver or pick up the communications themselves. The non-content information is the information the network uses to deliver communications, consisting of where the communication originated, where it must be delivered, and in some cases the path of delivery. This

information is generated in lieu of what would occur in public; it is information about the path and timing of delivery. In contrast, the contents are the private communications themselves that would have been inside in a physical network.

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In light of this, a technologically neutral way to translate the Fourth Amendment from the physical world to the Internet would be to treat government collection of the contents of communications as analogous to the government collection of information inside and the collection of non-content information as analogous to the collection of information outside. x x x.

This approach would mirror the line that the Fourth Amendment imposes in the physical world. In the physical world, the inside/outside distinction strikes a sensible balance. It generally lets the government observe where people go, when they go, and to whom they are communicating while protecting the actual substance of their speech from government observation without a warrant unless the speech is made in a setting open to the public. The content/non-content distinction preserves that function. It generally lets the government observe where people go in a virtual sense, and to observe when and with whom communications occur. The essentially transactional information that would occur in public in a physical world has been replaced by non-content information in a network environment, and the content/non-content line preserves that treatment. At the same time, the distinction permits individuals to communicate with others in ways that keep the government at bay. The Fourth Amendment ends up respecting private areas where people can share their most private thoughts without government interference both in physical space and cyberspace alike.[119] (Emphases supplied.)

Indeed, there is a clear distinction between content and non-content data. The distinction presents a reasonable conciliation between privacy guarantees and law enforcement needs, since the distinction proceeds from logical differences between the two in their nature and privacy expectations. According to a

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[119] Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005 (2010).

comprehensive UN study on six international or regional cybercrime instruments,[120] which include provisions on real-time collection of computer data, these instruments "make a distinction between real-time collection of traffic data and of content data" to account for the "differences in the level of intrusiveness into the private life of persons subject to each of the measures."[121]

From the above jurisprudence and scholarly analysis, there is enough basis to conclude that, given the very public nature of the Internet and the nature of traffic data as non-content and non-identifying information, individuals cannot have legitimate expectations of privacy in traffic data *per se*.

Section 12, however, suffers from lack of procedural safeguards to ensure that the traffic data to be obtained are limited to non-content and non-identifying data, and that they are obtained only for the limited purpose of investigating specific instances of criminality.

Thus far, it has been shown that real-time collection of traffic data may be indispensable in providing a crucial first lead in the investigation of criminality. Also, it has been explained that there is clearly no legitimate expectation of privacy in traffic data *per se* because of the nature of the Internet — it requires disclosure of traffic data which, unlike content data, will then travel exposed as it passes through a very public communications highway. It has also been shown that the definition of traffic

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[120] These are: 1.) COMESA Draft Model Bill, Art. 38; 2.) Commonwealth Model Law, Art. 19; 3.) Council of Europe Cybercrime Convention, Art. 20; 4.) ITU/CARICOM/CTU Model Legislative Texts, Art. 25; 5.) League of Arab States Convention, Art. 28 and 6.) Draft African Union Convention, Art. 3-55.

[121] UNITED NATIONS OFFICE ON DRUGS AND CRIME, COMPREHENSIVE STUDY ON CYBERCRIME (DRAFT), 130 (2013).

data under the law is sufficiently circumscribed to cover only non-content and non-identifying data and to explicitly exclude content data. This distinction is important in protecting privacy guarantees while supporting law enforcement needs.

However, Section 12 suffers from a serious deficiency. The narrow definition of traffic data *per se* as non-content and non-identifying data is not supported by equally narrow procedural criteria for the exercise of the authority to obtain them. The government asserts that Section 12 provides for some protection against abuse. While this may be true, the safeguards provided are not sufficient to protect constitutional guarantees.

Firstly, the provision does not indicate what the purpose of the collection would be, since it only provides for "due cause" as a trigger for undertaking the activity. While the government has explained the limited purpose of the collection of traffic data, which purportedly can only go as far as providing an initial lead to an ongoing criminal investigation primarily in the form of an IP address, this limited purpose is not explicit in the assailed provision. Moreover, there is no assurance that the collected traffic data would not be used for preventive purposes as well. Notably, the Solicitor-General defines "due cause" as "good faith law enforcement reason"[122] or "when there's a complaint from a citizen that cybercrime has been committed." According to the Solicitor General this situation is "enough to trigger" a collection of traffic data.[123] However, during the oral arguments, the Solicitor General prevaricated on whether Section 12 could also be used for preventive monitoring. He said that there might be that possibility, although the purpose would "largely" be for the investigation of an existing criminal act.[124] This vagueness is disconcerting, since a preventive monitoring would necessarily entail casting a wider net than an investigation of a specific instance of criminality would. Preventive monitoring would correspondingly need more restrictive procedural safeguards.

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[122] TSN dated 29 January 2013, p. 49.

[123] *Id* at 86.

[124] *Id* at 95-96.

This failure to provide an unequivocally specified purpose is fatal because it would give the government the roving authority to obtain traffic data for any purpose.[125]

Secondly, Section 12 does not indicate who will determine "due cause." This failure to assign the determination of due cause to a specific and independent entity opens the floodgates to possible abuse of the authority to collect traffic data in real-time, since the measure will be undertaken virtually unchecked. Also, while Section 12 contemplates the collection only of data "associated with specified communications," it does not indicate who will make the specification and how specific it will be.

Finally, the collection of traffic data under Section 12 is not time-bound. This lack of limitation on the period of collection undoubtedly raises concerns about the possibility of unlimited collection of traffic data in bulk for purposes beyond the simple investigation of specific instances of criminality.

Existing approaches in other jurisdictions for collection of traffic data

To foreclose an Orwellian collection of traffic data in bulk that may lead to the invasion of privacy, the relevant law must be canalized to accommodate only an acceptable degree of discretion to law enforcers. It must provide for clear parameters and robust safeguards for the exercise of the authority. Notably, the Solicitor General himself has observed that stronger safeguards against abuse by law enforcers may have to be put in place.[126] There are also indications that the legislature is willing to modify the law to provide for stronger safeguards, as shown in the bills filed in both chambers of Congress.[127]

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[125] *Ople v. Torres*, 354 Phil. 948 (1998).

[126] TSN dated 29 January 2013, p. 48.

[127] *See* Senate Bill (SB) No. 126, "An Act Repealing Section 4(c) (4), Chapter II of Republic Act No. 10175"; SB No. 11, "An Act Amending Section 6 of Republic Act 10175 Otherwise Known as an Act Defining Cybercrime, Providing For the Prevention, Investigation and Imposition of

In fashioning procedural safeguards against invasion of privacy, the rule of thumb should be: the more intrusive the activity, the stricter the procedural safeguards. Other countries have put in place some restrictions on the real-time collection of traffic data in their jurisdictions. In the United States, the following are the requirements for the exercise of this authority:

(1) **relevance** of the collected information to an ongoing criminal investigation;
(2) **court order** issued by a judicial officer based upon the **certification of a government attorney**; and
(3) **limitation of the period** of collection to sixty days (with the **possibility of extension**).

In the United Kingdom, the following requirements must be complied with:

(1) **necessity** of the information to be collected for the investigation of crime, protection of public safety, or a similar goal;
(2) **approval of a high-level government official**;
(3) **proportionality** of the collection to what is sought to be achieved; and
(4) **limitation of the period** of collection to thirty days.[128]

The above requirements laid down by two different jurisdictions offer different but similar formulations. As to what the triggering threshold or purpose would be, it could be the necessity threshold (for the investigation of crime, protection of public safety, or a similar goal) used in the United Kingdom or the relevance threshold (to an ongoing criminal investigation) in the United States. Note that these thresholds do not amount to probable cause.

Penalties Therefor and For Other Purposes"; SB No. 154, "An Act Amending Republic Act No. 10175, Otherwise Known as the Cybercrime Prevention Act of 2012"; SB No. 249, "An Act Repealing Sections 4 (c) (4), 5, 6, and 7 of RA 10175, Otherwise Known as the Cybercrime Prevention Act of 2012"; SB Nos. 53 and 1091 and House Bill (HB) No. 1086 or the Magna Carta for Philippine Internet Freedom; HB No. 1132, "An Act Repealing Republic Act No. 10175 or the Cybercrime Prevention Act of 2012."

[128] Richard W. Downing, *Shoring up the Weakest Link: What Lawmakers around the World Need to Consider in Developing Comprehensive Laws to Combat Cybercrime*, 43 COLUM. J. TRANSNAT'L L. 705 (2005).

As to who determines compliance with the legal threshold that triggers the exercise of the authority to collect traffic data in real time, the laws of the United States suggest that special judicial intervention is required. This intervention would be a very strong measure against the violation of privacy even if the judicial order does not require determination of probable cause. At the same time, however, the general concern of Justice Brion that "time is of the utmost essence in cyber crime law enforcement" needs to be considered. Hence, procedural rules of court will have to be adjusted so as not to unduly slow down law enforcement response to criminality considering how ephemeral some information could be. We must ensure that these rules are not out of step with the needs of law enforcement, given current technology. It may be noted that Justice Carpio has broached the idea of creating 24-hour courts to address the need for speedy law enforcement response.[129]

In the United Kingdom, the mechanism suggests that the authorizing entity need not be a judge, as it could be a high-ranking government official. Perhaps this non-judicial authorization proceeds from the consideration that since the triggering threshold is not probable cause, but only necessity to an ongoing criminal investigation, there is no need for a judicial determination of compliance with the aforesaid threshold.

The above requirements also provide limits on the period of collection of traffic data. In the United States, the limit is 60 days with a possibility of extension. This period and the possibility of extension are similar to those provided under our Anti-Wiretapping Law. Note, however, that the Anti-Wiretapping Law concerns the content of communications whereas the traffic data to be collected under Section 12 of the *Cybercrime Prevention Act* is limited to non-content and non-identifying data. Hence, the restriction on the period of collection could perhaps be eased by extending it to a longer period in the case of the latter type of data. In the United Kingdom, the limit is 30 days.

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[129] TSN dated 29 January 2013, p. 50.

From the above observation of the deficiencies of Section 12, as well as the samples from other jurisdictions, the following general guidelines could be considered to strengthen the safeguards against possible abuse.

First, the relevance or necessity of the collection of traffic data to an ongoing criminal investigation must be established. This requirement to specify the purpose of the collection (to aid ongoing criminal investigation) will have the effect of limiting the usage of the collected traffic data to exclude dossier building, profiling and other purposes not explicitly sanctioned by the law. It will clarify that the intention for the collection of traffic data is not to create a historical data base for a comprehensive analysis of the personal life of an individual whose traffic data is collected, but only for investigation of specific instances of criminality. More important, it is not enough that there be an ongoing criminal investigation; the real-time collection must be shown to be necessary or at least relevant to the investigation. Finally, it should be explicitly stated that the examination of traffic data will not be for the purpose of preventive monitoring which, as observed earlier, would necessarily entail a greater scope than that involved in a targeted collection of traffic data for the investigation of a specific criminal act.

Second, there must be an independent authority — judicial or otherwise — who shall review compliance with the relevance and necessity threshold. The designation of this authority will provide additional assurance that the activity will be employed only in specific instances of criminal investigation and will be necessary or relevant. The designation of an authorizing entity will also inhibit the unjustified use of real-time collection of traffic data. The position of this person should be sufficiently high to ensure greater accountability. For instance, it was suggested during the oral arguments that the authorizing person be a lawyer of the national government in order to additionally strengthen that person's accountability, proceeding as it would from his being an officer of the court.[130]

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[130] TSN dated 29 January 2013, p. 92.

Third, there must be a limitation on the period of collection. The restriction on the time period will further prevent the indiscriminate and bulk collection of traffic data beyond what is necessary for a regular criminal investigation.

As to the type of technology to be used for collection, it seems that this cannot be specified beforehand. Certainly, only a general restriction can be made – that the technology should be capable of collecting only non-content and non-identifying traffic data. It should not be able to directly point to the location of the users of the Internet, the websites visited, the search words used, or any other data that reveal the thoughts of the user.

In the end, whatever mechanism is to be set in place must satisfy the Constitution's requirements for the safeguard of the people's right to privacy and against undue incursions on their liberties.

Final Words

Laws and jurisprudence should be able to keep current with the exponential growth in information technology.[131] The challenge is acute, because the rapid progress of technology has opened up new avenues of criminality. Understandably, governments try to keep pace and pursue criminal elements that use new technological avenues. It is precisely during these times of zeal that the Court must be ever ready to perform its duty to uphold fundamental rights when a proper case is brought before it.

The Court has carefully trod through the issues that have been heard in these Petitions, especially since they involve the exercise of our power of judicial review over acts of the legislature. I believe that we have tried to exercise utmost judicial restraint and approached the case as narrowly as we could so as to avoid setting sweeping and overreaching precedents.[132] We have thus

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[131] RAY KURZWEIL, *THE AGE OF SPIRITUAL MACHINES: WHEN COMPUTERS EXCEED HUMAN INTELLIGENCE*, 13 (1999); Ray Kurzweil, *The Law of Accelerating Returns*, 7 March 2001, available at <http://www.kurzweilai.net/the-law-of-accelerating-returns>, accessed on 29 September 2013.

[132] See: *Francisco v. House of Representatives*, *supra* note 2 (citing *Estrada v. Desierto*, [Sep. Op. of J. Mendoza] 406 Phil. 1 [2001]; *Demetria*

prudently resolved the present Petitions with the view in mind that a future re-examination of the law is still possible,[133] especially when the constitutional challenges set forth become truly ripe for adjudication. This is also so that we do not unduly tie the hands of the government when it regulates socially harmful conduct in the light of sudden changes in technology, especially since the regulation is meant to protect the very same fundamental rights that petitioners are asking this Court to uphold.

However, we have also not hesitated to strike down as unconstitutional those regulatory provisions that clearly transgress the Constitution and upset the balance between the State's inherent police power and the citizen's fundamental rights. After all, the lofty purpose of police power is to be at the loyal service of personal freedom.

WHEREFORE, I join the *ponencia* in resolving to leave the determination of the correct application of Section 7 to actual cases, except as it is applied to libel. Charging an offender both under Section 4(c)(4) of the *Cybercrime Prevention Act* and under Article 353 of the *Revised Penal Code* violates the guarantee against double jeopardy and is *VOID* and *UNCONSTITUTIONAL* for that reason.

Moreover, I join in declaring the following as *UNCONSTITUTIONAL*:

1. Section 4(c)(4), insofar as it creates criminal liability on the part of persons who receive a libelous post and merely react to it;
2. Section 12, insofar as it fails to provide proper safeguards for the exercise of the authority to collect traffic data in real time;
3. Section 19, also insofar as it fails to provide proper standards for the exercise of the authority to restrict or block access to computer data.

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v. Alba, *supra* note 2; and *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 [1936]).

[133] See: *Republic v. Roque*, G.R. No. 204603, 24 September 2013.

However, I vote to declare Section 6 *UNCONSTITUTIONAL*, insofar as it applies to Section 4(c)(4), for unduly curtailing freedom of speech.

As regards the remaining assailed provisions, I vote to *DISMISS* the Petitions for failure to establish that a pre-enforcement judicial review is warranted at this time.

CONCURRING AND DISSENTING OPINION

[C]orporations of all shapes and sizes track what you buy, store and analyze our data, and use it for commercial purposes; thats how those targeted ads pop up on your computer or smartphone. But all of us understand that the standards for government surveillance must be higher. Given the unique power of the state, it is not enough for leaders to say: trust us, we won't abuse the data we collect. For history has too many examples when that trust has been breached. ***Our system of government is built on the premise that our liberty cannot depend on the good intentions of those in power; it depends upon the law to constrain those in power***.[1]

President Barack Obama
17 January 2014, on National Security Agency Reforms

CARPIO, *J.*:

I concur in striking down as unconstitutional Section 4(c)(3), Section 7, Section 12, and Section 19 of Republic Act No. 10175 (RA 10175) (1) penalizing unsolicited commercial speech; (2) allowing multiple prosecutions post-conviction under RA 10175; (3) authorizing the warrantless collection in bulk of traffic data; and (4) authorizing the extrajudicial restriction or blocking of access to computer data, respectively, for being violative of the Free Speech, Search and Seizure, Privacy of Communication, and Double Jeopardy Clauses.

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[1] *Transcript of President Obama's Jan. 17 Speech on NSA Reforms*, THE WASHINGTON POST, 17 January 2014, http://www.washingtonpost.com/politics/full-text-of-president-obamas-jan-17-speech-on-nsa-reforms/2014/01/17/fa33590a-7f8c-11e3-9556-4a4bf7bcbd84_story.html.

I dissent, however, from the conclusion that (1) Article 354 of the Revised Penal Code (Code) creating the presumption of malice in defamatory imputations, and (2) Section 4(c)(1) of RA 10175 penalizing "cybersex," are not equally violative of the constitutional guarantees of freedom of speech and expression. I therefore vote to declare Article 354 of the Code, as far as it applies to public officers and public figures, and Section 4(c)(1) of RA 10175, unconstitutional for violating Section 4, Article III of the Constitution.

Article 354 of the Code Repugnant to the Free Speech Clause

Article 354's Presumption of Malice Irreconcilable with Free Speech Jurisprudence On Libel of Public Officers and Public Figures

Article 4(c)(4) of RA 10175 impliedly re-adopts Article 354 of the Code *without any qualification*. Article 354 took effect three years[2] before the ratification of the 1935 Constitution that embodied the Free Speech Clause.[3] Unlike most of the provisions of the Code which are derived from he Spanish Penal Code of 1870, Article 354 is based on legislation[4] passed by the Philippine Commission during the American occupation. Nevertheless, Article 354 is inconsistent with norms on free speech and free expression now prevailing in both American and Philippine constitutional jurisprudence.

Article 354 provides as follows:

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:

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[2] On 1 January 1932.

[3] Article III, Section 1 (8) ("No law shall be passed abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble and petition the Government for redress of grievances."). This is substantially reiterated in Article III, Section 9 of the 1973 Constitution and Article III, Section 4 of the 1987 Constitution.

[4] Act No. 277.

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. (Italicization supplied)

While the text of Article 354 has remained intact since the Code's enactment in 1930, constitutional rights have rapidly expanded since the latter half of the last century, owing to expansive judicial interpretations of broadly worded constitutional guarantees such as the Free Speech Clause. Inevitably, judicial doctrines crafted by the U.S. Supreme Court protective of the rights to free speech, free expression and free press found their way into local jurisprudence, adopted by this Court as authoritative interpretation of the Free Speech Clause in the Philippine Bill of Rights. One such doctrine is the New York Times actual malice rule, named after the 1964 case in which it was crafted, *New York Times v. Sullivan*.[5]

New York Times broadened the mantle of protection accorded to communicative freedoms by holding that the "central meaning" of the Free Speech Clause is the protection of citizens who criticize official conduct *even if such criticism is defamatory and false*. True, the defamed public official may still recover damages for libel. However, as precondition for such recovery, *New York Times* laid down a formidable evidentiary burden[6] — the public official must prove that the false defamatory statement was made

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[5] 376 U.S. 254 (1964) (involving a libel complaint for damages filed by the Montgomery, Alabama police commissioner against the New York Times Company and other individuals for a paid political advertisement published in the *New York Times*, criticizing police conduct during a series of protests staged by civil rights activists at the height of the campaign for racial equality in the American South in the 1960s).

[6] Also described as "an escalati[on] of the plaintiff's burden of proof to an almost impossible level." *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 771 (1985) (White, *J.*, concurring).

"with actual malice — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[7]

The broad protection *New York Times* extended to communicative rights of citizens and the press *vis-à-vis* the conduct of public officials was grounded on the theory that "unfettered interchange of ideas for the bringing about of political and social changes desired by the people"[8] is indispensable in perfecting the experiment of self-governance. As for erroneous statements, the ruling considered them "inevitable in free debate, and that [they] must be protected if the freedoms of expression are to have the 'breathing space' that they need x x x to survive."[9] The actual malice doctrine was later made applicable to public figures.[10]

Six years after *New York Times* became U.S. federal law in 1964, this Court took note of the actual malice doctrine as part of a trend of local and foreign jurisprudence enlarging the protection of the press under the Free Speech Clause.[11] Since then, the Court has issued a steady stream of decisions applying *New York Times* as controlling doctrine to dismiss civil[12] and criminal[13] libel complaints filed by public officers or public figures. As Justice Teehankee aptly noted:

The Court has long adopted the criterion set forth in the U.S. benchmark case of *New York Times Co. vs. Sullivan* that "libel can

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[7] *Supra* note 5 at 279-280.

[8] *Supra* note 5 at 269 quoting *Roth v. United States*, 354 U.S. 476, 484 (1957).

[9] *Supra* note 5 at 271-272 citing *N. A. A. C. P. v. Button*, 371 U.S. 415, 433 (1963).

[10] *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

[11] *Lopez v. Court of Appeals*, 145 Phil. 219 (1970).

[12] *Borjal v. CA*, 361 Phil. 1 (1999); *Baguio Midland Courier v. CA*, 486 Phil. 223 (2004); *Villanueva v. Philippine Daily Inquirer, Inc.*, G.R. No. 164437, 15 May 2009, 588 SCRA 1.

[13] *Flor v. People*, 494 Phil. 439 (2005); *Guingguing v. CA*, 508 Phil. 193 (2005); *Vasquez v. CA*, 373 Phil. 238 (1999).

claim no talismanic immunity from constitutional limitations" that protect the preferred freedoms of speech and press. *Sullivan* laid down the test of actual malice, *viz*. "(T)he constitutional guaranty of freedom of speech and press prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he 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." x x x.[14]

Indeed, just as the actual malice doctrine is enshrined in the U.S. First Amendment jurisprudence, it too has become interwoven into our own understanding of the Free Speech Clause of the Philippine Bill of Rights of the 1973 and 1987 Constitutions.[15]

The actual malice rule enunciates three principles, namely:

1) Malice is *not presumed* even in factually false and defamatory statements against public officers and public figures; it must be proven as a fact for civil and criminal liability to lie;

2) Report on official proceedings or conduct of an officer may *contain fair comment*, including factually erroneous and libelous criticism; and

3) *Truth* or lack of reckless disregard for the truth or falsity of a defamatory statement *is an absolute defense* against public officers and public figures.

In contrast, Article 354, in relation to Article 361 and Article 362 of the Code, operates on the following principles:

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[14] *Babst v. National Intelligence Board*, 217 Phil. 302, 331-332 (1984) (internal citations omitted).

[15] Justice Enrique Fernando consistently espoused the theory that *U.S. v. Bustos*, 37 Phil. 731 (1918), preceded *New York Times* by over three decades (*Mercado v. CFI of Rizal*, 201 Phil. 565 [1982]; *Philippine Commercial and Industrial Bank v. Philnabank Employees Association*, 192 Phil. 581 [1981]). The OSG does one better than Justice Fernando by claiming that a much earlier case, *U.S. v. Sedano*, 14 Phil. 338 (1909), presaged *New York Times* (OSG Memorandum, pp. 62-63).

1) Malice is *presumed* in every defamatory imputation, even if true (unless good intention and justifiable motives are shown);

2) Report on official proceedings or conduct of an officer must be made *without comment or remarks*, or, alternatively, must be made without malice;[16] and

3) In defamatory allegations made against a public official, *truth is a defense only if the imputed act or omission constitutes a crime or if the imputed act or omission relates to official duties*.[17]

The actual malice rule and Article 354 of the Code impose contradictory rules on (1) the necessity of proof of malice in defamatory imputations involving public proceedings or conduct of a public officer or public figure; and (2) the availability of truth as a defense in defamatory imputations against public officials or public figures. The former requires proof of malice and allows truth as a defense unqualifiedly, while the latter presumes malice and allows truth as a defense selectively. **The repugnancy between the actual malice rule and Article 354 is clear, direct and absolute.**

Nonetheless, the Office of the Solicitor General (OSG) argues for the retention of Article 354 in the Code, suggesting that the Court can employ a "limiting construction" of the provision to reconcile it with the actual malice rule. [18] The *ponencia* appears

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[16] Art. 362. Libelous remarks. — Libelous remarks or comments connected with the matter privileged under the provisions of Article 354, *if made with malice*, shall not exempt the author thereof nor the editor or managing editor of a newspaper from criminal liability. (Emphasis supplied)

[17] Art. 361. Proof of the truth. — x x x

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

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

[18] OSG Memorandum, pp. 56-66, citing *Snyder v. Ware*, 397 U.S. 589 (1970).

to agree, holding that the actual malice rule "impl[ies] a stricter standard of 'malice' x x x where the offended party is a [public officer or] public figure," the "penal code and, implicitly, the cybercrime law mainly target libel against private persons."[19]

Allowing a criminal statutory provision clearly repugnant to the Constitution, and directly attacked for such repugnancy, to nevertheless remain in the statute books is a gross constitutional anomaly which, if tolerated, weakens the foundation of constitutionalism in this country. "The Constitution is either a superior, paramount law, x x x or it is on a level with ordinary legislative acts,"[20] and if it is superior, as we have professed ever since the Philippines operated under a Constitution, then "a law repugnant to the Constitution is void."[21]

Neither does the *ponencia's* claim that Article 354 (and the other provisions in the Code penalizing libel) "mainly target libel against private persons" furnish justification to let Article 354 stand. First, it is grossly incorrect to say that Article 354 "mainly target[s] libel against private persons." Article 354 expressly makes reference to news reports of "any judicial, legislative or other official proceedings" which necessarily involve *public officers* as principal targets of libel. Second, the proposition that this Court ought to refrain from exercising its power of judicial review because a law is constitutional when applied to one class of persons but unconstitutional when applied to another class is fraught with mischief. It stops this Court from performing its duty,[22] as the highest court of the land, to "say what the law

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[19] Decision, p. 15.

[20] *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

[21] *Id.* at 177.

[22] The obligatory nature of judicial power is *textualized* under the 1987 Constitution. Section 1, Article VIII provides: "Judicial power includes the ***duty*** of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government." (Emphasis supplied)

is" whenever a law is attacked as repugnant to the Constitution. Indeed, it is not only the power **but also the duty** of the Court to declare such law unconstitutional as to one class, and constitutional as to another, if valid and substantial class distinctions are present.

Undoubtedly, there is a direct and absolute repugnancy between Article 354, on one hand, and the actual malice rule under the Free Speech Clause, on the other hand. Section 4(c)(4) of RA 10175 impliedly re-adopts Article 354 *without qualification*, giving rise to a clear and direct conflict between the re-adopted Article 354 and the Free Speech Clause based on prevailing jurisprudence. It now becomes imperative for this Court to strike down Article 354, insofar as it applies to public officers and public figures.

The ramifications of thus striking down Article 354 are: (1) for cases filed by public officers or public figures, civil or criminal liability will lie only if the complainants prove, through the relevant quantum of proof, that the respondent made the false defamatory imputation with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not; and (2) for cases filed by private individuals, the respondent cannot raise truth as a defense to avoid liability if there is no good intention and justifiable motive.

Section 4(c)(1) Fails Strict Scrutiny

Section 4(c)(1) which provides:

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

x x x x x x x x x

(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.

is attacked by petitioners as unconstitutionally overbroad. Petitioners in G.R. No. 203378 contend that Section 4(c)(1)

sweeps in protected online speech such as "works of art that depict sexual activities" which museums make accessible to the public for a fee.[23] Similarly, the petitioner in G.R. No. 203359, joining causes with the petitioner in G.R. No. 203518, adopts the latter's argument that the crime penalized by Section 4(c)(1) "encompasses even commercially available cinematic films which feature adult subject matter and artistic, literary or scientific material and instructional material for married couples."[24]

The OSG counters that Section 4(c)(1) does not run afoul with the Free Speech Clause because it merely "seeks to punish online exhibition of sexual organs and activities or cyber prostitution and white slave trade for favor or consideration."[25] It adds that "publication of pornographic materials in the internet [is] punishable under Article 201 of the Revised Penal Code x x x which has not yet been declared unconstitutional."[26] The *ponencia* agrees, noting that the "subject" of Section 4(c)(1) is "not novel" as it is allegedly covered by two other penal laws, Article 201 of the Code and Republic Act No. 9208 (The Anti-Trafficking in Persons Act of 2003 [RA 9208]). The *ponencia* rejects the argument that Section 4(c)(1) is overbroad because "it stands a construction that makes it apply only to persons engaged in the business of maintaining, controlling, or operating x x x the lascivious exhibition of sexual organs or sexual activity, with the aid of a computer system."[27]

The government and the *ponencia's* position cannot withstand analysis.

As Section 4(c) of RA 10175 itself states, the crimes defined under that part of RA 10175, including Section 4(c)(1), are "*Content-related* Offenses," penalizing the *content* of categories of online speech or expression. As a content-based regulation,

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[23] Memorandum (G.R. No. 203378), p. 19.

[24] Memorandum (G.R. No. 203359), p. 58.

[25] OSG Memorandum, p. 43.

[26] *Id.* at 44-45.

[27] Decision, p. 11.

Section 4(c)(1) triggers the most stringent standard of review for speech restrictive laws – strict scrutiny – to test its validity.[28] Under this heightened scrutiny, a regulation will pass muster only if the government shows (1) a compelling state interest justifying the suppression of speech; and (2) that the law is narrowly-tailored to further such state interest. On both counts, the government in this case failed to discharge its burden.

The state interests the OSG appears to advance as bases for Section 4(c)(1) are: (1) the protection of children "as cybersex operations x x x are most often committed against children," and (2) the cleansing of cyber traffic by penalizing the online publication of pornographic images.[29] Although legitimate or even substantial, these interests fail to rise to the level of compelling interests because Section 4(c)(1) is both (1) *overinclusive* in its reach of the persons exploited to commit the offense of cybersex, and (2) *underinclusive* in its mode of commission. These defects expose a legislative failure to narrowly tailor Section 4(c)(1) to tightly fit its purposes.

As worded, Section 4(c)(1) penalizes 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." On the first interest identified by the government, the overinclusivity of this provision rests on the lack of a narrowing clause limiting its application to *minors*. As a result, Section 4(c)(1) penalizes the "lascivious exhibition of sexual organs of, or sexual activity" involving *minors and adults*, betraying a loose fit between the state interest and the means to achieve it.

Indeed, the proffered state interest of protecting minors is narrowly advanced not by Section 4(c)(1) but by the provision immediately following it, Section 4(c)(2), which penalizes *online child* pornography. Section 4(c)(2) provides:

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[28] *Osmeña v. COMELEC*, 351 Phil. 692 (1998).

[29] *Id.* at 44.

(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 x x x.

Republic Act No. 9775 defines "Child pornography" as referring to —

any representation, whether visual, audio, or written combination thereof, by *electronic*, mechanical, digital, optical, magnetic or any other *means*, of **child** engaged or involved in real or simulated **explicit sexual activities**.[30] (Emphasis supplied)

Under Section 3 of that law, the term "explicit sexual activities" is defined as follows:

Section 3. Definition of terms. –

x x x x

(c) "Explicit Sexual Activity" includes actual or simulated –

(1) As to form:

(i) *sexual intercourse or lascivious act* including, but not limited to, contact involving genital to genital, oral to genital, anal to genital, or oral to anal, whether between persons of the same or opposite sex;

x x x x x x x x x

(5) *lascivious exhibition of the genitals*, buttocks, breasts, pubic area and/or anus[.] (Emphasis supplied)

Clearly then, it is Section 4(c)(2), not Section 4(c)(1), that narrowly furthers the state interest of protecting minors by punishing the "representation x x x by electronic means" of sexually explicit conduct including the exhibition of sexual organs of, or sexual acts, involving *minors*. Section 4(c)(1) does not advance such state interest narrowly because it is broadly drawn to cover both minors *and* adults. Section 4(c)(2) is constitutional

[30] Section 3 (c).

because it narrowly prohibits cybersex acts involving minors only, while Section 4(c)(1) is unconstitutional because it expands the prohibition to cybersex acts involving both minors and adults when the justification for the prohibition is to protect minors only.

The overinclusivity of Section 4(c)(1) *vis-a-vis* the second state interest the government invokes results from the broad language Congress employed to define "cybersex." As the petitioners in G.R. No. 203378, G.R. No. 203359 and G.R. No. 203518 correctly point out, the crime of "lascivious *exhibition* of sexual organs or sexual activity, with the aid of a computer system, for favor or consideration" embraces within its ambit "works of art that depict sexual activities" made accessible to the public for a fee or "commercially available cinematic films which feature adult subject matter and artistic, literary or scientific material and instructional material for married couples."[31] Congress could have narrowly tailored Section 4(c)(1) to cover only online pornography by hewing closely to the *Miller* test – the prevailing standard for such category of unprotected speech, namely, "an average person, applying contemporary standards would find [that] the work, taken as a whole, appeals to the prurient interest by depict[ing] or describ[ing] in a patently offensive way, sexual conduct specifically defined by the applicable x x x law and x x x, taken as a whole, lacks serious literary, artistic, political, or scientific value."[32]

Moreover, Section 4(c)(1) penalizes "**any** lascivious exhibition of sexual organs or sexual activity, with the aid of a computer system, for favor or consideration." There are many fee-based online medical publications that illustrate sexual organs and

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[31] For the same reason, Section 4 (c) (1) is unconstitutionally overbroad, sweeping in "too much speech" including the protected indecent but non-obscene type. G. GUNTHER AND K. SULLIVAN, *CONSTITUTIONAL LAW* 1287 (14th ed.).

[32] *Miller v. California*, 413 U.S. 15 (1973), cited with approval in *Soriano v. Laguardia*, G.R. No. 164785, 15 March 2010, 615 SCRA 254, (Carpio, *J.*, dissenting); *Fernando v. Court of Appeals*, 539 Phil. 407 (2006).

even sexual acts. Section 4(c)(1) will now outlaw all these online medical publications which are needed by doctors in practicing their profession. This again shows the overinclusiveness of Section 4(c)(1) in violation of the Free Speech Clause.

The loose fit between the government interests of cleansing the Internet channels of immoral content and of protecting minors, on the one hand, and the means employed to further such interests, on the other hand, is highlighted by the underinclusivity of Section 4(c)(1) insofar as the manner by which it regulates content of online speech. Section 4(c)(1) limits the ambit of its prohibition to fee-based websites exhibiting sexual organs or sexual activity. In doing so, it leaves **outside its scope and unpunished under Section 4(c)(1) non-fee based porn websites**, such as those generating income through display advertisements. The absence of regulation under Section 4(c)(1) of undeniably unprotected online speech in free and open porn websites defeats the advancement of the state interests behind the enactment of Section 4(c)(1) because unlike fee-based online porn websites where the pool of viewers is narrowed down to credit card-owning subscribers who affirm they are adults, free and open porn websites are accessible to all, minors and adults alike. Instead of purging the Internet of pornographic content, Section 4(c)(1) will trigger the proliferation of free and open porn websites which, unlike their fee-based counterparts, are not subject to criminal regulation under Section 4(c)(1). What Section 4(c)(1) should have prohibited and penalized are free and open porn websites which are accessible by minors, and not fee-based porn websites which are accessible only by credit card-owning adults, unless such fee-based websites cater to child pornography, in which case they should also be prohibited and penalized.

It is doubtful whether Congress, in failing to tailor Section 4(c)(1) to narrowly advance state interests, foresaw this worrisome and absurd effect. It is, unfortunately, an altogether common by-product of loosely crafted legislations.

Contrary to the *ponencia's* conclusion, Section 4(c)(1) does not cover "the same subject" as Article 201 of the Code and RA 9208. Article 201 penalizes "Immoral doctrines, *obscene*

publications and exhibitions and indecent shows" as understood under the Miller test.[33] On the other hand, RA 9208 penalizes *trafficking in persons* (or its promotion) for illicit purposes (Section 4[a]). The fact that these statutory provisions remain valid in the statute books has no bearing on the question whether a statutory provision penalizing the "lascivious exhibition of sexual organs or sexual activity, with the aid of a computer system, for favor or consideration" offends the Free Speech Clause.

The majority's decision to uphold the validity of Section 4(c)(1) reverses, without explanation, the well-entrenched jurisprudence in this jurisdiction applying the obscenity test of *Miller*. Just five years ago in 2009, this Court unanimously applied *Miller in Soriano v. Laguardia*[34] to test whether the statements aired on late night TV qualified for protection under the Free Speech Clause. Much earlier in 2006, the Court also applied *Miller* to review a conviction for violation of Article 201 of the Code on obscene publications in *Fernando v. Court of Appeals*.[35] It was in *Pita v. Court of Appeals*,[36] however, decided in 1989 over a decade after *Miller*, where the Court had first occasion to describe *Miller* as "the latest word" in the evolution of the obscenity test in the U.S. jurisdiction. Indeed, as I noted in my separate opinion in *Soriano*, *Miller* is an "*expansion*" of previous tests on pornography developed in the U.S. and English jurisdictions, liberalizing the elements of previous tests (*Hicklin* and *Roth*):

> The leading test for determining what material could be considered obscene was the famous *Regina v. Hicklin* case wherein Lord Cockburn enunciated thus:
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> > I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt

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[33] *Fernando v. Court of Appeals*, *supra* note 32.

[34] G.R. No. 164785, 29 April 2009, 587 SCRA 79.

[35] 539 Phil. 407 (2006).

[36] 258-A Phil. 134 (1989).

> those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

Judge Learned Hand, in United *States v. Kennerly*, opposed the strictness of the Hicklin test even as he was obliged to follow the rule. He wrote:

> I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time.

Roth v. United States laid down the more reasonable and thus, more acceptable test for obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Such material is defined as that which has "a tendency to excite lustful thoughts," and "prurient interest" as "a shameful or morbid interest in nudity, sex, or excretion."

Miller v. California merely expanded the Roth test to include two additional criteria: "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and the work, taken as whole, lacks serious literary, artistic, political, or scientific value." The basic test, as applied in our jurisprudence, extracts the essence of both *Roth* and *Miller* – that is, whether the material appeals to prurient interest.[37] (Italicization supplied; internal citations omitted)

Miller is the modern obscenity test most protective of speech uniformly followed in this jurisdiction for over two decades. The majority, in upholding Section 4(c)(1) and rejecting *Miller*, regresses to less protective frameworks of speech analysis. Because neither the *ponencia* nor the concurring opinions devote discussion on this doctrinal shift, one is left guessing whether the Philippine jurisdiction's test on pornography has reverted only up to *Roth* or reaches as far back as the discredited *Hicklin* test. Either way, the lowered protection afforded to works claimed as obscene turns back the clock of free expression protection to the late 1960s and beyond when prevailing mores of morality are incongruous to 21st century realities.

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[37] G.R. No. 164785, 15 March 2010, 615 SCRA 254, 270-271 (Resolution).

Section 4(c)(3) Repugnant to the Free Speech Clause

Section 4(c)(3) of RA 10175 makes criminal the transmission through a computer system of "electronic communication x x x which seek to advertise, sell, or offer for sale products and services" unless they fall under three categories of exceptions. These categories are: (1) the recipient of the commercial message "gave prior affirmative consent" to do so; (2) the "primary intent" of the commercial message "is for service and/or administrative announcements from the sender" to its "users, subscribers or customers"; and (3) the commercial message (a) has an "opt-out" feature; (b) has a source which is "not purposely disguise[d]"; and (c) "does not purposely include misleading information x x x to induce the recipient to read the message." According to the OSG, Congress enacted Section 4(c)(3) to improve the "efficiency of commerce and technology" and prevent interference with "the owner's peaceful enjoyment of his property [computer device]."[38]

Section 4(c)(3) fails scrutiny. Section 4(c)(3) impermissibly restricts the flow of truthful and non-misleading commercial speech in cyberspace that does not fall under any of the exceptions in Section 4(c)(3), lowering the protection it enjoys under the Free Speech Clause.[39] Section 4(c)(3) would be constitutional if it allowed the free transmission of truthful and non-misleading commercial speech, even though not falling under any of the exceptions in Section 4(c)(3). There is no legitimate government interest in criminalizing *per se* the transmission in cyberspace of truthful and non-misleading commercial speech.

Under the exception clauses of Section 4(c)(3), commercial speech may be transmitted online only when (1) the recipient has subscribed to receive it ("opted-in"); or (2) the commercial speech, directed to its "users, subscribers or customers," contains announcements; or (3) the undisguised, non-misleading

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[38] Decision, p. 13.

[39] The protected nature of truthful and non-misleading commercial speech was adverted to in Philippine jurisprudence in *Pharmaceutical and Health Care Association of the Philippines v. Secretary of Health Duque III*, 561 Phil. 386, 448-451 (Puno, *C.J.*, concurring).

commercial speech has an "opt-out" feature. The combination of these exceptions results in penalizing the transmission online (1) of commercial speech with no "opt-out" feature to non-subscribers, **even if truthful and non-misleading**; and (2) of commercial speech which does not relay "announcements" to subscribers, **even if truthful and non-misleading**. Penalizing the transmission of these protected categories of commercial speech is devoid of any legitimate government interest and thus violates the Free Speech Clause.

Indeed, the free flow of truthful and non-misleading commercial speech online should remain unhampered to assure freedom of expression of protected speech. In cyberspace, the free flow of truthful and non-misleading commercial speech does not obstruct the public view or degrade the aesthetics of public space in the way that billboards and poster advertisements mar the streets, highways, parks and other public places. True, commercial speech does not enjoy the same protection as political speech in the hierarchy of our constitutional values. However, any regulation of truthful and non-misleading commercial speech must still have a legitimate government purpose. Regulating truthful and non-misleading commercial speech does not result in "efficiency of commerce and technology" in cyberspace.

In fact, the free flow of truthful and non-misleading commercial speech should be encouraged in cyberspace for the enlightenment of the consuming public, considering that it is cost-free to the public and almost cost-free to merchants. Instead of using paper to print and mail truthful and non-misleading commercial speech, online transmission of the same commercial message will save the earth's dwindling forests and be more economical, reducing marketing costs and bringing down consumer prices. If any regulation of truthful and non-misleading commercial speech is to take place, its terms are best fixed through the interplay of market forces in cyberspace. This is evident, in fact, in the menu of options currently offered by email service providers to deal with unwanted or spam email, allowing their account holders to customize preferences in receiving and rejecting them. Unwanted or spam emails automatically go to a separate spam folder where all the contents can be deleted by simply checking

the "delete all" box and clicking the delete icon. Here, the account holders are given the **freedom to read, ignore or delete** the unwanted or spam email with hardly any interference to the account holders' peaceful enjoyment of their computer device. Unless the commercial speech transmitted online is misleading or untruthful, as determined by courts, government should step aside and let this efficient self-regulatory market system run its course.

Section 7 of RA 10175 Repugnant to the Double Jeopardy and Free Speech Clauses

The petitioners in G.R. No. 203335 and G.R. No. 203378 attack the constitutionality of Section 7, which makes conviction under RA 10175 non-prejudicial to "any liability for violation of any provision of the Revised Penal Code, as amended, or special laws," for being repugnant to the Double Jeopardy Clause. The OSG sees no merit in the claim, citing the rule that "a single set of acts may be prosecuted and penalized under two laws."[40]

The OSG misapprehends the import of Section 7. Although RA 10175 defines and punishes a number of offenses to which Section 7 applies, its application to the offense of online libel under Section 4(c)(4) of RA 10175, in relation to the offense of libel under Article 353 of the Code, suffices to illustrate its unconstitutionality for trenching the Double Jeopardy and Free Speech Clauses.

RA 10175 does not define libel. Its definition is found in the Code (Article 353) which provides:

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

As defined, the medium through which libel is committed *is not an element of such offense*. What is required of the prosecution

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[40] OSG Consolidated Comment, pp. 109-110, citing *People v. Sandoval*, G.R. Nos. 95353-54, 7 March 1996, 254 SCRA 436.

are proof of the (1) statement of a discreditable act or condition of another person; (2) publication of the charge; (3) identity of the person defamed; and (4) existence of malice.[41] The irrelevance of the medium of libel in the definition of the crime is evident in Article 355 of the Code which punishes libel with a uniform penalty[42] whether it is committed "by means of writing, printing, lithography, engraving, radio, phonograph, painting, theatrical exhibition, cinematographic exhibition, or any similar means."

RA 10175 adopts the Code's definition of libel by describing online libel under Section 4(c)(4) as "[t]he unlawful or prohibited acts *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." By adopting the Code's definition of libel, Section 4(c)(4) also adopts the elements of libel as defined in Article 353 in relation to Article 355 of the Code. Section 4(c)(4) merely adds the media of "computer system or any other similar means which may be devised in the future" to the list of media enumerated in Article 355. This is understandable because at the time the Code was enacted in 1930, the Internet was non-existent. In the words of the OSG itself (in contradiction to its position on the constitutionality of Section 7), Congress enacted Section 4(c)(4) not to create a new crime, but merely to "ma[ke] express an avenue *already covered by the term 'similar means' under Article 355, to keep up with the times*":

> Online libel is not a new crime. Online libel is a crime punishable under x x x Article 353, in relation to Article 355 of the Revised Penal Code. *Section 4(c)(4) just made express an avenue already covered by the term "similar means" under Article 355, to keep up with the times*.[43] (Emphasis supplied)

For purposes of double jeopardy analysis, therefore, Section 4(c)(4) of RA 10175 and Article 353 in relation to Article

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[41] *Vasquez v. Court of Appeals*, 373 Phil. 238 (1999).

[42] *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.

[43] OSG Consolidated Comment, p. 77.

355 of the Code *define and penalize the same offense* of libel. Under the Double Jeopardy Clause, conviction or acquittal under either Section 4(c)(4) or Article 353 in relation to Article 355 constitutes a bar to another prosecution *for the **same** offense* of libel.

The case of petitioners Ellen Tordesillas, Harry Roque and Romel Bagares in G.R. No. 203378 provides a perfect example for applying the rules on print and online libel in relation to the Double Jeopardy Clause. These petitioners write columns which are published online and in print by national and local papers.[44] They allege, and respondents do not disprove, that "their columns see publication in both print and online versions of the papers they write for."[45] Should these petitioners write columns for which they are prosecuted and found liable under Section 4(c)(4) of RA 10175 for online libel the Double Jeopardy Clause bars their second prosecution for print libel for the same columns upon which their first conviction rested, under Article 353 in relation to Article 355 of the Code. Such constitutional guarantee shields them from being twice put in jeopardy of punishment for the same offense of libel.

The foregoing analysis applies to all other offenses defined and penalized under the Code or special laws which (1) are penalized as the same offense under RA 10175 committed through the use of a computer system; or (2) are considered aggravated offenses under RA 10175. Conviction or acquittal under the Code or such special laws constitutes a bar to the prosecution for the commission of any of the offenses defined under RA 10175. Thus, for instance, conviction or acquittal under Section 4(a) of RA 9775 (use of a child to create child pornography[46])

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[44] *Malaya* (http://www.malaya.com.ph/) and *Abante* (http://www.abante.com.ph); *Manila Standard Today* (manilastandardtoday.com); and The News Today (www.thenewstoday.info), respectively.

[45] Petition (G.R. No. 203378), p. 37.

[46] "Section 4. Unlawful or Prohibited Acts. — It shall be unlawful for any person: (a) To hire, employ, use, persuade, induce or coerce a child to perform in the creation or production of any form of child pornography[.]"

constitutes a bar to the prosecution for violation of Section 4(c)(2) of RA 10175 (online child pornography) and *vice versa*. This is because the offense of child pornography under RA 9775 is the same offense of child pornography under RA 10175 committed through the use of a computer system.

Section 7 of RA 10175 also offends the Free Speech Clause by assuring multiple prosecutions of those who fall under the ambit of Section 4(c)(4). The specter of multiple trials and sentencing, even after conviction under RA 10175, creates a significant and not merely incidental chill on online speech. Section 7 stifles speech in much the same way that excessive prison terms for libel, subpoenas to identify anonymous online users or high costs of libel litigation do. It has the effect of making Internet users "steer far wide of the unlawful zone"[47] by practicing self-censorship, putting to naught the democratic and inclusive culture of the Internet where anyone can be a publisher and everyone can weigh policies and events from anywhere in the world in real time. Although Section 7, as applied to Section 4(c)(4), purports to strengthen the protection to private reputation that libel affords, its sweeping ambit deters not only the online publication of defamatory speech against private individuals but also the online dissemination of scathing, false, and defamatory statements against public officials and public figures which, under the actual malice rule, are conditionally protected. This chilling effect on online communication stifles robust and uninhibited debate on public issues, the constitutional value lying at the core of the guarantees of free speech, free expression and free press.

Section 12 of RA 10175 Violative of the Search and Seizure and Privacy of Communication Clauses

Section 12 of RA 10175 grants authority to the government to record in bulk and in real time electronic data transmitted by means of a computer system,[48] such as through mobile phones

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[47] *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

[48] Defined in the law (Section 3 [g]) as "refer[ing] to any device or group of interconnected or related devices, one or more of which, pursuant to a

and Internet-linked devices. The extent of the power granted depends on the type of electronic data sought to be recorded, that is, whether traffic data or non-traffic data ("all other data"). For traffic data, which RA 10175 defines as "the communication's origin, destination, route, time, date, size, duration, or type of underlying service," the government, for "due cause" can record them on its own or with the aid of service providers, **without need of a court order**. For non-traffic data collection, a "court warrant" is required based on reasonable grounds that the data to be collected is "essential" for the prosecution or prevention of violation of any of the crimes defined under RA 10175. The full text of Section 12 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

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program, performs automated processing of data. It covers any type of device with data processing capabilities including, but not limited to, computers and mobile phones. The device consisting of hardware and software may include input, output and storage components which may stand alone or be connected in a network or other similar devices. It also includes computer data storage devices or media."

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.

Section 12 of RA 10175 is the statutory basis for intelligence agencies of the government to undertake warrantless electronic data surveillance and collection in bulk to investigate and prosecute violations of RA 10175.

Section 12 fails constitutional scrutiny. Collection in bulk of private and personal electronic data transmitted through telephone and the Internet allows the government to create profiles of the surveilled individuals' close social associations, personal activities and habits, political and religious interests, and lifestyle choices expressed through these media. The intrusion into their private lives is as extensive and thorough as if their houses, papers and effects are physically searched. **As such, collection in bulk of such electronic data rises to the level of a search and seizure within the meaning of the Search and Seizure Clause, triggering the requirement for a judicial warrant grounded on probable cause**. By vesting the government with authority to undertake such highly intrusive search and collection in bulk of personal digital data without benefit of a judicial warrant, Section 12 is unquestionably repugnant to the guarantee under the Search and Seizure Clause against warrantless searches and seizures.

Further, Section 12 allows the use of advanced technology to impermissibly narrow the right to privacy of communication guaranteed under the Privacy of Communications Clause. Although such clause exempts from its coverage searches undertaken "when public safety or order requires otherwise, as prescribed by law," Section 12 is not a "law" within the contemplation of such exception because it does not advance the interest of "public safety or order." Nor does it comply with the warrant requirement which applies to all searches of communication and correspondence not falling under recognized exceptions to the Search and Seizure Clause, such as the search

of non-legal communication sent and received by detainees[49] search of electronic data stored in government issued computers,[50] or security searches at airports.[51]

Scope of Information Subject of Real-Time Extrajudicial Collection and Analysis by Government

Section 12's definition of traffic data – the communication's origin, destination, route, time, date, size, duration, or type of underlying service – encompasses the following information for mobile phone, Internet and email communications:

Mobile phone:

telephone number of the caller
telephone number of the person called
location of the caller
location of the person called
the time, date, and duration of the call
(For messages sent via the Short Messaging System, the same information are available save for the duration of the communication.)

Email:

date
time
source
destination and size
attachment/s
country of sender and recipient
city of sender and recipient

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[49] *Pollo v. Constantino-David*, G.R. No. 181881, 18 October 2011, 659 SCRA 189.

[50] *In the Matter of the Petition for Habeas Corpus of Capt. Alejano v. Gen. Cabuay*, 505 Phil. 298 (2005).

[51] *People v. Canton*, 442 Phil. 743 (2002); *People v. Johnson*, 401 Phil. 734 (2000). See also *United States v. Arnold*, 523 F.3d 941 (9th Cir. Cal., 2008), *certiorari* denied by the U.S. Supreme Court in *Arnold v. United States*, 129 S. Ct. 1312 (2009) (involving a warrantless search of a laptop of a passenger who had arrived from overseas travel).

Internet:

search keywords
public IP (Internet Protocol) of user
geolocation of user
client's name (for smartphone, PC or desktop)
browser
OS (Operating System)
URL (Universal Source Locator)
date and time of use

Unlike personal information which form part of the public domain (hence, readily accessible) because their owners have either disclosed them to the government as a result of employment in that sector or are part of transactions made with regulatory agencies (such as the land transportation, passport and taxing agencies), the information indicated above are personal *and* private. They reveal data on the social associations, personal activities and habits, political and religious interests, and lifestyle choices of individuals that are not freely accessible to the public. **Because Section 12 contains no limitation on the quantity of traffic data the government can collect, state intelligence agencies are free to accumulate and analyze as much data as they want, anytime they want them**.

Randomly considered, traffic data do not reveal much about a person's relationships, habits, interests or lifestyle expressed online or through phone. After all, they are mere bits of electronic footprint tracking a person's electronic communicative or expressive activities. When compiled in massive amounts, however, traffic data, analyzed over time, allows the state to create a virtual profile of the surveilled individuals, revealing their close relationships, mental habits, political and religious interests, as well as lifestyle choices – as detailed as if the government had access to the content of their letters or conversations. Or put differently —

> When [traffic] information x x x is combined, it can identify all of our surreptitious connections with the world, providing powerful evidence of our activities and beliefs. [L]aw enforcement can construct a "complete mosaic of a person's characteristics" through this type

of x x x surveillance. *Under these circumstances, the information the government accumulates* ***is more akin to content*** *than mere cataloguing.*[52] (Emphasis supplied)

The profiling of individuals is not hampered merely because the bulk data relate to telephone communication. As pointed out in a Report, dated 12 December 2013, by a government panel of experts[53] which reviewed the U.S. government's electronic surveillance policy (Panel's Report) —

> [t]he record of every telephone call an individual makes or receives over the course of several years can reveal an enormous amount about that individual's private life. x x x. [T]elephone calling data can reveal x x x an individual's "familial, political, professional, religious, and sexual associations." It can reveal calls "to the psychiatrist, the plastic surgeon, x x x the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour-motel, the union meeting, the mosque, synagogue or church, the gay bar, and on and on."[54]

This virtual profiling is possible not only because of software[55] which sifts through telephone and Internet data to locate common patterns but also because, for Internet "Universal Resource Locators x x x, they are [both] addresses (*e.g.*, www.amazon.com/kidneydisease) and [links] x x x allowing access to the website

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[52] Christopher Slobogin, *The Search and Seizure of Computers and Electronic Evidence: Transaction Surveillance by the Government*, 75 Miss. L.J. 139, 178. (Hereinafter Slobogin, *Transaction Surveillance*).

[53] Composed of Richard A. Clarke, Michael J. Morell, Geoffrey R. Stone, Cass R. Sunstein, and Peter Swine.

[54] Report and Recommendations of The President's Review Group on Intelligence and Communications Technologies, 12 December 2013, pp. 116-117 (internal citations omitted), http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf (last visited on 29 December 2013).

[55] Commercially available programs are collectively referred to as "snoopware" which "allows its buyer to track the target well beyond a single website; it accumulates the addresses of all the Internet locations the target visits, as well as the recipient of the target's emails." Slobogin, *Transaction Surveillance* at 146. The government surveillance agencies tend to develop their own version of such programs.

and thus permit government to ascertain what the user has viewed."[56] The identities of users of mobile phone numbers can easily be found through Internet search or in public and private mobile phone directories, calling cards, letterheads and similar documents.

Bulk Data Surveillance Rises to the Level of a "Search and Seizure" Within the Meaning of the Search and Seizure Clause

There is no quarrel that not all state access to personal information amount to a "search" within the contemplation of the Search and Seizure Clause. Government collection of data readily available (or exposed) to the public, even when obtained using devices facilitating access to the information, does not implicate constitutional concerns of privacy infringement.[57] It is when government, to obtain private information, intrudes into domains over which an individual holds legitimate privacy expectation that a "search" takes place within the meaning of the Search and Seizure Clause.[58] To determine whether the collection of bulk traffic data of telephone and online communication amounts to a constitutional search, the relevant inquiry, therefore, is whether individuals using such media hold legitimate expectation that the traffic data they generate will remain private.

Unlike this Court, the U.S. Supreme Court had weighed such question and answered in the negative. In *Smith v. Maryland*,[59]

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[56] *Id.* at 153.

[57] See, *e.g.*, *Florida v. Riley*, 488 U.S. 445 (1989) and *California v. Ciraolo*, 476 U.S. 207 (1986) (uniformly holding that aerial surveillance of private homes and surrounding areas is not a "search" under the Fourth Amendment).

[58] This standard, crafted by Mr. Justice Harlan in his separate opinion in *Katz v. US*, 389 U.S. 347 (1967), has been adopted by this Court to settle claims of unreasonable search (see, *e.g.*, *Pollo v. Constantino-David*, G.R. No. 181881, 18 October 2011, 659 SCRA 189; *People v. Johnson*, *supra* note 51).

[59] 442 U.S. 735 (1979). The earlier ruling in *United States v. Miller*, 425 U.S. 435 (1976), found no legitimate privacy expectation over the contents

promulgated in 1979, that court was confronted with the issue whether the warrantless monitoring of telephone numbers dialed from a private home and stored by the telephone company, amounted to a search within the meaning of the Fourth Amendment. The U.S. High Court's analysis centered on the reasoning that a caller has no legitimate privacy expectation over telephone numbers stored with telephone companies because he "assumed the risk that the company would reveal to police the numbers he dialed."[60]

Several reasons undercut not only the persuasive worth of *Smith* in this jurisdiction but also the cogency of its holding. First, all three modern Philippine Constitutions, **unlike the U.S. Constitution**, explicitly guarantee "privacy of communications and correspondence."[61] This is a constitutional recognition, no less, of the legitimacy of the expectation of surveilled individuals that their communication and correspondence will remain private and can be searched by the government only upon compliance with the warrant requirement under the Search and Seizure Clause. Although such guarantee readily protects the *content* of private communication and correspondence, the guarantee also protects traffic data collected *in bulk* which enables the government to

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of checks and bank deposit slips. Unlike in the United States, however, Philippine law treats bank deposits "as of an absolutely confidential nature" (For deposits in local currency, see Section 2 of Republic Act No. 1405, as amended. For deposits in foreign currency, see Section 8 of Republic Act No. 6426, as amended).

[60] *Id.* at 744.

[61] Constitution (1935), Article III, Section 1 (5) ("The privacy of communication and correspondence shall be inviolable except upon lawful order of the court or when public safety and order require otherwise."); Constitution (1973), Article III, Section 4 (1) ("The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety and order require otherwise."); Constitution (1987), Article III, Section 3 (1) ("The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise, as prescribed by law."). The inclusion of the phrase "as prescribed by law" in the 1987 Constitution indicates heightened protection to the right, removing the executive exemption to the guarantee (on the ground of public safety or order).

construct profiles of individuals' close social associations, personal activities and habits, political and religious interests, and lifestyle choices, enabling intrusion into their lives as extensively as if the government was physically searching their "houses, papers and effects."[62]

Second, at the time the U.S. Supreme Court decided *Smith* in 1979, there were no cellular phones, no Internet and no emails as we know and use them today. Over the last 30 years, technological innovations in mass media and electronic surveillance have radically transformed the way people communicate with each other and government surveils individuals. These radical changes undergirded the refusal of the District Court of Columbia to follow *Smith* in its ruling promulgated last 16 December 2013, striking down portions of the spying program of the U.S. National Security Agency (NSA).[63] The District Court observed:

> [T]he relationship between the police and the phone company in *Smith* is nothing compared to the relationship that has apparently evolved over the last seven years between the Government and telecom companies. x x x In *Smith*, the Court *considered a one-time, targeted request for data* regarding an individual suspect in a criminal investigation, x x x ***which in no way resembles the daily, all-encompassing, indiscriminate dump of phone metadata that the (NSA) now receives as part of its Bulk Telephony Metadata Program***. *It's one thing to say that people expect phone companies to occasionally provide information to law enforcement;* ***it is quite***

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[62] The protection afforded by Section 3 (1), Article III of the Constitution to the privacy of communication and correspondence is supplemented by the Rule of the Writ of Habeas Data, effective 2 February 2008, giving judicial relief to "any person whose right to privacy in life, liberty or security is violated or threatened by an unlawful act or omission of a public official or employee, or of a private individual or entity engaged in the gathering, collecting or storing of data or information regarding the x x x correspondence of the aggrieved party" (Section 1). If the writ lies, the court hearing the application for the writ "shall enjoin the act complained of, or order the deletion, destruction, or rectification of the erroneous data or information x x x" (Section 16).

[63] *Klayman v. Obama*, 2013 U.S. Dist. LEXIS 176928.

another to suggest that our citizens expect all phone companies to operate what is effectively a joint intelligence-gathering operation with the Government. x x x.[64] (Emphasis supplied)

Third, individuals using the telephone and Internet do not freely disclose private information to the service providers and the latter do not store such information in trust for the government. Telephone and Internet users divulge private information to service providers *as a matter of necessity* to access the telephone and Internet services, and the service providers store such information (within certain periods) also *as a matter of necessity* to enable them to operate their businesses. In what can only be described as an outright rejection of *Smith's* analysis, the Panel's Report, in arriving at a similar conclusion, states:[65]

> In modern society, individuals, for practical reasons, have to use banks, credit cards, e-mail, telephones, the Internet, medical services, and the like. *Their decision to reveal otherwise private information to such third parties does not reflect a lack of concern for the privacy of the information,* ***but a necessary accommodation to the realities of modern life****. What they want — and reasonably expect —* ***is both the ability to use such services and the right to maintain their privacy when they do so***.[66] (Emphasis supplied)

Clearly then, bulk data surveillance and collection is a "search and seizure" within the meaning of the Search and Seizure Clause not only because it enables maximum intrusion into the private lives of the surveilled individuals but also because such individuals do not forfeit their privacy expectations over the traffic data they generate by transacting with service providers. Bulk data and content-based surveillance and collection are functionally identical in their access to personal and private information. It follows that the distinction Section 12 of RA 10175 draws between content-based and bulk traffic data surveillance and collection, requiring judicial warrant for the former and a mere administrative "due cause" for the latter, is

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[64] *Id.* at 84-85 (internal citations omitted).

[65] Panel's Report at 744.

[66] *Id.* at 111-112.

unconstitutional. As "searches and seizures" within the contemplation of Search and Seizure Clause, bulk data and content-based surveillance and collection are uniformly subject to the constitutional requirement of a judicial warrant grounded on probable cause.

Section 12 of RA 10175 Impermissibly Narrows the Right to Privacy of Communication and Correspondence

The grant under Section 12 of authority to the government to undertake bulk data surveillance and collection without benefit of a judicial warrant enables the government to access private and personal details on the surveilled individuals' close social associations, personal activities and habits, political and religious interests, and lifestyle choices. This impermissibly narrows the sphere of privacy afforded by the Privacy of Communication Clause. It opens a backdoor for government to pry into their private lives as if it obtained access to their phones, computers, letters, books, and other papers and effects. Since Section 12 does not require a court warrant for government to undertake such surveillance and data collection, law enforcement agents can access these information anytime they want to, for whatever purpose they may deem as amounting to "due cause."

The erosion of the right to privacy of communication that Section 12 sanctions is pernicious because the telephone and Internet are indispensable tools for communication and research in this millennium. People use the telephone and go online to perform tasks, run businesses, close transactions, read the news, search for information, communicate with friends, relatives and business contacts, and in general go about their daily lives in the most efficient and convenient manner. Section 12 forces individuals to make the difficult choice of preserving their communicative privacy but reverting to non-electronic media, on the one hand, or availing of electronic media while surrendering their privacy, on the other hand. These choices are inconsistent with the Constitution's guarantee to privacy of communication.

Section 12 of RA 10175 not a "law" Within the Contemplation of the Exception Clause in Section 3(1), Article III of the 1987 Constitution

Undoubtedly, the protection afforded by the Constitution under the Privacy of Communication Clause is not absolute. It exempts from the guarantee intrusions "upon lawful order of the court, *or when public safety or order requires otherwise, as prescribed by* ***law***." Does Section 12 of RA 10175 constitute a "law" within the contemplation of the Privacy of Communication Clause?

When the members of the 1971 Constitutional Convention deliberated on Article III, Section 4(1) of the 1973 Constitution, the counterpart provision of Article III, Section 3(1) of the 1987 Constitution, the phrase "public safety or order" was understood by the convention members to encompass "the security of human lives, liberty and property *against the activities of invaders, insurrectionists and rebels*."[67] This narrow understanding of the public safety exception to the guarantee of communicative privacy is consistent with Congress' own interpretation of the same exception as provided in Article III, Section 1(5) of the 1935 Constitution. Thus, when Congress passed the Anti-Wiretapping Act[68] (enacted in 1965), it exempted from the ban on wiretapping "cases involving the crimes of treason, espionage, provoking war and disloyalty in case of war, piracy, mutiny in the high seas, rebellion, conspiracy and proposal to commit rebellion, inciting to rebellion, sedition, conspiracy to commit sedition, inciting to sedition, kidnapping as defined by the Revised Penal Code, and violations of Commonwealth Act No. 616, punishing espionage and *other offenses against national security*" (Section 3). In these specific and limited cases where wiretapping has been allowed, **a court warrant is required** before the government can record the conversations of individuals.

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[67] I J. BERNAS, *THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 135, citing 1971 Constitutional Convention, Session of 25 November 1972.

[68] Republic Act No. 4200.

Under RA 10175, the categories of crimes defined and penalized relate to (1) offenses against the confidentiality, integrity and availability of computer data and systems (Section 4[a]); (2) computer-related offenses (Section 4[b]); (3) content-related offenses (Section 4[c]); and (4) other offenses (Section 5). None of these categories of crimes are limited to public safety or public order interests (akin to the crimes exempted from the coverage of the Anti-Wiretapping Law). They relate to crimes committed in the cyberspace which have no stated public safety or even national security dimensions. Such fact takes Section 12 outside of the ambit of the Privacy of Communication Clause.

In any event, even assuming that Section 12 of RA 10175 is such a "law," such "law" can never negate the constitutional requirement under the Search and Seizure Clause that when the intrusion into the privacy of communication and correspondence rises to the level of a search and seizure of personal effects, then a warrant issued by a judge becomes **mandatory** for such search and seizure. Fully cognizant of this fact, Congress, in enacting exceptions to the ban on wiretapping under the Anti-Wiretapping Act, made sure that law enforcement authorities obtain a warrant from a court based on probable cause to undertake wiretapping. Section 3 of the Anti-Wiretapping Act provides:

> Nothing contained in this Act, however, shall render it unlawful or punishable for any peace officer, who is authorized by a *written order of the Court*, to execute any of the acts declared to be unlawful in the two preceding Sections in cases involving the crimes of treason, espionage, provoking war and disloyalty in case of war, piracy, mutiny in the high seas, rebellion, conspiracy and proposal to commit rebellion, inciting to rebellion, sedition, conspiracy to commit sedition, inciting to sedition, kidnapping as defined by the Revised Penal Code, and violations of Commonwealth Act No. 616, punishing espionage and other offenses against national security: Provided, *That such written order 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 a 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***: Provided, however, That in cases

involving the offenses of rebellion, conspiracy and proposal to commit rebellion, inciting to rebellion, sedition, conspiracy to commit sedition, and inciting to sedition, *such authority shall be granted only upon prior proof that a rebellion or acts of sedition, as the case may be, have actually been or are being committed; (2)* ***that there are reasonable grounds to believe*** *that evidence will be obtained 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.* (Emphasis supplied)

Section 12 of RA 10175 More Expansive than U.S. Federal Electronic Surveillance Laws

Under U.S. federal law, authorities are required to obtain a court order to install "a pen register or trap and trace device" to record in real time or decode electronic communications.[69] Although initially referring to technology to record telephone numbers only, the term "pen register or trap and trace device" was enlarged by the Patriot Act to cover devices which record "dialing, routing, addressing, and signaling information utilized in the processing and transmitting of wire or electronic communications," including Internet traffic data.[70] The court of competent jurisdiction may issue *ex parte* the order for the installation of the device "if [it] finds that the State law

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[69] Under the Electronic Communications Privacy Act, codified in 18 USC § 3121 (a) which provides: "*In General.* — Except as provided in this section, no person may install or use a pen register or a trap and trace *device without first obtaining a court order* under Section 3123 of this title or under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 *et seq.*)." (Emphasis supplied)

[70] 18 USC § 3121 (c) which provides: "Limitation. — A government agency authorized to install and use a pen register or trap and trace device under this chapter or under State law shall use technology reasonably available to it that restricts the recording or decoding *of electronic or other impulses to the dialing, routing, addressing, and signaling information utilized in the processing and transmitting of wire or electronic communications* so as not to include the contents of any wire or electronic communications." (Emphasis supplied)

enforcement or investigative officer has certified to the court that the information likely to be obtained by such installation and use is *relevant to an ongoing criminal investigation*."[71]

For electronic surveillance relating to foreign intelligence, U.S. federal law requires the government to obtain *ex parte* orders from the Foreign Intelligence Surveillance Court (FISC)[72] upon showing that "the target of surveillance was a foreign power or an agent of a foreign power."[73] Under an amendment introduced by the Patriot Act, the government was further authorized to obtain an *ex parte* order from the FISC for the release by third parties of "tangible things" such as books, papers, records, documents and other items "upon showing that the tangible things sought are relevant to an authorized investigation x x x to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities."[74] The investigation is further subjected to administrative oversight by the Attorney General whose prior authorization to undertake such investigation is required.[75]

In contrast, Section 12 of RA 10175 authorizes law enforcement officials "to collect or record by technical or electronic means traffic data in real-time" if, in their judgment,

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[71] 18 USC § 3123 (a) (2) which provides: "State investigative or law enforcement officer. — Upon an application made under Section 3122 (a) (2), the court shall enter an *ex parte* order authorizing the installation and use of a pen register or trap and trace device within the jurisdiction of the court, if the court finds that the State law enforcement or investigative officer *has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation*." (Emphasis supplied)

[72] Composed of eleven district court judges appointed by the Chief Justice of the U.S. Supreme Court.

[73] Foreign Intelligence Surveillance Act, codified at 50 USC § 1804 (a) (3), 1805 (a) (2).

[74] 50 USC § 1861 (b) (2) (A).

[75] 50 USC § 1861 (a) (2) (A).

such is for "due cause."[76] Unlike in the Patriot Act, there is no need for a court order to collect traffic data. RA 10175 does not provide a definition of "due cause" although the OSG suggests that it is synonymous with "just reason or motive" or "adherence to a lawful procedure."[77] The presence of "due cause" is to be determined solely by law enforcers.

In comparing the U.S. and Philippine law, what is immediately apparent is that the U.S. federal law requires judicial oversight for bulk electronic data collection and analysis while Philippine law leaves such process to the exclusive discretion of law enforcement officials. The absence of judicial participation under Philippine law precludes independent neutral assessment by a court on the necessity of the surveillance and collection of data.[78] Because the executive's assessment of such necessity is unilateral, Philippine intelligence officials can give the standard of "due cause" in Section 12 of RA 10175 as broad or as narrow an interpretation as they want.

The world by now is aware of the fallout from the spying scandal in the United States arising from the disclosure by one of its intelligence computer specialists that the U.S. government embarked on bulk data mining, in real time or otherwise, of Internet and telephone communication not only of its citizens but also of foreigners, including heads of governments of 35 countries.[79] The

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[76] Under the first paragraph of Section 12 which provides: "*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." (Emphasis supplied)

[77] Decision, p. 33.

[78] While the U.S. law has been criticized as turning courts into "rubber stamps" which are obliged to issue the order for the installation of recording devices once the applicant law enforcement officer certifies that the information to be recorded is relevant to an ongoing criminal investigation (see Slobogin, *Transaction Investigation* at 154-155), the objection relates to the degree of judicial participation, not to the law's structure.

[79] Costas Pitas, *Report: US Monitored the Phone Calls of 35 World Leaders*, REUTERS http://worldnews.nbcnews.com/_news/2013/10/24/21124561-

District Court's observation in Klayman on the bulk data collection and mining undertaken by the NSA of telephone traffic data is instructive:

> I cannot imagine a more "indiscriminate" and "arbitrary invasion" than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying and analyzing it without prior judicial approval. Surely, such a program infringes on "that degree of privacy" that the Founders enshrined in the Fourth Amendment. Indeed, I have little doubt that the author of our Constitution, James Madison, who cautioned us to beware "the abridgment of freedom of the people by gradual and silent encroachments by those in power," would be aghast.[80]

Equally important was that court's finding on the efficacy of the bulk surveillance program of the U.S. government: "*the Government does not cite a single instance* in which analysis of the NSA's bulk metadata collection actually *stopped an imminent attack, or otherwise aided the Government* in achieving any objective that was time-sensitive in nature."[81]

To stem the ensuing backlash, legislative and executive leaders of the U.S. government committed to re-writing current legislation to curb the power of its surveillance agencies.[82] The pressure for reforms increased with the recent release of an unprecedented statement by the eight largest Internet service providers in America calling on the U.S. government to "limit surveillance to specific, known users for lawful purposes, and x x x not undertake bulk

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report-us-monitored-the-phone-calls-of-35-world-leaders (last visited on 16 December 2013).

[80] *Supra* note 63 at 114-115 (internal citations omitted).

[81] *Supra* note 63 at 109 (emphasis supplied).

[82] Dan Roberts, *Patriot Act Author Prepares Bill to Put NSA Bulk Collection 'Out of Business*,' THE GUARDIAN, 10 October 2013 http://www.theguardian.com/world/2013/oct/10/nsa-surveillance-patriot-act-author-bill; Andrew Raferty, *Obama: NSA Reforms Will Give Americans 'More Confidence' in Surveillance Programs*, NBC NEWS, http://nbcpolitics.nbcnews.com/_news/2013/12/05/21776882-obama-nsa-reforms-will-give-americans-more-confidence-in-surveillance-programs (last visited on 16 December 2013).

data collection of Internet communications."[83] Along the same lines, the Panel's Report recommended, among others that, "the government should not be permitted to collect and store all mass, undigested, non-public personal information about individuals to enable future queries and data-mining for foreign intelligence purposes"[84] as such poses a threat to privacy rights, individual liberty and public trust. The Panel's Report elaborated:

> Because international terrorists inevitably leave footprints when they recruit, train, finance, and plan their operations, government acquisition and analysis of such personal information might provide useful clues about their transactions, movements, behavior, identities and plans. It might, in other words, help the government find the proverbial needles in the haystack. *But because such information overwhelmingly concerns the behavior of ordinary, law-abiding individuals, there is a substantial risk of serious invasions of privacy.*
>
> As a report of the National Academy of Sciences (NAS) has observed, the mass collection of such personal information by the government would raise serious "concerns about the misuse and abuse of data, about the accuracy of the data and the manner in which the data are aggregated, and about the possibility that the government could, through its collection and analysis of data, inappropriately influence individuals' conduct."
>
> According to the NAS report, "data and communication streams" are ubiquitous:
>
> > [They] concern financial transactions, medical records, travel, communications, legal proceedings, consumer preferences, Web searches, and, increasingly, behavior and biological information. This is the essence of the information age — x x x *everyone leaves personal digital tracks in these systems whenever he or she makes a purchase, takes a trip, uses a bank account, makes a phone call, walks past a security camera, obtains a prescription, sends or receives a package, files income tax forms, applies for a loan, e-mails a friend, sends a fax, rents a video, or engages in just about any other activity* x x x

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[83] "Global Government Surveillance Reform," http://reformgovernmentsurveillance.com/ (last visited on 16 December 2013).

[84] Panel's Report at 27.

> Gathering and analyzing [such data] can play major roles in the prevention, detection, and mitigation of terrorist attacks x x x [But even] under the pressures of threats as serious as terrorism, the privacy rights and civil liberties that are cherished core values of our nation must not be destroyed x x x One x x x concern is that law-abiding citizens who come to believe that their behavior is watched too closely by government agencies x x x *may be unduly inhibited from participating in the democratic process, may be inhibited from contributing fully to the social and cultural life of their communities, and may even alter their purely private and perfectly legal behavior for fear that discovery of intimate details of their lives will be revealed and used against them in some manner*.[85] (Emphasis supplied)

In lieu of data collection in bulk and data mining, the Panel's Report recommended that such data be held by "private providers or by a private third party,"[86] accessible by American intelligence officials only by order of the FISC, upon showing that the requested information is "relevant to an authorized investigation intended to protect 'against international terrorism or clandestine intelligence activities,'"[87] a more stringent standard than what is required under current federal law.

Finding merit in the core of the Panel's Report's proposal, President Obama ordered a two-step "transition away from the existing program" of telephone data collection in bulk and analysis, first, by increasing the threshold for querying the data and requiring judicial oversight to do so (save in emergency cases), and second, by relinquishing government's possession of the bulk data:

> [I]'ve ordered that the transition away from the existing program will proceed in two steps.
>
> Effective immediately, we will only pursue phone calls that are two steps removed from a number associated with a terrorist

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[85] *Id.* at 109-111 (internal citations omitted).

[86] *Id.* at 25.

[87] *Id.* at 26.

organization, instead of the current three, and I have directed the attorney general to work with the Foreign Intelligence Surveillance Court so that during this transition period, *the database can be queried only after a judicial finding or in the case of a true emergency*.

Next, step two: I have instructed the intelligence community and the attorney general to use this transition period to develop options for a new approach that can match the capabilities and fill the gaps that the Section 215 program was designed to address, *without the government holding this metadata itself*. x x x.[88] (Emphasis supplied)

The U.S. spying fiasco offers a cautionary tale on the real danger to privacy of communication caused by the grant of broad powers to the state to place anyone under electronic surveillance without or with minimal judicial oversight. If judicial intervention under U.S. law for real time surveillance of electronic communication did not rein in U.S. spies, the total absence of such intervention under Section 12 of RA 10175 is a blanket legislative authorization for data surveillance and collection in bulk to take place in this country.

Section 12 Tilts the Balance in Favor of Broad State Surveillance Over Privacy of Communications Data

As large parts of the world become increasingly connected, with communications carried on wired or wirelessly and stored electronically, the need to balance the state's national security and public safety interest, on the one hand, with the protection of the privacy of communication, on the other hand, has never been more acute. Allowing the state to undertake extrajudicial, unilateral surveillance and collection of electronic data in bulk which, in the aggregate, is just as revealing of a person's mind as the content of his communication, impermissibly tilts the balance in favor of state surveillance at the expense of communicative and expressive privacy. More than an imbalance in the treatment of equally important societal values, however, such government policy gives rise to fundamental questions on the place of human dignity in civilized society. This concern

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[88] *Supra* note 1.

was succinctly articulated by writers from all over the world protesting the policy of mass surveillance and collection of data in bulk:

> With a few clicks of the mouse, the state can access your mobile device, your email, your social networking and Internet searches. It can follow your political leanings and activities and, in partnership with Internet corporations, it collects and stores your data.
>
> The basic pillar of democracy is the inviolable integrity of the individual. x x x [A]ll humans have a right to remain unobserved and unmolested. x x x.
>
> A person under surveillance is no longer free; a society under surveillance is no longer a democracy. [O]ur democratic rights must apply in virtual as in real space.[89]

The Government must maintain fidelity to the 1987 Constitution's guarantee against warrantless searches and seizures, as well as the guarantee of privacy of communication and correspondence. Thus, the Government, consistent with its national security needs, may enact legislation allowing surveillance and data collection in bulk only if **based on individualized suspicion and subject to meaningful judicial oversight**.

Section 19 of RA 10175 Violative of the Free Speech, Free Press, Privacy of Communication and Search and Seizure Clauses

The OSG concedes the unconstitutionality of Section 19 which authorizes the Department of Justice (DOJ) to "issue an order to restrict or block access" to computer data, that is, "any representation of facts, information, or concepts in a form suitable for processing in a computer system,"[90] whenever the DOJ finds such data *prima facie* violative of RA 10175. The OSG's stance on this "take down" clause is unavoidable. Section 19

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[89] *World Writers Demand UN Charter to Curb State Surveillance*, AGENCE FRANCE-PRESSE, 10 December 2013, http://www.globalpost.com/dispatch/news/afp/131210/world-writers-demand-un-charter-curb-state-surveillance.

[90] Section 3 (e), RA 10175.

allows the government to search without warrant the content of private electronic data *and administratively* censor *all* categories of speech. Although censorship or prior restraint is permitted on speech which is pornographic, commercially misleading or dangerous to national security,[91] only pornographic speech is covered by RA 10175 (under Section 4(c)(2) on online child pornography). Moreover, a court order is required to censor or effect prior restraint on protected speech.[92] By allowing the government to electronically search without warrant and administratively censor all categories of speech, specifically speech which is non-pornographic, not commercially misleading and not a danger to national security, which cannot be subjected to censorship or *prior* restraint, Section 19 is unquestionably repugnant to the guarantees of free speech, free expression and free press and the rights to privacy of communication and against unreasonable searches and seizures. Indeed, as a system of *prior* restraint on *all* categories of speech, Section 19 is glaringly unconstitutional.

ACCORDINGLY, I vote to DECLARE UNCONSTITUTIONAL Article 354 of the Revised Penal Code, insofar as it applies to public officers and public figures, and the following provisions of Republic Act No. 10175, namely: Section 4(c)(1), Section 4(c)(3), Section 7, Section 12, and Section 19, for being violative of Section 2, Section 3(1) Section 4, and Section 21, Article III of the Constitution.

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[91] *Chavez v. Gonzales*, 569 Phil. 155, 237 (2008), Carpio, *J*., concurring.

[92] *Iglesia ni Cristo v. Court of Appeals*, G.R. No. 119673, 26 July 1996, 259 SCRA 529, 575-578 (1996) (Mendoza, *J*., Separate Opinion).

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

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

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
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]

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[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] *Tañada 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 *C.J.* Davide, Jr., *En Banc*].

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

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

[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*].

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," lest 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)

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[13] *Id.* at 357-358.

[14] 63 Phil. 139 (1936) [Per *J.* Laurel, *En Banc*].

[15] *Id.* at 158.

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 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]

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[16] G.R. No. 204603, September 24, 2013 [Per *J.* Perlas-Bernabe, *En Banc*].

[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*].

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.

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

[19] *Id.* at 179.

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]

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[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).

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 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.

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[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.*

[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.

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]

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

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[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).

[31] *Id.*

6 (Ipv6). From a communication protocol that allows for roughly 4.3 billion unique addresses, the new version will allow for 2128 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

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[32] *Id.* at 279.

[33] *Id.*

[34] *Id.* Government or state-run.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 282.

"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 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

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[38] *Id.* at 280.

[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/

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 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

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

[46] *Id*.

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

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[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).

tripled over the past five years, and the developing countries' share of the world's total number of Internet users has 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:		

[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).

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%
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]

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[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

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

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Commission was set up by the ITU and the United Nations Educational, Scientific and Cultural Organization (UNESCO) pursuant to the 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).

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:

> [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]

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[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).

[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.

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 creating a wide range of problems if they are not filtered appropriately.

[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.

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]

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

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[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.*

[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.

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."

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[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.

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

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[72] *A Prehistory of Internet Governance*

[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).

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.

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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]

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

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[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).

[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).

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:

1. Setting clear standards of behavior for the use of computer devices;
2. Deterring perpetrators and protecting citizens;

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[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).

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.
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>
> 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)

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[83] *Id.* at 52.

[84] *Id.* at 51-52.

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 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

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[85] *Id.* at 51.

[86] *Id.* at 53.

[87] *Id.* at 11-12.

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 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

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[88] *Id.* at 12.

[89] *Id.* at 64.

[90] *Id.*

[91] *Id.* at 67.

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]

[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.

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[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.

[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.

1	llegal 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 interference 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 interference 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		
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, (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 abetting		Art. 26			Art. 11 and 7 (OP)	Art. 24			Art. 8							
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

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[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/commissionsCCPCJ_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.*

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
   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 Framework 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		Art. 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

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

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 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

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[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*].

penal statutes. As the U.S. Supreme Court put it, in an opinion by Chief Justice Rehnquist, "we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." In *Broadrick v. Oklahoma*, the Court ruled that "claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate only spoken words" and, again, that "overbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct." For this reason, it has been held that "a facial challenge to a legislative Act is … the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." As for the vagueness doctrine, it is said that a litigant may challenge a statute on its face only if it is vague in all its possible applications. "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."

In sum, the doctrines of strict scrutiny, overbreadth, and vagueness are analytical tools developed for testing "on their faces" statutes in free speech cases or, as they are called in American law, First Amendment cases. They cannot be made to do service when what is involved is a criminal statute. With respect to such statute, the established rule is that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." As has been pointed out, "vagueness challenges in the First Amendment context, like overbreadth challenges typically produce facial invalidation, while statutes found vague as a matter of due process typically are invalidated [only] 'as applied' to a particular defendant."Consequently, there is no basis for petitioner's claim that this Court review the Anti-Plunder Law on its face and in its entirety.[136]

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[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

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.

x x x x x x x x x

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 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.

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:

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*].

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

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[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*].

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 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.

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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)

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

[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-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).

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.

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:

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

(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 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:

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[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*].

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 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,

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

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, 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

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

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]

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.

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[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*].

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]

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

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[150] 344 U.S. 183 (1952).

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

[152] 376 U.S. 254 (1964).

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.

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For, in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications

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[153] *New York Times v. Sullivan,* 376 U.S. 254, 300-301(1964).

[154] 371 U.S. 415 (1963).

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. 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

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[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*].

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 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 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

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

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 blatantly unconstitutional.

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:

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(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.

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

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.

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 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)

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[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.

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

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.
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> 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.
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> **The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the**

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[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.

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.

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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*

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[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].

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:

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

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[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*].

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

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[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*].

the imputation was published with good motives and for justifiable ends.

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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 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

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[173] *Id.* at 250-255.

[174] 508 Phil. 193 (2005) [Per *J.* Tinga, Second Division].

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."

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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]

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[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 x x x blacken[ed] the memory of [the] dead."[180]

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[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.

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 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:

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[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:

(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.

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 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,

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[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).

[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).

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]

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[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).

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]

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

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

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.

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

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 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]

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[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.

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]

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

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[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.

[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).

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 private parties before the Supreme Court are sparse.[207] Dean Raul Pangalangan, former

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[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.

[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].

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

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[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].

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.

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

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[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].

[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

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:

> 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.

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.

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*. at 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

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[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).

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.

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 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.

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

[221] *Id.* at 18.

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.

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.

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[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

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[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].

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]

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

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[234] G.R. No. 164785 and G.R. No. 165636, April 29, 2009, 587 SCRA 79 [Per *J.* Velasco, Jr., *En Banc*].

[235] *Id.* at 101.

[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*],

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 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

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[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).

[242] *Id.*

[243] *Gonzales v. Kalaw-Katigbak*, 222 Phil. 225, 233 (1985) [Per *C.J.* Fernando, *En Banc*].

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

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[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).

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

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

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[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.*

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]

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

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[260] *Id.* at 1194.

[261] *Id.* at 1197-1211.

[262] *Id.* at 1199.

[263] *Id.* at 1203.

[264] *Id.* at 1204.

[265] *Id.*

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.

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

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[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.

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[268] *Id.* at 719-720.

VII (C)
Traffic Data and Privacy Rights

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

> 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**."

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[269] 535 Phil. 687 (2006).

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]

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.

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[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).

[273] 367 Phil. 703 (1999).

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]

For a valid search warrant to issue, there must be probable cause, which is to be determined personally by the judge, after examination

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[274] *Id.* at 715.

[275] G.R. No. 164815, September 3, 2009, 598 SCRA 41.

[276] *Id.* at 59.

[277] 259 Phil. 541 (1989).

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)

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[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:
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> x x x x x x x x x

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[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.

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 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.

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[284] *Id.* at 283-284.

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

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 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

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[286] *Id.* at 728-729.

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 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

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

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

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[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*].

[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."

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.
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> 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,

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

[293] *Id.* at 449.

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 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)

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[294] *Id.* at 449-450.

[295] 569 Phil. 155 (2008) [*En Banc*].

[296] *Id.* at 237.

[297] *Id.*

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:

> 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

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[298] *Id.* at 244.

[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).

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.

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

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[302] *Id.*

[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).

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)

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]

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[304] *Id.*

[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).

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

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[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.

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.

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,

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

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.

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]

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[308] *Id.*

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

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, 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.
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> A botnet is a network of "zombie" computers infected by a piece of malicious software (or "malware") designed to enslave them to

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[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).

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

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

[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).

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

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[314] Rep. Act No. 10175, Sec. 4 (c) (3).

[315] Rep. Act No. 10175, Sec. 4 (c) (3).

to will for themselves if the transmission of communication shall be facilitated.

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.

EN BANC

[G.R. No. 204429. February 18, 2014]

SMART COMMUNICATIONS, INC., *petitioner, vs.* **MUNICIPALITY OF MALVAR, BATANGAS,** *respondent.*

SYLLABUS

1. TAXATION; COURT OF TAX APPEALS; THE COURT OF TAX APPEALS IS VESTED WITH THE EXCLUSIVE APPELLATE JURISDICTION OVER DECISIONS, ORDERS AND RESOLUTIONS OF THE REGIONAL TRIAL COURTS IN LOCAL TAX CASES; SUSTAINED.— Jurisdiction is conferred by law. Republic Act No. 1125, as amended by Republic Act No. 9282, created the Court of Tax Appeals. Section 7, paragraph (a), sub-paragraph (3) of the law vests the CTA with the exclusive appellate jurisdiction over "decisions, orders or resolutions of the Regional Trial Courts in local **tax** cases originally decided or resolved by them in the exercise of their original or appellate jurisdiction."

2. POLITICAL LAW; LOCAL GOVERNMENTS; LOCAL GOVERNMENT CODE (LGC); EACH LGU SHALL HAVE THE POWER TO CREATE ITS OWN SOURCES OF

REVENUES AND TO LEVY TAXES, FEES, AND CHARGES; LIMITATION.— Section 5, Article X of the 1987 Constitution provides that "[e]ach local government unit shall have the power to create its own sources of revenues and to levy taxes, fees, and charges subject to such guidelines and limitations as the Congress may provide, consistent with the basic policy of local autonomy. Such taxes, fees, and charges shall accrue exclusively to the local government." Consistent with this constitutional mandate, the LGC grants the taxing powers to each local government unit. Specifically, Section 142 of the LGC grants municipalities the power to levy taxes, fees, and charges not otherwise levied by provinces. Section 143 of the LGC provides for the scale of taxes on business that may be imposed by municipalities while Section 147 of the same law provides for the fees and charges that may be imposed by municipalities on business and occupation. The LGC defines the term "charges" as referring to pecuniary liability, as rents or fees against persons or property, while the term "fee" means "a charge fixed by law or ordinance for the regulation or inspection of a business or activity."

3. ID.; ID.; ID.; MUNICIPAL ORDINANCE NO. 18 OF MALVAR, BATANGAS; THE MAIN PURPOSE OF THE MUNICIPAL ORDINANCE IS TO REGULATE CERTAIN CONSTRUCTION ACTIVITIES WHICH ARE PRIMARILY REGULATORY IN NATURE AND NOT PRIMARILY REVENUE-RAISING, THUS, THE FEES IMPOSED ARE NOT TAXES.— In this case, the Municipality issued Ordinance No. 18, which is entitled "An Ordinance ***Regulating*** the Establishment of Special Projects," to ***regulate*** the "placing, stringing, attaching, installing, repair and construction of all gas mains, electric, telegraph and telephone wires, conduits, meters and other apparatus, and provide for the correction, condemnation or removal of the same when found to be dangerous, defective or otherwise hazardous to the welfare of the inhabitant[s]." It was also envisioned to address the foreseen "environmental depredation" to be brought about by these "special projects" to the Municipality. Pursuant to these objectives, the Municipality imposed fees on various structures, which included telecommunications towers. As clearly stated in its whereas clauses, the primary purpose of Ordinance No. 18 is to regulate the "placing, stringing, attaching, installing, repair and construction of all gas mains, electric, telegraph

and telephone wires, conduits, meters and other apparatus" listed therein, which included Smart's telecommunications tower. Clearly, the purpose of the assailed Ordinance is to regulate the enumerated activities particularly related to the construction and maintenance of various structures. The fees in Ordinance No. 18 are not impositions on the building or structure itself; rather, they are impositions on the activity subject of government regulation, such as the installation and construction of the structures. Since the main purpose of Ordinance No. 18 is to regulate certain construction activities of the identified special projects, which included "cell sites" or telecommunications towers, the fees imposed in Ordinance No. 18 are ***primarily regulatory in nature, and not primarily revenue-raising***. While the fees may contribute to the revenues of the Municipality, this effect is merely incidental. Thus, the fees imposed in Ordinance No. 18 are not taxes.

4. ID.; ID.; ID.; TO STRIKE DOWN A LAW OR ORDINANCE, THE PETITIONER HAS THE BURDEN TO PROVE A CLEAR AND EQUIVOCAL BREACH OF THE CONSTITUTION; NOT ESTABLISHED IN CASE AT BAR.— On the constitutionality issue, Smart merely pleaded for the declaration of unconstitutionality of Ordinance No. 18 in the Prayer of the Petition, without any argument or evidence to support its plea. Nowhere in the body of the Petition was this issue specifically raised and discussed. Significantly, Smart failed to cite any constitutional provision allegedly violated by respondent when it issued Ordinance No. 18. Settled is the rule that every law, in this case an ordinance, is presumed valid. To strike down a law as unconstitutional, Smart has the burden to prove a clear and unequivocal breach of the Constitution, which Smart miserably failed to do.

APPEARANCES OF COUNSEL

Picazo Buyco Tan Fider & Santos for petitioner.
Office for Legal Services (Batangas) for respondent.

D E C I S I O N

CARPIO, *J.*:

The Case

This petition for review[1] challenges the 26 June 2012 Decision[2] and 13 November 2012 Resolution[3] of the Court of Tax Appeals (CTA) *En Banc*. The CTA *En Banc* affirmed the 17 December 2010 Decision[4] and 7 April 2011 Resolution[5] of the CTA First Division, which in turn affirmed the 2 December 2008 Decision[6] and 21 May 2009 Order[7] of the Regional Trial Court of Tanauan City, Batangas, Branch 6. The trial court declared void the assessment imposed by respondent Municipality of Malvar, Batangas against petitioner Smart Communications, Inc. for its telecommunications tower for 2001 to July 2003 and directed respondent to assess petitioner only for the period starting 1 October 2003.

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[1] Under Rule 45 of the Rules of Court. *Rollo*, pp. 3-45.

[2] *Id.* at 51-63. Penned by Associate Justice Olga Palanca-Enriquez, concurred in by Presiding Justice Ernesto D. Acosta, Associate Justices Juanito C. Castañeda, Jr., Lovell R. Bautista, Erlinda P. Uy, Caesar A. Casanova, Esperanza R. Fabon-Victorino, Cielito N. Mindaro-Grulla, and Amelia R. Cotangco-Manalastas.

[3] *Id.* at 64-66. Penned by Associate Justice Olga Palanca-Enriquez, concurred in by Presiding Justice Ernesto D. Acosta, Associate Justices Juanito C. Castañeda, Jr., Lovell R. Bautista, Erlinda P. Uy, Caesar A. Casanova, Esperanza R. Fabon-Victorino, Cielito N. Mindaro-Grulla, and Amelia R. Cotangco-Manalastas.

[4] *Id.* at 111-137. Penned by Associate Justice Esperanza R. Fabon-Victorino, concurred in by Presiding Justice Ernesto D. Acosta and Erlinda P. Uy.

[5] *Id.* at 138-140. Penned by Associate Justice Esperanza R. Fabon-Victorino, concurred in by Presiding Justice Ernesto D. Acosta and Erlinda P. Uy.

[6] *Id.* at 248-252. Penned by Judge Arcadio I. Manigbas.

[7] *Id.* at 271-272.

The Facts

Petitioner Smart Communications, Inc. (Smart) is a domestic corporation engaged in the business of providing telecommunications services to the general public while respondent Municipality of Malvar, Batangas (Municipality) is a local government unit created by law.

In the course of its business, Smart constructed a telecommunications tower within the territorial jurisdiction of the Municipality. The construction of the tower was for the purpose of receiving and transmitting cellular communications within the covered area.

On 30 July 2003, the Municipality passed Ordinance No. 18, series of 2003, entitled "An Ordinance Regulating the Establishment of Special Projects."

On 24 August 2004, Smart received from the Permit and Licensing Division of the Office of the Mayor of the Municipality an assessment letter with a schedule of payment for the total amount of ₱389,950.00 for Smart's telecommunications tower. The letter reads as follows:

> This is to formally submit to your good office your schedule of payments in the Municipal Treasury of the Local Government Unit of Malvar, province of Batangas which corresponds to the tower of your company built in the premises of the municipality, to wit:
>
> | | | |
> |---|---|---|
> | TOTAL PROJECT COST: | PHP 11,000,000.00 | |
> | For the Year 2001-2003 | | |
> | 50% of 1% of the total project cost | Php55,000.00 | |
> | Add: 45% surcharge | 24,750.00 | |
> | | Php79,750.00 | |
> | Multiply by 3 yrs. (2001, 2002, 2003) | | Php239,250.00 |
> | For the year 2004 | | |
> | 1% of the total project cost | Php110,000.00 | |
> | 37% surcharge | 40,700.00 | |
> | | | Php150,700.00 |
> | | TOTAL | Php389,950.00 |

Hoping that you will give this matter your preferential attention.[8]

Due to the alleged arrears in the payment of the assessment, the Municipality also caused the posting of a closure notice on the telecommunications tower.

On 9 September 2004, Smart filed a protest, claiming lack of due process in the issuance of the assessment and closure notice. In the same protest, Smart challenged the validity of Ordinance No. 18 on which the assessment was based.

In a letter dated 28 September 2004, the Municipality denied Smart's protest.

On 17 November 2004, Smart filed with Regional Trial Court of Tanauan City, Batangas, Branch 6, an "Appeal/Petition" assailing the validity of Ordinance No. 18. The case was docketed as SP Civil Case No. 04-11-1920.

On 2 December 2008, the trial court rendered a Decision partly granting Smart's Appeal/Petition. The trial court confined its resolution of the case to the validity of the assessment, and did not rule on the legality of Ordinance No. 18. The trial court held that the assessment covering the period from 2001 to July 2003 was void since Ordinance No. 18 was approved only on 30 July 2003. However, the trial court declared valid the assessment starting 1 October 2003, citing Article 4 of the Civil Code of the Philippines,[9] in relation to the provisions of Ordinance No. 18 and Section 166 of Republic Act No. 7160 or the Local Government Code of 1991 (LGC).[10] The dispositive portion of the trial court's Decision reads:

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[8] *Id.* at 164.

[9] Article 4. Laws shall have no retroactive effect, unless the contrary is provided.

[10] SECTION 166. *Accrual of Tax*. – Unless otherwise provided in this Code, all local taxes, fees, and charges shall accrue on the first (1st) day of January of each year. However, new taxes, fees or charges, or changes in the rates thereof, shall accrue on the first (1st) day of the quarter next following the effectivity of the ordinance imposing such new levies or rates.

WHEREFORE, in light of the foregoing, the Petition is partly GRANTED. The assessment dated August 24, 2004 against petitioner is hereby declared null and void insofar as the assessment made from year 2001 to July 2003 and respondent is hereby prohibited from assessing and collecting, from petitioner, fees during the said period and the Municipal Government of Malvar, Batangas is directed to assess Smart Communications, Inc. only for the period starting October 1, 2003.

No costs.

SO ORDERED.[11]

The trial court denied the motion for reconsideration in its Order of 21 May 2009.

On 8 July 2009, Smart filed a petition for review with the CTA First Division, docketed as CTA AC No. 58.

On 17 December 2010, the CTA First Division denied the petition for review. The dispositive portion of the decision reads:

WHEREFORE, the Petition for Review is hereby DENIED, for lack of merit. Accordingly, the assailed Decision dated December 2, 2008 and the Order dated May 21, 2009 of Branch 6 of the Regional Trial Court of Tanauan City, Batangas in SP. Civil Case No. 04-11-1920 entitled "*Smart Communications, Inc. vs. Municipality of Malvar, Batangas*" are AFFIRMED.

SO ORDERED.[12]

On 7 April 2011, the CTA First Division issued a Resolution denying the motion for reconsideration.

Smart filed a petition for review with the CTA *En Banc*, which affirmed the CTA First Division's decision and resolution. The dispositive portion of the CTA *En Banc*'s 26 June 2012 decision reads:

WHEREFORE, premises considered, the present Petition for Review is hereby DISMISSED for lack of merit.

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[11] *Rollo*, p. 252.

[12] *Id.* at 136.

Accordingly, the assailed Decision dated December 17, 2010 and Resolution dated April 7, 2011 are hereby AFFIRMED.

SO ORDERED.[13]

The CTA *En Banc* denied the motion for reconsideration.

Hence, this petition.

The Ruling of the CTA *En Banc*

The CTA *En Banc* dismissed the petition on the ground of lack of jurisdiction. The CTA *En Banc* declared that it is a court of special jurisdiction and as such, it can take cognizance only of such matters as are clearly within its jurisdiction. Citing Section 7(a), paragraph 3, of Republic Act No. 9282, the CTA *En Banc* held that the CTA has exclusive appellate jurisdiction to review on appeal, decisions, orders or resolutions of the Regional Trial Courts in local tax cases originally resolved by them in the exercise of their original or appellate jurisdiction. However, the same provision does not confer on the CTA jurisdiction to resolve cases where the constitutionality of a law or rule is challenged.

The Issues

The petition raises the following arguments:

1. The [CTA *En Banc* Decision and Resolution] should be reversed and set aside for being contrary to law and jurisprudence considering that the CTA *En Banc* should have exercised its jurisdiction and declared the Ordinance as illegal.

2. The [CTA *En Banc* Decision and Resolution] should be reversed and set aside for being contrary to law and jurisprudence considering that the doctrine of exhaustion of administrative remedies does not apply in [this case].

3. The [CTA *En Banc* Decision and Resolution] should be reversed and set aside for being contrary to law and jurisprudence considering that the respondent has no authority to impose the so-called "fees" on the basis of the void ordinance.[14]

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[13] *Id.* at 62.

[14] *Id.* at 20-21.

The Ruling of the Court

The Court denies the petition.

On whether the CTA has jurisdiction over the present case

Smart contends that the CTA erred in dismissing the case for lack of jurisdiction. Smart maintains that the CTA has jurisdiction over the present case considering the "unique" factual circumstances involved.

The CTA refuses to take cognizance of this case since it challenges the constitutionality of Ordinance No. 18, which is outside the province of the CTA.

Jurisdiction is conferred by law. Republic Act No. 1125, as amended by Republic Act No. 9282, created the Court of Tax Appeals. Section 7, paragraph (a), sub-paragraph (3)[15] of the law vests the CTA with the exclusive appellate jurisdiction over "decisions, orders or resolutions of the Regional Trial Courts in local **tax** cases originally decided or resolved by them in the exercise of their original or appellate jurisdiction."

The question now is whether the trial court resolved a local tax case in order to fall within the ambit of the CTA's appellate jurisdiction This question, in turn, depends ultimately on whether the fees imposed under Ordinance No. 18 are in fact taxes.

Smart argues that the "fees" in Ordinance No. 18 are actually taxes since they are not regulatory, but revenue-raising. Citing *Philippine Airlines, Inc. v. Edu*,[16] Smart contends that the designation of "fees" in Ordinance No. 18 is not controlling.

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[15] Sec. 7. Jurisdiction.– The CTA shall exercise:

a. Exclusive appellate jurisdiction to review by appeal, as herein provided:

x x x x x x x x x

3. Decisions, orders or resolutions of the Regional Trial Courts in local tax cases originally decided or resolved by them in the exercise of their original or appellate jurisdiction;

x x x x x x x x x

[16] 247 Phil. 283 (1988).

The Court finds that the fees imposed under Ordinance No. 18 are not taxes.

Section 5, Article X of the 1987 Constitution provides that "[e]ach local government unit shall have the power to create its own sources of revenues and to levy taxes, fees, and charges subject to such guidelines and limitations as the Congress may provide, consistent with the basic policy of local autonomy. Such taxes, fees, and charges shall accrue exclusively to the local government."

Consistent with this constitutional mandate, the LGC grants the taxing powers to each local government unit. Specifically, Section 142 of the LGC grants municipalities the power to levy taxes, fees, and charges not otherwise levied by provinces. Section 143 of the LGC provides for the scale of taxes on business that may be imposed by municipalities[17] while Section

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[17] Section 143. *Tax on Business.*– The municipality may impose taxes on the following businesses:

(a) On manufacturers, assemblers, repackers, processors, brewers, distillers, rectifiers, and compounders of liquors, distilled spirits, and wines or manufacturers of any article of commerce of whatever kind or nature, in accordance with the following schedule:

x x x x x x x x x

(b) On wholesalers, distributors, or dealers in any article of commerce of whatever kind or nature in accordance with the following schedule:

x x x x x x x x x

(c) On exporters, and on manufacturers, millers, producers, wholesalers, distributors, dealers or retailers of essential commodities enumerated hereunder at a rate not exceeding one-half (½) of the rates prescribed under subsection (a), (b) and (d) of this Section:

(1) Rice and corn;

(2) Wheat or cassava flour, meat, dairy products, locally manufactured, processed or preserved food, sugar, salt and other agricultural, marine, and fresh water products, whether in their original state or not;

(3) Cooking oil and cooking gas;

(4) Laundry soap, detergents, and medicine;

(5) Agricultural implements, equipment and post-harvest facilities, fertilizers, pesticides, insecticides, herbicides and other farm inputs;

147[18] of the same law provides for the fees and charges that may be imposed by municipalities on business and occupation.

The LGC defines the term "charges" as referring to pecuniary liability, as rents or fees against persons or property, while the term "fee" means "a charge fixed by law or ordinance for the regulation or inspection of a business or activity."[19]

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(6) Poultry feeds and other animal feeds;

(7) School supplies; and

(8) Cement.

(d) On retailers.

x x x x x x x x x

Provided, however, That *barangays* shall have the exclusive power to levy taxes, as provided under Section 152 hereof, on gross sales or receipts of the preceding calendar year of Fifty thousand pesos (₱50,000.00) or less, in the case of cities, and Thirty thousand pesos (₱30,000.00) or less, in the case of municipalities.

(e) On contractors and other independent contractors, in accordance with the following schedule:

x x x x x x x x x

(f) On banks and other financial institutions, at a rate not exceeding fifty percent (50%) of one percent (1%) on the gross receipts of the preceding calendar year derived from interest, commissions and discounts from lending activities, income from financial leasing, dividends, rentals on property and profit from exchange or sale of property, insurance premium.

(g) On peddlers engaged in the sale of any merchandise or article of commerce, at a rate not exceeding Fifty pesos (₱50.00) per peddler annually.

(h) On any business, not otherwise specified in the preceding paragraphs, which the sanggunian concerned may deem proper to tax: Provided, That on any business subject to the excise, value-added or percentage tax under the National Internal Revenue Code, as amended, the rate of tax shall not exceed two percent (2%) of gross sales or receipts of the preceding calendar year.

The sanggunian concerned may prescribe a schedule of graduated tax rates but in no case to exceed the rates prescribed herein.

[18] Section 147. *Fees and Charges.* – The municipality may impose and collect such reasonable fees and charges on business and occupation and, except as reserved to the province in Section 139 of this Code, on the practice of any profession or calling, commensurate with the cost of regulation, inspection and licensing before any person may engage in such business or occupation, or practice such profession or calling.

[19] Section 131. *Definition of Terms.* – When used in this Title, the term:

In this case, the Municipality issued Ordinance No. 18, which is entitled "An Ordinance ***Regulating*** the Establishment of Special Projects," to ***regulate*** the "placing, stringing, attaching, installing, repair and construction of all gas mains, electric, telegraph and telephone wires, conduits, meters and other apparatus, and provide for the correction, condemnation or removal of the same when found to be dangerous, defective or otherwise hazardous to the welfare of the inhabitant[s]."[20] It was also envisioned to address the foreseen "environmental depredation" to be brought about by these "special projects" to the Municipality.[21] Pursuant to these objectives, the Municipality imposed fees on various structures, which included telecommunications towers.

As clearly stated in its whereas clauses, the primary purpose of Ordinance No. 18 is to regulate the "placing, stringing, attaching, installing, repair and construction of all gas mains, electric, telegraph and telephone wires, conduits, meters and other apparatus" listed therein, which included Smart's telecommunications tower. Clearly, the purpose of the assailed Ordinance is to regulate the enumerated activities particularly related to the construction and maintenance of various structures. The fees in Ordinance No. 18 are not impositions on the building or structure itself; rather, they are impositions on the activity subject of government regulation, such as the installation and construction of the structures.[22]

Since the main purpose of Ordinance No. 18 is to regulate certain construction activities of the identified special projects,

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x x x x x x x x x

(g) "Charges" refers to pecuniary liability, as rents or fees against persons or property;

x x x x x x x x x

(l) "Fee" means a charge fixed by law or ordinance for the regulation or inspection of a business or activity;

x x x x x x x x x

[20] *Rollo*, p. 165.

[21] *Id.*

[22] See *Angeles University Foundation v. City of Angeles*, G.R. No. 189999, 27 June 2012, 675 SCRA 359, 373.

which included "cell sites" or telecommunications towers, the fees imposed in Ordinance No. 18 are ***primarily regulatory in nature, and not primarily revenue-raising***. While the fees may contribute to the revenues of the Municipality, this effect is merely incidental. Thus, the fees imposed in Ordinance No. 18 are not taxes.

In *Progressive Development Corporation v. Quezon City*,[23] the Court declared that "if the generating of revenue is the primary purpose and regulation is merely incidental, the imposition is a tax; but if regulation is the primary purpose, the fact that incidentally revenue is also obtained does not make the imposition a tax."

In *Victorias Milling Co., Inc. v. Municipality of Victorias*,[24] the Court reiterated that the purpose and effect of the imposition determine whether it is a tax or a fee, and that the lack of any standards for such imposition gives the presumption that the same is a tax.

> We accordingly say that the designation given by the municipal authorities does not decide whether the imposition is properly a license tax or a license fee. The determining factors are the purpose and effect of the imposition as may be apparent from the provisions of the ordinance. Thus, "[w]hen no police inspection, supervision, or regulation is provided, nor any standard set for the applicant to establish, or that he agrees to attain or maintain, but any and all persons engaged in the business designated, without qualification or hindrance, may come, and a license on payment of the stipulated sum will issue, to do business, subject to no prescribed rule of conduct and under no guardian eye, but according to the unrestrained judgment or fancy of the applicant and licensee, the presumption is strong that the power of taxation, and not the police power, is being exercised."

Contrary to Smart's contention, Ordinance No. 18 expressly provides for the standards which Smart must satisfy prior to

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[23] 254 Phil. 635, 643 (1989). See also *City of Iloilo v. Villanueva,* 105 Phil. 337 (1959).

[24] 134 Phil. 180, 189-190 (1968).

the issuance of the specified permits, clearly indicating that the fees are regulatory in nature. These requirements are as follows:

SECTION 5. Requirements and Procedures in Securing Preliminary Development Permit.

The following documents shall be submitted to the SB Secretary in triplicate:

a) zoning clearance
b) Vicinity Map
c) Site Plan
d) Evidence of ownership
e) Certificate true copy of NTC Provisional Authority in case of Cellsites, telephone or telegraph line, ERB in case of gasoline station, power plant, and other concerned national agencies
f) Conversion order from DAR is located within agricultural zone.
g) Radiation Protection Evaluation.
h) Written consent from subdivision association or the residence of the area concerned if the special projects is located within the residential zone.
i) Barangay Council Resolution endorsing the special projects.

SECTION 6. Requirement for Final Development Permit – Upon the expiration of 180 days and the proponents of special projects shall apply for final [development permit] and they are require[d] to submit the following:
a) evaluation from the committee where the Vice Mayor refers the special project
b) Certification that all local fees have been paid.

Considering that the fees in Ordinance No. 18 are not in the nature of local taxes, and Smart is questioning the constitutionality of the ordinance, the CTA correctly dismissed the petition for lack of jurisdiction. Likewise, Section 187 of the LGC,[25] which

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[25] Section 187. *Procedure for Approval and Effectivity of Tax, Ordinances and Revenue Measures; Mandatory Public Hearings.* — The procedure for approval of local tax ordinances and revenue measures shall be in accordance with the provisions of this Code: Provided, That public hearings shall be conducted for the purpose prior to the enactment thereof: Provided, further, That any question on the constitutionality or legality of tax ordinances or revenue measures may be raised on appeal within thirty (30) days from

outlines the procedure for questioning the constitutionality of a tax ordinance, is inapplicable, rendering unnecessary the resolution of the issue on non-exhaustion of administrative remedies.

On whether the imposition of the fees in Ordinance No. 18 is ultra vires

Smart argues that the Municipality exceeded its power to impose taxes and fees as provided in Book II, Title One, Chapter 2, Article II of the LGC. Smart maintains that the mayor's permit fees in Ordinance No. 18 (equivalent to 1% of the project cost) are not among those expressly enumerated in the LGC.

As discussed, the fees in Ordinance No.18 are not taxes. Logically, the imposition does not appear in the enumeration of taxes under Section 143 of the LGC.

Moreover, even if the fees do not appear in Section 143 or any other provision in the LGC, the Municipality is empowered to impose taxes, fees and charges, not specifically enumerated in the LGC or taxed under the Tax Code or other applicable law. Section 186 of the LGC, granting local government units wide latitude in imposing fees, expressly provides:

Section 186. *Power To Levy Other Taxes, Fees or Charges.* — Local government units may exercise the power to levy taxes, fees or charges on any base or subject not otherwise specifically enumerated herein or taxed under the provisions of the National Internal Revenue Code, as amended, or other applicable laws: Provided, That the taxes, fees, or charges shall not be unjust, excessive, oppressive, confiscatory or contrary to declared national policy: Provided, further, That the ordinance levying such taxes, fees or charges shall not be enacted without any prior public hearing conducted for the purpose.

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the effectivity thereof to the Secretary of Justice who shall render a decision within sixty (60) days from the date of receipt of the appeal: Provided, however, That such appeal shall not have the effect of suspending the effectivity of the ordinance and the accrual and payment of the tax, fee, or charge levied therein: Provided, finally, That within thirty (30) days after receipt of the decision or the lapse of the sixty-day period without the Secretary of Justice acting upon the appeal, the aggrieved party may file appropriate proceedings with a court of competent jurisdiction.

Smart further argues that the Municipality is encroaching on the regulatory powers of the National Telecommunications Commission (NTC). Smart cites Section 5(g) of Republic Act No. 7925 which provides that the National Telecommunications Commission (NTC), in the exercise of its regulatory powers, shall impose such fees and charges as may be necessary to cover reasonable costs and expenses for the regulation and supervision of the operations of telecommunications entities. Thus, Smart alleges that the regulation of telecommunications entities and all aspects of its operations is specifically lodged by law on the NTC.

To repeat, Ordinance No. 18 aims to regulate the "placing, stringing, attaching, installing, repair and construction of all gas mains, electric, telegraph and telephone wires, conduits, meters and other apparatus" within the Municipality. The fees are not imposed to regulate the administrative, technical, financial, or marketing operations of telecommunications entities, such as Smart's; rather, to regulate the installation and maintenance of physical structures – Smart's cell sites or telecommunications tower. The regulation of the installation and maintenance of such physical structures is an exercise of the police power of the Municipality. Clearly, the Municipality does not encroach on NTC's regulatory powers.

The Court likewise rejects Smart's contention that the power to fix the fees for the issuance of development permits and locational clearances is exercised by the Housing and Land Use Regulatory Board (HLURB). Suffice it to state that the HLURB itself recognizes the local government units' power to collect fees related to land use and development. Significantly, the HLURB issued locational guidelines governing telecommunications infrastructure. Guideline No. VI relates to the collection of locational clearance fees either by the HLURB or the concerned local government unit, to wit:

VI. Fees

The Housing and Land Use Regulatory Board in the performance of its functions shall collect the locational clearance fee based on the revised schedule of fees under the special use project as per

Resolution No. 622, series of 1998 or by the concerned LGUs subject to EO 72.[26]

On whether Ordinance No. 18 is valid and constitutional

Smart contends that Ordinance No. 18 violates Sections 130(b)(3)[27] and 186 of the LGC since the fees are unjust, excessive, oppressive and confiscatory. Aside from this bare allegation, Smart did not present any evidence substantiating its claims. In *Victorias Milling Co., Inc. v. Municipality of Victorias*,[28] the Court rejected the argument that the fees imposed by respondent therein are excessive for lack of evidence supporting such claim, to wit:

> An ordinance carries with it the presumption of validity. The question of reasonableness though is open to judicial inquiry. Much should be left thus to the discretion of municipal authorities. Courts will go slow in writing off an ordinance as unreasonable unless the amount is so excessive as to be prohibitive, arbitrary, unreasonable, oppressive, or confiscatory. A rule which has gained acceptance is that factors relevant to such an inquiry are the municipal conditions as a whole and the nature of the business made subject to imposition.
>
> Plaintiff, has however not sufficiently proven that, taking these factors together, the license taxes are unreasonable. The presumption of validity subsists. For, plaintiff has limited itself to insisting that the amounts levied exceed the cost of regulation and the municipality has adequate funds for the alleged purposes as evidenced by the municipality's cash surplus for the fiscal year ending 1956.

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[26] http://hlurb.gov.ph/wp-content/uploads/laws-issuances/policies/CellSite.pdf (last visited on 4 February 2014).

[27] SECTION 130. *Fundamental Principles*. – The following fundamental principles shall govern the exercise of the taxing and other revenue-raising powers of local government units:

x x x x x x x x x

(b) Taxes, fees, charges and other impositions shall:

x x x x x x x x x

(3) not be unjust, excessive, oppressive, or confiscatory;

[28] *Supra* note 24, at 194.

On the constitutionality issue, Smart merely pleaded for the declaration of unconstitutionality of Ordinance No. 18 in the Prayer of the Petition, without any argument or evidence to support its plea. Nowhere in the body of the Petition was this issue specifically raised and discussed. Significantly, Smart failed to cite any constitutional provision allegedly violated by respondent when it issued Ordinance No. 18.

Settled is the rule that every law, in this case an ordinance, is presumed valid. To strike down a law as unconstitutional, Smart has the burden to prove a clear and unequivocal breach of the Constitution, which Smart miserably failed to do. In *Lawyers Against Monopoly and Poverty (LAMP) v. Secretary of Budget and Management*,[29] the Court held, thus:

> To justify the nullification of the law or its implementation, there must be a clear and unequivocal, not a doubtful, breach of the Constitution. In case of doubt in the sufficiency of proof establishing unconstitutionality, the Court must sustain legislation because "to invalidate [a law] based on x x x baseless supposition is an affront to the wisdom not only of the legislature that passed it but also of the executive which approved it." This presumption of constitutionality can be overcome only by the clearest showing that there was indeed an infraction of the Constitution, and only when such a conclusion is reached by the required majority may the Court pronounce, in the discharge of the duty it cannot escape, that the challenged act must be struck down.

WHEREFORE, the Court DENIES the petition.

SO ORDERED.

Sereno, C.J., Velasco, Jr., Leonardo-de Castro, Peralta, Bersamin, del Castillo, Abad, Villarama, Jr., Perez, Mendoza, Reyes, Perlas-Bernabe, and *Leonen, JJ.,* concur.

Brion, J., on leave.

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[29] G.R. No. 164987, 24 April 2012, 670 SCRA 373, 386-387.

EN BANC

[G.R. No. 206248. February 18, 2014]

GRACE M. GRANDE, *petitioner, vs.* **PATRICIO T. ANTONIO,** *respondent.*

SYLLABUS

1. **CIVIL LAW; FAMILY CODE; USE OF SURNAMES; THE GENERAL RULE IS THAT AN ILLEGITIMATE CHILD SHALL USE THE SURNAME OF HIS OR HER MOTHER; EXCEPTION, EXPLAINED.—** [Article 176 of the Family Code] is clear that the general rule is that an illegitimate child **shall** use the surname of his or her mother. The exception provided by RA 9255 is, in case his or her filiation is expressly recognized by the father through the record of birth appearing in the civil register or when an admission in a public document or private handwritten instrument is made by the father. In such a situation, the illegitimate child may use the surname of the father. x x x Art. 176 gives illegitimate children the right to decide if they want to use the surname of their father or not. It is not the father (herein respondent) or the mother (herein petitioner) who is granted by law the right to dictate the surname of their illegitimate children. Nothing is more settled than that when the law is clear and free from ambiguity, it must be taken to mean what it says and it must be given its literal meaning free from any interpretation. Respondent's position that the court can order the minors to use his surname, therefore, has no legal basis. On its face, Art. 176, as amended, is free from ambiguity. And where there is no ambiguity, one must abide by its words. The use of the word "may" in the provision readily shows that **an acknowledged illegitimate child is under no compulsion to use the surname of his illegitimate father**. The word "may" is permissive and operates to confer discretion upon the illegitimate children.

2. **ID.; ID.; ID.; IMPLEMENTING RULES AND REGULATION OF R.A. 9255; MANDATORY USE OF THE FATHER'S SURNAME UPON HIS RECOGNITION OF HIS ILLEGITIMATE CHILDREN, VOIDED BY THE SUPREME COURT; RATIONALE.—** An argument, however,

> may be advanced advocating the mandatory use of the father's surname upon his recognition of his illegitimate children, citing the Implementing Rules and Regulations (IRR) of RA 9255. x x x Nonetheless, the hornbook rule is that an administrative issuance cannot amend a legislative act. In *MCC Industrial Sales Corp. v. Ssangyong Corporation*, We held: x x x Thus, We can disregard contemporaneous construction where there is no ambiguity in law and/or the construction is clearly erroneous. What is more, this Court has the constitutional prerogative and authority to strike down and declare as void the rules of procedure of special courts and quasi-judicial bodies when found contrary to statutes and/or the Constitution. x x x Thus, We exercise this power in voiding the above-quoted provisions of the IRR of RA 9255 insofar as it provides the mandatory use by illegitimate children of their father's surname upon the latter's recognition of his paternity. To conclude, the use of the word "shall" in the IRR of RA 9255 is of no moment. The clear, unambiguous, and unequivocal use of "may" in Art. 176 rendering the use of an illegitimate father's surname discretionary controls, and **illegitimate children are given the choice on the surnames by which they will be known**.

APPEARANCES OF COUNSEL

Nancy Villanueva Teylan for petitioner.
Romeo N. Bartolome for respondent.

D E C I S I O N

VELASCO, JR., *J.*:

Before this Court is a Petition for Review on *Certiorari* under Rule 45, assailing the July 24, 2012 Decision[1] and March 5, 2013 Resolution[2] of the Court of Appeals (CA) in CA-G.R. CV No. 96406.

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[1] *Rollo*, pp. 23-41. Penned by Associate Justice Edwin D. Sorongon and concurred in by Associate Justices Hakim S. Abdulwahid and Marlene Gonzales-Sison.

[2] *Id.* at 42-43.

As culled from the records, the facts of this case are:

Petitioner Grace Grande (Grande) and respondent Patricio Antonio (Antonio) for a period of time lived together as husband and wife, although Antonio was at that time already married to someone else.[3] Out of this illicit relationship, two sons were born: Andre Lewis (on February 8, 1998) and Jerard Patrick (on October 13, 1999).[4] The children were not expressly recognized by respondent as his own in the Record of Births of the children in the Civil Registry. The parties' relationship, however, eventually turned sour, and Grande left for the United States with her two children in May 2007. This prompted respondent Antonio to file a Petition for Judicial Approval of Recognition with Prayer to take Parental Authority, Parental Physical Custody, Correction/Change of Surname of Minors and for the Issuance of Writ of Preliminary Injunction before the Regional Trial Court, Branch 8 of Aparri, Cagayan (RTC), appending a notarized Deed of Voluntary Recognition of Paternity of the children.[5]

On September 28, 2010, the RTC rendered a Decision in favor of herein respondent Antonio, ruling that "[t]he evidence at hand is overwhelming that the best interest of the children can be promoted if they are under the sole parental authority and physical custody of [respondent Antonio]."[6] Thus, the court *a quo* decreed the following:

WHEREFORE, foregoing premises considered, the Court hereby grants [Antonio's] prayer for recognition and the same is hereby judicially approved. x x x Consequently, the Court forthwith issues the following Order granting the other reliefs sought in the Petition, to wit:

a. Ordering the Office of the City Registrar of the City of Makati to cause the entry of the name of [Antonio] as the father of

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[3] *Id.* at 25.

[4] *Id.* at 10, 25, 44-46, 50.

[5] *Id.* at 79.

[6] *Id.* at 30.

the aforementioned minors in their respective Certificate of Live Birth and **causing the correction/change and/or annotation of the surnames of said minors in their Certificate of Live Birth from Grande to Antonio**;

b. Granting [Antonio] the right to jointly exercise Parental Authority with [Grande] over the persons of their minor children, Andre Lewis Grande and Jerard Patrick Grande;

c. Granting [Antonio] primary right and immediate custody over the parties' minor children Andre Lewis Grandre and Jerard Patrick Grande who shall stay with [Antonio's] residence in the Philippines from Monday until Friday evening and to [Grande's] custody from Saturday to Sunday evening;

d. Ordering [Grande] to immediately surrender the persons and custody of minors Andre Lewis Grande and Jerard Patrick Grande unto [Antonio] for the days covered by the Order;

e. Ordering parties to cease and desist from bringing the aforenamed minors outside of the country, without the written consent of the other and permission from the court.

f. Ordering parties to give and share the support of the minor children Andre Lewis Grande and Jerard Patrick Grande in the amount of ₱30,000 per month at the rate of 70% for [Antonio] and 30% for [Grande].[7] (Emphasis supplied.)

Aggrieved, petitioner Grande moved for reconsideration. However, her motion was denied by the trial court in its Resolution dated November 22, 2010[8] for being *pro forma* and for lack of merit.

Petitioner Grande then filed an appeal with the CA attributing grave error on the part of the RTC for allegedly ruling contrary to the law and jurisprudence respecting the grant of sole custody to the mother over her illegitimate children.[9] In resolving the appeal, the appellate court modified in part the Decision of the RTC. The dispositive portion of the CA Decision reads:

WHEREFORE, the appeal is partly **GRANTED**. Accordingly, the appealed Decision of the Regional Trial Court Branch 8, Aparri

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[7] *Id.* at 24-25.

[8] *Id.* at 30.

[9] *Id.* at 31.

Cagayan in SP Proc. Case No. 11-4492 is **MODIFIED** in part and shall hereinafter read as follows:

> **a. The Offices of the Civil Registrar General and the City Civil Registrar of Makati City are DIRECTED to enter the surname Antonio as the surname of Jerard Patrick and Andre Lewis, in their respective certificates of live birth, and record the same in the Register of Births;**
> b. [Antonio] is ORDERED to deliver the minor children Jerard Patrick and Andre Lewis to the custody of their mother herein appellant, Grace Grande who by virtue hereof is hereby awarded the full or sole custody of these minor children;
> c. [Antonio] shall have visitorial rights at least twice a week, and may only take the children out upon the written consent of [Grande]; and
> d. The parties are DIRECTED to give and share in support of the minor children Jerard Patrick and Andre Lewis in the amount of ₱30,000.00 per month at the rate of 70% for [Antonio] and 30% for [Grande]. (Emphasis supplied.)

In ruling thus, the appellate court ratiocinated that notwithstanding the father's recognition of his children, the mother cannot be deprived of her sole parental custody over them absent the most compelling of reasons.[10] Since respondent Antonio failed to prove that petitioner Grande committed any act that adversely affected the welfare of the children or rendered her unsuitable to raise the minors, she cannot be deprived of her sole parental custody over their children.

The appellate court, however, maintained that **the legal consequence of the recognition made by respondent Antonio that he is the father of the minors, taken in conjunction with the universally protected "best-interest-of-the-child" clause, compels the use by the children of the surname "ANTONIO."**[11]

As to the issue of support, the CA held that the grant is legally in order considering that not only did Antonio express his willingness to give support, it is also a consequence of his

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[10] *Id.* at 36-38.

[11] *Id.* at 38.

acknowledging the paternity of the minor children.[12] Lastly, the CA ruled that there is no reason to deprive respondent Antonio of his visitorial right especially in view of the constitutionally inherent and natural right of parents over their children.[13]

Not satisfied with the CA's Decision, petitioner Grande interposed a partial motion for reconsideration, particularly assailing the order of the CA insofar as it decreed the change of the minors' surname to "Antonio." When her motion was denied, petitioner came to this Court via the present petition. In it, she posits that Article 176 of the Family Code—as amended by Republic Act No. (RA) 9255, couched as it is in permissive language—may not be invoked by a father to compel the use by his illegitimate children of his surname without the consent of their mother.

We find the present petition impressed with merit.

The sole issue at hand is the right of a father to compel the use of his surname by his illegitimate children upon his recognition of their filiation. Central to the core issue is the application of Art. 176 of the Family Code, originally phrased as follows:

> Illegitimate children shall use the surname and shall be under the parental authority of their mother, and shall be entitled to support in conformity with this Code. The legitime of each illegitimate child shall consist of one-half of the legitime of a legitimate child. Except for this modification, all other provisions in the Civil Code governing successional rights shall remain in force.

This provision was later amended on March 19, 2004 by RA 9255[14] which now reads:

> Art. 176. – Illegitimate children shall use the surname and shall be under the parental authority of their mother, and shall be entitled

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[12] *Id.* at 39.

[13] *Id.*

[14] An Act Allowing Illegitimate Children to Use the Surname of Their Father Amending for the Purpose Article 176 of Executive Order No. 209, Otherwise Known as the "Family Code of the Philippines," signed into law on February 24, 2004 and took effect on March 19, 2004 fifteen (15) days after its publication on Malaya and the Manila Times on March 4, 2004.

to support in conformity with this Code. However, **illegitimate children may use the surname of their father if their filiation has been expressly recognized by their father** through the record of birth appearing in the civil register, or when an admission in a public document or private handwritten instrument is made by the father. *Provided*, the father has the right to institute an action before the regular courts to prove non-filiation during his lifetime. The legitime of each illegitimate child shall consist of one-half of the legitime of a legitimate child. (Emphasis supplied.)

From the foregoing provisions, it is clear that the general rule is that an illegitimate child **shall** use the surname of his or her mother. The exception provided by RA 9255 is, in case his or her filiation is expressly recognized by the father through the record of birth appearing in the civil register or when an admission in a public document or private handwritten instrument is made by the father. In such a situation, the illegitimate child may use the surname of the father.

In the case at bar, respondent filed a petition for judicial approval of recognition of the filiation of the two children with the prayer for the correction or change of the surname of the minors from Grande to Antonio when a public document acknowledged before a notary public under Sec. 19, Rule 132 of the Rules of Court[15] is enough to establish the paternity of his children. But he wanted more: a judicial conferment of parental authority, parental custody, and an official declaration of his children's surname as Antonio.

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[15] Rule 132, Sec. 19. *Classes of Documents.* – For the purpose of their presentation in evidence, documents are either public or private.

Public documents are:

(a) The written official acts, or records of the official acts of the sovereign authority, official bodies and tribunals, and public officers, whether of the Philippines, or a foreign country;

(b) Documents acknowledged before a notary public except last will and testaments; and

(c) Public records, kept in the Philippines, of private documents required by law to be entered therein.

All other writings are private.

Parental authority over minor children is lodged by Art. 176 on the mother; hence, respondent's prayer has no legal mooring. Since parental authority is given to the mother, then custody over the minor children also goes to the mother, unless she is shown to be unfit.

Now comes the matter of the change of surname of the illegitimate children. Is there a legal basis for the court *a quo* to order the change of the surname to that of respondent?

Clearly, there is none. Otherwise, the order or ruling will contravene the explicit and unequivocal provision of Art. 176 of the Family Code, as amended by RA 9255.

Art. 176 gives illegitimate children the right to decide if they want to use the surname of their father or not. It is not the father (herein respondent) or the mother (herein petitioner) who is granted by law the right to dictate the surname of their illegitimate children.

Nothing is more settled than that when the law is clear and free from ambiguity, it must be taken to mean what it says and it must be given its literal meaning free from any interpretation.[16] Respondent's position that the court can order the minors to use his surname, therefore, has no legal basis.

On its face, Art. 176, as amended, is free from ambiguity. And where there is no ambiguity, one must abide by its words. The use of the word "may" in the provision readily shows that **an acknowledged illegitimate child is under no compulsion to use the surname of his illegitimate father**. The word "may" is permissive and operates to confer discretion[17] upon the illegitimate children.

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[16] *Republic v. Lacap*, G.R. No. 158253, March 2, 2007, 517 SCRA 255; *Chartered Bank Employees Association v. Ople*, No. L-44717, August 28, 1985, 138 SCRA 273; *Quijano v. Development Bank of the Philippines*, G.R. No. L-26419, October 19, 1970, 35 SCRA 270; *Luzon Surety Co., Inc. v. De Garcia*, No. L-25659, October 31, 1969, 30 SCRA 111.

[17] Agpalo, Ruben, *STATUTORY CONSTRUCTION* 460 (6th ed., 2009); citations omitted.

It is best to emphasize once again that the yardstick by which policies affecting children are to be measured is their best interest. On the matter of children's surnames, this Court has, time and again, rebuffed the idea that the use of the father's surname serves the best interest of the minor child. In *Alfon v. Republic*,[18] for instance, this Court allowed even a **legitimate** child to continue using the surname of her mother rather than that of her legitimate father as it serves her best interest and there is no legal obstacle to prevent her from using the surname of her mother to which she is entitled. In fact, in *Calderon v. Republic*,[19] this Court, upholding the best interest of the child concerned, even allowed the use of a surname different from the surnames of the child's father or mother. Indeed, the rule regarding the use of a child's surname is second only to the rule requiring that the child be placed in the best possible situation considering his circumstances.

In *Republic of the Philippines v. Capote*,[20] We gave due deference to the choice of an illegitimate minor to use the surname of his mother as it would best serve his interest, thus:

> The foregoing discussion establishes the significant connection of a person's name to his identity, his status in relation to his parents and his successional rights as a legitimate or illegitimate child. For sure, these matters should not be taken lightly as to deprive those who may, in any way, be affected by the right to present evidence in favor of or against such change.
>
> The law and facts obtaining here favor Giovanni's petition. Giovanni availed of the proper remedy, a petition for change of name under Rule 103 of the Rules of Court, and complied with all the procedural requirements. After hearing, the trial court found (and the appellate court affirmed) that the evidence presented during the hearing of Giovanni's petition sufficiently established that, under Art. 176 of the Civil Code, Giovanni is entitled to change his name as he was never recognized by his father while his mother has always recognized him as her child. A change of name will erase the

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[18] G.R. No. 51201, May 29, 1980, 97 SCRA 858.

[19] 126 Phil. 1 (1967).

[20] G.R. No. 157043, February 2, 2007, 514 SCRA 76, 83-84.

impression that he was ever recognized by his father. **It is also to his best interest as it will facilitate his mother's intended petition to have him join her in the United States. This Court will not stand in the way of the reunification of mother and son**. (Emphasis supplied.)

An argument, however, may be advanced advocating the mandatory use of the father's surname upon his recognition of his illegitimate children, citing the Implementing Rules and Regulations (IRR) of RA 9255,[21] which states:

Rule 7. Requirements for the Child to Use the Surname of the Father

7.1 For Births Not Yet Registered

7.1.1 The illegitimate child **shall** use the surname of the father if a public document is executed by the father, either at the back of the Certificate of Live Birth or in a separate document.

7.1.2 If admission of paternity is made through a private instrument, the child **shall** use the surname of the father, provided the registration is supported by the following documents:

x x x x x x x x x

7.2. For Births Previously Registered under the Surname of the Mother

7.2.1 If filiation has been expressly recognized by the father, the child **shall** use the surname of the father upon the submission of the accomplished AUSF [Affidavit of Use of the Surname of the Father].

7.2.2 If filiation has not been expressly recognized by the father, the child **shall** use the surname of the father upon submission of a public document or a private handwritten instrument supported by the documents listed in Rule 7.1.2.

7.3 Except in Item 7.2.1, the consent of the illegitimate child is required if he/she has reached the age of majority. The consent may be contained in a separate instrument duly notarized.

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[21] Office of Civil Registrar General (OCRG) Administrative Order No. 1, Series of 2004, issued by the National Statistics Office-Office of the Civil Registrar General. Approved on May 14, 2004, published on May 18, 2004 on the Manila Times, and took effect on June 2, 2004.

x x x x x x x x x

Rule 8. Effects of Recognition

8.1 For Births Not Yet Registered

8.1.1 The surname of the father **shall** be entered as the last name of the child in the Certificate of Live Birth. The Certificate of Live Birth shall be recorded in the Register of Births.

x x x x x x x x x

8.2 For Births Previously Registered under the Surname of the Mother

8.2.1 If admission of paternity was made either at the back of the Certificate of Live Birth or in a separate public document or in a private handwritten document, the public document or AUSF shall be recorded in the Register of Live Birth and the Register of Births as follows:

*"The surname of the child is **hereby changed** from (original surname) to (new surname) pursuant to* RA 9255.*"*

The original surname of the child appearing in the Certificate of Live Birth and Register of Births shall not be changed or deleted.

8.2.2 If filiation was not expressly recognized at the time of registration, the public document or AUSF shall be recorded in the Register of Legal Instruments. Proper annotation shall be made in the Certificate of Live Birth and the Register of Births as follows:

*"Acknowledged by (name of father) on (date). The surname of the child is **hereby changed** from (original surname) on (date) pursuant to* RA 9255." (Emphasis supplied.)

Nonetheless, the hornbook rule is that an administrative issuance cannot amend a legislative act. In *MCC Industrial Sales Corp. v. Ssangyong Corporation*,[22] We held:

After all, the power of administrative officials to promulgate rules in the implementation of a statute is necessarily limited to what is found in the legislative enactment itself. The implementing rules and regulations of a law cannot extend the law or expand its coverage,

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[22] G.R. No. 170633, October 17, 2007, 536 SCRA 408, 453.

as the power to amend or repeal a statute is vested in the Legislature. Thus, if a discrepancy occurs between the basic law and an implementing rule or regulation, it is the former that prevails, because the law cannot be broadened by a mere administrative issuance — an administrative agency certainly cannot amend an act of Congress.

Thus, We can disregard contemporaneous construction where there is no ambiguity in law and/or the construction is clearly erroneous.[23] What is more, this Court has the constitutional prerogative and authority to strike down and declare as void the rules of procedure of special courts and quasi-judicial bodies[24] when found contrary to statutes and/or the Constitution.[25] Section 5(5), Art. VIII of the Constitution provides:

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[23] *Regalado v. Yulo*, 61 Phil. 173 (1935); *Molina v. Rafferty*, 37 Phil. 545 (1918).

[24] The Office of the Civil Registrar General exercises quasi-judicial powers under Rule 13, Title 1, of NSO Administrative Order 1-93, December 18, 1993, *Implementing Rules and Regulations of Act No. 3753 and Other Laws on Civil Registration*:

RULE 13. Posting of the Pending Application. — (1) A notice to the public on the pending application for delayed registration shall be posted in the bulletin board of the city/municipality for a period of not less than ten (10) days.

(2) If after ten (10) days, no one opposes the registration, the civil registrar shall evaluate the veracity of the statements made in the required documents submitted.

(3) If after proper evaluation of all documents presented and investigation of the allegations contained therein, the civil registrar is convinced that the event really occurred within the jurisdiction of the civil registry office, and finding out that said event was not registered, he shall register the delayed report thereof.

(4) The civil registrar, in all cases of delayed registration of birth, death and marriage, shall conduct an investigation whenever an opposition is filed against its registration by taking the testimonies of the parties concerned and witnesses in the form of questions and answers. After investigation, the civil registrar shall forward his findings and recommendations to the Office of the Civil Registrar-General for appropriate action.

(5) The Civil Registrar-General may, after review and proper evaluation, deny or authorize the registration.

[25] *Tan v. COMELEC*, G.R. Nos. 166143-47 & 166891, November 20, 2006, 507 SCRA 352, 370-371.

Sec. 5. The Supreme Court shall have the following powers:

x x x x x x x x x

(5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. **Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.** (Emphasis supplied.)

Thus, We exercise this power in voiding the above-quoted provisions of the IRR of RA 9255 insofar as it provides the mandatory use by illegitimate children of their father's surname upon the latter's recognition of his paternity.

To conclude, the use of the word "shall" in the IRR of RA 9255 is of no moment. The clear, unambiguous, and unequivocal use of "may" in Art. 176 rendering the use of an illegitimate father's surname discretionary controls, and **illegitimate children are given the choice on the surnames by which they will be known**.

At this juncture, We take note of the letters submitted by the children, now aged thirteen (13) and fifteen (15) years old, to this Court declaring their opposition to have their names changed to "Antonio."[26] However, since these letters were not offered before and evaluated by the trial court, they do not provide any evidentiary weight to sway this Court to rule for or against petitioner.[27] A proper inquiry into, and evaluation of the evidence of, the children's choice of surname by the trial court is necessary.

WHEREFORE, the instant petition is PARTIALLY GRANTED. The July 24, 2012 Decision of the Court of Appeals

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[26] *Rollo*, pp. 45-46.

[27] Rule 132, Sec. 34. *Offer of evidence.* – The court shall consider no evidence which has not been formally offered. The purpose for which the evidence is offered must be specified.

in CA-G.R. CV No. 96406 is MODIFIED, the dispositive portion of which shall read:

WHEREFORE, the appeal is partly **GRANTED**. Accordingly, the appealed Decision of the Regional Trial Court Branch 8, Aparri Cagayan in SP Proc. Case No. 11-4492 is **MODIFIED** in part and shall hereinafter read as follows:

a. [Antonio] is ORDERED to deliver the minor children Jerard Patrick and Andre Lewis to the custody of their mother herein appellant, Grace Grande who by virtue hereof is hereby awarded the full or sole custody of these minor children;
b. [Antonio] shall have visitation rights[28] at least twice a week, and may only take the children out upon the written consent of [Grande];
c. The parties are DIRECTED to give and share in support of the minor children Jerard Patrick and Andre Lewis in the amount of ₱30,000.00 per month at the rate of 70% for [Antonio] and 30% for [Grande]; and
d. The case is REMANDED to the Regional Trial Court, Branch 8 of Aparri, Cagayan for the sole purpose of determining the surname to be chosen by the children Jerard Patrick and Andre Lewis.

Rule 7 and Rule 8 of the Office of the Civil Registrar General Administrative Order No. 1, Series of 2004 are DISAPPROVED and hereby declared NULL and VOID.

SO ORDERED.

Sereno, C.J., Carpio, Leonardo-de Castro, Peralta, Bersamin, del Castillo, Abad, Villarama, Jr., Perez, Reyes, Perlas-Bernabe, and *Leonen, JJ.,* concur.

Mendoza, J., no part.

Brion, J., on leave.

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[28] In family law, the right granted by a court to a parent or other relative who is deprived custody of a child to visit the child on a regular basis. *See* DICTIONARY OF LEGAL TERMS 529 (3rd ed.).

SECOND DIVISION

[G.R. No. 173523. February 19, 2014]

LUCENA D. DEMAALA, *petitioner, vs.* **SANDIGANBAYAN (Third Division) and OMBUDSMAN,** *respondents.*

SYLLABUS

POLITICAL LAW; CONSTITUTIONAL LAW; BILL OF RIGHTS; DUE PROCESS; WHERE A PARTY WAS AFFORDED THE OPPORTUNITY TO PARTICIPATE IN THE PROCEEDINGS, YET FAILED TO DO SO, HE CANNOT BE ALLOWED LATER ON TO CLAIM THAT HE WAS DEPRIVED OF HIS DAY IN COURT; APPLICATION IN CASE AT BAR.— [P]etitioner's failure to attend the scheduled April 26, 2006 hearing of her own Motion for Reconsideration is fatal to her cause. Her excuse – that she no longer bothered to go to court on April 26, 2006 since "she had no business to be there" – is unavailing. By being absent at the April 21, 2006 hearing, petitioner did not consider the prosecution's manifestation and motion to reset trial as related to her pending Motion for Reconsideration. Thus, it was incumbent upon her to have attended the hearing of her own motion on April 26, 2006. Her absence at said hearing was inexcusable, and the *Sandiganbayan* was therefore justified in considering the matter submitted for resolution based on the pleadings submitted. Consequently, there was nothing procedurally irregular in the issuance of the assailed May 23, 2006 Resolution by the *Sandiganbayan.* The contention that petitioner was deprived of her day in court is plainly specious; it simply does not follow. Where a party was afforded the opportunity to participate in the proceedings, yet he failed to do so, he cannot be allowed later on to claim that he was deprived of his day in court. It should be said that petitioner was accorded ample opportunity to be heard through her pleadings, such conclusion being consistent with the Court's ruling in *Batul v. Bayron*, later reiterated in *De La Salle University, Inc. v. Court of Appeals*.

APPEARANCES OF COUNSEL

Romeo Q. Artazo, Jr. for petitioner.
The Solicitor General for respondents.

D E C I S I O N

DEL CASTILLO, *J.*:

Where a party was afforded the opportunity to participate in the proceedings, yet he failed to do so, he cannot be allowed later on to claim that he was deprived of his day in court.

This Petition for *Certiorari* With Urgent Motion For Preliminary Injunction And Prayer For Temporary Restraining Order[1] assails the May 23, 2006 Resolution[2] of the *Sandiganbayan*, Third Division, in Criminal Case Nos. 27208, 27210, 27212, 27214, 27216-27219, and 27223-27228, which denied petitioner's Motion for Reconsideration of the February 9, 2006 Resolution[3] ordering her suspension *pendente lite* as Mayor of Narra, Palawan.

Factual Antecedents

Petitioner Lucena D. Demaala is the Municipal Mayor of Narra, Palawan, and is the accused in Criminal Case Nos. 27208, 27210, 27212, 27214, 27216- 27219, and 27223-27228 for violations of Section 3(h) of Republic Act No. 3019[4] (RA 3019), which cases are pending before the *Sandiganbayan*.

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[1] *Rollo*, pp. 3-8.

[2] *Id.* at 35-38; penned by Associate Justice Godofredo L. Legaspi and concurred in by Associate Justices Efren N. de la Cruz and Norberto Y. Geraldez, Sr.

[3] *Id.* at 19-24.

[4] The Anti-Graft and Corrupt Practices Act, which provides —

Section 3. *Corrupt practices of public officers.* — In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:

x x x x x x x x x

On January 9, 2006, the Office of the Special Prosecutor filed before the *Sandiganbayan* a Motion to Suspend the Accused Pursuant to Section 13, RA 3019[5] arguing that under Section 13 of RA 3019,[6] petitioner's suspension from office was mandatory. Petitioner opposed[7] the motion claiming that there is no proof that the evidence against her was strong; that her continuance in office does not prejudice the cases against her nor pose a threat to the safety and integrity of the evidence and records in her office; and that her re-election to office justifies the denial of suspension.

Ruling of the Sandiganbayan

On February 9, 2006, the *Sandiganbayan* issued a Resolution granting the motion to suspend, thus:

WHEREFORE, PREMISES CONSIDERED, the Motion of the Prosecution is hereby GRANTED. As prayed for, this Court hereby ORDERS the suspension *pendente lite* of herein accused, Lucena Diaz Demaala, from her present position as Municipal Mayor of

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(h) Directly or indirectly having financial or pecuniary interest in any business, contract or transaction in connection with which he intervenes or takes part in his official capacity, or in which he is prohibited by the Constitution or by any law from having any interest.

[5] *Rollo*, pp. 10-14.

[6] Section 13. *Suspension and loss of benefits*. — Any incumbent public officer against whom any criminal prosecution under a valid information under this Act or under Title Seven Book II of the Revised Penal Code or for any offense involving fraud upon government or public funds or property whether as a simple or as complex offense and in whatever stage of execution and mode of participation, is pending in court, shall be suspended from office. Should he be convicted by final judgment, he shall lose all retirement or gratuity benefits under any law, but if he is acquitted, he shall be entitled to reinstatement and to the salaries and benefits which he failed to receive during suspension, unless in the meantime administrative proceedings have been filed against him.

In the event that such convicted officer, who may have been separated from the service, has already received such benefits he shall be liable to restitute the same to the government. (As amended by Batas Pambansa Blg. 195, March 16, 1982).

[7] *Rollo*, pp. 16-18.

Narra, Palawan, and from any other public position he [sic] may now be holding. His [sic] suspension from office shall be for a period of ninety (90) days only, to take effect upon the finality of this Resolution.

Let the Honorable Secretary of the Department of Interior and Local Government, and the Provincial Governor of Palawan be furnished copies of this Resolution.

Once this Resolution shall have become final and executory, the Honorable Secretary of the Department of Interior and Local Government shall be informed accordingly for the implementation of the suspension of herein accused.

Thereafter, the Court shall be informed of the actual date of implementation of the suspension of the accused.

SO ORDERED.[8]

The *Sandiganbayan* held that preventive suspension was proper to prevent petitioner from committing further acts of malfeasance while in office. It stated further that petitioner's re-election to office does not necessarily prevent her suspension, citing this Court's ruling in *Oliveros v. Judge Villaluz*[9] that pending prosecutions for violations of RA 3019 committed by an elective official during one term may be the basis for his suspension in a subsequent term should he be re-elected to the same position or office. The court added that by her arraignment, petitioner is deemed to have recognized the validity of the Informations against her; thus, the order of suspension should issue as a matter of course.

On March 23, 2006, petitioner filed her Motion for Reconsideration.[10] She argued that the motion to suspend should have been filed earlier and not when the prosecution is about to conclude the presentation of its evidence; that the prosecution evidence indicates that petitioner's acts are not covered by Section 3(h) of RA 3019, and thus not punishable under said law; that

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[8] *Id.* at 23-24.

[9] 156 Phil. 137, 155 (1974).

[10] *Rollo*, pp. 26-28.

the evidence failed to show that petitioner was committing further acts of malfeasance in office; and that suspension – while mandatory – is not necessarily automatic. Petitioner scheduled the hearing of her Motion for Reconsideration on April 26, 2006, thus:

NOTICE OF HEARING

To: Pros. Manuel T. Soriano, Jr.
Office of the Special Prosecutor
Sandiganbayan Bldg.
Commonwealth Avenue
Quezon City

GREETINGS:

Please take notice that on Wednesday, April 26, 2006 at 1:30 o'clock P.M. or as soon as [sic] thereafter as counsels may be heard, the undersigned will submit the foregoing Motion for the consideration and approval of the Honorable Court.

(signed)
ZOILO C. CRUZAT[11]

The Ombudsman (prosecution) opposed[12] petitioner's Motion for Reconsideration.

On April 19, 2006, the prosecution filed a Manifestation with Motion to Reset the Trial Scheduled on April 26 and 27, 2006.[13] It sought to reset the scheduled April 26 and 27, 2006 hearing for the continuation of the presentation of the prosecution's evidence to a later date. The manifestation and motion to reset trial was scheduled for hearing on April 21, 2006. It states, in part, that —

Per the January 19, 2006 Order of the Honorable Court, trial of these cases will continue on April 26 and 27, 2006, both at 1:30 in the afternoon.

x x x x x x x x x

[11] *Id*. at 28.

[12] *Id*. at 72-76.

[13] *Id*. at 30-33.

In view of the foregoing and in order not to make the government unnecessarily pay for the expenses of the intended witnesses who were in Palawan, the prosecution did not issue a subpoena to its next witnesses anymore.

Unfortunately, to date, the parties are yet to meet and discuss matters that would be included in the joint stipulations, as the two (2) scheduled meetings at the Office of the Special Prosecutor between the prosecution and the defense did not materialize. Nevertheless, the accused has not filed any manifestation to inform the Honorable Court that the accused is no longer willing to enter into stipulations. Hence, there is a possibility that the parties will eventually come up with a joint stipulation of facts.[14] (Emphasis supplied)

On April 21, 2006, the *Sandiganbayan* issued an Order[15] granting the prosecution's motion to reset trial and scheduled the continuation thereof on August 2 and 3, 2006. The Order reads, as follows:

In view of the Motion to Reset the Trial Scheduled on April 26 and 27, 2006 filed by the Prosecution and finding the same to be meritorious, the motion is hereby granted. Thus, trial on April 26 and 27, 2006 is cancelled and reset on August 2 and 3, 2006, both at 1:30 in the afternoon.

Notify the parties and counsels accordingly.

SO ORDERED.[16]

On May 23, 2006, the *Sandiganbayan* issued the assailed Resolution denying petitioner's March 23, 2006 Motion for Reconsideration, thus:

WHEREFORE, PREMISES CONSIDERED, the instant Motion for Reconsideration filed by herein accused Mayor Lucena Diaz Demaala, is hereby DENIED for lack of merit. Our ruling in our Resolution of February 9, 2006 is MAINTAINED.

SO ORDERED.[17]

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[14] *Id*. at 30-31.

[15] *Id*. at 34.

[16] *Id*.

[17] *Id*. at 38.

In denying the motion, the *Sandiganbayan* held that the grounds relied upon and arguments raised therein were mere reiterations of those contained in petitioner's Opposition to the Motion to Suspend the Accused; that contrary to petitioner's submission that the motion to suspend should have been filed earlier and not when the prosecution is about to conclude the presentation of its evidence, the suspension of an accused public officer is allowed so long as his case remains pending with the court; that the issue of whether petitioner's acts constitute violations of RA 3019 is better threshed out during trial; and that while it is not shown that petitioner was committing further acts of malfeasance while in office, the presumption remains that unless she is suspended, she might intimidate the witnesses, frustrate prosecution, or further commit acts of malfeasance.[18]

Feeling aggrieved, petitioner filed the instant Petition.

On August 9, 2006, the Court issued a *Status Quo* Order[19] enjoining the implementation of the *Sandiganbayan's* February 9, 2006 Resolution.

Issue

Petitioner claims that she was denied due process when the *Sandiganbayan* issued its May 23, 2006 Resolution denying her Motion for Reconsideration even before the same could be heard on the scheduled August 2 and 3, 2006 hearings.

Petitioner's Arguments

The Petition is premised on the argument that petitioner's Motion for Reconsideration – of the February 9, 2006 Resolution ordering her suspension from office – was originally set for hearing on April 26, 2006, but upon motion by the prosecution, the same was reset to August 2 and 3, 2006; nonetheless, before the said date could arrive, or on May 23, 2006, the *Sandiganbayan* resolved to deny her Motion for Reconsideration. Hence, she

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[18] Citing *Bolastig v. Sandiganbayan*, G.R. No. 110503, August 4, 1994, 235 SCRA 103, 108 and *Beroña v. Sandiganbayan*, 479 Phil. 182, 190 (2004).

[19] *Rollo*, pp. 45-48.

was deprived of the opportunity to be heard on her Motion for Reconsideration on the appointed dates – August 2 and 3, 2006, thus rendering the court's May 23, 2006 Resolution void for having been issued with grave abuse of discretion.

In her Reply,[20] petitioner adds that her counsel intentionally set the hearing of her Motion for Reconsideration on April 26 and 27, 2006 in order to coincide with the main trial of the criminal cases; that since the court rescheduled the April 26 and 27 hearings, she no longer bothered to go to court on April 26, 2006 as "she had no business to be there." Petitioner further claims that she did not file any pleading seeking to reset the hearing of her Motion for Reconsideration because the same had already been scheduled for hearing on August 2 and 3, 2006 at the initiative of the prosecution.

Petitioner now prays that the February 9 and May 23, 2006 Resolutions of the *Sandiganbayan* be set aside, and that injunctive relief be granted to enjoin her suspension from office.

Respondent's Arguments

Praying that the Petition be dismissed, the prosecution argues in its Comment[21] that petitioner's arguments are misleading. It stresses that the prosecution's Manifestation with Motion to Reset the Trial Scheduled on April 26 and 27, 2006 sought to reset the scheduled April 26 and 27, 2006 hearing for the continuation of the presentation of the prosecution's evidence, and not the scheduled April 26, 2006 hearing of petitioner's Motion for Reconsideration. It clarifies that a reading of its manifestation and motion to reset trial would reveal that what was sought to be rescheduled was the hearing proper and not the hearing on petitioner's Motion for Reconsideration; in the same vein, what the *Sandiganbayan* granted in its April 21, 2006 Order was the rescheduling of the April 26 and 27, 2006 hearing for the continuation of the presentation of the prosecution's evidence, and not the April 26, 2006 hearing of

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[20] *Id*. at 78-82.

[21] *Id*. at 57-68.

petitioner's Motion for Reconsideration. For this reason, it cannot be said that petitioner was denied due process when the *Sandiganbayan* issued its assailed May 23, 2006 Resolution.

The prosecution adds that petitioner should have gone to court on April 21, 2006 to attend the hearing of its manifestation and motion to reset trial to reiterate her Motion for Reconsideration.

Next, the prosecution argues that petitioner's Motion for Reconsideration was not denied outright; the *Sandiganbayan* resolved her motion on the merits and painstakingly addressed each argument raised therein. Moreover, the prosecution filed its written opposition to the Motion for Reconsideration, which thus joined the issues and rendered the motion ripe for resolution. As such, petitioner was given reasonable opportunity to be heard and submit her evidence on the motion. It cites the ruling in *Batul v. Bayron*[22] stating that "'to be heard' does not only mean presentation of testimonial evidence in court. One may also be heard through pleadings and where opportunity to be heard through pleadings is accorded, there is no denial of due process."[23]

Our Ruling

The Court dismisses the Petition.

The only issue is whether petitioner was denied due process when the *Sandiganbayan* issued its May 23, 2006 Resolution denying the Motion for Reconsideration without conducting a hearing thereon.

Petitioner's cause of action lies in the argument that her Motion for Reconsideration, which was originally set for hearing on April 26, 2006, was reset to August 2 and 3, 2006 via the *Sandiganbayan's* April 21, 2006 Order. Nonetheless, before the said date could arrive, the anti-graft court supposedly precipitately issued the assailed May 23, 2006 Resolution denying her Motion for Reconsideration, thus depriving her of the opportunity to be heard.

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[22] 468 Phil. 130 (2004).

[23] *Id*. at 143.

The above premise, however, is grossly erroneous.

A reading and understanding of the April 21, 2006 Order of the *Sandiganbayan* indicates that what it referred to were the **two** hearing dates of April 26 and 27, 2006 covering the continuation of the trial proper – the ongoing presentation of the prosecution's evidence – and ***not*** the **single** hearing date of April 26, 2006 for the determination of petitioner's Motion for Reconsideration. The prosecution's manifestation and motion to reset trial itself unmistakably specified that what was being reset was the trial proper which was scheduled on April 26 and 27, 2006 *pursuant to the court's previous January 19, 2006 Order*; it had nothing at all to do with petitioner's Motion for Reconsideration.

If petitioner truly believed that the prosecution's manifestation and motion to reset trial referred to the April 26, 2006 hearing of her Motion for Reconsideration, then she should have attended the scheduled April 21, 2006 hearing thereof to reiterate her motion or object to a resetting. Her failure to attend said hearing is a strong indication that she did not consider the manifestation and motion to reset trial as covering or pertaining to her Motion for Reconsideration which she set for hearing on April 26, 2006.

On the other hand, petitioner's failure to attend the scheduled April 26, 2006 hearing of her own Motion for Reconsideration is fatal to her cause. Her excuse – that she no longer bothered to go to court on April 26, 2006 since "she had no business to be there" – is unavailing. By being absent at the April 21, 2006 hearing, petitioner did not consider the prosecution's manifestation and motion to reset trial as related to her pending Motion for Reconsideration. Thus, it was incumbent upon her to have attended the hearing of her own motion on April 26, 2006. Her absence at said hearing was inexcusable, and the *Sandiganbayan* was therefore justified in considering the matter submitted for resolution based on the pleadings submitted.

Consequently, there was nothing procedurally irregular in the issuance of the assailed May 23, 2006 Resolution by the *Sandiganbayan*. The contention that petitioner was deprived of her day in court is plainly specious; it simply does not follow.

Where a party was afforded the opportunity to participate in the proceedings, yet he failed to do so, he cannot be allowed later on to claim that he was deprived of his day in court. It should be said that petitioner was accorded ample opportunity to be heard through her pleadings, such conclusion being consistent with the Court's ruling in *Batul v. Bayron*, later reiterated in *De La Salle University, Inc. v. Court of Appeals*,[24] thus –

> Where a party was afforded an opportunity to participate in the proceedings but failed to do so, he cannot complain of deprivation of due process. Notice and hearing is the bulwark of administrative due process, the right to which is among the primary rights that must be respected even in administrative proceedings. The essence of due process is simply an opportunity to be heard, or as applied to administrative proceedings, an opportunity to explain one's side or an opportunity to seek reconsideration of the action or ruling complained of. So long as the party is given the opportunity to advocate her cause or defend her interest in due course, it cannot be said that there was denial of due process.
>
> A formal trial-type hearing is not, at all times and in all instances, essential to due process – it is enough that the parties are given a fair and reasonable opportunity to explain their respective sides of the controversy and to present supporting evidence on which a fair decision can be based. "To be heard" does not only mean presentation of testimonial evidence in court – one may also be heard through pleadings and where the opportunity to be heard through pleadings is accorded, there is no denial of due process.[25]

WHEREFORE, the Petition is **DISMISSED**. The August 9, 2006 *Status Quo* Order is **LIFTED**.

SO ORDERED.

Carpio (Chairperson), Perez, Reyes,[*] and *Leonen,*[**] *JJ.*, concur.

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[24] 565 Phil. 330 (2007).

[25] *Id.* at 357-358.

[*] Per Special Order No. 1633 dated February 17, 2014.

[**] Per Special Order No. 1636 dated February 17, 2014.

FIRST DIVISION

[G.R. No. 182128. February 19, 2014]

PHILIPPINE NATIONAL BANK, *petitioner, vs.* **TERESITA TAN DEE, ANTIPOLO PROPERTIES, INC., (now PRIME EAST PROPERTIES, INC.) and AFP-RSBS, INC.,** *respondents.*

SYLLABUS

1. **CIVIL LAW; CONTRACTS; PRINCIPLE OF RELATIVITY OF CONTRACT; CONTRACTS CAN ONLY BIND THE PARTIES WHO ENTERED INTO IT.—** The basic principle of relativity of contracts is that contracts can only bind the parties who entered into it, and cannot favor or prejudice a third person, even if he is aware of such contract and has acted with knowledge thereof. "Where there is no privity of contract, there is likewise no obligation or liability to speak about."

2. **ID.; ID.; SALES; OBLIGATIONS OF PARTIES; EXPLAINED.—** In a contract of sale, the parties' obligations are plain and simple. The law obliges the vendor to transfer the ownership of and to deliver the thing that is the object of sale. On the other hand, the principal obligation of a vendee is to pay the full purchase price at the agreed time. Based on the final contract of sale between them, the obligation of PEPI, as owners and vendors of Lot 12, Block 21-A, Village East Executive Homes, is to transfer the ownership of and to deliver Lot 12, Block 21-A to Dee, who, in turn, shall pay, and has in fact paid, the full purchase price of the property.

3. **ID.; ID.; MORTGAGE; MORTGAGE IS MERELY AN ACCESSORY CONTRACT TO THE PRINCIPAL LOAN CONTRACT; SUSTAINED IN CASE AT BAR.—** It must be stressed that the mortgage contract between PEPI and the petitioner is merely an accessory contract to the principal three-year loan takeout from the petitioner by PEPI for its expansion project. It need not be belaboured that "[a] mortgage is an accessory undertaking to secure the fulfillment of a principal obligation," and it does not affect the ownership of the property

as it is nothing more than a lien thereon serving as security for a debt.

4. ID.; ID.; ID.; WHILE THE CONTRACT OF MORTGAGE IS VALID IT CANNOT CLAIM ANY SUPERIOR RIGHT AS AGAINST THE INSTALLMENT BUYER; RATIONALE; CASE AT BAR.— Note that at the time PEPI mortgaged the property to the petitioner, the prevailing contract between respondents PEPI and Dee was still the Contract to Sell, as Dee was yet to fully pay the purchase price of the property. On this point, PEPI was acting fully well within its right when it mortgaged the property to the petitioner, for in a contract to sell, ownership is retained by the seller and is not to pass until full payment of the purchase price. In other words, at the time of the mortgage, PEPI was still the owner of the property. Thus, in *China Banking Corporation v. Spouses Lozada*, the Court affirmed the right of the owner/developer to mortgage the property subject of development, to wit: "[P.D.] No. 957 cannot totally prevent the owner or developer from mortgaging the subdivision lot or condominium unit when the title thereto still resides in the owner or developer awaiting the full payment of the purchase price by the installment buyer." Moreover, the mortgage bore the clearance of the HLURB, in compliance with Section 18 of P.D. No. 957, which provides that "[n]o mortgage on any unit or lot shall be made by the owner or developer without prior written approval of the [HLURB]." Nevertheless, despite the apparent validity of the mortgage between the petitioner and PEPI, the former is still bound to respect the transactions between respondents PEPI and Dee. The petitioner was well aware that the properties mortgaged by PEPI were also the subject of existing contracts to sell with other buyers. While it may be that the petitioner is protected by Act No. 3135, as amended, it cannot claim any superior right as against the installment buyers. This is because the contract between the respondents is protected by P.D. No. 957, a social justice measure enacted primarily to protect innocent lot buyers. Thus, in *Luzon Development Bank v. Enriquez*, the Court reiterated the rule that a bank dealing with a property that is already subject of a contract to sell and is protected by the provisions of P.D. No. 957, **is bound by the contract to sell**. x x x **More so in this case where the contract to sell has already ripened into a contract of absolute sale**.

5. ID.; OBLIGATIONS; EXTINGUISHMENT OF OBLIGATIONS; *DACION EN PAGO*; DATION IN PAYMENT EXTINGUISHES THE OBLIGATION TO THE EXTENT OF THE VALUE OF THE THING DELIVERED; EXPLAINED.— *Dacion en pago* or dation in payment is the delivery and transmission of ownership of a thing by the debtor to the creditor as an accepted equivalent of the performance of the obligation. It is a mode of extinguishing an existing obligation and partakes the nature of sale as the creditor is really buying the thing or property of the debtor, the payment for which is to be charged against the debtor's debt. Dation in payment extinguishes the obligation to the extent of the value of the thing delivered, either as agreed upon by the parties or as may be proved, unless the parties by agreement – express or implied, or by their silence – consider the thing as equivalent to the obligation, in which case the obligation is totally extinguished.

APPEARANCES OF COUNSEL

Litigation Division (PNB) for petitioner.
Rolando G. Borja for AFP-RSBS.
Donato Zarate Rodriguez for API/PEPI.
Benjamin B. Vargas for Teresita Tan Dee.

D E C I S I O N

REYES, *J.*:

This is a Petition for Review[1] under Rule 45 of the Rules of Court, assailing the Decision[2] dated August 13, 2007 and Resolution[3] dated March 13, 2008 rendered by the Court of Appeals (CA) in CA-G.R. SP No. 86033, which affirmed the

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[1] *Rollo*, pp. 28-50.

[2] Penned by Associate Justice Arcangelita M. Romilla-Lontok, with Associate Justices Rodrigo V. Cosico and Mariano C. Del Castillo (now a member of this Court), concurring; *id.* at 53-64.

[3] *Id.* at 66-67.

Decision[4] dated August 4, 2004 of the Office of the President (OP) in O.P. Case No. 04-D-182 (HLURB Case No. REM-A-030724-0186).

Facts of the Case

Some time in July 1994, respondent Teresita Tan Dee (Dee) bought from respondent Prime East Properties Inc.[5] (PEPI) on an installment basis a residential lot located in Binangonan, Rizal, with an area of 204 square meters[6] and covered by Transfer Certificate of Title (TCT) No. 619608. Subsequently, PEPI assigned its rights over a 213,093-sq m property on August 1996 to respondent Armed Forces of the Philippines-Retirement and Separation Benefits System, Inc. (AFP-RSBS), which included the property purchased by Dee.

Thereafter, or on September 10, 1996, PEPI obtained a ₱205,000,000.00 loan from petitioner Philippine National Bank (petitioner), secured by a mortgage over several properties, including Dee's property. The mortgage was cleared by the Housing and Land Use Regulatory Board (HLURB) on September 18, 1996.[7]

After Dee's full payment of the purchase price, a deed of sale was executed by respondents PEPI and AFP-RSBS on July 1998 in Dee's favor. Consequently, Dee sought from the petitioner the delivery of the owner's duplicate title over the property, to no avail. Thus, she filed with the HLURB a complaint for specific performance to compel delivery of TCT No. 619608 by the petitioner, PEPI and AFP-RSBS, among others. In its Decision[8] dated May 21, 2003, the HLURB ruled in favor of Dee and disposed as follows:

WHEREFORE, ***premises considered***, judgment is hereby rendered as follows:

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[4] CA *rollo*, pp. 6-14.

[5] Formerly Antipolo Properties, Inc.

[6] Identified as Lot 12, Block 21-A.

[7] CA *rollo*, p. 56.

[8] *Id.* at 58-62.

1. Directing [the petitioner] to cancel/release the mortgage on Lot 12, Block 21-A, Village East Executive Homes covered by Transfer Certificate of Title No. -619608- (TCT No. -619608-), and accordingly, surrender/release the title thereof to [Dee];

2. Immediately upon receipt by [Dee] of the owner's duplicate of Transfer Certificate of Title No. -619608- (TCT No. -619608-), respondents PEPI and AFP-RSBS are hereby ordered to deliver the title of the subject lot in the name of [Dee] free from all liens and encumbrances;

3. Directing respondents PEPI and AFP-RSBS to pay [the petitioner] the redemption value of Lot 12, Block 21-A, Village East Executive Homes covered by Transfer Certificate of Title No. -619608- (TCT No. -619608-) as agreed upon by them in their Real Estate Mortgage within six (6) months from the time the owner's duplicate of Transfer Certificate of Title No. -619608- (TCT No. -619608-) is actually surrendered and released by [the petitioner] to [Dee];

4. In the alternative, in case of legal and physical impossibility on the part of [PEPI, AFP-RSBS, and the petitioner] to comply and perform their respective obligation/s, as above-mentioned, respondents PEPI and AFP-RSBS are hereby ordered to jointly and severally pay to [Dee] the amount of **FIVE HUNDRED TWENTY THOUSAND PESOS ([₱]520,000.00)** plus twelve percent (12%) interest to be computed from the filing of complaint on April 24, 2002 until fully paid; and

5. Ordering [PEPI, AFP-RSBS, and the petitioner] to pay jointly and severally [Dee] the following sums:

    a) The amount of **TWENTY FIVE THOUSAND PESOS ([₱]25,000.00)** as attorney's fees;
    b) The cost of litigation[;] and
    c) An administrative fine of **TEN THOUSAND PESOS ([₱]10,000.00)** payable to this Office fifteen (15) days upon receipt of this decision, for violation of Section 18 in relation to Section 38 of PD 957.

SO ORDERED.[9]

[9] *Id.* at 61-62.

The HLURB decision was affirmed by its Board of Commissioners per Decision dated March 15, 2004, with modification as to the rate of interest.[10]

On appeal, the Board of Commissioners' decision was affirmed by the OP in its Decision dated August 4, 2004, with modification as to the monetary award.[11]

Hence, the petitioner filed a petition for review with the CA, which, in turn, issued the assailed Decision dated August 13, 2007, affirming the OP decision. The dispositive portion of the decision reads:

WHEREFORE, in view of the foregoing, the petition is **DENIED**. The Decision dated August 4, 2004 rendered by the Office of the President in O. P. Case No. 04-D-182 (HLURB Case No. REM-A-030724-0186) is hereby **AFFIRMED**.

SO ORDERED.[12]

Its motion for reconsideration having been denied by the CA in the Resolution dated March 13, 2008, the petitioner filed the present petition for review on the following grounds:

I. THE HONORABLE COURT OF APPEALS ERRED IN ORDERING OUTRIGHT RELEASE OF TCT NO. 619608 DESPITE PNB'S DULY REGISTERED AND HLURB[-] APPROVED MORTGAGE ON TCT NO. 619608.

II. THE HONORABLE COURT OF APPEALS ERRED IN ORDERING CANCELLATION OF MORTGAGE/ RELEASE OF TITLE IN FAVOR OF RESPONDENT DEE DESPITE THE LACK OF PAYMENT OR SETTLEMENT BY THE MORTGAGOR (API/PEPI and AFP-RSBS) OF ITS EXISTING LOAN OBLIGATION TO PNB, OR THE PRIOR EXERCISE OF RIGHT OF REDEMPTION BY THE MORTGAGOR AS MANDATED BY SECTION 25 OF PD 957 OR DIRECT PAYMENT MADE BY RESPONDENT

[10] *Rollo*, p. 57.

[11] *Id.* at 57-58.

[12] *Id.* at 64.

DEE TO PNB PURSUANT TO THE DEED OF UNDERTAKING WHICH WOULD WARRANT RELEASE OF THE SAME.[13]

The petitioner claims that it has a valid mortgage over Dee's property, which was part of the property mortgaged by PEPI to it to secure its loan obligation, and that Dee and PEPI are bound by such mortgage. The petitioner also argues that it is not privy to the transactions between the subdivision project buyers and PEPI, and has no obligation to perform any of their respective undertakings under their contract.[14]

The petitioner also maintains that Presidential Decree (P.D.) No. 957[15] cannot nullify the subsisting agreement between it and PEPI, and that the petitioner's rights over the mortgaged properties are protected by Act 3135.[16] If at all, the petitioner can be compelled to release or cancel the mortgage only after the provisions of P.D. No. 957 on redemption of the mortgage by the owner/developer (Section 25) are complied with. The petitioner also objects to the denomination by the CA of the provisions in the Affidavit of Undertaking as stipulations *pour autrui*,[17] arguing that the release of the title was conditioned on Dee's direct payment to it.[18]

Respondent AFP-RSBS, meanwhile, contends that it cannot be compelled to pay or settle the obligation under the mortgage

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[13] *Id.* at 36-37.

[14] *Id.* at 37-42.

[15] Entitled, "The Subdivision and Condominium Buyers' Protective Decree."

[16] Entitled "An Act to Regulate the Sale of Property under Special Powers Inserted In or Annexed to Real Estate Mortgages."

[17] In upholding the OP decision, the CA ruled that paragraph 6 of herein petitioner's undertaking is a stipulation *pour autrui*, which is an exception to the principle of relativity of contracts under Article 1311 of the Civil Code. According to the CA, the provision should be read in conjunction with Section 25 of P.D. No. 957, which compels the owner/developer to redeem the mortgage on the property and deliver the title to the buyer; *rollo*, pp. 59-64.

[18] *Id.* at 42-46.

contract between PEPI and the petitioner as it is merely an investor in the subdivision project and is not privy to the mortgage.[19]

Respondent PEPI, on the other hand, claims that the title over the subject property is one of the properties due for release by the petitioner as it has already been the subject of a Memorandum of Agreement and *dacion en pago* entered into between them.[20] The agreement was reached after PEPI filed a petition for rehabilitation, and contained the stipulation that the petitioner agreed to release the mortgage lien on fully paid mortgaged properties upon the issuance of the certificates of title over the *dacioned* properties.[21]

For her part, respondent Dee adopts the arguments of the CA in support of her prayer for the denial of the petition for review.[22]

Ruling of the Court

The petition must be **DENIED**.

The petitioner is correct in arguing that it is not obliged to perform any of the undertaking of respondent PEPI and AFP-RSBS in its transactions with Dee because it is not a privy thereto. The basic principle of relativity of contracts is that contracts can only bind the parties who entered into it,[23] and cannot favor or prejudice a third person, even if he is aware of such contract and has acted with knowledge thereof.[24] "Where there is no privity of contract, there is likewise no obligation or liability to speak about."[25]

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[19] *Id.* at 70-75.

[20] *Id.* at 77.

[21] *See* Memorandum of Agreement dated November 22, 2006, *id.* at 92-95.

[22] *Id.* at 131-133.

[23] CIVIL CODE, Article 1311, states in part, that contracts take effect only between the parties, their assigns and heirs.

[24] *Spouses Borromeo v. Hon. Court of Appeals*, 573 Phil. 400, 412 (2008).

[25] *Id.* at 411-412.

The petitioner, however, is not being tasked to undertake the obligations of PEPI and AFP-RSBS. In this case, there are two phases involved in the transactions between respondents PEPI and Dee – the first phase is the contract to sell, which eventually became the second phase, the absolute sale, after Dee's full payment of the purchase price. In a contract of sale, the parties' obligations are plain and simple. The law obliges the vendor to transfer the ownership of and to deliver the thing that is the object of sale.[26] On the other hand, the principal obligation of a vendee is to pay the full purchase price at the agreed time.[27] Based on the final contract of sale between them, the obligation of PEPI, as owners and vendors of Lot 12, Block 21-A, Village East Executive Homes, is to transfer the ownership of and to deliver Lot 12, Block 21-A to Dee, who, in turn, shall pay, and has in fact paid, the full purchase price of the property. There is nothing in the decision of the HLURB, as affirmed by the OP and the CA, which shows that the petitioner is being ordered to assume the obligation of any of the respondents. There is also nothing in the HLURB decision, which validates the petitioner's claim that the mortgage has been nullified. The order of cancellation/release of the mortgage is simply a consequence of Dee's full payment of the purchase price, as mandated by Section 25 of P.D. No. 957, to wit:

> Sec. 25. *Issuance of Title*. The owner or developer shall deliver the title of the lot or unit to the buyer upon full payment of the lot or unit. No fee, except those required for the registration of the deed of sale in the Registry of Deeds, shall be collected for the issuance of such title. In the event a mortgage over the lot or unit is outstanding at the time of the issuance of the title to the buyer, the owner or developer shall redeem the mortgage or the corresponding portion thereof within six months from such issuance in order that the title over any fully paid lot or unit may be secured and delivered to the buyer in accordance herewith.

It must be stressed that the mortgage contract between PEPI and the petitioner is merely an accessory contract to the principal three-year loan takeout from the petitioner by PEPI for its

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[26] CIVIL CODE, Article 1495.

[27] CIVIL CODE, Article 1582.

expansion project. It need not be belaboured that "[a] mortgage is an accessory undertaking to secure the fulfillment of a principal obligation,"[28] and it does not affect the ownership of the property as it is nothing more than a lien thereon serving as security for a debt.[29]

Note that at the time PEPI mortgaged the property to the petitioner, the prevailing contract between respondents PEPI and Dee was still the Contract to Sell, as Dee was yet to fully pay the purchase price of the property. On this point, PEPI was acting fully well within its right when it mortgaged the property to the petitioner, for in a contract to sell, ownership is retained by the seller and is not to pass until full payment of the purchase price.[30] In other words, at the time of the mortgage, PEPI was still the owner of the property. Thus, in *China Banking Corporation v. Spouses Lozada*,[31] the Court affirmed the right of the owner/developer to mortgage the property subject of development, to wit: "[P.D.] No. 957 cannot totally prevent the owner or developer from mortgaging the subdivision lot or condominium unit when the title thereto still resides in the owner or developer awaiting the full payment of the purchase price by the installment buyer."[32] Moreover, the mortgage bore the clearance of the HLURB, in compliance with Section 18 of P.D. No. 957, which provides that "[n]o mortgage on any unit or lot shall be made by the owner or developer without prior written approval of the [HLURB]."

Nevertheless, despite the apparent validity of the mortgage between the petitioner and PEPI, the former is still bound to respect the transactions between respondents PEPI and Dee.

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[28] *Situs Development Corporation v. Asiatrust Bank*, G.R. No. 180036, July 25, 2012, 677 SCRA 495, 509.

[29] *Typingco v. Lim*, G.R. No. 181232, October 23, 2009, 604 SCRA 396, 401.

[30] *Spouses Delfin O. Tumibay and Aurora T. Tumibay v. Spouses Melvin A. Lopez and Rowena Gay T. Visitacion Lopez*, G.R. No. 171692, June 3, 2013.

[31] 579 Phil. 454 (2008).

[32] *Id.* at 480.

The petitioner was well aware that the properties mortgaged by PEPI were also the subject of existing contracts to sell with other buyers. While it may be that the petitioner is protected by Act No. 3135, as amended, it cannot claim any superior right as against the installment buyers. This is because the contract between the respondents is protected by P.D. No. 957, a social justice measure enacted primarily to protect innocent lot buyers.[33] Thus, in *Luzon Development Bank v. Enriquez*,[34] the Court reiterated the rule that a bank dealing with a property that is already subject of a contract to sell and is protected by the provisions of P.D. No. 957, **is bound by the contract to sell**.[35]

However, the transferee BANK is bound by the Contract to Sell and has to respect Enriquez's rights thereunder. **This is because the Contract to Sell, involving a subdivision lot, is covered and protected by PD 957**. x x x.

x x x x x x x x x

x x x Under these circumstances, the BANK knew or should have known of the possibility and risk that the assigned properties were already covered by existing contracts to sell in favor of subdivision lot buyers. As observed by the Court in another case involving a bank regarding a subdivision lot that was already subject of a contract to sell with a third party:

> "[The Bank] should have considered that it was dealing with a property subject of a real estate development project. A reasonable person, particularly a financial institution x x x, should have been aware that, to finance the project, funds other than those obtained from the loan could have been used to serve the purpose, albeit partially. Hence, there was a need to verify whether any part of the property was already intended to be the subject of any other contract involving buyers or potential buyers. In granting the loan, [the Bank] should not

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[33] *Philippine Bank of Communications v. Pridisons Realty Corporation*, G.R. No. 155113, January 9, 2013, 688 SCRA 200, 214, citing *Philippine National Bank v. Office of the President,* 252 Phil. 5 (1996); *Far East Bank & Trust Co. v. Marquez,* 465 Phil. 276, 287 (2004).

[34] G.R. No. 168646, January 12, 2011, 639 SCRA 332.

[35] The contract to sell in Luzon Development Bank was not registered.

> have been content merely with a clean title, considering the presence of circumstances indicating the need for a thorough investigation of the existence of buyers x x x. Wanting in care and prudence, the [Bank] cannot be deemed to be an innocent mortgagee. x x x"[36] (Citation omitted)

More so in this case where the contract to sell has already ripened into a contract of absolute sale.

Moreover, PEPI brought to the attention of the Court the subsequent execution of a Memorandum of Agreement dated November 22, 2006 by PEPI and the petitioner. Said agreement was executed pursuant to an Order dated February 23, 2004 by the Regional Trial Court (RTC) of Makati City, Branch 142, in SP No. 02-1219, a petition for Rehabilitation under the Interim Rules of Procedure on Corporate Rehabilitation filed by PEPI. The RTC order approved PEPI's modified Rehabilitation Plan, which included the settlement of the latter's unpaid obligations to its creditors by way of *dacion* of real properties. In said order, the RTC also incorporated certain measures that were not included in PEPI's plan, one of which is that "[t]itles to the lots which have been fully paid shall be released to the purchasers within 90 days after the *dacion* to the secured creditors has been completed."[37] Consequently, the agreement stipulated that as partial settlement of PEPI's obligation with the petitioner, the former absolutely and irrevocably conveys by way of "*dacion en pago*" the properties listed therein,[38] which included the lot purchased by Dee. The petitioner also committed to –

> [R]elease its mortgage lien on fully paid Mortgaged Properties upon issuance of the certificates of title over the Dacioned Properties in the name of the [petitioner]. The request for release of a Mortgaged Property shall be accompanied with: (i) proof of full payment by the buyer, together with a certificate of full payment issued by the Borrower x x x. The [petitioner] hereby undertakes to cause the transfer of the certificates of title over the Dacioned Properties

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[36] *Supra* note 34, at 352-353.

[37] *Rollo*, p. 90.

[38] *Id.* at 92.

and the release of the Mortgaged Properties with reasonable dispatch.[39]

Dacion en pago or dation in payment is the delivery and transmission of ownership of a thing by the debtor to the creditor as an accepted equivalent of the performance of the obligation.[40] It is a mode of extinguishing an existing obligation[41] and partakes the nature of sale as the creditor is really buying the thing or property of the debtor, the payment for which is to be charged against the debtor's debt.[42] Dation in payment extinguishes the obligation to the extent of the value of the thing delivered, either as agreed upon by the parties or as may be proved, unless the parties by agreement – express or implied, or by their silence – consider the thing as equivalent to the obligation, in which case the obligation is totally extinguished.[43]

There is nothing on record showing that the Memorandum of Agreement has been nullified or is the subject of pending litigation; hence, it carries with it the presumption of validity.[44] Consequently, the execution of the dation in payment effectively extinguished respondent PEPI's loan obligation to the petitioner insofar as it covers the value of the property purchased by Dee. This negates the petitioner's claim that PEPI must first redeem the property before it can cancel or release the mortgage. As it now stands, the petitioner already stepped into the shoes of PEPI and there is no more reason for the petitioner to refuse the cancellation or release of the mortgage, for, as stated by the Court in *Luzon Development Bank*, in accepting the assigned properties as payment of the obligation, "[the bank] has assumed

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[39] *Id.* at 93.

[40] *Aquintey v. Sps. Tibong*, 540 Phil. 422, 446 (2006), citing *Vda. de Jayme v. Court of Appeals*, 439 Phil. 192, 210 (2002).

[41] *Dao Heng Bank, Inc. v. Spouses Laigo*, 592 Phil. 172, 181 (2008).

[42] *Bank of the Philippine Islands v. Securities and Exchange Commission*, 565 Phil. 588, 596 (2007).

[43] *Tan Shuy v. Maulawin*, G.R. No. 190375, February 8, 2012, 665 SCRA 604, 614-615.

[44] *GSIS v. The Province of Tarlac*, 462 Phil. 471, 478 (2003).

the risk that some of the assigned properties are covered by contracts to sell which must be honored under PD 957."[45] Whatever claims the petitioner has against PEPI and AFP-RSBS, monetary or otherwise, should not prejudice the rights and interests of Dee over the property, which she has already fully paid for.

> As between these small lot buyers and the gigantic financial institutions which the developers deal with, it is obvious that the law—as an instrument of social justice—must favor the weak.[46] (Emphasis omitted)

Finally, the Court will not dwell on the arguments of AFP-RSBS given the finding of the OP that "[b]y its non-payment of the appeal fee, AFP-RSBS is deemed to have abandoned its appeal and accepts the decision of the HLURB."[47] As such, the HLURB decision had long been final and executory as regards AFP-RSBS and can no longer be altered or modified.[48]

WHEREFORE, the petition for review is **DENIED** for lack of merit. Consequently, the Decision dated August 13, 2007 and Resolution dated March 13, 2008 of the Court of Appeals in CA-G.R. SP No. 86033 are **AFFIRMED**.

Petitioner Philippine National Bank and respondents Prime East Properties Inc. and Armed Forces of the Philippines-Retirement and Separation Benefits System, Inc. are hereby **ENJOINED** to strictly comply with the Housing and Land Use Regulatory Board Decision dated May 21, 2003, as modified by its Board of Commissioners Decision dated March 15, 2004 and Office of the President Decision dated August 4, 2004.

SO ORDERED.

Sereno, C.J. (Chairperson), Leonardo-de Castro, Bersamin, and *Villarama, Jr., JJ.,* concur.

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[45] *Supra* note 34, at 357.

[46] *Philippine Bank of Communications v. Pridisons Realty Corporation, supra* note 33.

[47] CA *rollo,* p. 10.

[48] *Eastland Construction & Development Corp. v. Mortel*, 520 Phil. 76, 91 (2006).

FIRST DIVISION

[G.R. Nos. 184360 & 184361. February 19, 2014]

SILICON PHILIPPINES, INC., (formerly Intel Philippines Manufacturing, Inc.), *petitioner, vs.* **COMMISSIONER OF INTERNAL REVENUE,** *respondent.*

[G.R. No. 184384. February 19, 2014]

COMMISSIONER OF INTERNAL REVENUE, *petitioner, vs.* **SILICON PHILIPPINES, INC., (formerly Intel Philippines Manufacturing, Inc.),** *respondent.*

SYLLABUS

1. TAXATION; NATIONAL INTERNAL REVENUE CODE (NIRC); CLAIM FOR REFUND OR TAX CREDIT; 120-DAY PERIOD FOR THE COMMISSIONER OF INTERNAL REVENUE TO DECIDE THE CLAIM FOR REFUND OR TAX CREDIT AND 30-DAY PERIOD FOR THE TAXPAYER TO APPEAL TO THE COURT OF TAX APPEALS, MANDATORY AND JURISDICTIONAL.— Sec. 112(C) (formerly sub paragraph D) of the NLRC expressly grants the CIR 120 days within which to decide the taxpayer's claim for refund or tax credit. In addition, the taxpayer is granted a 30-day period to appeal to the CTA the decision or inaction of the CIR after the 120-day period. x x x The CTA has exclusive appellate jurisdiction to review on appeal decisions of the CIR in cases involving refunds of internal revenue taxes. Moreover, if the CIR fails to decide within the 120-day period provided by law, such inaction shall be deemed a denial of the application for tax refund which the taxpayer can elevate to the CTA through a petition for review. In the recently decided consolidated cases of *Commissioner of Internal Revenue v. San Roque Power Corporation, (San Roque* for brevity*)* this Court stressed the mandatory and jurisdictional nature of the 120+30 day period provided under Section 112(C) of the NIRC.

2. ID.; ID.; ID.; NONCOMPLIANCE WITH THE MANDATORY PERIODS, NONOBSERVANCE OF THE PRESCRIPTIVE

PERIODS, AND NONADHERENCE TO EXHAUSTION OF ADMINISTRATIVE REMEDIES BAR A TAXPAYER'S CLAIM FOR TAX REFUND OR CREDIT.— Courts are bound by prior decisions. Thus, once a case has been decided one way, courts have no choice but to resolve subsequent cases involving the same issue in the same manner. As this Court has repeatedly emphasized, a tax credit or refund, like tax exemption, is strictly construed against the taxpayer. The taxpayer claiming the tax credit or refund has the burden of proving that he is entitled to the refund by showing that he has strictly complied with the conditions for the grant of the tax refund or credit. Strict compliance with the mandatory and jurisdictional conditions prescribed by law to claim such tax refund or credit is essential and necessary for such claim to prosper. Noncompliance with the mandatory periods, nonobservance of the prescriptive periods, and nonadherence to exhaustion of administrative remedies bar a taxpayer's claim for tax refund or credit, whether or not the CIR questions the numerical correctness of the claim of the taxpayer. For failure of Silicon to comply with the provisions of Section 112(C) of the NIRC, its judicial claims for tax refund or credit should have been dismissed by the CTA for lack of jurisdiction.

APPEARANCES OF COUNSEL

Noval and Buñag Law Office for Silicon Phils., Inc.
The Solicitor General for Commissioner of Internal Revenue.

D E C I S I O N

VILLARAMA, JR., *J.*:

Before us are three consolidated petitions for review on *certiorari* under Rule 45 of the 1997 Rules of Civil Procedure, as amended, assailing (1) the Decision[1] dated February 18, 2008 of the Court of Tax Appeals (CTA) *En Banc* in CTA E.B. No.

[1] *Rollo* (G.R. No. 184361), pp. 11-27; *rollo* (G.R. No. 184384), pp. 33-50. Penned by Associate Justice Erlinda P. Uy with Presiding Justice Ernesto D. Acosta, Associate Justices Juanito C. Castañeda, Jr., Lovell R. Bautista, Caesar A. Casanova and Olga Palanca-Enriquez concurring.

219; (2) the Decision[2] dated February 20, 2008 of the CTA *En Banc* in CTA E.B. Case No. 209; and (3) the two Resolutions[3] both dated September 2, 2008 of the CTA *En Banc* denying the motions for reconsideration from the aforementioned assailed decisions.

The facts as summarized by the CTA in Division and adopted by the CTA *En Banc* are as follows:

Silicon Philippines, Inc. (formerly Intel Philippines Manufacturing, Inc.) is a corporation duly organized and existing under the laws of the Republic of the Philippines. It is primarily engaged in the business of designing, developing, manufacturing and exporting advance and large-scale integrated circuit components.[4] It is registered with the Bureau of Internal Revenue (BIR) as a Value-Added Tax (VAT) taxpayer with Certificate of Registration bearing RDO Control No. 94-048-02621.[5] It is likewise registered with the Board of Investments (BOI) as a preferred pioneer enterprise.[6]

On the other hand, the Commissioner of Internal Revenue (CIR) is the government official vested with the power and authority to refund any internal revenue tax erroneously or illegally assessed or collected under the National Internal Revenue Code of 1997, as amended[7] (hereafter NIRC or Tax Code).

For the 1st quarter of 1999, Silicon seasonably filed its Quarterly VAT Return on April 22, 1999 reflecting, among others, output VAT in the amount of ₱145,316.96; input VAT on domestic

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[2] *Rollo* (G.R. No. 184360), pp. 10-28. Penned by Associate Justice Erlinda P. Uy with Associate Justices Juanito C. Castañeda, Jr., Lovell R. Bautista, Caesar A. Casanova and Olga Palanca-Enriquez concurring; Presiding Justice Ernesto D. Acosta filed a Concurring and Dissenting Opinion.

[3] *Id.* at 37-42; *rollo* (G.R. No. 184361), pp. 28-31; *rollo* (G.R. No. 184384), pp. 51-54.

[4] *Id.* at 11.

[5] *Id.* Originally under RDO Control No. 32A-3-002649 dated January 1, 1988. *Id.* at 138.

[6] *Id.*

[7] *Id.*

purchases in the amount of ₱20,041,888.41; input VAT on importation of goods in the amount of ₱44,560,949.00; and zero-rated export sales in the sum of ₱929,186,493.91.[8]

On August 6, 1999, Silicon filed with the CIR, through its One-Stop-Shop Inter-Agency Tax Credit and Duty Drawback Center of the Department of Finance (DOF), a claim for tax credit or refund of ₱64,457,520.45 representing VAT input taxes on its domestic purchases of goods and services and importation of goods and capital equipment which are attributable to zero-rated sales for the period January 1, 1999 to March 31, 1999.

Due to the inaction of the CIR, Silicon filed a Petition for Review[9] with the CTA on March 30, 2001, to toll the running of the two-year prescriptive period. The petition was docketed as *CTA Case No. 6263*.

The CIR filed its Answer[10] dated June 1, 2001 raising, among others, the following special and affirmative defenses: (1) that Silicon failed to show compliance with the substantiation requirements under the provisions of Section 16(c)(3)[11] of Revenue Regulations No. 5-87, as amended by Revenue Regulations No.

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[8] *Id.* at 138.

[9] *Id.* at 121-130.

[10] *Id.* at 131-132.

[11] SECTION 16. Refunds or tax credits of input tax. –

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(c) *Claims for tax credits/refunds*. – Application For Tax Credit/Refund of Value-Added Tax Paid (BIR Form No. 2552) shall be filed with the Revenue District Office of the city or municipality where the principal place of business of the applicant is located or directly with the Commissioner, Attention: VAT Division.

A photo copy of the purchase invoice or receipt evidencing the value added tax paid shall be submitted together with the application. The original copy of the said invoice/receipt, however, shall be presented for cancellation prior to the issuance of the Tax Credit Certificate or refund. In addition, the following documents shall be attached whenever applicable:

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3. Effectively zero-rated sale of goods and services.

3-88; and (2) that Silicon has not shown proof that the alleged domestic purchases of goods and services and importation of goods/capital equipment on which the VAT input taxes were paid are attributable to its export sales or have not yet been applied to the output tax for the period covered in its claim or any succeeding period and that the alleged total foreign exchange proceeds have been accounted for in accordance with the rules and regulations of the *Bangko Sentral ng Pilipinas*.

During the pendency of the case, Silicon manifested that it was granted by the DOF a tax credit certificate equivalent to 50% of its total claimed input VAT on local purchases of ₱19,896,571.45 or for the amount of ₱9,948,285.73. Hence, the CTA Division limited its review on the amounts of ₱9,896,571.45[12] and ₱44,560,949.00.[13]

Meanwhile, on August 10, 2000, Silicon filed a second claim for tax credit or refund in the amount of ₱20,411,419.07 for the period April 1, 2000 to June 30, 2000.

To toll the running of the two-year prescriptive period, Silicon filed on June 28, 2002 with the CTA a Petition for Review,[14] which was docketed as *CTA Case No. 6493*.

The CIR filed an Answer[15] asserting, among others, that Silicon's claim for refund/tax credit in the amount of ₱20,411,419.07 was not duly substantiated and that said claim for refund is not subject to zero-percent (0%) rate of VAT under Sections

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i) photo copy of approved application for zero rate if filing for the first time.

ii) sales invoice or receipt showing name of the person or entity to whom the sale of goods or services were delivered, date of delivery, amount of consideration, and description of goods or services delivered.

iii) evidence of actual receipt of goods or services.

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[12] Should be ₱9,948,285.73.

[13] *Rollo* (G.R. No. 184360), pp. 139-140.

[14] *Rollo* (G.R. No. 184361), pp. 86-97.

[15] *Id.* at 98-100.

106(A)(2)(a)(1)[16] and 108(B)(1)[17] of the NIRC. Further, the claim for refund has already prescribed pursuant to Section 112(A) and (B)[18] of the NIRC.

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[16] SEC. 106. **Value-added Tax on Sale of Goods or Properties. –**

(A) *Rate and Base of Tax.* – There shall be levied, assessed and collected on every sale, barter or exchange of goods or properties, value-added tax equivalent to ten percent (10%) of the gross selling price or gross value in money of the goods or properties sold, bartered or exchanged, such tax to be paid by the seller or transferor.

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(2) The following sales by VAT-registered persons shall be subject to zero percent (0%) rate:

(a) *Export Sales.* – The term "*export sales*" means:

(1) The sale and actual shipment of goods from the Philippines to a foreign country, irrespective of any shipping arrangement that may be agreed upon which may influence or determine the transfer of ownership of the goods so exported and paid for in acceptable foreign currency or its equivalent in goods or services, and accounted for in accordance with the rules and regulations of the *Bangko Sentral ng Pilipinas* (BSP)[.]

[17] SEC. 108. **Value-added Tax on Sale of Services and Use or Lease of Properties. –**

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(B) *Transactions Subject to Zero Percent (0%) Rate.* – The following services performed in the Philippines by VAT- registered persons shall be subject to zero percent (0%) rate:

(1) Processing, manufacturing or repacking goods for other persons doing business outside the Philippines which goods are subsequently exported, where the services are paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the *Bangko Sentral ng Pilipinas* (BSP)[.]

[18] SEC. 112. **Refunds or Tax Credits of Input Tax. –**

(A) *Zero-rated or Effectively Zero-rated Sales.* – Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: *Provided, however*, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (B) and Section 108(B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the *Bangko Sentral ng*

CTA Case Nos. 6263 (Second Division) and 6493 (First Division)

On March 6, 2006, the CTA Second Division rendered a Decision[19] in CTA Case No. 6263 denying Silicon's claim for refund or issuance of tax credit certificate for the first quarter of 1999 in the amount of ₱9,896,571.45 representing the input VAT on its alleged domestic purchases of goods and services because it failed to substantiate its claimed zero-rated export sales. The CTA Second Division held that the export sales invoices have no probative value in establishing its zero-rated sales for VAT purposes as the same were not duly registered with the BIR and the required information, particularly the BIR authority to print, was likewise not indicated therein in violation of the provisions of Sections 113,[20] 237[21] and 238[22] of the NIRC. The

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Pilipinas (BSP): *Provided, further*, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales.

(B) *Capital Goods.* – A VAT-registered person may apply for the issuance of a tax credit certificate or refund of input taxes paid on capital goods imported or locally purchased, to the extent that such input taxes have not been applied against output taxes. The application may be made only within two (2) years after the close of the taxable quarter when the importation or purchase was made.

[19] *Rollo* (G.R. No. 184360), pp. 137-146. Penned by Associate Justice Juanito C. Castañeda, Jr. with Associate Justices Erlinda P. Uy and Olga Palanca-Enriquez concurring.

[20] SEC. 113. **Invoicing and Accounting Requirements for VAT-Registered Persons.** –

(A) *Invoicing Requirements.* – A VAT-registered person shall, for every sale, issue an invoice or receipt. In addition to the information required under Section 237, the following information shall be indicated in the invoice or receipt:

(1) A statement that the seller is a VAT-registered person, followed by his taxpayer's identification number (TIN); and

(2) The total amount which the purchaser pays or is obligated to pay to the seller with the indication that such amount includes the value-added tax.

(B) *Accounting Requirements.* – Notwithstanding the provisions of Section 233, all persons subject to the value-added tax under Sections 106 and 108 shall, in addition to the regular accounting records required, maintain a subsidiary sales journal and subsidiary purchase journal on which the daily sales and purchases are recorded. The subsidiary journals shall contain such information as may be required by the Secretary of Finance.

[21] SEC. 237. **Issuance of Receipts or Sales or Commercial Invoices.** – All persons subject to an internal revenue tax shall, for each sale or transfer of merchandise or for services rendered valued at Twenty-five pesos (₱25.00) or more, issue duly registered receipts or sales or commercial invoices, prepared at least in duplicate, showing the date of transaction, quantity, unit cost and description of merchandise or nature of service: *Provided, however*, That in the case of sales, receipts or transfers in the amount of One hundred pesos (₱100.00) or more, or regardless of the amount, where the sale or transfer is made by a person liable to value-added tax to another person also liable to value-added tax; or where the receipt is issued to cover payment made as rentals, commissions, compensations or fees, receipts or invoices shall be issued which shall show the name, business style, if any, and address of the purchaser, customer or client: *Provided, further*, That where the purchaser is a VAT-registered person, in addition to the information herein required, the invoice or receipt shall further show the Taxpayer's Identification Number (TIN) of the purchaser.

The original of each receipt or invoice shall be issued to the purchaser, customer or client at the time the transaction is effected, who, if engaged in business or in the exercise of profession, shall keep and preserve the same in his place of business for a period of three (3) years from the close of the taxable year in which such invoice or receipt was issued, while the duplicate shall be kept and preserved by the issuer, also in his place of business, for a like period.

The Commissioner may, in meritorious cases, exempt any person subject to an internal revenue tax from compliance with the provisions of this Section.

[22] SEC. 238. **Printing of Receipts or Sales or Commercial Invoices.** – All persons who are engaged in business shall secure from the Bureau of Internal Revenue an authority to print receipts or sales or commercial invoices before a printer can print the same.

No authority to print receipts or sales or commercial invoices shall be granted unless the receipts or invoices to be printed are serially numbered and shall show, among other things, the name, business style, Taxpayer Identification Number (TIN) and business address of the person or entity to use the same, and such other information that may be required by rules and regulations to be promulgated by the Secretary of Finance, upon recommendation of the Commissioner.

other evidence presented by Silicon, *i.e.,* the certification of inward remittance, export declarations, and airway bills were likewise found to be insufficient to prove actual exportation of goods.

With respect to the claim of ₱44,560,949.00 representing Silicon's input VAT paid on imported goods, the same was not granted by the CTA Second Division since Silicon did not present duly machine-validated Import Entry and Revenue Declarations or Bureau of Customs official receipts or any other document proving actual payment of VAT on the imported goods as required under Section 4.104-5[23] of Revenue Regulations No. 7-95.

All persons who print receipt or sales or commercial invoices shall maintain a logbook/register of taxpayers who availed of their printing services. The logbook/register shall contain the following information:

(1) Names, Taxpayer Identification Numbers of the persons or entities for whom the receipts or sales or commercial invoices were printed; and

(2) Number of booklets, number of sets per booklet, number of copies per set and the serial numbers of the receipts or invoices in each booklet.

[23] SEC. 4.104-5. **Substantiation of claims for input tax credit.** – (a) Input taxes shall be allowed only if the domestic purchase of goods, properties or services is made in the course of trade or business. The input tax should be supported by an invoice or receipt showing the information as required under Sections 108(a) and 238 of the Code. Input tax on purchases of real property should be supported by a copy of the public instrument, *i.e.*, deed of absolute sale, deed of conditional sale, contract/agreement to sell, *etc*., together with the VAT receipt issued by the seller.

A cash register machine tape issued to a VAT-registered buyer by a VAT-registered seller from a machine duly registered with the BIR in lieu of the regular sales invoice, shall constitute valid proof of substantiation of tax credit only if the name and TIN of the purchaser is indicated in the receipt and authenticated by a duly authorized representative of the seller.

(b) Input tax on importations shall be supported with the import entry or other equivalent document showing actual payment of VAT on the imported goods.

(c) Presumptive input tax shall be supported by an inventory of goods as shown in a detailed list to be submitted to the BIR.

(d) Input tax on "deemed sale" transactions shall be substantiated with the required invoices.

(e) Input tax from payments made to non-residents shall be supported by a copy of the VAT declaration/return filed by the resident licensee/lessee in behalf of the non-resident licensor/lessor evidencing remittance of the VAT due.

Neither did Silicon submit any evidence to prove that the subject imported capital equipment qualify as capital goods pursuant to Section 4.106-1(b)[24] of Revenue Regulations No. 7-95.

Silicon filed a motion for reconsideration from the aforementioned decision but the motion was denied in a Resolution[25] dated June 22, 2006.

Likewise, in a Decision[26] dated June 14, 2006 in CTA Case No. 6493, the CTA First Division denied Silicon's claim for refund or tax credit of ₱20,411,419.07 for the second quarter of 2000 on the ground that its reported export sales did not qualify for zero-rating under Section 106(A)(2)(a)(1) of the NIRC since the sales invoices were not duly registered VAT sales invoices containing the required information, particularly the BIR authority to print, Silicon's TIN-VAT number and the imprinted word "zero-rated."

On October 5, 2006, Silicon's motion for reconsideration was denied by the CTA First Division.[27]

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[24] SEC. 4.106-1. **Refunds or tax credits of input tax.** – x x x

(b) *Capital Goods*. – Only a VAT-registered person may apply for issuance of a tax credit certificate or refund of input taxes paid on capital goods imported or locally purchased. The refund shall be allowed to the extent that such input taxes have not been applied against output taxes. The application should be made within two (2) years after the close of the taxable quarter when the importation or purchase was made.

Refund of input taxes on capital goods shall be allowed only to the extent that such capital goods are used in VAT taxable business. If it is also used in exempt operations, the input tax refundable shall only be the ratable portion corresponding to the taxable operations.

"*Capital goods or properties*" refer to goods or properties with estimated useful life greater than one year and which are treated as depreciable assets under Section 29(f), used directly or indirectly in the production or sale of taxable goods or services.

[25] *Rollo* (G.R. No. 184360), pp. 179-180.

[26] *Rollo* (G.R. No. 184361), pp. 106-117. Penned by Associate Justice Caesar A. Casanova with Associate Justice Lovell R. Bautista concurring and Presiding Justice Ernesto D. Acosta dissenting.

[27] *Id.* at 154-156.

Silicon appealed the two decisions of the CTA in Division to the CTA *En Banc* as CTA E.B. No. 209 and CTA E.B. No. 219.

Decision of the CTA En Banc (CTA E.B. Nos. 209 & 219)

On **February 18, 2008**, the CTA *En Banc* rendered the herein first assailed Decision in CTA E.B. No. 219 partially granting the petition for review and ordering the CIR to refund or issue a tax credit certificate in favor of Silicon Philippines in the reduced amount of ₱2,139,431.00 representing its unutilized input VAT attributable to its zero-rated sales for the period April 1, 2000 to June 30, 2000. After reviewing the records, the CTA *En Banc* stated that the amount of ₱13,916,752.43 may be a valid claim for tax credit or refund which is composed of input VAT on local purchases of ₱11,777,321.43 and input VAT on importations of ₱2,139,431.00. However, because Silicon is a BOI-registered entity with 100% exports and sales of properties or services made by VAT-registered suppliers to Silicon are automatically zero-rated, there is no VAT that has to be passed on to Silicon. Consequently, Silicon would not gain input taxes on its purchases of goods, properties or services. Thus, the CTA *En Banc* ruled that in the absence of any clear and convincing proof that Silicon's local suppliers passed on or shifted the VAT on such domestic purchases to Silicon, Silicon cannot claim the amount of ₱11,777,321.43 as input tax credits on its domestic purchases for the period April 1, 2000 to June 30, 2000.

On **February 20, 2008**, the CTA *En Banc* also rendered the second assailed Decision in CTA E.B. No. 209 denying the petition for review for lack of merit. After it reviewed and examined the invoices and other documentary evidence of Silicon for the first quarter of 1999, the CTA *En Banc* found that Silicon's valid input VAT for refund was only ₱9,531,635.69. But since the DOF had already granted Silicon a tax credit certificate on January 24, 2002 in the amount of ₱9,948,285.73, the CTA *En Banc* held that Silicon is no longer entitled to refund or issuance of a tax credit certificate for its input tax for the first quarter of 1999.

The Consolidated Petitions before this Court

In **G.R. No. 184360**, petitioner Silicon assails the Decision dated February 20, 2008 and the Resolution dated September 2, 2008 of the CTA *En Banc* in CTA E.B. Case No. 209.

In its Memorandum, Silicon discussed two important issues. One, whether the CTA *En Banc* erred in denying its claim for refund of input VAT derived from domestic purchases of goods and services attributable to its zero-rated sales on the ground of failure to imprint the words "TIN-VAT" and "ZERO-RATED" on its export sales invoices. And two, whether the CTA *En Banc* erred in denying Silicon's claim for refund on the ground that Silicon failed to prove its input VAT derived from its importation of capital goods and equipment and in not considering the recommendation and findings of the Court-commissioned Independent Certified Public Accountant that Silicon has substantially supported its export sales, importation of capital goods/equipment and its input VAT on local purchases.

In **G.R. Nos. 184384 & 184361**, Silicon and the CIR assail the Decision dated February 18, 2008 and the Resolution dated September 2, 2008 of the CTA *En Banc* in CTA E.B. No. 219 which ordered the CIR to refund, or issue a tax credit certificate to Silicon for the amount of ₱2,139,431.00 (from the original claim of ₱20,411,419.07) representing its unutilized excess input VAT on domestic purchases of goods and services and importation of goods/capital equipment attributable to its zero-rated sales for the period April 1, 2000 to June 30, 2000.

The issues raised in the three petitions boil down to (1) whether the CTA *En Banc* correctly denied Silicon's claim for refund or issuance of a tax credit certificate for its input VAT for its domestic purchases of goods and services and importation of goods/capital equipment attributable to zero-rated sales for the period January 1, 1999 to March 31, 1999; and (2) whether the CTA *En Banc* correctly ordered the CIR to refund or issue a tax credit certificate in favor of Silicon for the reduced amount of ₱2,139,431.00 representing Silicon's unutilized input VAT attributable to its zero-rated sales for the period April 1, 2000 to June 30, 2000.

Notwithstanding the above issues, we emphasize that when a case is on appeal, this Court has the authority to review matters not specifically raised or assigned as error if their consideration is necessary in reaching a just conclusion of the case.[28]

In the present case, while the parties never raised as an issue the timeliness of Silicon's judicial claims, we deem it proper to look into whether the petitions for review filed by Silicon before the CTA were filed within the prescribed period provided under the Tax Code in order to determine whether the CTA validly acquired jurisdiction over the petitions filed by Silicon.

The pertinent provision, Section 112(C) (formerly subparagraph D)[29] of the NIRC reads:

> SEC. 112. *Refunds or Tax Credits of Input Tax.* –
>
> x x x x x x x x x
>
> (C) *Period within which Refund or Tax Credit of Input Taxes shall be Made.* – In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes **within one hundred twenty (120) days from the date of submission of complete documents** in support of the application filed in accordance with Subsection (A) hereof.
>
> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application **within the period prescribed above, the taxpayer affected may, within (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period,** appeal the decision or the unacted claim with the Court of Tax Appeals. (Emphasis supplied.)

The above-mentioned provision expressly grants the CIR 120 days within which to decide the taxpayer's claim for refund or tax credit. In addition, the taxpayer is granted a 30-day period

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[28] *Aliling v. Feliciano*, G. R. No. 185829, April 25, 2012, 671 SCRA 186, 198-199.

[29] In R.A. No. 8424, the section is number 112(D). R.A. No. 9337 re-numbered the section to 112(C). In this Decision, we refer to Section 112(D) under R.A. No. 8424 as Section 112(C) as it is currently numbered.

to appeal to the CTA the decision or inaction of the CIR after the 120-day period.

Meanwhile, the charter of the CTA, Republic Act (R.A.) No. 1125, as amended, provides:

> Section 7. Jurisdiction. – The CTA shall exercise:
>
> a. Exclusive appellate jurisdiction to review by appeal, as herein provided:
>
> **1. Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes,** fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue or other laws administered by the Bureau of Internal Revenue;
>
> **2. Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes**, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, **where the National Internal Revenue Code provides a specific period of action, in which case the inaction shall be deemed a denial**;
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> x x x x x x x x x (Emphasis supplied.)

The CTA has exclusive appellate jurisdiction to review on appeal decisions of the CIR in cases involving refunds of internal revenue taxes. Moreover, if the CIR fails to decide within the 120-day period provided by law, such inaction shall be deemed a denial of the application for tax refund which the taxpayer can elevate to the CTA through a petition for review.

In the recently decided consolidated cases of *Commissioner of Internal Revenue v. San Roque Power Corporation*,[30] *(San Roque* for brevity*)* this Court stressed the mandatory and jurisdictional nature of the 120+30 day period provided under Section 112(C) of the NIRC. Therein, we ruled that

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[30] G.R. Nos. 187485, 196113 & 197156, February 12, 2013, 690 SCRA 336.

x x x The application of the 120+30 day periods was first raised in *Aichi*, which adopted the *verba legis* rule in holding that the 120+30 day periods are mandatory and jurisdictional. The language of Section 112(C) is plain, clear, and unambiguous. When Section 112(C) states that "the Commissioner shall grant a refund or issue the tax credit within one hundred twenty (120) days from the date of submission of complete documents," the law clearly gives the Commissioner 120 days within which to decide the taxpayer's claim. Resort to the courts prior to the expiration of the 120-day period is a patent violation of the doctrine of exhaustion of administrative remedies, a ground for dismissing the judicial suit due to prematurity. Philippine jurisprudence is awash with cases affirming and reiterating the doctrine of exhaustion of administrative remedies. Such doctrine is basic and elementary.

When Section 112(C) states that "the taxpayer affected **may**, within thirty (30) days from receipt of the decision denying the claim or after the expiration of the one hundred twenty-day period, appeal the decision or the unacted claim with the Court of Tax Appeals," the law does not make the 120+30 day periods optional just because the law uses the word "**may**." The word "may" simply means that the taxpayer **may or may not appeal** the decision of the Commissioner within 30 days from receipt of the decision, or within 30 days from the expiration of the 120-day period. Certainly, by no stretch of the imagination can the word "may" be construed as making the 120+30 day periods optional, allowing the taxpayer to file a judicial claim one day after filing the administrative claim with the Commissioner.

The old rule that the taxpayer may file the judicial claim, without waiting for the Commissioner's decision if the two-year prescriptive period is about to expire, cannot apply because that rule was adopted before the enactment of the 30-day period. **The 30-day period was adopted precisely to do away with the old rule, so that under the VAT System the taxpayer will always have 30 days to file the judicial claim even if the Commissioner acts only on the 120th day, or does not act at all during the 120-day period**. With the 30-day period always available to the taxpayer, the taxpayer can no longer file a judicial claim for refund or credit of input VAT without waiting for the Commissioner to decide until the expiration of the 120-day period.

To repeat, a claim for tax refund or credit, like a claim for tax exemption, is construed strictly against the taxpayer. One of the conditions for a judicial claim of refund or credit under the VAT

System is compliance with the 120+30 day mandatory and jurisdictional periods. Thus, strict compliance with the 120+30 day periods is necessary for such a claim to prosper, whether before, during, or after the effectivity of the *Atlas* doctrine, except for the period from the issuance of BIR Ruling No. DA-489-03 on 10 December 2003 to 6 October 2010 when the *Aichi* doctrine was adopted, which again reinstated the 120+30 day periods as mandatory and jurisdictional.[31]

In the case of *Philex Mining Corporation v. Commissioner of Internal Revenue,* which was consolidated with the case of *San Roque*, this Court denied Philex's claim for refund since its petition for review was filed with the CTA beyond the 120+30 day period. The Court explained:

> Unlike San Roque and Taganito, Philex's case is not one of premature filing but of late filing. Philex did not file any petition with the CTA within the 120-day period. Philex did not also file any petition with the CTA within 30 days after the expiration of the 120-day period. Philex filed its judicial claim **long after** the expiration of the 120-day period, in fact 426 days after the lapse of the 120-day period. **In any event, whether governed by jurisprudence before, during, or after the *Atlas* case, Philex's judicial claim will have to be rejected because of late filing.** Whether the two-year prescriptive period is counted from the date of payment of the output VAT following the *Atlas* doctrine, or from the close of the taxable quarter when the sales attributable to the input VAT were made following the *Mirant* and *Aichi* doctrines, Philex's judicial claim was indisputably filed late.
>
> The *Atlas* doctrine cannot save Philex from the late filing of its judicial claim. The **inaction** of the Commissioner on Philex's claim during the 120-day period is, by express provision of law, "deemed a denial" of Philex's claim. Philex had 30 days from the expiration of the 120-day period to file its judicial claim with the CTA. Philex's failure to do so rendered the "deemed a denial" decision of the Commissioner final and inappealable. The right to appeal to the CTA from a decision or "deemed a denial" decision of the Commissioner is merely a statutory privilege, not a constitutional right. The exercise of such statutory privilege requires strict compliance with the

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[31] *Id.* at 397-399.

conditions attached by the statute for its exercise. Philex failed to comply with the statutory conditions and must thus bear the consequences.[32]

Also, in the recent case of *Commissioner of Internal Revenue v. Dash Engineering Philippines, Inc.*,[33] this Court likewise denied the claim for tax refund for having been filed late or after the expiration of the 30-day period from the denial by the CIR or failure of the CIR to make a decision within 120 days from the submission of the documents in support of its administrative claim. We held:

> Petitioner is entirely correct in its assertion that compliance with the periods provided for in the abovequoted provision is indeed mandatory and jurisdictional, as affirmed in this Court's ruling in *San Roque*, where the Court *En Banc* settled the controversy surrounding the application of the 120+30-day period provided for in Section 112 of the NIRC and reiterated the *Aichi* doctrine that the 120+30-day period is mandatory and jurisdictional. Nonetheless, the Court took into account the issuance by the Bureau of Internal Revenue (*BIR*) of BIR Ruling No. DA-489-03 which misled taxpayers by explicitly stating that taxpayers may file a petition for review with the CTA even before the expiration of the 120-day period given to the CIR to decide the administrative claim for refund. Even though observance of the periods in Section 112 is compulsory and failure to do so will deprive the CTA of jurisdiction to hear the case, such a strict application will be made from the effectivity of the Tax Reform Act of 1997 on January 1, 1998 until the present, except for the period from December 10, 2003 (the issuance of the erroneous BIR ruling) to October 6, 2010 (the promulgation of *Aichi*), during which taxpayers need not wait for the lapse of the 120+30-day period before filing their judicial claim for refund.[34]

After a careful perusal of the records in the instant case, we find that Silicon's judicial claims were filed late and way beyond the prescriptive period. Silicon's claims do not fall under the exception mentioned above. Silicon filed its Quarterly VAT Return

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[32] *Id.* at 389-390.

[33] G.R. No. 184145, December 11, 2013.

[34] *Id.* at 6-7.

for the 1st quarter of 1999 on April 22, 1999 and subsequently filed on August 6, 1999 a claim for tax credit or refund of its input VAT taxes for the same period. From August 6, 1999, the CIR had until December 4, 1999, the last day of the 120-day period, to decide Silicon's claim for tax refund. But since the CIR did not act on Silicon's claim on or before the said date, Silicon had until January 3, 2000, the last day of the 30-day period to file its judicial claim. However, Silicon failed to file an appeal within 30 days from the lapse of the 120-day period, and it only filed its petition for review with the CTA on March 30, 2001 which was **451 days late**. Thus, in consonance with our ruling in *Philex* in the *San Roque ponencia*, Silicon's judicial claim for tax credit or refund should have been dismissed for having been filed late. The CTA did not acquire jurisdiction over the petition for review filed by Silicon.

Similarly, Silicon's claim for tax refund for the second quarter of 2000 should have been dismissed for having been filed out of time. Records show that Silicon filed its claim for tax credit or refund on August 10, 2000. The CIR then had 120 days or until December 8, 2000 to grant or deny the claim. With the inaction of the CIR to decide on the claim which was deemed a denial of the claim for tax credit or refund, Silicon had until January 7, 2001 or 30 days from December 8, 2000 to file its petition for review with the CTA. However, Silicon again failed to comply with the 120+30 day period provided under Section 112(C) since it filed its judicial claim only on June 28, 2002 or **536 days late**. Thus, the petition for review, which was belatedly filed, should have been dismissed by the CTA which acquired no jurisdiction to act on the petition.

Courts are bound by prior decisions. Thus, once a case has been decided one way, courts have no choice but to resolve subsequent cases involving the same issue in the same manner.[35]

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[35] *J.R.A. Philippines, Inc. v. Commissioner of Internal Revenue*, G.R. No. 177127, October 11, 2010, 632 SCRA 517, 518, citing *Agencia Exquisite of Bohol, Incorporated v. Commissioner of Internal Revenue*, G.R. Nos. 150141, 157359 and 158644, February 12, 2009, 578 SCRA 539, 550.

As this Court has repeatedly emphasized, a tax credit or refund, like tax exemption, is strictly construed against the taxpayer.[36] The taxpayer claiming the tax credit or refund has the burden of proving that he is entitled to the refund by showing that he has strictly complied with the conditions for the grant of the tax refund or credit. Strict compliance with the mandatory and jurisdictional conditions prescribed by law to claim such tax refund or credit is essential and necessary for such claim to prosper.[37] Noncompliance with the mandatory periods, nonobservance of the prescriptive periods, and nonadherence to exhaustion of administrative remedies bar a taxpayer's claim for tax refund or credit, whether or not the CIR questions the numerical correctness of the claim of the taxpayer.[38] For failure of Silicon to comply with the provisions of Section 112(C) of the NIRC, its judicial claims for tax refund or credit should have been dismissed by the CTA for lack of jurisdiction.

Considering the foregoing disquisition, we deem it unnecessary to rule upon the other issues raised by the parties in the three consolidated petitions.

WHEREFORE, the assailed February 18, 2008 Decision and September 2, 2008 Resolution of the Court of Tax Appeals *En Banc* in CTA E.B. No. 219 and the assailed February 20, 2008 Decision and September 2, 2008 Resolution of the Court of Tax Appeals *En Banc* in CTA E.B. No. 209 are **REVERSED and SET ASIDE**. Silicon's judicial claims for refund for the 1st quarter of 1999 and the 2nd quarter of 2000 through its petitions for review docketed as CTA Case Nos. 6263 and 6493 filed with the Court of Tax Appeals are hereby **DISMISSED** for having been filed out of time.

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[36] *Microsoft Philippines, Inc. v. Commissioner of Internal Revenue*, G.R. No. 180173, April 6, 2011, 647 SCRA 398, 403.

[37] *Mindanao II Geothermal Partnership v. Commissioner of Internal Revenue,* G.R. Nos. 193301 & 194637, March 11, 2013, 693 SCRA 49, 77, citing the case of *Commissioner of Internal Revenue v. San Roque Power Corporation, supra* note 30, at 383.

[38] *Id.* at 78.

No pronouncement as to costs.

SO ORDERED.

Sereno, C.J. (Chairperson), Leonardo-de Castro, Bersamin, and *Reyes, JJ.*, concur.

FIRST DIVISION

[G.R. No. 188497. February 19, 2014]

COMMISSIONER OF INTERNAL REVENUE, *petitioner, vs.* **PILIPINAS SHELL PETROLEUM CORPORATION,** *respondent.*

SYLLABUS

1. TAXATION; NATIONAL INTERNAL REVENUE CODE (NIRC); EXCISE TAXES; TWO TYPES OF EXCISE TAXES, DISTINGUISHED.— Under Section 129 of the NIRC, excise taxes are those applied to goods manufactured or produced in the Philippines for domestic sale or consumption or for any other disposition and to things imported. Excise taxes as used in our Tax Code fall under two types – (1) *specific tax* which is based on weight or volume capacity and other physical unit of measurement, and (2) *ad valorem tax* which is based on selling price or other specified value of the goods. Aviation fuel is subject to specific tax under Section 148 (g) which attaches to said product "as soon as they are in existence as such."

2. ID.; ID.; ID.; THE EXCISE TAX IMPOSED ON PETROLEUM PRODUCTS IS A DIRECT LIABILITY OF THE MANUFACTURER WHO CANNOT THUS INVOKE THE EXERCISE OF EXEMPTION GRANTED TO ITS BUYERS WHO ARE INTERNATIONAL CARRIERS.— On the basis of *Philippine Acetylene*, we held that a tax

exemption being enjoyed by the buyer cannot be the basis of a claim for tax exemption by the manufacturer or seller of the goods for any tax due to it as the manufacturer or seller. The excise tax imposed on petroleum products under Section 148 is the direct liability of the manufacturer who cannot thus invoke the excise tax exemption granted to its buyers who are international carriers. And following our pronouncement in *Maceda v. Macarig, Jr.* we further ruled that Section 135(a) should be construed as prohibiting the shifting of the burden of the excise tax to the international carriers who buy petroleum products from the local manufacturers. Said international carriers are thus allowed to purchase the petroleum products without the excise tax component which otherwise would have been added to the cost or price fixed by the local manufacturers or distributors/sellers. Excise tax on aviation fuel used for international flights is practically nil as most countries are signatories to the 1944 Chicago Convention on International Aviation (Chicago Convention). Article 24 of the Convention has been interpreted to prohibit taxation of aircraft fuel consumed for international transport. Taxation of international air travel is presently at such low level that there has been an intensified debate on whether these should be increased to "finance development rather than simply to augment national tax revenue" considering the "cross-border environmental damage" caused by aircraft emissions that contribute to global warming, not to mention noise pollution and congestion at airports). Mutual exemptions given under bilateral air service agreements are seen as main legal obstacles to the imposition of indirect taxes on aviation fuel. In response to present realities, the International Civil Aviation Organization (ICAO) has adopted policies on charges and emission-related taxes and charges. Section 135(a) of the NIRC and earlier amendments to the Tax Code represent our Governments' compliance with the Chicago Convention, its subsequent resolutions/annexes, and the air transport agreements entered into by the Philippine Government with various countries.

3. ID.; ID.; ID.; THE STATUTORY TAXPAYER IS ENTITLED TO A REFUND OR CREDIT OF THE EXCISE TAX ON PETROLEUM PRODUCTS SOLD TO INTERNATIONAL CARRIERS; RATIONALE.— We therefore hold that respondent, as the statutory taxpayer who is directly liable to

pay the excise tax on its petroleum products, is entitled to a refund or credit of the excise taxes it paid for petroleum products sold to international carriers, the latter having been granted exemption from the payment of said excise tax under Sec. 135 (a) of the NIRC.

BERSAMIN, *J.*, *separate opinion*:

1. TAXATION; CLASSIFICATION OF TAXES; DISTINGUISHED. — Taxes are classified, according to subject matter or object, into three groups, to wit: (1) personal, capitation or poll taxes; (2) property taxes; and (3) excise or license taxes. Personal, capitation or poll taxes are fixed amounts imposed upon residents or persons of a certain class without regard to their property or business, an example of which is the basic community tax. Property taxes are assessed on property or things of a certain class, whether real or personal, in proportion to their value or other reasonable method of apportionment, such as the real estate tax. Excise or license taxes are imposed upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation, profession or business. Income tax, value-added tax, estate and donor's tax fall under the third group.

2. ID.; NATIONAL INTERNAL REVENUE CODE (NIRC); EXCISE TAX UNDER TITLE VI OF THE NLRC; THE ACCRUAL OF TAX LIABILITY IS CONTINGENT ON THE PRODUCTION, MANUFACTURE OR IMPORTATION OF THE TAXABLE GOODS AND THE INTENTION OF THE MANUFACTURER, PRODUCER OR IMPORTER TO HAVE THE GOODS LOCALLY SOLD OR CONSUMED OR DISPOSED IN ANY OTHER MANNER.— Excise tax, as a classification of tax according to object, must not be confused with the excise tax under Title VI of the NIRC. The term "excise tax" under Title VI of the 1997 NIRC derives its definition from the 1986 NIRC, and relates to taxes applied to goods manufactured or produced in the Philippines *for domestic sale or consumption or for any other disposition and to things imported*. In contrast, an excise tax that is imposed directly on certain specified goods – goods manufactured or produced in the Philippines, or things imported – is undoubtedly a tax on property. x x x The production,

manufacture or importation of the goods belonging to any of the categories enumerated in Title VI of the NIRC (*i.e.*, alcohol products, tobacco products, petroleum products, automobiles and non-essential goods, mineral products) are not the sole determinants for the proper levy of the excise tax. It is further required that the goods be manufactured, produced or imported for *domestic* sale, consumption or any other disposition. The accrual of the tax liability is, therefore, contingent on the production, manufacture or importation of the taxable goods *and* the intention of the manufacturer, producer or importer to have the goods locally sold or consumed or disposed in any other manner. This is the reason why the accrual and liability for the payment of the excise tax are imposed directly on the manufacturer or producer of the taxable goods, and arise before the removal of the goods from the place of their production. x x x Simply stated, the accrual and payment of the excise tax under Title VI of the NIRC materially rest on the fact of actual production, manufacture or importation of the taxable goods *in the Philippines* and on their *presumed* or *intended* domestic sale, consumption or disposition. Considering that the excise tax attaches to the goods upon the accrual of the manufacturer's direct liability for its payment, the subsequent sale, consumption or other disposition of the goods becomes relevant only to determine whether any exemption or tax relief may be granted thereafter.

3. ID.; ID.; ID.; UPON THE SALE OF THE PETROLEUM PRODUCTS TO THE INTERNATIONAL CARRIERS, THE GOODS BECAME EXEMPT FROM THE EXCISE TAX BY THE EXPRESS PROVISION OF SECTION 135(A) OF THE NIRC.— Verily, it is the *actual* sale, consumption or disposition of the taxable goods that *confirms* the proper tax treatment of goods previously subjected to the excise tax. If any of the goods enumerated under Title VI of the NIRC are manufactured or produced in the Philippines and eventually sold, consumed, or disposed of in any other manner *domestically*, therefore, there can be no claim for any tax relief inasmuch as the excise tax was properly levied and collected from the manufacturer-seller. x x x **However, upon the sale of the petroleum products to the international carriers, the goods became exempt from the excise tax by the express provision of Section 135(a) of the NIRC. In the latter instance, the fact of sale to the international carriers of the petroleum**

products previously subjected to the excise tax confirms the proper tax treatment of the goods as exempt from the excise tax. x x x Given the nature of the excise tax on petroleum products as a tax on property, the tax exemption espoused by Article 24(a) of the *Chicago Convention*, as now embodied in Section 135(a) of the NIRC, is clearly conferred on the aviation fuel or petroleum product on-board international carriers. Consequently, the manufacturer's or producer's sale of the petroleum products to international carriers for their use or consumption outside the Philippines operates to bring the tax exemption of the petroleum products into full force and effect.

4. ID.; ID.; ID.; ID.; THE PROPER PARTY TO QUESTION OR SEEK A REFUND OF AN INDIRECT TAX IS THE STATUTORY TAXPAYER, THE PERSON ON WHOM THE TAX IS IMPOSED BY LAW AND WHO PAID THE SAME; CLARIFIED.— The excise taxes are of the nature of indirect taxes, the liability for the payment of which may fall on a person other than whoever actually bears the burden of the tax. x x x Accordingly, the option of shifting the burden to pay the excise tax rests on the statutory taxpayer, which is the manufacturer or producer in the case of the excise taxes imposed on the petroleum products. Regardless of who shoulders the burden of tax payment, however, the Court has ruled as early as in the 1960s that the proper party to question or to seek a refund of an indirect tax is the statutory taxpayer, the person on whom the tax is imposed by law and who paid the same, even if he shifts the burden thereof to another. x x x The *Silkair* rulings involving the excise taxes on the petroleum products sold to international carriers firmly hold that the proper party to claim the refund of excise taxes paid is the manufacturer-seller. x x x Section 135(a) of the NIRC cannot be further construed as granting the excise tax exemption to the international carrier to whom the petroleum products are sold considering that the international carrier has not been subjected to excise tax at the outset. To reiterate, the excise tax is levied on the petroleum products because it is a tax on property. Levy is the act of imposition by the Legislature such as by its enactment of a law. The law enacted here is the NIRC whereby the excise tax is imposed on the petroleum products, the liability for the payment of which is further statutorily imposed on the domestic petroleum manufacturer. Accordingly, the exemption

must be allowed to the petroleum products because it is on them that the tax is imposed. **The tax status of an international carrier to whom the petroleum products are sold is not based on exemption; rather, it is based on the absence of a law imposing the excise tax on it.** This further supports the position that the burden passed on by the domestic petroleum manufacturer is not anymore in the nature of a tax – although resulting from the previously-paid excise tax – but as an additional cost component in the selling price. Consequently, the purchaser of the petroleum products to whom the burden of the excise tax has been shifted, not being the statutory taxpayer, cannot claim a refund of the excise tax paid by the manufacturer or producer.

APPEARANCES OF COUNSEL

The Solicitor General for petitioner.
Simeon V. Marcelo, et al. for respondent.

R E S O L U T I O N

VILLARAMA, JR., *J.*:

For resolution are the Motion for Reconsideration dated May 22, 2012 and Supplemental Motion for Reconsideration dated December 12, 2012 filed by Pilipinas Shell Petroleum Corporation (respondent). As directed, the Solicitor General on behalf of petitioner Commissioner of Internal Revenue filed their Comment, to which respondent filed its Reply.

In our Decision promulgated on April 25, 2012, we ruled that the Court of Tax Appeals (CTA) erred in granting respondent's claim for tax refund because the latter failed to establish a tax exemption in its favor under Section 135(a) of the National Internal Revenue Code of 1997 (NIRC).

WHEREFORE, the petition for review on *certiorari* is GRANTED. The Decision dated March 25, 2009 and Resolution dated June 24, 2009 of the Court of Tax Appeals *En Banc* in CTA EB No. 415 are hereby REVERSED and SET ASIDE. The claims for tax refund or

credit filed by respondent Pilipinas Shell Petroleum Corporation are DENIED for lack of basis.

No pronouncement as to costs.

SO ORDERED.[1]

Respondent argues that a plain reading of Section 135 of the NIRC reveals that it is the petroleum products sold to international carriers which are exempt from excise tax for which reason no excise taxes are deemed to have been due in the first place. It points out that excise tax being an indirect tax, Section 135 in relation to Section 148 should be interpreted as referring to a tax exemption from the point of production and removal from the place of production considering that it is only at that point that an excise tax is imposed. The situation is unlike the value-added tax (VAT) which is imposed at every point of turnover – from production to wholesale, to retail and to end-consumer. Respondent thus concludes that exemption could only refer to the imposition of the tax on the statutory seller, in this case the respondent. This is because when a tax paid by the statutory seller is passed on to the buyer it is no longer in the nature of a tax but an added cost to the purchase price of the product sold.

Respondent also contends that our ruling that Section 135 only prohibits local petroleum manufacturers like respondent from shifting the burden of excise tax to international carriers has adverse economic impact as it severely curtails the domestic oil industry. Requiring local petroleum manufacturers to absorb the tax burden in the sale of its products to international carriers is contrary to the State's policy of "protecting gasoline dealers and distributors from unfair and onerous trade conditions," and places them at a competitive disadvantage since foreign oil producers, particularly those whose governments with which we have entered into bilateral service agreements, are not subject to excise tax for the same transaction. Respondent fears this could lead to cessation of supply of petroleum products to international carriers, retrenchment of employees of domestic

[1] *Commissioner of Internal Revenue v. Pilipinas Shell Petroleum Corporation*, G.R. No. 188497, April 25, 2012, 671 SCRA 241, 264.

manufacturers/producers to prevent further losses, or worse, shutting down of their production of jet A-1 fuel and aviation gas due to unprofitability of sustaining operations. Under this scenario, participation of Filipino capital, management and labor in the domestic oil industry is effectively diminished.

Lastly, respondent asserts that the imposition by the Philippine Government of excise tax on petroleum products sold to international carriers is in violation of the Chicago Convention on International Aviation ("Chicago Convention") to which it is a signatory, as well as other international agreements (the Republic of the Philippines' air transport agreements with the United States of America, Netherlands, Belgium and Japan).

In his Comment, the Solicitor General underscores the statutory basis of this Court's ruling that the exemption under Section 135 does not attach to the products. Citing *Exxonmobil Petroleum & Chemical Holdings, Inc.-Philippine Branch v. Commissioner of Internal Revenue*,[2] which held that the excise tax, when passed on to the purchaser, becomes part of the purchase price, the Solicitor General claims this refutes respondent's theory that the exemption attaches to the petroleum product itself and not to the purchaser for it would have been erroneous for the seller to pay the excise tax and inequitable to pass it on to the purchaser if the excise tax exemption attaches to the product.

As to respondent's reliance in the cases of *Silkair (Singapore) Pte. Ltd. v. Commissioner of Internal Revenue*[3] and *Exxonmobil Petroleum & Chemical Holdings, Inc.-Philippine Branch v. Commissioner of Internal Revenue*,[4] the Solicitor General points out that there was no pronouncement in these cases that petroleum manufacturers selling petroleum products to international carriers are exempt from paying excise taxes. In fact, *Exxonmobil* even cited the case of *Philippine Acetylene Co, Inc. v. Commissioner of Internal Revenue*.[5] Further, the ruling in *Maceda v. Macaraig,*

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[2] G.R. No. 180909, January 19, 2011, 640 SCRA 203.

[3] G.R. No. 166482, January 25, 2012, 664 SCRA 33.

[4] *Supra* note 2.

[5] No. L-19707, August 17, 1967, 20 SCRA 1056.

Jr.[6] which confirms that Section 135 does not intend to exempt manufacturers or producers of petroleum products from the payment of excise tax.

The Court will now address the principal arguments proffered by respondent: (1) Section 135 intended the tax exemption to apply to petroleum products at the point of production; (2) *Philippine Acetylene Co., Inc. v. Commissioner of Internal Revenue* and *Maceda v. Macaraig, Jr.* are inapplicable in the light of previous rulings of the Bureau of Internal Revenue (BIR) and the CTA that the excise tax on petroleum products sold to international carriers for use or consumption outside the Philippines attaches to the article when sold to said international carriers, as it is the article which is exempt from the tax, not the international carrier; and (3) the Decision of this Court will not only have adverse impact on the domestic oil industry but is also in violation of international agreements on aviation.

Under Section 129 of the NIRC, excise taxes are those applied to goods manufactured or produced in the Philippines for domestic sale or consumption or for any other disposition and to things imported. Excise taxes as used in our Tax Code fall under two types — (1) *specific tax* which is based on weight or volume capacity and other physical unit of measurement, and (2) *ad valorem tax* which is based on selling price or other specified value of the goods. Aviation fuel is subject to specific tax under Section 148 (g) which attaches to said product "as soon as they are in existence as such."

On this point, the clarification made by our esteemed colleague, Associate Justice Lucas P. Bersamin regarding the traditional meaning of excise tax adopted in our Decision, is well-taken.

The transformation undergone by the term "excise tax" from its traditional concept up to its current definition in our Tax Code was explained in the case of *Petron Corporation v. Tiangco*,[7] as follows:

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[6] G.R. No. 88291, June 8, 1993, 223 SCRA 217.

[7] G.R. No. 158881, April 16, 2008, 551 SCRA 484.

Admittedly, the proffered definition of an excise tax as "a tax upon the performance, carrying on, or exercise of some right, privilege, activity, calling or occupation" derives from the compendium *American Jurisprudence*, popularly referred to as *Am Jur* and has been cited in previous decisions of this Court, including those cited by Petron itself. Such a definition would not have been inconsistent with previous incarnations of our Tax Code, such as the NIRC of 1939, as amended, or the NIRC of 1977 because in those laws the term "excise tax" was not used at all. In contrast, the nomenclature used in those prior laws in referring to taxes imposed on specific articles was "specific tax." Yet beginning with the National Internal Revenue Code of 1986, as amended, the term "excise taxes" was used and defined as applicable "to goods manufactured or produced in the Philippines… and to things imported." This definition was carried over into the present NIRC of 1997. Further, these two latest codes categorize two different kinds of excise taxes: "specific tax" which is imposed and based on weight or volume capacity or any other physical unit of measurement; and "*ad valorem* tax" which is imposed and based on the selling price or other specified value of the goods. In other words, **the meaning of "excise tax" has undergone a transformation, morphing from the *Am Jur* definition to its current signification which is a tax on certain specified goods or articles.**

The change in perspective brought forth by the use of the term "excise tax" in a different connotation was not lost on the departed author Jose Nolledo as he accorded divergent treatments in his 1973 and 1994 commentaries on our tax laws. Writing in 1973, and essentially alluding to the *Am Jur* definition of "excise tax," Nolledo observed:

> Are specific taxes, taxes on property or excise taxes –
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> > In the case of *Meralco v. Trinidad* ([G.R.] 16738, 1925) it was held that specific taxes are property taxes, a ruling which seems to be erroneous. Specific taxes are truly excise taxes for the fact that the value of the property taxed is taken into account will not change the nature of the tax. It is correct to say that specific taxes are taxes on the privilege to import, manufacture and remove from storage certain articles specified by law.

In contrast, after the tax code was amended to classify specific taxes as a subset of excise taxes, Nolledo, in his 1994 commentaries, wrote:

> 1. *Excise taxes*, as used in the Tax Code, refers to taxes applicable to certain specified goods or articles manufactured or produced in the Philippines for domestic sale or consumption or for any other disposition and to things imported into the Philippines. They are either *specific* or *ad valorem*.
>
> 2. *Nature of excise taxes.* – They are imposed directly on certain specified goods. (*infra*) They are, therefore, taxes on property. (see Medina *vs.* City of Baguio, 91 Phil. 854.)
>
> A tax is not excise where it does not subject directly the produce or goods to tax but indirectly as an incident to, or in connection with, the business to be taxed.

In their 2004 commentaries, De Leon and De Leon restate the *Am Jur* definition of excise tax, and observe that the term is "synonymous with 'privilege tax' and [both terms] are often used interchangeably." At the same time, they offer a caveat that "[e]xcise tax, as [defined by *Am Jur*], is not to be confused with excise tax imposed [by the NIRC] on certain specified articles manufactured or produced in, or imported into, the Philippines, 'for domestic sale or consumption or for any other disposition.'"

It is evident that *Am Jur* aside, the current definition of an excise tax is that of a tax levied on a specific article, rather than one "upon the performance, carrying on, or the exercise of an activity." This current definition was already in place when the Code was enacted in 1991, and we can only presume that it was what the Congress had intended as it specified that local government units could not impose "excise taxes on articles enumerated under the [NIRC]." This prohibition must pertain to the same kind of excise taxes as imposed by the NIRC, and not those previously defined "excise taxes" which were not integrated or denominated as such in our present tax law.[8] (Emphasis supplied.)

That excise tax as presently understood is a tax on property has no bearing at all on the issue of respondent's entitlement to refund. Nor does the nature of excise tax as an indirect tax supports respondent's postulation that the *tax exemption* provided in Sec. 135 attaches to the petroleum products themselves and consequently the domestic petroleum manufacturer is not liable

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[8] *Id.* at 492-493.

for the payment of excise tax *at the point of production*. As already discussed in our Decision, to which Justice Bersamin concurs, "the accrual and payment of the excise tax on the goods enumerated under Title VI of the NIRC prior to their removal at the place of production are absolute and admit of no exception." This also underscores the fact that the exemption from payment of excise tax is conferred on international carriers who purchased the petroleum products of respondent.

On the basis of *Philippine Acetylene*, we held that a tax exemption being enjoyed by the buyer cannot be the basis of a claim for tax exemption by the manufacturer or seller of the goods for any tax due to it as the manufacturer or seller. The excise tax imposed on petroleum products under Section 148 is the direct liability of the manufacturer who cannot thus invoke the excise tax exemption granted to its buyers who are international carriers. And following our pronouncement in *Maceda v. Macarig, Jr.* we further ruled that Section 135(a) should be construed as prohibiting the shifting of the burden of the excise tax to the international carriers who buy petroleum products from the local manufacturers. Said international carriers are thus allowed to purchase the petroleum products without the excise tax component which otherwise would have been added to the cost or price fixed by the local manufacturers or distributors/sellers.

Excise tax on aviation fuel used for international flights is practically nil as most countries are signatories to the 1944 Chicago Convention on International Aviation (Chicago Convention). Article 24[9] of the Convention has been interpreted

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[9] Art. 24. Customs Duty

(a) Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. This exemption shall not apply to any quantities or articles unloaded, except in accordance with the customs regulations of the State, which may require that they shall be kept under customs supervision.

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to prohibit taxation of aircraft fuel consumed for international transport. Taxation of international air travel is presently at such low level that there has been an intensified debate on whether these should be increased to "finance development rather than simply to augment national tax revenue" considering the "cross-border environmental damage" caused by aircraft emissions that contribute to global warming, not to mention noise pollution and congestion at airports).[10] Mutual exemptions given under bilateral air service agreements are seen as main legal obstacles to the imposition of indirect taxes on aviation fuel. In response to present realities, the International Civil Aviation Organization (ICAO) has adopted policies on charges and emission-related taxes and charges.[11]

Section 135(a) of the NIRC and earlier amendments to the Tax Code represent our Governments' compliance with the Chicago Convention, its subsequent resolutions/annexes, and the air transport agreements entered into by the Philippine Government with various countries. The rationale for exemption of fuel from national and local taxes was expressed by ICAO as follows:

> . . . The Council in 1951 adopted a Resolution and Recommendation on the taxation of fuel, a Resolution on the taxation of income and of aircraft, and a Resolution on taxes related to the sale or use of international air transport (cf. Doc 7145) which were further amended and amplified by the policy statements in Doc 8632 published in 1966. The Resolutions and Recommendation concerned were designed **to recognize the uniqueness of civil aviation and the need to accord tax exempt status to certain aspects of the operations of international air transport and were adopted because multiple taxation on the aircraft, fuel, technical supplies and the income of international air transport, as well as taxes on its sale and**

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[10] See "*Indirect Taxes on International Aviation*" by Michael Keen and Jon Strand, IMF Working Paper published in May 2006, sourced from Internet - *http://www.imf.org/external/pubs/ft/wp/2006/wp06124.pdf*

[11] Set out in the *Statements by the Council to Contracting States for Airports and Air Navigation Services* (Doc 9082) and Council Resolution on environmental charges adopted in December 1996.

use, were considered as major obstacles to the further development of international air transport. Non-observance of the principle of reciprocal exemption envisaged in these policies was also seen as risking retaliatory action with adverse repercussions on international air transport which plays a major role in the development and expansion of international trade and travel.[12]

In the 6th Meeting of the Worldwide Air Transport Conference (ATCONF) held on March 18-22, 2013 at Montreal, among matters agreed upon was that "the proliferation of various taxes and duties on *air transport* could have negative impact on the sustainable development of air transport and on consumers." Confirming that ICAO's policies on taxation remain valid, the Conference recommended that "ICAO promote more vigorously its policies and with industry stakeholders to develop analysis and guidance to States on the impact of taxes and other levies on air transport."[13] Even as said conference was being held, on March 7, 2013, President Benigno Aquino III has signed into law Republic Act (R.A.) No. 10378[14] granting tax incentives to foreign carriers which include exemption from the 12% value-added tax (VAT) and 2.5% gross Philippine billings tax (GPBT). GPBT is a form of income tax applied to international airlines or shipping companies. The law, based on reciprocal grant of similar tax exemptions to Philippine carriers, is expected to increase foreign tourist arrivals in the country.

Indeed, the avowed purpose of a tax exemption is always "some public benefit or interest, which the law-making body

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[12] *ICAO's Policies on Taxation in the Field of International Air Transport* (Document 8632-C/968), Introduction, Second Edition, January 1994. Sourced from Internet - *http://www.icao.int/publications/Documents/8632_2ed_en.pdf*

[13] *Outcome of the Sixth Worldwide Air Transport Conference*, Item 2.6, accessed at - *http://www.icao.int/Meetings/a38/Documents/WP/wp056_rev1_en.pdf*

[14] AN ACT RECOGNIZING THE PRINCIPLE OF RECIPROCITY AS BASIS FOR THE GRANT OF INCOME TAX EXEMPTIONS TO INTERNATIONAL CARRIERS AND RATIONALIZING OTHER TAXES IMPOSED THEREON BY AMENDING SECTIONS 28(A)(3)(A), 109, 118 AND 236 OF THE NATIONAL REVENUE CODE (NIRC), AS AMENDED, AND FOR OTHER PURPOSES (Approved on March 07, 2013).

considers sufficient to offset the monetary loss entailed in the grant of the exemption."[15] The exemption from excise tax of aviation fuel purchased by international carriers for consumption outside the Philippines fulfills a treaty obligation pursuant to which our Government supports the promotion and expansion of international travel through avoidance of multiple taxation and ensuring the viability and safety of international air travel. In recent years, developing economies such as ours focused more serious attention to significant gains for business and tourism sectors as well. Even without such recent incidental benefit, States had long accepted the need for international cooperation in maintaining a capital intensive, labor intensive and fuel intensive airline industry, and recognized the major role of international air transport in the development of international trade and travel.

Under the basic international law principle of *pacta sunt servanda*, we have the duty to fulfill our treaty obligations in good faith. This entails harmonization of national legislation with treaty provisions. In this case, Sec. 135(a) of the NIRC embodies our compliance with our undertakings under the Chicago Convention and various bilateral air service agreements not to impose excise tax on aviation fuel purchased by international carriers from domestic manufacturers or suppliers. In our Decision in this case, we interpreted Section 135 (a) as prohibiting domestic manufacturer or producer to pass on to international carriers the excise tax it had paid on petroleum products upon their removal from the place of production, pursuant to Article 148 and pertinent BIR regulations. Ruling on respondent's claim for tax refund of such paid excise taxes on petroleum products sold to tax-exempt international carriers, we found no basis in the Tax Code and jurisprudence to grant the refund of an "erroneously or illegally paid" tax.

Justice Bersamin argues that "(T)he shifting of the tax burden by manufacturers-sellers is a business prerogative resulting from the collective impact of market forces," and that it is "erroneous

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[15] *Commissioner of Internal Revenue, et al. v. Botelho Shipping Corp., et al.,* 126 Phil. 846, 851.

to construe Section 135(a) only as a prohibition against the shifting by the manufacturers-sellers of petroleum products of the tax burden to international carriers, for such construction will deprive the manufacturers-sellers of their business prerogative to determine the prices at which they can sell their products."

We maintain that Section 135 (a), in fulfillment of international agreement and practice to exempt aviation fuel from excise tax and other impositions, prohibits the passing of the excise tax to international carriers who buys petroleum products from local manufacturers/sellers such as respondent. However, we agree that there is a need to reexamine the *effect* of denying the domestic manufacturers/sellers' claim for refund of the excise taxes they already paid on petroleum products sold to international carriers, and its serious implications on our Government's commitment to the goals and objectives of the Chicago Convention.

The Chicago Convention, which established the legal framework for international civil aviation, did not deal comprehensively with tax matters. Article 24 (a) of the Convention simply provides that fuel and lubricating oils on board an aircraft of a Contracting State, on arrival in the territory of another Contracting State and retained on board on leaving the territory of that State, shall be exempt from customs duty, inspection fees or similar national or local duties and charges. Subsequently, the exemption of airlines from national taxes and customs duties on spare parts and fuel has become a standard element of bilateral air service agreements (ASAs) between individual countries.

The importance of exemption from aviation fuel tax was underscored in the following observation made by a British author[16] in a paper assessing the debate on using tax to control aviation emissions and the obstacles to introducing excise duty on aviation fuel, thus:

Without any international agreement on taxing fuel, it is highly likely that moves to impose duty on international flights, either at

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[16] Antony Seely, *Taxing Aviation Fuel* (Standard Note SN00523, last updated 02 October 2012), House of Commons Library, accessed at *ww,parliament.uk/briefing-paper/SN00523.pdf*

a domestic or European level, would encourage 'tankering': carriers filling their aircraft as full as possible whenever they landed outside the EU to avoid paying tax. Clearly this would be entirely counterproductive. Aircraft would be travelling further than necessary to fill up in low-tax jurisdictions; in addition they would be burning up more fuel when carrying the extra weight of a full fuel tank.

With the prospect of declining sales of aviation jet fuel sales to international carriers on account of major domestic oil companies' unwillingness to shoulder the burden of excise tax, or of petroleum products being sold to said carriers by local manufacturers or sellers at still high prices, the practice of "tankering" would not be discouraged. This scenario does not augur well for the Philippines' growing economy and the booming tourism industry. Worse, our Government would be risking retaliatory action under several bilateral agreements with various countries. Evidently, construction of the tax exemption provision in question should give primary consideration to its broad implications on our commitment under international agreements.

In view of the foregoing reasons, we find merit in respondent's motion for reconsideration. We therefore hold that respondent, as the statutory taxpayer who is directly liable to pay the excise tax on its petroleum products, is entitled to a refund or credit of the excise taxes it paid for petroleum products sold to international carriers, the latter having been granted exemption from the payment of said excise tax under Sec. 135 (a) of the NIRC.

WHEREFORE, the Court hereby resolves to:

(1) **GRANT** the original and supplemental motions for reconsideration filed by respondent Pilipinas Shell Petroleum Corporation; and

(2) **AFFIRM** the Decision dated March 25, 2009 and Resolution dated June 24, 2009 of the Court of Tax Appeals *En Banc* in CTA EB No. 415; and **DIRECT** petitioner Commissioner of Internal Revenue to refund or to issue a tax credit certificate to Pilipinas Shell Petroleum Corporation in the amount of ₱95,014,283.00 representing

the excise taxes it paid on petroleum products sold to international carriers from October 2001 to June 2002.

SO ORDERED.

Sereno, C.J. (Chairperson) and *Reyes, J.,* concur.

Leonardo-de Castro, J., I concur but joins the opinion of *J.* Bersamin that the excise tax exemption applies to the product sold to international carriers and not to the latter.

Bersamin, J., please see separate opinion.

SEPARATE OPINION

BERSAMIN, *J.*:

In essence, the Resolution written for the Court by my esteemed colleague, Justice Martin S. Villarama, Jr., maintains that the exemption from payment of the excise tax under Section 135 (a) of the National Internal Revenue Code (NIRC) is conferred on the international carriers; and that, accordingly, and in fulfillment of international agreement and practice to exempt aviation fuel from the excise tax and other impositions, Section 135 (a) of the NIRC prohibits the passing of the excise tax to international carriers purchasing petroleum products from local manufacturers/sellers. Hence, he finds merit in the Motion for Reconsideration filed by Pilipinas Shell Petroleum Corporation (Pilipinas Shell), and rules that Pilipinas Shell, as the statutory taxpayer directly liable to pay the excise tax on its petroleum products, is entitled to the refund or credit of the excise taxes it paid on the petroleum products sold to international carriers, the latter having been granted exemption from the payment of such taxes under Section 135 (a) of the NIRC.

I **CONCUR** in the result.

I write this separate opinion only to explain that I hold a different view on the proper interpretation of the excise tax exemption under Section 135 (a) of the NIRC. I hold that the excise tax exemption under Section 135 (a) of the NIRC is conferred on the petroleum products on which the excise tax is

levied in the first place in view of its nature as a tax on property, the liability for the payment of which is statutorily imposed on the domestic petroleum manufacturer.

I submit the following disquisition in support of this separate opinion.

The issue raised here was whether the manufacturer was entitled to claim the refund of the excise taxes paid on the petroleum products sold to international carriers exempt under Section 135 (a) of the NIRC.

We ruled in the negative, and held that the exemption from the excise tax under Section 135 (a) of the NIRC was conferred on the international carriers to whom the petroleum products were sold. In the decision promulgated on April 25, 2012,[1] the Court granted the petition for review on *certiorari* filed by the Commissioner of Internal Revenue (CIR), and disposed thusly:

> WHEREFORE, the petition for review on *certiorari* is GRANTED. The Decision dated March 25, 2009 and Resolution dated June 24, 2009 of the Court of Tax Appeals *En Banc* in CTA EB No. 415 are hereby REVERSED and SET ASIDE. The claims for tax refund or credit filed by respondent Pilipinas Shell Petroleum Corporation are DENIED for lack of basis.
>
> No pronouncement as to costs.
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> SO ORDERED.[2]

We thereby agreed with the position of the Solicitor General that Section 135 (a) of the NIRC must be construed only as a prohibition for the manufacturer-seller of the petroleum products from shifting the tax burden to the international carriers by incorporating the previously-paid excise tax in the selling price. As a consequence, the manufacturer-seller could not invoke the exemption from the excise tax granted to international carriers. Concluding, we said: —

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[1] 671 SCRA 241.

[2] *Id*. at 264.

Respondent's locally manufactured petroleum products are clearly subject to excise tax under Sec. 148. Hence, its claim for tax refund may not be predicated on Sec. 229 of the NIRC allowing a refund of erroneous or excess payment of tax. Respondent's claim is premised on what it determined as a tax exemption "attaching to the goods themselves," which must be based on a statute granting tax exemption, or "the result of legislative grace." Such a claim is to be construed *strictissimi juris* against the taxpayer, meaning that the claim cannot be made to rest on vague inference. Where the rule of strict interpretation against the taxpayer is applicable as the claim for refund partakes of the nature of an exemption, the claimant must show that he clearly falls under the exempting statute.

The exemption from excise tax payment on petroleum products under Sec. 135 (a) is conferred on international carriers who purchased the same for their use or consumption outside the Philippines. The only condition set by law is for these petroleum products to be stored in a bonded storage tank and may be disposed of only in accordance with the rules and regulations to be prescribed by the Secretary of Finance, upon recommendation of the Commissioner.[3]

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Because an excise tax is a tax on the manufacturer and not on the purchaser, and there being no express grant under the NIRC of exemption from payment of excise tax to local manufacturers of petroleum products sold to international carriers, and absent any provision in the Code authorizing the refund or crediting of such excise taxes paid, the Court holds that Sec. 135 (a) should be construed as prohibiting the shifting of the burden of the excise tax to the international carriers who buys petroleum products from the local manufacturers. Said provision thus merely allows the international carriers to purchase petroleum products without the excise tax component as an added cost in the price fixed by the manufacturers or distributors/sellers. Consequently, the oil companies which sold such petroleum products to international carriers are not entitled to a refund of excise taxes previously paid on the goods.[4]

In its Motion for Reconsideration filed on May 23, 2012, Pilipinas Shell principally contends that the Court has erred in

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[3] *Id*. at 255-256.

[4] *Id*. at 263.

its interpretation of Section 135 (a) of the 1997 NIRC; that Section 135 (a) of the NIRC categorically exempts from the excise tax the petroleum products sold to international carriers of Philippine or foreign registry for their use or consumption outside the Philippines;[5] that no excise tax should be imposed on the petroleum products, whether in the hands of the qualified international carriers or in the hands of the manufacturer-seller;[6] that although it is the manufacturer, producer or importer who is generally liable for the excise tax when the goods or articles are subject to the excise tax, no tax should accordingly be collected from the manufacturer, producer or importer in instances when the goods or articles themselves are not subject to the excise tax;[7] and that as a consequence any excise tax paid in advance on products that are exempt under the law should be considered erroneously paid and subject of refund.[8]

Pilipinas Shell further contends that the Court's decision, which effectively prohibits petroleum manufacturers from passing on the burden of the excise tax, defeats the rationale behind the grant of the exemption;[9] and that without the benefit of a refund or the ability to pass on the burden of the excise tax to the international carriers, the excise tax will constitute an additional production cost that ultimately increases the selling price of the petroleum products.[10]

The CIR counters that the decision has clearly set forth that the excise tax exemption under Section 135 (a) of the NIRC does not attach to the products; that Pilipinas Shell's reliance on the Silkair rulings is misplaced considering that the Court made no pronouncement therein that the manufacturers selling petroleum products to international carriers were exempt from

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[5] *Rollo*, p. 356.

[6] *Id.* at 360.

[7] *Id.* at 364.

[8] *Id.* at 366.

[9] *Id.* at 375.

[10] *Id.*

paying the taxes; that the rulings that are more appropriate are those in *Philippine Acetylene Co., Inc. v. Commissioner of Internal Revenue*[11] and *Maceda v. Macaraig, Jr.*,[12] whereby the Court confirmed the obvious intent of Section 135 of the NIRC to grant the excise tax exemption to the international carriers or agencies as the buyers of petroleum products; and that this intention is further supported by the requirement that the petroleum manufacturer must pay the excise tax in advance without regard to whether or not the petroleum purchaser is qualified for exemption under Section 135 of the NIRC.

In its Supplemental Motion for Reconsideration, Pilipinas Shell reiterates that what is being exempted under Section 135 of the NIRC is the petroleum product that is sold to international carriers; that the exemption is not given to the producer or the buyer but to the product itself considering that the excise taxes, according to the NIRC, are taxes applicable to certain specific goods or articles for domestic sale or consumption or for any other disposition, whether manufactured in or imported into the Philippines; that the excise tax that is passed on to the buyer is no longer in the nature of a tax but of an added cost to the purchase price of the product sold; that what is contemplated under Section 135 of the NIRC is an exemption from the excise tax, not an exemption from the burden to shoulder the tax; and that inasmuch as the exemption can refer only to the imposition of the tax on the statutory seller, like Pilipinas Shell, a contrary interpretation renders Section 135 of the NIRC nugatory because the NIRC does not impose the excise tax on subsequent holders of the product like the international carriers.

As I earlier said, I agree to **GRANT** Pilipinas Shell's motions for reconsideration.

Excise tax is essentially a tax on goods, products or articles

Taxes are classified, according to subject matter or object, into three groups, to wit: (1) personal, capitation or poll taxes;

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[11] No. L-19707, August 17, 1967, 20 SCRA 1056.

[12] G.R. No. 88291, June 8, 1993, 223 SCRA 217.

(2) property taxes; and (3) excise or license taxes. Personal, capitation or poll taxes are fixed amounts imposed upon residents or persons of a certain class without regard to their property or business, an example of which is the basic community tax.[13] Property taxes are assessed on property or things of a certain class, whether real or personal, in proportion to their value or other reasonable method of apportionment, such as the real estate tax.[14] Excise or license taxes are imposed upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation, profession or business.[15] Income tax, value-added tax, estate and donor's tax fall under the third group.

Excise tax, as a classification of tax according to object, must not be confused with the excise tax under Title VI of the NIRC. The term "excise tax" under Title VI of the 1997 NIRC derives its definition from the 1986 NIRC,[16] and relates to taxes applied to goods manufactured or produced in the Philippines *for domestic sale or consumption or for any other disposition and to things imported*.[17] In contrast, an excise tax that is imposed directly on certain specified goods — goods manufactured or produced in the Philippines, or things imported — is undoubtedly a tax on property.[18]

The payment of excise taxes is the direct liability of the manufacturer or producer

The production, manufacture or importation of the goods belonging to any of the categories enumerated in Title VI of

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[13] Vitug and Acosta, *Tax Law and Jurisprudence*, Third Edition (2006), p. 26.

[14] *Id*.

[15] *Id*.

[16] *Petron Corporation v. Tiangco*, G.R. No. 158881, April 16, 2008, 551 SCRA 484, 494; see Section 126, Presidential Decree No. 1994, establishing the National Internal Revenue Code of 1986 (NIRC).

[17] Section 129, NIRC.

[18] *Petron Corporation v. Tiangco, supra*, citing *Medina v. City of Baguio*, 91 Phil. 854 (1952).

the NIRC (*i.e.*, alcohol products, tobacco products, petroleum products, automobiles and non-essential goods, mineral products) are not the sole determinants for the proper levy of the excise tax. It is further required that the goods be manufactured, produced or imported for *domestic* sale, consumption or any other disposition.[19] The accrual of the tax liability is, therefore, contingent on the production, manufacture or importation of the taxable goods *and* the intention of the manufacturer, producer or importer to have the goods locally sold or consumed or disposed in any other manner. This is the reason why the accrual and liability for the payment of the excise tax are imposed directly on the manufacturer or producer of the taxable goods,[20] and arise before the removal of the goods from the place of their production.[21]

The manufacturer's or producer's direct liability to pay the excise taxes similarly operates although the goods produced or manufactured within the country are intended for export and are "actually exported without returning to the Philippines, whether so exported in their original state or as ingredients or parts of any manufactured goods or products." This is implied from the grant of a tax credit or refund to the manufacturer or producer by Section 130 (4) (D) of the NIRC, thereby presupposing that the excise tax corresponding to the goods exported were previously paid. Section 130 (4) (D) reads:

x x x x x x x x x

(D) *Credit for Excise Tax on Goods Actually Exported*. — When goods locally produced or manufactured are removed and actually exported without returning to the Philippines, whether so exported in their original state or as ingredients or parts of any manufactured goods or products, **any excise tax paid thereon shall be credited or refunded upon**

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[19] Section 129, NIRC.

[20] Section 130 (A) (2), NIRC*; Silkair (Singapore) Pte., Ltd. v. Commissioner of Internal Revenue*, G.R. No. 173594, February 6, 2008, 544 SCRA 100, 112.

[21] Section 130 (A) (2), NIRC.

> **submission of the proof of actual exportation and upon receipt of the corresponding foreign exchange payment**: *Provided*, That the excise tax on mineral products, except coal and coke, imposed under Section 151 shall not be creditable or refundable even if the mineral products are actually exported. (Emphasis supplied.)

Simply stated, the accrual and payment of the excise tax under Title VI of the NIRC materially rest on the fact of actual production, manufacture or importation of the taxable goods *in the Philippines* and on their *presumed* or *intended* domestic sale, consumption or disposition. Considering that the excise tax attaches to the goods upon the accrual of the manufacturer's direct liability for its payment, the subsequent sale, consumption or other disposition of the goods becomes relevant only to determine whether any exemption or tax relief may be granted thereafter.

The actual sale, consumption or disposition of the taxable goods confirms the proper tax treatment of goods previously subjected to the excise tax

Conformably with the foregoing discussion, the accrual and payment of the excise tax on the goods enumerated under Title VI of the NIRC prior to their removal from the place of production are absolute and admit of no exception. As earlier mentioned, even locally manufactured goods *intended for export* cannot escape the imposition and payment of the excise tax, subject to a future claim for tax credit or refund once proof of *actual exportation* has been submitted to the Commissioner of Internal Revenue (CIR).[22] Verily, it is the *actual* sale, consumption or disposition of the taxable goods that *confirms* the proper tax treatment of goods previously subjected to the excise tax. If any of the goods enumerated under Title VI of the NIRC are manufactured or produced in the Philippines and eventually sold, consumed, or disposed of in any other manner *domestically*, therefore, there can be no claim for any tax relief inasmuch as

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[22] Section 130 (4) (D); Revenue Regulations No. 1377, Section 31 (c).

the excise tax was properly levied and collected from the manufacturer-seller.

Here, the point of interest is the proper tax treatment of the petroleum products sold by Pilipinas Shell to various international carriers. An international carrier is engaged in international transportation or contract of carriage between places in different territorial jurisdictions.[23]

Pertinent is Section 135 (a) of the NIRC, which provides:

SEC. 135. **Petroleum Products Sold to International Carriers and Exempt Entities or Agencies. —** Petroleum products sold to the following are exempt from excise tax:

(a) International carriers of Philippine or foreign registry on their use or consumption outside the Philippines: *Provided*, That the petroleum products sold to these international carriers shall be stored in a bonded storage tank and may be disposed of only in accordance with the rules and regulations to be prescribed by the Secretary of Finance, upon recommendation of the Commissioner; x x x

x x x x x x x x x

As the taxpayer statutorily and directly liable for the accrual and payment of the excise tax on the petroleum products it manufactured and it intended for future *domestic* sale or consumption, Pilipinas Shell paid the corresponding excise taxes prior to the removal of the goods from the place of production. **However, upon the sale of the petroleum products to the international carriers, the goods became exempt from the excise tax by the express provision of Section 135 (a) of the NIRC. In the latter instance, the fact of sale to the international carriers of the petroleum products previously subjected to the excise tax confirms the proper tax treatment of the goods as exempt from the excise tax.**

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[23] Vilma Cruz-Silvederio, *International Common Carriers and the VAT Law*, http://www.punongbayan-araullo.com/pnawebsite/pnahome.nsf/section_docs. Visited on February 19, 2013.

It is worthy to note that Section 135 (a) of the NIRC is a product of the *1944 Convention of International Civil Aviation*, otherwise known as the *Chicago Convention*, of which the Philippines is a Member State. Article 24 (a) of the *Chicago Convention* provides —

> Article 24
> Customs duty
>
> (a) Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. **Fuel**, lubricating oils, spare parts, regular equipment and aircraft stores **on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from** customs duty, inspection fees or similar **national** or local duties and **charges**. This exemption shall not apply to any quantities or articles unloaded, except in accordance with the customs regulations of the State, which may require that they shall be kept under customs supervision. x x x (Bold emphasis supplied.)

This provision was extended by the ICAO Council in its 1999 Resolution, which stated that "fuel . . . taken on board for consumption" by an aircraft from a contracting state in the territory of another contracting State departing for the territory of any other State must be exempt from all customs or other duties. The Resolution broadly interpreted the scope of the Article 24 prohibition to include "import, export, excise, sales, consumption and internal duties and taxes of all kinds levied upon . . . fuel."[24]

Given the nature of the excise tax on petroleum products as a tax on property, the tax exemption espoused by Article 24 (a) of the *Chicago Convention*, as now embodied in Section 135 (a) of the NIRC, is clearly conferred on the aviation fuel or

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[24] *Supra* note 1, at 261, citing *Prohibition Against Taxes on International Airlines*, prepared by The International Air Transport Association, citing *ICAO's Policies on Taxation in the Field of International Air Transport*, ICAO Doc. 8632-C/968 (3d rd. 2000), www.globalwarming.markey.house.gov/files/.Visited on October 5, 2012.

petroleum product on-board international carriers. Consequently, the manufacturer's or producer's sale of the petroleum products to international carriers for their use or consumption outside the Philippines operates to bring the tax exemption of the petroleum products into full force and effect.

Pilipinas Shell, the statutory taxpayer, is the proper party to claim the refund of the excise taxes paid on petroleum products sold to international carriers

The excise taxes are of the nature of indirect taxes, the liability for the payment of which may fall on a person other than whoever actually bears the burden of the tax.[25]

In *Commissioner of Internal Revenue v. Philippine Long Distance Telephone Company*,[26] the Court has discussed the nature of indirect taxes in the following manner:

> [I]ndirect taxes are those that are demanded, in the first instance, from, or are paid by, one person in the expectation and intention that he can shift the burden to someone else. Stated elsewise, indirect taxes are taxes wherein the liability for the payment of the tax falls on one person but the burden thereof can be shifted or passed on to another person, such as when the tax is imposed upon goods before reaching the consumer who ultimately pays for it. When the seller passes on the tax to his buyer, he, in effect, shifts the tax burden, not the liability to pay it, to the purchaser, as part of the price of goods sold or services rendered.[27]

In another ruling, the Court has observed:

> Accordingly, the party liable for the tax can shift the burden to another, as part of the purchase price of the goods or services. Although the manufacturer/seller is the one who is statutorily liable for the tax, it is the buyer who actually shoulders or bears the burden of

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[25] *Exxonmobil Petroleum and Chemical Holdings, Inc. — Philippine Branch v. Commissioner of Internal Revenue*, G.R. No. 180909, January 19, 2011, 640 SCRA 203, 219.

[26] G.R. No. 140230, December 15, 2005, 478 SCRA 61.

[27] *Id.* at 72.

the tax, albeit not in the nature of a tax, but part of the purchase price or the cost of the goods or services sold.[28]

Accordingly, the option of shifting the burden to pay the excise tax rests on the statutory taxpayer, which is the manufacturer or producer in the case of the excise taxes imposed on the petroleum products. Regardless of who shoulders the burden of tax payment, however, the Court has ruled as early as in the 1960s that the proper party to question or to seek a refund of an indirect tax is the statutory taxpayer, the person on whom the tax is imposed by law and who paid the same, even if he shifts the burden thereof to another.[29] The Court has explained:

> In *Philippine Acetylene Co., Inc. v. Commissioner of Internal Revenue*, the Court held that the sales tax is imposed on the manufacturer or producer and not on the purchaser, "except probably in a very remote and inconsequential sense." Discussing the "passing on" of the sales tax to the purchaser, the Court therein cited Justice Oliver Wendell Holmes' opinion in *Lash's Products v. United States* wherein he said:
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> > "The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. The purchaser does not really pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all. x x x The price is the sum total paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore it is part of the price x x x."
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> Proceeding from this discussion, the Court went on to state:
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> > It may indeed be that the economic burden of the tax finally falls on the purchaser; when it does the tax becomes a part of the price which the purchaser must pay. It does not matter that an additional amount is billed as tax to the purchaser. x x x The effect is still the same, namely, that the purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all and the amount added because of the tax is paid to get the goods and for nothing else.

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[28] *Exxonmobil Petroleum and Chemical Holdings, Inc. - Philippine Branch v. Commissioner of Internal Revenue, supra* note 25, at 220.

[29] *Id.* at 222.

> But the tax burden may not even be shifted to the purchaser at all. A decision to absorb the burden of the tax is largely a matter of economics. Then it can no longer be contended that a sales tax is a tax on the purchaser.[30]

The *Silkair* rulings involving the excise taxes on the petroleum products sold to international carriers firmly hold that the proper party to claim the refund of excise taxes paid is the manufacturer-seller.

In the February 2008 *Silkair* ruling,[31] the Court declared:

> The proper party to question, or seek a refund of, an indirect tax is the statutory taxpayer, the person on whom the tax is imposed by law and who paid the same even if he shifts the burden thereof to another. Section 130 (A) (2) of the NIRC provides that "[u]nless otherwise specifically allowed, the return shall be filed and the excise tax paid by the manufacturer or producer before removal of domestic products from place of production." Thus, Petron Corporation, not Silkair, is the statutory taxpayer which is entitled to claim a refund based on Section 135 of the NIRC of 1997 and Article 4(2) of the Air Transport Agreement between RP and Singapore.
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> Even if Petron Corporation passed on to Silkair the burden of the tax, the additional amount billed to Silkair for jet fuel is not a tax but part of the price which Silkair had to pay as a purchaser.

In the November 2008 *Silkair* ruling,[32] the Court reiterated:

> Section 129 of the NIRC provides that excise taxes refer to taxes imposed on specified goods manufactured or produced in the

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[30] *Id*. at 222-223, citing *Silkair (Singapore) Pte., Ltd. v. Commissioner of Internal Revenue*, G.R. No. 173594, February 6, 2008, 544 SCRA 100, 112; Vitug and Acosta, *op. cit.*, at 317, citing *Commissioner of Internal Revenue v. American Rubber Company and Court of Tax Appeals*, 124 Phil. 1471 (1966); *Cebu Portland Cement Co. v. Collector of Internal Revenue*, 134 Phil. 735 (1968).

[31] *Silkair (Singapore), Pte. Ltd. v. Commissioner of Internal Revenue*, G.R. No. 173594, February 6, 2008, 544 SCRA 100, 112.

[32] *Silkair (Singapore) Pte., Ltd. v. Commissioner of Internal Revenue*, G.R. Nos. 171383 and 172379, November 14, 2008, 571 SCRA 141.

Philippines for domestic sale or consumption or for any other disposition and to things imported. The excise taxes are collected from manufacturers or producers before removal of the domestic products from the place of production. Although excise taxes can be considered as taxes on production, they are really taxes on property as they are imposed on certain specified goods.

Section 148(g) of the NIRC provides that there shall be collected on aviation jet fuel an excise tax of ₱3.67 per liter of volume capacity. Since the tax imposed is based on volume capacity, the tax is referred to as "specific tax." However, excise tax, whether classified as specific or *ad valorem* tax, is basically an indirect tax imposed on the consumption of a specified list of goods or products. The tax is directly levied on the manufacturer upon removal of the taxable goods from the place of production but in reality, the tax is passed on to the end consumer as part of the selling price of the goods sold.

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When Petron removes its petroleum products from its refinery in Limay, Bataan, it pays the excise tax due on the petroleum products thus removed. Petron, as manufacturer or producer, is the person liable for the payment of the excise tax as shown in the Excise Tax Returns filed with the BIR. Stated otherwise, Petron is the taxpayer that is primarily, directly and legally liable for the payment of the excise taxes. However, since an excise tax is an indirect tax, Petron can transfer to its customers the amount of the excise tax paid by treating it as part of the cost of the goods and tacking it on to the selling price.

As correctly observed by the CTA, this Court held in *Philippine Acetylene Co., Inc. v. Commissioner of Internal Revenue*:

> It may indeed be that the economic burden of the tax finally falls on the purchaser; when it does the tax becomes part of the price which the purchaser must pay.

Even if the consumers or purchasers ultimately pay for the tax, they are not considered the taxpayers. The fact that Petron, on whom the excise tax is imposed, can shift the tax burden to its purchasers does not make the latter the taxpayers and the former the withholding agent.

Petitioner, as the purchaser and end-consumer, ultimately bears the tax burden, but this does not transform petitioner's status into a statutory taxpayer.

In the refund of indirect taxes, the statutory taxpayer is the proper party who can claim the refund.

Section 204(c) of the NIRC provides:

> Sec. 204. Authority of the Commissioner to Compromise, Abate, and Refund or Credit Taxes. — The Commissioner may —
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> x x x x x x x x x
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> (b) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. **No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund** within two (2) years after the payment of the tax or penalty: *Provided, however,* That a return filed showing an overpayment shall be considered as a written claim for credit or refund. (Emphasis and underscoring supplied)

The person entitled to claim a tax refund is the statutory taxpayer. Section 22(N) of the NIRC defines a taxpayer as "any person subject to tax." In *Commissioner of Internal Revenue v. Procter and Gamble Phil. Mfg. Corp.*, the Court ruled that:

> A "person liable for tax" has been held to be a "person subject to tax" and properly considered a "taxpayer." The terms "liable for tax" and "subject to tax" both connote a legal obligation or duty to pay a tax.

The excise tax is due from the manufacturers of the petroleum products and is paid upon removal of the products from their refineries. Even before the aviation jet fuel is purchased from Petron, the excise tax is already paid by Petron. Petron, being the manufacturer, is the "person subject to tax." In this case, Petron, which paid the excise tax upon removal of the products from its Bataan refinery, is the "person liable for tax." Petitioner is neither a "person liable for tax" nor "a person subject to tax." There is also no legal duty on the part of petitioner to pay the excise tax; hence, petitioner cannot be considered the taxpayer.

Even if the tax is shifted by Petron to its customers and even if the tax is billed as a separate item in the aviation delivery receipts

and invoices issued to its customers, Petron remains the taxpayer because the excise tax is imposed directly on Petron as the manufacturer. Hence, Petron, as the statutory taxpayer, is the proper party that can claim the refund of the excise taxes paid to the BIR.[33]

It is noteworthy that the foregoing pronouncements were applied in two more *Silkair* cases[34] involving the same parties and the same cause of action but pertaining to different periods of taxation.

The shifting of the tax burden by manufacturers-sellers is a business prerogative resulting from the collective impact of market forces. Such forces include government impositions like the excise tax. Hence, the additional amount billed to the purchaser as part of the price the purchaser pays for the goods acquired cannot be solely attributed to the effect of the tax liability imposed on the manufacture-seller. It is erroneous to construe Section 135 (a) only as a prohibition against the shifting by the manufacturers-sellers of petroleum products of the tax burden to international carriers, for such construction will deprive the manufacturers-sellers of their business prerogative to determine the prices at which they can sell their products.

Section 135 (a) of the NIRC cannot be further construed as granting the excise tax exemption to the international carrier to whom the petroleum products are sold considering that the international carrier has not been subjected to excise tax at the outset. To reiterate, the excise tax is levied on the petroleum products because it is a tax on property. Levy is the act of imposition by the Legislature such as by its enactment of a law.[35] The law enacted here is the NIRC whereby the excise tax is imposed on the petroleum products, the liability for the payment of which is further statutorily imposed on the domestic petroleum manufacturer. Accordingly, the exemption must be allowed to

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[33] *Id.* at 154-158.

[34] *Silkair (Singapore) Pte., Ltd. v. Commissioner of Internal Revenue*, G.R. No. 184398, February 25, 2010, 613 SCRA 639, and *Silkair (Singapore) Pte., Ltd. v. Commissioner of Internal Revenue*, G.R. No. 166482, January 25, 2012, 664 SCRA 33.

[35] Vitug, and Acosta, *op. cit.*, at 25.

the petroleum products because it is on them that the tax is imposed. **The tax status of an international carrier to whom the petroleum products are sold is not based on exemption; rather, it is based on the absence of a law imposing the excise tax on it.** This further supports the position that the burden passed on by the domestic petroleum manufacturer is not anymore in the nature of a tax — although resulting from the previously-paid excise tax — but as an additional cost component in the selling price. Consequently, the purchaser of the petroleum products to whom the burden of the excise tax has been shifted, not being the statutory taxpayer, cannot claim a refund of the excise tax paid by the manufacturer or producer.

Applying the foregoing, the Court concludes that: (1) the exemption under Section 135 (a) of the NIRC is conferred on the petroleum products on which the excise tax was levied in the first place; (2) Pilipinas Shell, being the manufacturer or producer of petroleum products, was the statutory taxpayer of the excise tax imposed on the petroleum products; (3) as the statutory taxpayer, Pilipinas Shell's liability to pay the excise tax accrued as soon as the petroleum products came into existence, and Pilipinas Shell accordingly paid its excise tax liability prior to its sale or disposition of the taxable goods to third parties, a fact not disputed by the CIR; and (3) Pilipinas Shell's sale of the petroleum products to international carriers for their use or consumption outside the Philippines confirmed the proper tax treatment of the subject goods as exempt from the excise tax.

Under the circumstances, therefore, Pilipinas Shell erroneously paid the excise taxes on its petroleum products sold to international carriers, and was entitled to claim the refund of the excise taxes paid in accordance with prevailing jurisprudence and Section 204 (C) of the NIRC, *viz.*:

> Section 204. Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes. — The Commissioner may — x x x
>
> x x x x x x x x x
>
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal

revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after payment of the tax or penalty: *Provided, however,* That a return filed showing an overpayment shall be considered as a written claim for credit or refund.

IN VIEW OF THE FOREGOING, I VOTE TO GRANT the Motion for Reconsideration and Supplemental Motion for Reconsideration of Pilipinas Shell Petroleum Corporation and, accordingly:

(a) **TO AFFIRM** the decision dated March 25, 2009 and resolution dated June 24, 2009 of the Court of Tax Appeals *En Banc* in CTA EB No. 415; and

(b) **TO DIRECT** petitioner Commissioner of Internal Revenue to refund or to issue a tax credit certificate to Pilipinas Shell Petroleum Corporation in the amount of ₱95,014,283.00 representing the excise taxes it paid on the petroleum products sold to international carriers in the period from October 2001 to June 2002.

FIRST DIVISION

[G.R. No. 188913. February 19, 2014]

CITY GOVERNMENT OF BAGUIO, HEREIN REPRESENTED BY CITY MAYOR REINALDO A. BAUTISTA, *petitioner, vs.* **ATTY. BRAIN S. MASWENG,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; CONTEMPT; CONTEMPT OF COURT, DEFINED.— Contempt of court is defined as a disobedience to the Court by acting in opposition to its authority, justice and dignity. It signifies not only a willful disregard or disobedience of the court's orders, but such conduct which tends to bring the authority of the court and the administration of law into disrepute or in some manner to impede the due administration of justice. Contempt of court is a defiance of the authority, justice or dignity of the court; such conduct as tends to bring the authority and administration of the law into disrespect or to interfere with or prejudice party litigants or their witnesses during litigation.

2. ID.; ID.; ID.; POWER TO PUNISH FOR CONTEMPT IS INHERENT IN ALL COURTS AND IS ESSENTIAL TO THE PRESERVATION OF ORDER IN JUDICIAL PROCEEDINGS; EXPLAINED.— The power to punish for contempt is inherent in all courts and is essential to the preservation of order in judicial proceedings and to the enforcement of judgments, orders, and mandates of the court, and consequently, to the due administration of justice. Only in cases of clear and contumacious refusal to obey should the power be exercised, however, such power, being drastic and extraordinary in its nature, should not be resorted to unless necessary in the interest of justice. The court must exercise the power of contempt judiciously and sparingly, with utmost self-restraint, with the end in view of utilizing the same for correction and preservation of the dignity of the court, not for retaliation or vindication.

3. ID.; ID.; ID.; WHEN FOUND GUILTY OF CONTEMPT; IMPOSABLE PENALTY; CASE AT BAR.— Respondent's willful disregard and defiance of this Court's ruling on a matter submitted for the second time before his office cannot be countenanced. By acting in opposition to this Court's authority and disregarding its final determination of the legal issue pending before him, respondent failed in his duty not to impede the due administration of justice and consistently adhere to existing laws and principles as interpreted in the decisions of the Court. Section 7, Rule 71 of the Rules provides the penalty for indirect contempt. x x x For his contumacious conduct

and considering the attendant circumstances, the Court deems it proper to impose a fine of ₱10,000.00.

APPEARANCES OF COUNSEL

City Legal Office (Baguio) for petitioner.
Mangallay-Dampac and Partners Law Office for respondent.

D E C I S I O N

VILLARAMA, JR., *J.*:

Before this Court is a petition for contempt[1] against respondent Atty. Brain S. Masweng who issued the following orders in his capacity as the Regional Hearing Officer of the National Commission on Indigenous Peoples, Cordillera Administrative Region (NCIP-CAR):

(1) 72-Hour Temporary Restraining Order[2] dated July 27, 2009, Order[3] dated July 31, 2009 and Writ of Preliminary Injunction[4] in NCIP Case No. 31-CAR-09 and

(2) 72-Hour Temporary Restraining Order[5] dated July 27, 2009, Order[6] dated July 31, 2009 and Writ of Preliminary Injunction[7] in NCIP Case No. 29-CAR-09.

The factual antecedents:

Petitioner City Government of Baguio, through its then Mayor, issued Demolition Order No. 33, Series of 2005 and Demolition Order Nos. 25 and 28, Series of 2004, ordering the demolition

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[1] *Rollo*, pp. 3-12.

[2] Annex "4", *id.* at 74-76.

[3] Annex "6", *id.* at 85-97.

[4] Annex "A", *id.* at 132-133.

[5] Annex "7", *id.* at 98-100.

[6] Annex "8", *id.* at 101-113.

[7] Annex "D", *id.* at 149-150.

of illegal structures that had been constructed on a portion of the Busol Watershed Reservation located at Aurora Hill, Baguio City, without the required building permits and in violation of Section 69[8] of the Revised Forestry Code, as amended, the National Building Code[9] and the Urban Development and Housing Act.[10] Pursuant to said demolition orders, demolition advices dated September 19, 2006 were issued by the city government informing the occupants of the intended demolition of the structures on October 17 to 20, 2006.

On October 13, 2006, a petition for injunction with prayer for temporary restraining order and writ of preliminary injunction

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[8] Presidential Decree (P.D.) No. 705, Section 69. *Unlawful occupation or destruction of forest lands.* Any person who enters and occupies or possesses, or makes *kaingin* for his own private use or for others any forest land without authority under a license agreement, lease, license or permit, or in any manner destroys such forest land or part thereof, or causes any damage to the timber stand and other products and forest growths found therein, or who assists, aids or abets any other person to do so, or sets a fire, or negligently permits a fire to be set in any forest land shall, upon conviction, be fined in an amount of not less than five hundred pesos (₱500.00) nor more than twenty thousand pesos (₱20,000.00) and imprisoned for not less than six (6) months nor more than two (2) years for each such offense, and be liable to the payment of ten (10) times the rental fees and other charges which would have been accrued had the occupation and use of the land been authorized under a license agreement, lease, license or permit: Provided, That in the case of an offender found guilty of making *kaingin*, the penalty shall be imprisoned for not less than two (2) nor more than (4) years and a fine equal to eight (8) times the regular forest charges due on the forest products destroyed, without prejudice to the payment of the full cost of restoration of the occupied area as determined by the Bureau.

The Court shall further order the eviction of the offender from the land and the forfeiture to the Government of all improvements made and all vehicles, domestic animals and equipment of any kind used in the commission of the offense. If not suitable for use by the Bureau, said vehicles shall be sold at public auction, the proceeds of which shall accrue to the Development Fund of the Bureau.

In case the offender is a government official or employee, he shall, in addition to the above penalties, be deemed automatically dismissed from office and permanently disqualified from holding any elective or appointive position.

[9] P.D. No. 1096.

[10] Republic Act No. 7279.

was filed by Elvin Gumangan, Narciso Basatan and Lazaro Bawas before the NCIP-CAR against the City of Baguio, The Anti-Squatting Committee, City Building and Architecture Office, and Public Order and Safety Office. The case was docketed as NCIP Case No. 31-CAR-06.

On October 16 and 19, 2006, herein respondent, Atty. Brain Masweng, the Regional Hearing Officer of the NCIP-CAR, issued two temporary restraining orders directing petitioner and all persons acting in its behalf from enforcing the demolition orders and demolition advices for a total period of 20 days. Subsequently, the NCIP-CAR, through respondent, granted the application for preliminary injunction.

On appeal, the Court of Appeals (CA) affirmed the injunctive writ issued by the NCIP-CAR against the demolition orders. The case was then elevated to this Court in **G.R. No. 180206** entitled, "*City Government of Baguio City v. Masweng.*"[11]

On February 4, 2009, this Court rendered a Decision reversing and setting aside the ruling of the CA and dismissed NCIP Case No. 31-CAR-06. This Court held that although the NCIP had the authority to issue temporary restraining orders and writs of injunction, Elvin Gumangan, *et al.,* were not entitled to the relief granted by the NCIP-CAR. On April 22, 2009, this Court denied with finality the motion for reconsideration filed by Elvin Gumangan, *et al.* The decision thus became final and executory on June 9, 2009.[12]

Thereafter, petitioner, through the Office of the Mayor, issued Demolition Advices dated May 20, 2009[13] and July 20, 2009[14] against Alexander Ampaguey, Sr.,[15] a certain Mr. Basatan, Julio Daluyen, Sr.,[16] Carmen Panayo, and Concepcion Padang. Said

[11] G.R. No. 180206, February 4, 2009, 578 SCRA 88.

[12] *Rollo*, p. 166.

[13] *Id.* at 40.

[14] *Id.* at 43.

[15] Alex Ampaguey, Sr. in some parts of the records.

[16] Julio Daluyan in some parts of the records.

Demolition Advices notified them that Demolition Order No. 33, Series of 2005 and Demolition Order No. 83, Series of 1999 will be enforced in July 2009 and advised them to voluntarily dismantle their structures built on the Busol Watershed.

On July 23, 2009, Magdalena Gumangan, Marion Pool, Lourdes Hermogeno, Bernardo Simon, Joseph Legaspi, Joseph Basatan, Marcelino Basatan, Josephine Legaspi and Lansigan Bawas filed a petition[17] for the identification, delineation and recognition of their ancestral land and enforcement of their rights as indigenous cultural communities/indigenous peoples, with prayer for the issuance of a TRO and writ of preliminary injunction. The case was docketed as **NCIP Case No. 29-CAR-09**.

On July 27, 2009, Alexander Ampaguey, Sr., Julio Daluyen, Sr., Carmen Panayo and Concepcion Padang filed a petition[18] for injunction with urgent prayer for issuance of a temporary restraining order and writ of preliminary injunction before the NCIP against petitioner and the City Building and Architecture Office. The case was docketed as **NCIP Case No. 31-CAR-09**. They averred that they are all indigenous people particularly of the Ibaloi and Kankanaey Tribes, who are possessors of residential houses and other improvements at Bayan Park and Ambiong, Aurora Hill, Baguio City by virtue of transfers effected in accordance with traditions and customary laws from the ancestral land claimants namely, the Heirs of Molintas and the Heirs of Gumangan. They sought to enjoin the enforcement of the demolition orders.

On the same day, July 27, 2009, respondent issued two separate 72-hour temporary restraining orders in NCIP Case Nos. 31-CAR-09[19] and 29-CAR-09.[20] The order in NCIP Case No. 31-CAR-09 restraining the implementation of the demolition advices and demolition orders reads:

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[17] *Rollo*, pp. 114-123.

[18] *Id.* at 31-39.

[19] *Id.* at 74-76.

[20] *Id.* at 98-100.

WHEREFORE, premises considered, a Temporary Restraining Order pursuant to Section 69 (d) of R.A. [No.] 8371 in relation to Section 83 of NCIP Administrative Circular No. 1, series of 2003 is hereby issued against the respondents namely, CITY OF BAGUIO represented by City Mayor REINALDO BAUTISTA JR., CITY BUILDING AND ARCHITECTURE OFFICE represented by OSCAR FLORES and all persons under their instructions and acting for and in their behalves are hereby ordered to stay and refrain from implementing Demolition Advice dated May 20, 2009, Demolition Order No. 33 series of 2005, Demolition Advice dated July 20, 2009 and Demolition Order No. 69 series of 2002 within Seventy Two (72) Hours upon receipt of this order on the residential houses/ structures of Alexander Ampaguey Sr., Julio Daluyen Sr., Concep[c]ion Padang and Carmen Panayo all located at Busol Water Reservation, Baguio City.[21]

In NCIP Case No. 29-CAR-09, petitioner and the City Building and Architecture Office, represented by Oscar Flores; Public Safety and Order Division, represented by Gregorio Deligero; the Baguio Demolition Team, represented by Engr. Nazeta Banez; and all persons under their instructions were ordered to refrain from demolishing the residential structures of Magdalena Gumangan, Marion Pool, Lourdes Hermogeno, Bernardo Simon, Joseph Legaspi, Joseph Basatan, Marcelino Basatan, Josephine Legaspi and Lansigan Bawas located at Busol Water Reservation.

Subsequently, respondent issued two separate Orders[22] both dated July 31, 2009 in NCIP Case Nos. 29-CAR-09 and 31-CAR-09 extending the 72-hour temporary restraining orders for another 17 days.

On August 14, 2009, respondent issued a Writ of Preliminary Injunction[23] in NCIP Case No. 31-CAR-09, followed by a Writ of Preliminary Injunction[24] in NCIP Case No. 29-CAR-09.

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[21] *Id.* at 75.

[22] *Id.* at 85-97, 101-113.

[23] *Id.* at 132-133.

[24] *Id.* at 149-150.

Hence, this petition asserting that the restraining orders and writs of preliminary injunction were issued in willful disregard, disobedience, defiance and resistance of this Court's Decision in G.R. No. 180206 which dismissed the previous injunction case. Petitioner contends that respondent's act of enjoining the execution of the demolition orders and demolition advices is tantamount to allowing forum shopping since the implementation of the demolition orders over the structures in the Busol Forest Reservation had already been adjudicated and affirmed by this Court.

In his Comment,[25] respondent claims that he issued the restraining orders and writs of preliminary injunction in NCIP Case Nos. 31-CAR-09 and 29-CAR-09 because his jurisdiction was called upon to protect and preserve the rights of the petitioners (in the NCIP cases) who were undoubtedly members of the indigenous cultural communities/indigenous peoples. He avers that his personal judgment and assessment of the allegations of the parties in their pleadings, as supported by their attachments, convinced him that the petitioners therein were entitled to such restraining orders and writs of injunction.

Respondent maintains that the orders and writs he issued did not disregard the earlier ruling of this Court in G.R. No. 180206. He points out that the Court has in fact affirmed the power of the NCIP to issue temporary restraining orders and writs of injunction without any prohibition against the issuance of said writs when the main action is for injunction. He adds that he was aware of the said pronouncement and had to rule on the matter so he extensively explained and laid out his legal basis for issuing the assailed orders and writs.

Respondent further posits that if petitioner believes that he committed an error in issuing his orders and resolutions, there are judicial remedies provided by law. Thus, petitioner could have filed a motion for reconsideration of the assailed orders and resolutions or a petition for review if such motion for reconsideration is denied. Petitioner likewise could have filed

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[25] *Id.* at 173-190.

a motion for inhibition or a request for change of venue if it feels that valid ground exists to warrant the same.

The sole issue to be resolved is whether the respondent should be cited in contempt of court for issuing the subject temporary restraining orders and writs of preliminary injunction.

We rule in the affirmative.

The applicable provision is Section 3 of Rule 71 of the 1997 Rules of Civil Procedure, as amended, which states:

> SEC. 3. *Indirect contempt to be punished after charge and hearing*. – After a charge in writing has been filed, and an opportunity given to the respondent to comment thereon within such period as may be fixed by the court and to be heard by himself or counsel, a person guilty of any of the following acts may be punished for indirect contempt:
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> x x x x x x x x x
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> b) **Disobedience of or resistance to a lawful writ, process, order, or judgment of a court,** including the act of a person who, after being dispossessed or ejected from any real property by the judgment or process of any court of competent jurisdiction, enters or attempts or induces another to enter into or upon such real property, for the purpose of executing acts of ownership or possession, or in any manner disturbs the possession given to the person adjudged to be entitled thereto;
>
> x x x x x x x x x
>
> (Emphasis supplied.)

Contempt of court is defined as a disobedience to the Court by acting in opposition to its authority, justice and dignity. It signifies not only a willful disregard or disobedience of the court's orders, but such conduct which tends to bring the authority of the court and the administration of law into disrepute or in some manner to impede the due administration of justice. Contempt of court is a defiance of the authority, justice or dignity of the court; such conduct as tends to bring the authority and administration of the law into disrespect or to interfere

with or prejudice party litigants or their witnesses during litigation.[26]

The power to punish for contempt is inherent in all courts and is essential to the preservation of order in judicial proceedings and to the enforcement of judgments, orders, and mandates of the court, and consequently, to the due administration of justice.[27] Only in cases of clear and contumacious refusal to obey should the power be exercised, however, such power, being drastic and extraordinary in its nature, should not be resorted to unless necessary in the interest of justice.[28] The court must exercise the power of contempt judiciously and sparingly, with utmost self-restraint, with the end in view of utilizing the same for correction and preservation of the dignity of the court, not for retaliation or vindication.[29]

In this case, respondent was charged with indirect contempt for issuing the subject orders enjoining the implementation of demolition orders against illegal structures constructed on a portion of the Busol Watershed Reservation located at Aurora Hill, Baguio City.

In the Decision dated February 4, 2009 rendered in G.R. No. 180206, the Court indeed upheld the authority of the NCIP to issue temporary restraining orders and writs of injunction to preserve the rights of parties to a dispute who are members of indigenous cultural communities or indigenous peoples. However, the Court categorically ruled that Elvin Gumangan, et al., whose houses and structures are the subject of demolition orders issued by petitioner, are not entitled to the injunctive relief granted by herein respondent in his capacity as Regional Hearing Officer of the NCIP, thus:

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[26] *Roxas v. Tipon*, G.R. Nos. 160641 & 160642, June 20, 2012, 674 SCRA 52, 62.

[27] *Bank of the Philippine Islands v. Calanza*, G.R. No. 180699, October 13, 2010, 633 SCRA 186, 193.

[28] *Id.*

[29] *Heirs of Justice Reyes v. Court of Appeals*, 392 Phil. 827, 843 (2000).

The crucial question to be asked then is whether private respondents' ancestral land claim was indeed recognized by Proclamation No. 15, in which case, their right thereto may be protected by an injunctive writ. After all, before a writ of preliminary injunction may be issued, petitioners must show that there exists a right to be protected and that the acts against which injunction is directed are violative of said right.

Proclamation No. 15, however, does not appear to be a definitive recognition of private respondents' ancestral land claim. The proclamation merely identifies the Molintas and Gumangan families, the predecessors-in-interest of private respondents, as claimants of a portion of the Busol Forest Reservation but does not acknowledge vested rights over the same. In fact, Proclamation No. 15 explicitly withdraws the Busol Forest Reservation from sale or settlement. It provides:

> "Pursuant to the provisions of section eighteen hundred and twenty-six of Act Numbered Twenty-seven Hundred and eleven[,] I hereby establish the Busol Forest Reservation to be administered by the Bureau of Forestry for the purpose of conserving and protecting water and timber, the protection of the water supply being of primary importance and all other uses of the forest are to be subordinated to that purpose. I therefore withdraw from sale or settlement the following described parcels of the public domain situated in the Township of La Trinidad, City of Baguio, Mountain Province, Island of Luzon, to wit:"

The fact remains, too, that the Busol Forest Reservation was declared by the Court as inalienable in *Heirs of Gumangan v. Court of Appeals*. The declaration of the Busol Forest Reservation as such precludes its conversion into private property. Relatedly, the courts are not endowed with jurisdictional competence to adjudicate forest lands.

All told, **although the NCIP has the authority to issue temporary restraining orders and writs of injunction, we are not convinced that private respondents are entitled to the relief granted by the Commission**.[30] (Emphasis supplied.)

Accordingly, the CA decision affirming the injunctive writ issued by respondent against the demolition orders of petitioner

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[30] *Supra* note 11, at 99-100.

was reversed and set aside, and the petition for injunction (Case No. 31-CAR-06) was dismissed. In pursuance of the final Decision in G.R. No. 180206, petitioner issued the subject demolition advices for the enforcement of Demolition Order No. 33, Series of 2005 against Alexander Ampaguey, Sr. and Mr. Basatan, Demolition Order No. 83, Series of 1999 against Julio Daluyen, Sr., Concepcion Padang and Carmen Panayo, and Demolition Order No. 69, Series of 2002 against Julio Daluyen, Sr., Carmen Panayo, Benjamin Macelino, Herminia Aluyen and five other unidentified owners of structures, all in Busol Watershed, Baguio City. As it is, the aforesaid individuals filed a petition for injunction (Case No. 31-CAR-09) while Magdalena Gumangan, *et al.* filed a petition for identification, delineation and recognition of ancestral land claims with prayer for temporary restraining order and writ of preliminary injunction (Case No. 29-CAR-09). Respondent issued separate temporary restraining orders and writs of preliminary injunction in both cases.

The said orders clearly contravene our ruling in G.R. No. 180206 that those owners of houses and structures covered by the demolition orders issued by petitioner are not entitled to the injunctive relief previously granted by respondent.

We note that the same issues and arguments are raised in the present petitions for injunction which sought to enjoin the same demolition orders. Magdalena Gumangan, *et al*. in Case No. 29-CAR-09 anchored their ownership claim over portions of Busol Forest Reservation on Proclamation No. 15 as the portions occupied by the Gumangans and Molintas, their predecessors-in-interest, are indicated in the plans. In Case No. 31-CAR-09, Alexander Ampaguey, Sr., *et al.* likewise trace their ownership claims to the Heirs of Molintas and Heirs of Gumangan and a title (OCT No. 44) granted to Molintas on September 20, 1919 before the property was declared a reservation in 1922. The latter further argued that by virtue of R.A. No. 8371, the jurisdiction of the DENR over the Busol Forest Reservation was transferred to the NCIP. These matters touching on the issue of whether a clear legal right exists for the issuance of a writ of preliminary injunction in favor of the said claimants have already been settled in G.R. No. 180206. In other words,

the same parties or persons representing identical interests have litigated on the same issue and subject matter insofar as the injunctive relief is concerned. Evidently, the principle of *res judicata* applies to this case so that the parties are precluded from raising anew those issues already passed upon by this Court.

We do not subscribe to respondent's contention that petitioner resorted to the wrong remedy in assailing the injunctive orders as it should have moved for reconsideration of the same and then appeal the denial thereof to the CA. Likewise, we do not accept his explanation that his act of issuing the assailed injunctive writs was not contemptuous because the Court in G.R. No. 180206 even affirmed the power of the NCIP to issue temporary restraining orders and writs of injunction without any prohibition against the issuance of said writs when the main action is for injunction.

As mentioned earlier, the Court while recognizing that the NCIP is empowered to issue temporary restraining orders and writs of preliminary injunction, nevertheless ruled that *petitioners in the injunction case seeking to restrain the implementation of the subject demolition order are not entitled to such relief.* Petitioner City Government of Baguio in issuing the demolition advices are simply enforcing the previous demolition orders against the same occupants or claimants or their agents and successors-in-interest, only to be thwarted anew by the injunctive orders and writs issued by respondent. Despite the Court's pronouncement in G.R. No. 180206 that no such clear legal right exists in favor of those occupants or claimants to restrain the enforcement of the demolition orders issued by petitioner, and hence there remains no legal impediment to bar their implementation, respondent still issued the temporary restraining orders and writs of preliminary injunction. Worse, respondent would require petitioner to simply appeal his ruling, a move that will only result in multiple suits and endless litigation.

In the recent case of *The Baguio Regreening Movement, Inc. v. Masweng*[31] respondent issued similar temporary restraining

[31] G.R. No. 180882, February 27, 2013, 692 SCRA 109.

orders and writs of preliminary injunction in favor of claimants which include Magdalena Gumangan and Alexander Ampaguey, Sr. who sought to enjoin the Baguio District Engineer's Office, the Office of the City Architect and Parks Superintendent, the Baguio Regreening Movement, Inc. and the Busol Task Force from fencing the Busol Watershed Reservation. The CA affirmed respondent's orders and dismissed the petition for *certiorari* filed by the aforesaid offices. Applying the principle of *stare decisis*, the Court ruled:

> On February 4, 2009, this Court promulgated its Decision in G.R. No. 180206, a suit which involved several of the parties in the case at bar. In G.R. No. 180206, the City Mayor of Baguio City issued three Demolition Orders with respect to allegedly illegal structures constructed by private respondents therein on a portion of the Busol Forest Reservation. Private respondents filed a Petition for Injunction with the NCIP. Atty. Masweng issued two temporary restraining orders directing the City Government of Baguio to refrain from enforcing said Demolition Orders and subsequently granted private respondents' application for a preliminary injunction. The Court of Appeals, acting on petitioners' Petition for *Certiorari*, affirmed the temporary restraining orders and the writ of preliminary injunction.
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> This Court then upheld the jurisdiction of the NCIP on the basis of the allegations in private respondents' Petition for Injunction. It was similarly claimed in said Petition for Injunction that private respondents were descendants of Molintas and Gumangan whose claims over the portions of the Busol Watershed Reservation had been recognized by Proclamation No. 15. This Court thus ruled in G.R. No. 180206 that the nature of the action clearly qualify it as a dispute or controversy over ancestral lands/domains of the ICCs/IPs. On the basis of Section 69(d) of the IPRA and Section 82, Rule XV of NCIP Administrative Circular No. 1-03, the NCIP may issue temporary restraining orders and writs of injunction without any prohibition against the issuance of the writ when the main action is for injunction.
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> On petitioners' argument that the City of Baguio is exempt from the provisions of the IPRA and, consequently, the jurisdiction of the NCIP, this Court ruled in G.R. No. 180206 that said exemption cannot *ipso facto* be deduced from Section 78 of the IPRA because the law concedes the validity of prior land rights recognized or acquired through any process before its effectivity.

Lastly, however, this Court ruled that although the NCIP has the authority to issue temporary restraining orders and writs of injunction, it was not convinced that private respondents were entitled to the relief granted by the Commission. Proclamation No. 15 does not appear to be a definitive recognition of private respondents' ancestral land claim, as it merely identifies the Molintas and Gumangan families as *claimants* of a portion of the Busol Forest Reservation, but does not acknowledge vested rights over the same. Since it is required before the issuance of a writ of preliminary injunction that claimants show the existence of a right to be protected, this Court, in G.R. No. 180206, ultimately granted the petition of the City Government of Baguio and set aside the writ of preliminary injunction issued therein.

In the case at bar, petitioners and private respondents present the very same arguments and counter-arguments with respect to the writ of injunction against the fencing of the Busol Watershed Reservation. The same legal issues are thus being litigated in G.R. No. 180206 and in the case at bar, except that different writs of injunction are being assailed. In both cases, petitioners claim (1) that Atty. Masweng is prohibited from issuing temporary restraining orders and writs of preliminary injunction against government infrastructure projects; (2) that Baguio City is beyond the ambit of the IPRA; and (3) **that private respondents have not shown a clear right to be protected.** Private respondents, on the other hand, presented the same allegations in their Petition for Injunction, particularly the alleged recognition made under Proclamation No. 15 in favor of their ancestors. While *res judicata* does not apply on account of the different subject matters of the case at bar and G.R. No. 180206 (they assail different writs of injunction, *albeit* issued by the same hearing officer), **we are constrained by the principle of *stare decisis* to grant the instant petition.** The Court explained the principle of *stare decisis* in *Ting v. Velez-Ting:*

> The principle of *stare decisis* enjoins adherence by lower courts to doctrinal rules established by this Court in its final decisions. It is based on the principle that once a question of law has been examined and decided, it should be deemed settled and closed to further argument. Basically, it is a bar to any attempt to relitigate the same issues, necessary for two simple reasons: economy and stability. In our jurisdiction, the principle is entrenched in Article 8 of the Civil Code. (Citations omitted.)

We have also previously held that "[u]nder the doctrine of *stare decisis*, once a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same."[32] (Emphasis supplied.)

Respondent's willful disregard and defiance of this Court's ruling on a matter submitted for the second time before his office cannot be countenanced. By acting in opposition to this Court's authority and disregarding its final determination of the legal issue pending before him, respondent failed in his duty not to impede the due administration of justice and consistently adhere to existing laws and principles as interpreted in the decisions of the Court.

Section 7, Rule 71 of the Rules provides the penalty for indirect contempt. Section 7 of Rule 71 reads:

SEC. 7. *Punishment for indirect contempt.* – If the respondent is adjudged guilty of indirect contempt committed against a Regional Trial Court or a court of equivalent or higher rank, he may be punished by a fine not exceeding thirty thousand pesos or imprisonment not exceeding six (6) months, or both. x x x

For his contumacious conduct and considering the attendant circumstances, the Court deems it proper to impose a fine of ₱10,000.00.

WHEREFORE, the petition for contempt is **GRANTED.** The assailed Temporary Restraining Order dated July 27, 2009, Order dated July 31, 2009 and Writ of Preliminary Injunction in NCIP Case No. 31-CAR-09, and Temporary Restraining Order dated July 27, 2009, Order dated July 31, 2009 and Writ of Preliminary Injunction in NCIP Case No. 29-CAR-09 are hereby all **LIFTED and SET ASIDE.**

The Court finds respondent Atty. BRAIN S. MASWENG, Regional Hearing Officer, National Commission on Indigenous Peoples, Cordillera Administrative Region (NCIP-CAR), **GUILTY**

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[32] *Id.* at 122-125.

of Indirect Contempt and hereby imposes on him a fine of TEN THOUSAND PESOS (₱10,000.00) payable to this Court's Cashier within ten (10) days from notice, with the additional directive for respondent to furnish the Division Clerk of this Court with a certified copy of the Official Receipt as proof of his compliance.

SO ORDERED.

Sereno, C.J. (Chairperson), Leonardo-de Castro, Bersamin, and *Reyes, JJ.,* concur.

FIRST DIVISION

[G.R. No. 193666. Feb. 19, 2014]

PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **MARLON CASTILLO *Y* VALENCIA,** *accused-appellant.*

SYLLABUS

1. REMEDIAL LAW; EVIDENCE; FORMAL OFFER OF EVIDENCE; WHEN THE SWORN STATEMENT HAS BEEN FORMALLY OFFERED AS EVIDENCE, IT FORMS AN INTEGRAL PART OF THE PROSECUTION EVIDENCE WHICH COMPLEMENTS AND COMPLETES THE TESTIMONY ON THE WITNESS STAND.— The alleged variance in the narration in Nene's *Sinumpaang Salaysay* and during her testimony of the specific acts of the accused-appellant which constituted the rape is more apparent than real. During trial, Nene affirmed and confirmed the truthfulness of the statements contained in her *Sinumpaang Salaysay*. The *Sinumpaang Salaysay* was formally offered as evidence for the prosecution. When a sworn statement has been formally offered as evidence, it forms an integral part of the prosecution evidence which complements and completes the testimony on

the witness stand. Indeed, Nene's *Sinumpaang Salaysay* and testimony during trial complement, rather than contradict, each other. Thus, taken together, they give a more complete account of the dastardly acts done by the accused-appellant against his own daughter.

2. **CRIMINAL LAW; REVISED PENAL CODE; RAPE; CASE LAW PROVES THAT CIRCUMSTANCES OF TIME, PLACE, AND EVEN THE PRESENCE OF OTHER PERSONS ARE NOT CONSIDERED IN THE COMMISSION OF RAPE.—** The alleged contradiction about the whereabouts of Nene's mother at the time of the first incident of rape is inconsequential to the fact that the accused-appellant raped Nene at that time. Whether her mother, who is the accused-appellant's wife, was outside the house or sleeping inside the house at that time would not disprove the accused-appellant's rape of Nene. Case law proves that circumstances of time, place, and even the presence of other persons are not considerations in the commission of rape.

3. **ID.; ID.; ID.; PROOF OF HYMENAL LACERATION IS NOT AN ELEMENT OF RAPE; EXPLAINED.—** The medical report, which showed that Nene's hymen was still intact and revealed no sign of any genital injury, was consistent with Nene's statement that her genitalia did not bleed as a result of what the accused-appellant did to her. Contrary to the accused-appellant's contention, therefore, the medical report corroborated, rather than contradicted, Nene's testimony. More importantly, proof of hymenal laceration is not an element of rape. Nor is proof of genital bleeding. An intact hymen does not negate a finding that the victim was raped. Penetration of the penis by entry into the lips of the vagina, even without laceration of the hymen, is enough to constitute rape, and even the briefest of contact is deemed rape. Besides, rape can now be committed even without sexual intercourse, that is, by sexual assault.

4. **ID.; ID.; ID.; IN INCESTUOUS RAPE CASES, THE FATHER'S ABUSE OF MORAL ASCENDANCY AND INFLUENCE OVER HIS DAUGHTER CAN SUBJUGATE THE LATTER'S WILL THEREBY FORCING HER TO DO WHATEVER HE WANTS.—** Both Informations in Criminal Case Nos. Q-03-119452 and Criminal Case No.

Q-03-119453 alleged that the accused-appellant's acts of sexual molestation of his daughter Nene were attended by grave abuse of authority. The prosecution was able to establish that circumstance. In particular, the accused-appellant gravely abused his parental authority, particularly his disciplinary authority, over Nene and used it to further his lechery. In incestuous rape cases, the father's abuse of the moral ascendancy and influence over his daughter can subjugate the latter's will thereby forcing her to do whatever he wants. His moral and physical domination is sufficient to cow the daughter-victim into submission to his beastly desires. In this case, Nene feared the accused-appellant. In fact, the accused-appellant himself admitted in his testimony that he was a cruel husband and father and that he treated his wife and children harshly. Therefore, the trial and the appellate courts correctly ruled that Nene's testimony against the accused-appellant is credible enough and sufficient enough to sustain the accused-appellant's conviction. Nene was clear and categorical in her testimony that her father, the accused-appellant, with grave abuse of authority, threat and intimidation, sexually violated her in the two instances subject of the Informations in Criminal Case Nos. Q-03-119452 and Q-03-119453, respectively.

5. ID.; ID.; ID.; QUALIFIED RAPE BY SEXUAL ASSAULT; DISTINGUISHED FROM QUALIFIED RAPE BY SEXUAL INTERCOURSE; CASE AT BAR.— [R]ape by sexual intercourse and rape by sexual assault have different elements. We explained this matter in *People v. Espera*: x x x Moreover, under Article 266-B of the Revised Penal Code, as amended, qualified rape by sexual intercourse and qualified rape by sexual assault are punished differently. In particular, qualified rape by sexual intercourse is punishable by death. In view of Republic Act No. 9346 which prohibited the imposition of the death penalty, however, qualified rape is punishable by *reclusion perpetua*. On the other hand, qualified sexual assault is punishable by *reclusion temporal.* x x x Thus, Nene's statements in her *Sinumpaang Salaysay* and testimony at the witness stand established that her father mashed her breast, kissed and licked her vagina, inserted his finger in her sex organ, and rubbed his sex organ against hers but he did not penetrate her vagina. x x x This Court is aware of cases where the conviction of the accused for consummated rape has been upheld even if the

victim testified that there was no penetration and the accused simply rubbed his penis in the victim's vagina. However, in those cases, there were pieces of evidence such as the pain felt by the victim, injury to the sex organ of the victim *(e.g.*, hymenal laceration), and bleeding of the victim's genitalia. Here, the victim not only categorically stated that there was no penetration, she also stated that she felt no pain and her vagina did not bleed. Thus, the appellant cannot be convicted for qualified rape by sexual intercourse. Nevertheless, his conviction in Criminal Case No. Q-03-119452 cannot be downgraded to qualified attempted rape. The prosecution has alleged and proved that there was qualified rape by sexual assault when the accused-appellant kissed and licked his daughter Nene's vagina and inserted his finger in her sex organ.

6. ID.; ID.; ID.; ID.; IMPOSABLE PENALTY.— [U]nder Article 266-B of the Revised Penal Code, as amended, the penalty for qualified rape by sexual assault is *reclusion temporal.* There being neither mitigating nor aggravating circumstance which attended the crime, the penalty is imposable in its medium period which has a duration of 14 years, 8 months and 1 day to 17 years and 4 months, and the maximum period of the indeterminate penalty will be taken from this. The minimum period of the indeterminate sentence will be within the range of *prision mayor* which has a duration of 6 years and 1 day to 12 years, as it is the penalty next lower to *reclusion temporal.* Thus, the accused-appellant's penalty for qualified rape by sexual abuse in Criminal Case No. Q-03-119452 should be modified to an indeterminate sentence the minimum period of which is 12 years of *prision mayor* and the maximum period of which is 17 years and 4 months of *reclusion temporal.*

7. ID.; ID.; ID.; QUALIFIED ATTEMPTED RAPE; PRESENT IN CASE AT BAR.— Thus, Nene's statements in her *Sinumpaang Salaysay* and testimony at the witness stand established that, in November 2000, her father rubbed his sex organ against hers. This cannot be qualified rape by sexual assault. As the fact of penetration was not clearly established, this is only attempted qualified rape by sexual intercourse. There is an attempt to commit rape when the offender commences its commission directly by overt acts but does not perform all acts of execution which should produce the felony by reason of some cause or accident other than his own

spontaneous desistance. x x x In this case, the accused-appellant commenced the act of having sexual intercourse with Nene but failed to make a penetration into her sexual organ not because of his spontaneous desistance but because of the relatively small size of her orifice as indicated in the medical findings conducted upon Nene after the November 2000 incident.

8. ID.; ID.; ID.; ID.; IMPOSABLE PENALTY.— The penalty for qualified attempted rape is *prision mayor*. As no mitigating or aggravating circumstance attended the crime, the penalty is imposable in its medium period, which has a duration of 8 years and 1 day to 10 years, from which the maximum period of the indeterminate penalty will be taken. The minimum period of the indeterminate sentence will be within the range of *prision correccional*, which has a duration of 6 months and 1 day to 6 years, as it is the penalty next lower to *prision mayor*. Thus, the accused-appellant's conviction in Criminal Case No. Q-03-119453 should be modified to attempted qualified rape by sexual intercourse for which he is imposed an indeterminate sentence with a minimum period of 6 years of *prision correccional* and a maximum period of 10 years of *prision mayor*.

APPEARANCES OF COUNSEL

The Solicitor General for plaintiff-appellee.
Public Attorney's Office for accused-appellant.

D E C I S I O N

LEONARDO-DE CASTRO, *J.*:

This an appeal from the Decision[1] dated April 23, 2010 of the Court of Appeals in CA-G.R. CR.-H.C. No. 02999 denying the appeal of the ccused-appellant Marlon Castillo and affirming, with modification as to the award of damages, the

[1] *Rollo*, pp. 2-18; penned by Associate Justice Amy C. Lazaro-Javier with Associate Justices Rebecca De Guia-Salvador and Sesinando E. Villon, concurring.

Decision[2] dated April 11, 2007 of the Regional Trial Court (RTC) of Quezon City, Branch 86 in Criminal Case Nos. Q-03- 119452 and Q-03-119453 which found the accused-appellant guilty of two counts of rape committed against his 12-year old daughter.

The Informations filed against the accused-appellant read:

A. Criminal Case No. 0-03-119452

That sometime during the period comprised between August 27, 1996 up to August 27, 1997, inclusive, in Quezon City, Philippines, the said accused, with grave abuse of authority, did then and there willfully, unlawfully and feloniously commit sexual assault upon his daughter Nene,[3] a minor, then only six (6) years of age, by rubbing his penis on the labia of the vagina of said complainant, licking her vagina and breast and inserting his finger inside her vagina, against her will and without her consent, which act further debase[d], degrade[d] or demean[ed] the intrinsic worth and human dignity of said offended party as a human being, to the damage and prejudice of the said Nene.[4]

B. Criminal Case No. Q-03-119453

That on or about the month of November 2000, in Quezon City, Philippines, the said accused, with force, threat or intimidation and grave abuse of authority, did then and there willfully, unlawfully and feloniously commit sexual assault upon his daughter Nene, a minor, 12 years of age, by then and there mashing her breast, licking her vagina and breast and by vigorously rubbing his penis on the labia of her vagina, against her will and without her consent, which act further debase[d], degrade[d] or demean[ed] the intrinsic worth and human dignity of said offended party as a human being, to the damage and prejudice of the said Nene.[5]

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[2] CA *rollo*, pp. 17-25.

[3] The real names of the victim and the members of her immediate family have been withheld and fictitious names have been used instead to protect the victim's privacy pursuant to Republic Act No. 9262 (Anti-Violence Against Women and Their Children Act of 2004), its implementing rules and relevant jurisprudence beginning with *People v. Cabalquinto* (533 Phil. 703 [2006]).

[4] Records, p. 2.

[5] *Id.* at 4.

The accused-appellant pleaded not guilty to the charge when arraigned.[6] Pre-trial was conducted and, thereafter, trial ensued.

The prosecution established that Nene, the private offended party, is the child of the accused-appellant. She was born on August 27, 1990.[7]

Nene could no longer remember the exact date her ordeal at the hands of the accused-appellant started. All she could remember was that the accused-appellant first molested her when she was six years old.[8] Her mother was not around at that time and the accused-appellant told Nene' s siblings to go outside the house. Her father abused her in the bed placed in a corner of their house. He mashed her breasts and rubbed his sex organ against her vagina. He licked her breasts. He also licked her vagina and inserted his finger in it.[9] While he was doing these things to her, she resisted and cried but he scolded her and ordered her to be still. He also threatened to beat her and to kill her mother and brother.[10]

Nene' s defilement by the accused-appellant was repeated several times. Thus, disregarding the accused-appellant's threats, Nene summoned the courage to tell her mother about the accused-appellant's bestiality.[11] A complaint was filed against the accused-appellant in the National Bureau of Investigation which led to his detention. Nene's mother subsequently pleaded with Nene however, and they subsequently desisted from pursuing the complaint against him.[12] That was their mistake.

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[6] *Id.* at 56; Certificate of Arraignment.

[7] *Id.* at 25; Birth Certificate of Nene, Exhibit "B".

[8] *Rollo*, p. 5.

[9] Records, p. 22; *Sinumpaang Salaysay* of Nene, Exhibit "A".

[10] TSN, December 14, 2004, pp. 4-8.

[11] *Id.* at 9-10.

[12] Records, pp. 22-23; see also testimony of the accused-appellant, TSN, January 15, 2007, pp. 5-6.

Sometime in the second week of November 2000, the accused-appellant abused Nene again by rubbing his penis against her vagina.[13]

She underwent a medical examination which resulted to the following findings:

GENERAL PHYSICAL EXAMINATION

Height: 139.0 cm. Weight: 32.0 kg.

Fairly nourished, conscious, coherent, cooperative, ambulatory subject. Breasts, developing. Areolae, brown, measures 1.8 cm. in diameter. Nipples, brown, protruding, measures 0.4 cm. in diameter.
No sign of extragenital physical injury was noted.

GENITAL EXAMINATION:

Pubic hair, no growth. Labia majora, and minora, coaptated. Fourchette, tense. Vestibular mucosa, pinkish. Hymen, crescentric, short, thin, intact. Hymenal orifice, measures 1.0 cm. in diameter. Vaginal walls and rugosities, cannot be reached by the examining finger.

CONCLUSIONS:

1. No evident sign of extragenital physical injury was noted on the body of the subject at the time of examination.

2. Hymen, intact and its orifice small (1.0 cm. in diameter) as to preclude complete penetration by an average-sized adult Filipino male organ in full erection without producing any genital injury.[14]

In his defense, the accused-appellant denied the charges against him. He believes that Nene and her mother, "Nena," accused him of raping Nene because they believed him to be a cruel husband and father. He admitted being harsh to his wife and children, attributing it to the stress of being the family's sole breadwinner. "Rosing," his sister-in-law, witnessed his cruelty to his children and encouraged his daughter and wife to file the cases against him.[15]

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[13] *Rollo*, p. 5; TSN, December 14, 2004, pp. 15-16.

[14] Records, p. 115; Medico-Legal Findings, Exhibit "F".

[15] *Id.* at 7-8.

After weighing the respective evidence of the parties, the trial court found the prosecution's evidence credible and sufficient to sustain the conviction of the accused-appellant. According to the trial court:

> The rape consisted of rubbing the penis of the accused to the labia of the vagina of the private complainant. Prevailing jurisprudence is to the effect that "the slightest introduction of the male organ into the labia of the victim already constitutes rape["] x x x.[16] (Citations omitted.)

Thus, in a Decision dated April 11, 2007, the trial court found the accused-appellant guilty beyond reasonable doubt of two counts of qualified rape by sexual intercourse under Article 266-A(l) in relation to the first qualifying circumstance mentioned in Article 266-B of the Revised Penal Code, as amended. The dispositive portion of the decision reads:

> WHEREFORE, premises considered, judgment is hereby rendered as follows:
>
> 1) In Criminal Case No. Q-03-119452, finding the accused Marlon Castillo *y* Valencia,guilty ***beyond reasonable doubt*** of the crime of rape defined and penalized under Article[s] 266-A and 266-B of the Revised Penal Code, as amended, in relation to RA 7610 and hereby sentences said accused to suffer the penalty of ***reclusion perpetua.***
>
> 2) In Criminal Case No. Q-03-119453, finding the accused Marlon Castillo *y* Valencia, ***guilty beyond reasonable doubt*** of the crime of rape defined and penalized under Article[s] 266-A and 266-B of the Revised Penal Code, as amended, in relation to RA 7610 and hereby sentences him to suffer the penalty of ***reclusion perpetua.***
>
> In addition to the above penalties, the accused is hereby ordered to indemnify the private complainant the amount of ₱75,000.00 as moral damages.[17]

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[16] CA *rollo,* p. 22.

[17] *Id.* at 24-25.

The accused-appellant appealed his case to the Court of Appeals. For him, the RTC erred in giving undue credence to the testimonies of the prosecution witnesses, particularly Nene. He claimed that Nene's testimony contained many inconsistencies, improbabilities, ambiguities, and contradictions. She testified that she was six years old the first time the accused-appellant raped her while her mother was outside the house and at work, but stated in her *Sinumpaang Salaysay* dated November 23, 2000 that she was only four years old when the accused-appellant started sexually molesting her while her mother was inside the house sleeping. She also testified that the accused-appellant raped her by mashing her breast and trying to insert his sex organ into hers or rubbing his penis against her vagina, but she stated in her *Sinumpaang Salaysay* that he licked her breast and vagina, and inserted his penis and finger in her vagina.[18]

The accused-appellant also pointed to the inconsistency between Nene 's testimony that she was born on August 27, 1990 and her statement that she was twelve years old when the accused-appellant raped her in November 2000. He also argued that he could not have raped Nene as she herself testified that she neither felt any pain nor did her genitalia bleed. The medical report even showed that Nene's hymen was still intact and showed no sign of any genital injury. According to the accused-appellant, these inconsistencies cast serious doubt on the truthfulness of Nene's rape allegations.[19]

In a Decision dated April 23, 2010, the Court of Appeals rejected the contentions of the accused-appellant. It found credible Nene' s account during her testimony of her age and the manner she was ravished by her father. It held that the alleged inconsistencies in Nene's testimony were trivial and insufficient to render her account doubtful.[20] It further ruled that the accused-appellant committed rape by sexual assault under Article 266- A(2)

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[18] *Id.* at 40-45.

[19] *Id.*

[20] *Rollo,* pp. 11-14.

of the Revised Penal Code, as amended. According to the appellate court:

> [Nene's] testimony and *Sinumpaang Salaysay* agreed on the following matters: a) appellant licked her vagina; and b) appellant inserted his penis and finger into her vagina. As stated, she experienced all these lurid acts from her own father. Appellant cannot negate his liability by breaking down these acts and treating them separately. In any event, whether he penetrated his daughter with his penis or his finger does not affect his criminal liability for rape. Under Article 266-A of the Revised Penal Code, rape is committed by one who under any of the circumstances mentioned in paragraph 1, shall commit an act of sexual assault by inserting his penis into another's mouth or anal orifice or any instrument or object, into the genital or anal orifice of another person.[21]

Thus, the Court of Appeals denied the accused-appellant's appeal and affirmed the decision of the trial court, with modification as to the award of damages:

> **ACCORDINGLY**, We **AFFIRM** the appealed Decision with **MODIFICATION** granting ₱75,000 as civil indemnity and ₱25,000 as exemplary damages in addition to the trial court's award of ₱75,000 as moral damages.[22]

The accused-appellant brings this appeal based on the very same grounds of his appeal in the Court of Appeals.[23] Like the Court of Appeals, however, we deny the accused-appellant's appeal.

The alleged contradictions and inconsistencies refer to trivial matters. They are not material to the issue of whether or not the accused-appellant committed the acts for which he has been charged, tried and convicted.

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[21] *Id.* at 17.

[22] *Id.* at 18.

[23] *Id.* at 26-29. See Manifestation (In Lieu of Supplemental Brief) of the accused-appellant where he manifests that he has exhaustively discussed the assigned errors in the appellant's brief that he filed in the Court of Appeals and that he is adopting the same as his supplemental brief.

Besides, Nene was only ten years old when she answered the questions contained in the *Sinumpaang Salaysay* and she was only fourteen years old when she testified. Error-free testimony cannot be expected, most especially when a witness is recounting details of a harrowing experience, one which even an adult would like to bury in oblivion.[24]

The age of Nene when the incidents of rape happened has been established by her birth certificate which shows that she was born on August 27, 1990.[25] With that data, the age of Nene at the time of the first incident sometime in October 1996 to October 1997 and her age at the time of the second incident in November 2000 become a simple matter of mathematical computation.

Moreover, as regards Nene's age when the first incident of rape happened, Nene clarified what the accused-appellant perceives to be an inconsistency in her part. In her answer to the clarificatory questioning of the prosecutor, she categorically stated that she was six years old at that time:

ACP Taylor: Now, in Par. 10 of your complaint affidavit[/*Sinumpaang Salaysay*], it did not state [how] the incident transpired and where. Please tell me clearly, in connection with Par. 10 of your complaint affidavit[/*Sinumpaang Salaysay*] dated 23 Nov. 2000, when did this incident transpire?

[Nene]: ***Hindi ko na po maalaala pero ang sigurado po ako ay ako ay six years old po lamang ako noon.***[26] (Emphasis supplied.)

The alleged contradiction about the whereabouts of Nene's mother at the time of the first incident of rape is inconsequential to the fact that the accused-appellant raped Nene at that time. Whether her mother, who is the accused-appellant's wife, was outside the house or sleeping inside the house at that time would not disprove the accused-appellant's rape of Nene. Case law

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[24] *People v. Osing*, 402 Phil. 343, 350 (2001).

[25] Records, p. 25; Birth Certificate of Nene, Exhibit "B".

[26] *Id.* at 46.

proves that circumstances of time, place, and even the presence of other persons are not considerations in the commission of rape. Thus, we have held in *People v. Mendoza*:[27]

> [R]ape is no respecter of time and place. It can be committed even in places where people congregate, in parks, along the roadside, within school premises, inside a house or where there are other occupants, and even in the same room where there are other members of the family who are sleeping. (Citations omitted.)

The alleged variance in the narration in Nene's *Sinumpaang Salaysay* and during her testimony of the specific acts of the accused-appellant which constituted the rape is more apparent than real. During trial, Nene affirmed and confirmed the truthfulness of the statements contained in her *Sinumpaang Salaysay*.[28] The *Sinumpaang Salaysay* was formally offered as evidence for the prosecution.[29] When a sworn statement has been formally offered as evidence, it forms an integral part of the prosecution evidence which complements and completes the testimony on the witness stand.[30] Indeed, Nene's *Sinumpaang Salaysay* and testimony during trial complement, rather than contradict, each other. Thus, taken together, they give a more complete account of the dastardly acts done by the accused-appellant against his own daughter.

The medical report, which showed that Nene's hymen was still intact and revealed no sign of any genital injury, was consistent with Nene's statement that her genitalia did not bleed as a result of what the accused- appellant did to her. Contrary to the accused-appellant's contention, therefore, the medical report corroborated, rather than contradicted, Nene's testimony.

More importantly, proof of hymenal laceration is not an element of rape. Nor is proof of genital bleeding. An intact hymen does

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[27] 440 Phil. 755, 772 (2002).

[28] TSN, December 14, 2004, p. 12.

[29] Records, p. 160, see Order dated September 26, 2006.

[30] *People v. Servano*, 454 Phil. 256, 277. (2003).

not negate a finding that the victim was raped. Penetration of the penis by entry into the lips of the vagina, even without laceration of the hymen, is enough to constitute rape, and even the briefest of contact is deemed rape.[31] Besides, rape can now be committed even without sexual intercourse, that is, by sexual assault.

Both Informations in Criminal Case Nos. Q-03-119452 and Criminal Case No. Q-03-119453 alleged that the accused-appellant's acts of sexual molestation of his daughter Nene were attended by grave abuse of authority. The prosecution was able to establish that circumstance. In particular, the accused-appellant gravely abused his parental authority, particularly his disciplinary authority, over Nene and used it to further his lechery. In incestuous rape cases, the father's abuse of the moral ascendancy and influence over his daughter can subjugate the latter's will thereby forcing her to do whatever he wants. His moral and physical domination is sufficient to cow the daughter-victim into submission to his beastly desires.[32] In this case, Nene feared the accused-appellant. In fact, the accused-appellant himself admitted in his testimony that he was a cruel husband and father and that he treated his wife and children harshly.[33]

Therefore, the trial and the appellate courts correctly ruled that Nene's testimony against the accused-appellant is credible enough and sufficient enough to sustain the accused-appellant's conviction. Nene was clear and categorical in her testimony that her father, the accused-appellant, with grave abuse of authority, threat and intimidation, sexually violated her in the two instances subject of the Informations in Criminal Case Nos. Q-03- 119452 and Q-03-119453, respectively. The records bear this out.[34]

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[31] *People v. Pangilinan*, G.R. No. 183090, November 14, 2011, 660 SCRA 16, 3 l.

[32] *People v. Dominguez, Jr.*, G.R. No. 180914, November 24, 2010, 636 SCRA 134, 159.

[33] TSN, January 15, 2007, pp. 3-6.

[34] TSN, December 14, 2004.

In particular, Nene related that, sometime when she was six years old, the accused-appellant rubbed his sex organ against hers, licked her vagina and inserted his finger in it, all the while threatening her. Nene also recounted that, sometime in the second week of November 2000, the accused-appellant, in grave abuse of his parental authority, sexually molested her again by rubbing his penis against her vagina.

Nevertheless, there is a need to clarify the crimes for which the accused-appellant has been convicted.

The trial court found the accused-appellant guilty of qualified rape by sexual intercourse under Article 266-A(l) of the Revised Penal Code, as amended, in relation to the first qualifying circumstance enumerated in Article 266-B of the same law,[35] namely, that Nene is under 18 years of age and the accused-appellant is her father. On the other hand, the appellate court found the accused-appellant to have committed qualified rape by sexual assault under Article 266-A(2) of the Revised Penal Code, as amended, in relation to the first qualifying circumstance mentioned in Article 266-B.[36]

There is thus a substantial variance in the rulings of the trial and the appellate courts as regards the felony which the accused-appellant committed. The difference in their rulings is significant because rape by sexual intercourse and rape by sexual assault have different elements. We explained this matter in *People v. Espera*:[37]

> As the felony is defined under Article 266-A, rape may be committed either by sexual intercourse under paragraph 1 or by sexual assault under paragraph 2.
>
> Rape by sexual intercourse is a crime committed by a man against a woman. The central element is carnal knowledge and it is perpetrated under any of the circumstances enumerated in subparagraphs (a) to (d) of paragraph 1.

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[35] CA *rollo*, pp. 23-24.

[36] *Rollo*, p. 13.

[37] G.R. No. 202868, October 2, 2013.

On the other hand, rape by sexual assault contemplates two situations. *First*, it may be committed by a man who inserts his penis into the mouth or anal orifice of another person, whether a man or a woman, under any of the attendant circumstances mentioned in paragraph 1. *Second*, it may be committed by a person, whether a man or a woman, who inserts any instrument or object into the genital or anal orifice of another person, whether a man or a woman, under any of the four circumstances stated in paragraph 1. (Citations omitted.)

Moreover, under Article 266-B of the Revised Penal Code, as amended, qualified rape by sexual intercourse and qualified rape by sexual assault are punished differently. In particular, qualified rape by sexual intercourse is punishable by death. In view of Republic Act No. 9346[38] which prohibited the imposition of the death penalty, however, qualified rape is punishable by *reclusion perpetua*.[39] On the other hand, qualified sexual assault is punishable by *reclusion temporal*.

It is noteworthy that under the Information in Criminal Case No. Q-03-119452, the accused-appellant can be held liable for either of two crimes: (1) qualified statutory rape by sexual intercourse under Article 266-A(l)(d) of the Revised Penal Code, as amended, which punishes as rape a man's carnal knowledge of a woman under twelve years of age, even though there was no force, threat, intimidation, or grave abuse of authority, or (2) qualified statutory rape by sexual assault under Article 266-A(2) in connection with sub-paragraph (d) of the same Article 266-A(l). Both are qualified by the first qualifying circumstance under Article 266-B of the Revised Penal Code, as amended.

As stated earlier, the trial court convicted the accused-appellant for qualified statutory rape by sexual intercourse, finding that the accused- appellant' s sex organ penetrated Nene's genitalia. Such finding is, however, mistaken. What Nene testified to was that her father, the accused-appellant, rubbed his penis against

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[38] An Act Prohibiting the Imposition of Death Penalty in the Philippines.

[39] *Id.*, Section 2(a).

her vagina. However, such "rubbing of the penis" against the vagina does not amount to penetration which would consummate the rape by sexual intercourse.

In her *Sinumpaang Salaysay* dated November 23, 2000, Nene stated:

10 T: *Papaano ka nire-rape ng Papa mo?*
S: *Iyung ari niya inilalagay sa pekpek ko. Dinidilaan niya ung dede ko pati ang pekpek ko. Iyung daliri niya ipinapasok sa butas ng pekpek ko*.[40]

She explained this further on clarificatory questioning:

ACP Taylor: [O]key(,] to be more clear (sic), please tell me basically, what exactly did your father do to you when you were six years old and when you were residing in QC?

[Nene]: *Yung nga po yung ari niya idinidikit sa ari ko at kinukuskus nya yung ari niya sa ari ko tapos dinidilaan niya yung ari ko pati susu ko at pinapasok pa niya yung finger niya sa ari ko*[.]

ACP Taylor: You said and I quote, "*kinukuskus niya yung ari niya sa ari [k]o*." Now[,] ***may penetration ba, ipinap[a]sok ba niya sa ari mo yung ari niya*****?**

[Nene]: ***Hindi naman po pero kinukuskos nya po*****[.]**[41] (Emphases supplied.)

At the witness stand, Nene testified as follows during direct-examination:

Q: Will you please tell us how the accused raped you?
A: He was mashing my breast and *he was trying to insert his penis to my vagina*.

x x x x x x x x x

Q: So when the accused raped you for the first time, what did you feel?
A: I don't know, Sir.

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[40] Records, p. 22; *Sinumpaang Salaysay* of Nene, Exhibit "A".

[41] *Id*. at 46.

Q: Did you not feel pain at that time?
A: No, Sir.

Q: Was there any blood on your vital part when he raped you?
A: None, Sir.[42] (Emphasis supplied.)

On cross-examination, Nene testified:

Q: You also testified that you did not feel pain when the accused allegedly raped you, is that correct?
A: Yes, Sir.

Q: And also there was no blood coming from the vagina?
A: Yes, Sir.

Q: And it was only because the accused rubbed his penis to your vagina, is that correct?
A: Yes, Sir.[43]

Thus, Nene's statements in her *Sinumpaang Salaysay* and testimony at the witness stand established that her father mashed her breast, kissed and licked her vagina, inserted his finger in her sex organ, and rubbed his sex organ against hers but he did not penetrate her vagina.

Jurisprudence dictates that in order for rape to be consummated, there must be penetration of the penis into the vagina.[44] The concept of penetration required in rape by sexual intercourse has been explained in *People v. Campuhan*[45] as follows:

> [A] grazing of the surface of the female organ or touching the *mons pubis* of the *pudendum* is not sufficient to constitute consummated rape. Absent any showing of the slightest penetration of the female organ, *i.e*, touching of either *labia* of the *pudendum* by the penis, there can be no consummated rape; at most, it can only be attempted, if not acts of lasciviousness.

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[42] TSN, December 14, 2004, pp. 4 and 8.

[43] *Id.* at 14-15.

[44] *People v. Asuncion*, 417 Phil. 190, 197 (2001).

[45] 385 Phil. 912, 922 (2000).

This Court is aware of cases where the conviction of the accused for consummated rape has been upheld even if the victim testified that there was no penetration and the accused simply rubbed his penis in the victim's vagina.[46] However, in those cases, there were pieces of evidence such as the pain felt by the victim, injury to the sex organ of the victim (*e.g.*, hymenal laceration), and bleeding of the victim's genitalia. Here, the victim not only categorically stated that there was no penetration, she also stated that she felt no pain and her vagina did not bleed. Thus, the appellant cannot be convicted for qualified rape by sexual intercourse.

Nevertheless, his conviction in Criminal Case No. Q-03-119452 cannot be downgraded to qualified attempted rape. The prosecution has alleged and proved that there was qualified rape by sexual assault when the accused-appellant kissed and licked his daughter Nene's vagina and inserted his finger in her sex organ.

While the Court of Appeals correctly convicted the accused-appellant for rape by sexual assault, it erred in affirming the penalty imposed by the trial court — *reclusion perpetua*, which was for qualified rape by sexual intercourse. As stated earlier, under Article 266-B of the Revised Penal Code, as amended, the penalty for qualified rape by sexual assault is *reclusion temporal*. There being neither mitigating nor aggravating circumstance which attended the crime, the penalty is imposable in its medium period which has a duration of 14 years, 8 months and 1 day to 17 years and 4 months, and the maximum period of the indeterminate penalty will be taken from this. The minimum period of the indeterminate sentence will be within the range of *prision mayor* which has a duration of 6 years and 1 day to 12 years, as it is the penalty next lower to *reclusion temporal*. Thus, the accused-appellant's penalty for qualified rape by sexual abuse in Criminal Case No. Q-03-119452 should be modified

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[46] These cases include *People v. Alviz*, G.R. Nos. 144551-55, June 29, 2004, 433 SCRA 164; *People v. Asuncion*, *supra* note 44; *People v. Castillo*, 274 Phil. 940 (1991); and, *People v. Alimon*, 327 Phil. 447 (1996).

to an indeterminate sentence the minimum period of which is 12 years of *prision mayor* and the maximum period of which is 17 years and 4 months of *reclusion temporal.*

As regards the conviction of the accused-appellant in Criminal Case No. Q-03-119453, this too should be modified.

In her *Sinumpaang Salaysay* dated November 23, 2000, Nene simply stated:

17. T: *Kailan nangyari iyung huling paggalaw sa iyo ng Papa mo?*
S: *Noong lingo.*

18. T: *Ito bang nakaraang Linggo lang?*
S: *Opo*.[47]

Her testimony at the witness stand is as follows:

Q: In the information, you mentioned that you were again sexually abused by your father when you were already 12 years old?
A: Yes, Sir.

Q: And this was the last time your father raped you?
A: Yes, Sir.

Q: Do you recall the month?
A: November 2000.

Q: So in November of 2000 you were raped again by your father?
A: Yes, Sir, the last time.

Q: While rubbing his penis, did he not insert it to your vagina?
A: Yes, Sir.

Q: So he was just rubbing his penis to your vagina?
A: Yes,Sir.[48]

Thus, Nene's statements in her *Sinumpaang Salaysay* and testimony at the witness stand established that, in November 2000, her father rubbed his sex organ against hers. This cannot

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[47] Records, p. 22; *Sinumpaang Salaysay* of Nene, Exhibit "A".

[48] TSN, December 14, 2004, pp. 15-16.

be qualified rape by sexual assault. As the fact of penetration was not clearly established, this is only attempted qualified rape by sexual intercourse.

There is an attempt to commit rape when the offender commences its commission directly by overt acts but does not perform all acts of execution which should produce the felony by reason of some cause or accident other than his own spontaneous desistance.[49] In this connection, *People v. Bon*[50] is instructive:

> [U]nder Article 6 of the Revised Penal Code, there is an attempt when the offender commences the commission of a felony directly by overt acts, and does not perform all the acts of execution which should produce the felony by reason of some cause or accident other than his own spontaneous desistance. In the crime of rape, **penetration is an essential act of execution to produce the felony**. Thus, for there to be an attempted rape, the accused must have commenced the act of penetrating his sexual organ to the vagina of the victim but for some cause or accident other than his own spontaneous desistance, the penetration, however slight, is not completed.[51] (Emphasis supplied.)

In this case, the accused-appellant commenced the act of having sexual intercourse with Nene but failed to make a penetration into her sexual organ not because of his spontaneous desistance but because of the relatively small size of her orifice as indicated in the medical findings conducted upon Nene after the November 2000 incident.

The penalty for qualified attempted rape is *prision mayor*. As no mitigating or aggravating circumstance attended the crime, the penalty is imposable in its medium period, which has a duration of 8 years and 1 day to 10 years, from which the maximum period of the indeterminate penalty will be taken. The minimum period of the indeterminate sentence will be within the range of *prision correccional*, which has a duration of 6

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[49] *People v. Bon*, 536 Phil. 897, 916 (2006).

[50] *Id.*

[51] *Id.* at 918.

months and 1 day to 6 years, as it is the penalty next lower to *prision mayor*.[52] Thus, the accused-appellant's conviction in Criminal Case No. Q-03-119453 should be modified to attempted qualified rape by sexual intercourse for which he is imposed an indeterminate sentence with a minimum period of 6 years of *prision correccional* and a maximum period of 10 years of *prision mayor*.

With the modification of the crimes for which the accused-appellant has been convicted and of the corresponding penalties imposed on him, a modification of the award of damages is also in order.

For the qualified rape by sexual assault, in line with prevailing jurisprudence, the accused-appellant should pay Nene ₱30,000.00 civil indemnity. This is mandatory upon a finding of the fact of rape. Moreover, the award of moral damages is automatically granted without need of further proof, it being assumed that a rape victim has actually suffered moral damages entitling her to such award. Nene is, thus, entitled to recover ₱30,000.00 moral damages pursuant to prevailing case law. In addition, for purposes of the award of damages, the qualifying circumstances of minority and relationship entitle Nene to an award of ₱30,000.00 exemplary damages.[53]

For the attempted qualified rape by sexual intercourse, in accordance with recent case law, the accused-appellant should pay Nene ₱30,000.00 civil indemnity, ₱25,000.00 moral damages, and ₱l0,000.00 exemplary damages.[54]

As the Court of Appeals correctly ruled, interest at the rate of six percent (6%) *per annum* shall be imposed on all damages awarded from the date of finality of this judgment until fully paid, pursuant to prevailing jurisprudence.[55]

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[52] *People v. Brioso*, G.R. No. 182517, March 13, 2009, 581 SCRA 485, 500.

[53] *Flordeliz v. People*, G.R. No. 186441, March 3, 2010, 614 SCRA 225, 237-238.

[54] *People v. Brioso*, *supra* note 52.

[55] *Sison v. People*, G.R. No. 187229, February 22, 2012, 666 SCRA 645, 667.

WHEREFORE, the Decision dated April 23, 2010 of the Court of Appeals in CA-G.R. CR.-H.C. No. 02999 is hereby **AFFIRMED with MODIFICATION** as follows:

1) In Criminal Case No. Q-03-119452, the accused appellant Marlon Castillo *y* Valencia, is found **GUILTY** beyond reasonable doubt of the crime of qualified rape by sexual assault for which he is sentenced to suffer an indeterminate penalty the minimum period of which is 12 years of *prision mayor* and the maximum period of which is 17 years and 4 months of *reclusion temporal.*

The accused-appellant is further ordered to pay the victim ₱30,000.00 civil indemnity, ₱30,000.00 moral damages and ₱30,000.00 exemplary damages.

2) In Criminal Case No. Q-03-119453, the accused Marlon Castillo *y* Valencia, is found **GUILTY** beyond reasonable doubt of attempted qualified rape by sexual intercourse for which he is imposed an indeterminate sentence with a minimum period of 6 years of *prision correccional* and a maximum period of 10 years of *prision mayor*.

The accused-appellant is further ordered to pay the victim ₱30,000.00 civil indemnity, ₱25,000.00 moral damages, and ₱l0,000.00 exemplary damages.

The amounts awarded to the victim in Criminal Case Nos. Q-03- 119452 and Q-03-119453 shall earn legal interest at the rate of six percent (6%) *per annum* from the date of finality of this judgment until fully paid.

SO ORDERED.

Sereno, C.J. (Chairperson), Bersamin, Villarama, Jr., and *Reyes, JJ.*, concur.

FIRST DIVISION

[G.R. No. 193966. February 19, 2014]

DESIGN SOURCES INTERNATIONAL, INC. and KENNETH SY, *petitioners, vs.* **LOURDES L. ERISTINGCOL,** *respondent.*

SYLLABUS

REMEDIAL LAW; EVIDENCE; TESTIMONY OF WITNESSES; WITHOUT ANY MOTION FROM THE OPPOSING PARTY OR ORDER FROM THE COURT, THERE IS NOTHING IN THE RULES THAT PROHIBITS A WITNESS FROM HEARING THE TESTIMONIES OF OTHER WITNESSES; APPLICATION IN CASE AT BAR.— Excluding future witnesses from the courtroom at the time another witness is testifying, or ordering that these witnesses be kept separate from one another, is primarily to prevent them from conversing with one another. The purpose is to ensure that the witnesses testify to the truth by preventing them from being influenced by the testimonies of the others. In other words, this measure is meant to prevent connivance or collusion among witnesses. The efficacy of excluding or separating witnesses has long been recognized as a means of discouraging fabrication, inaccuracy, and collusion. However, without any motion from the opposing party or order from the court, there is nothing in the rules that prohibits a witness from hearing the testimonies of other witnesses. x x x Without any prior order or at least a motion for exclusion from any of the parties, a court cannot simply allow or disallow the presentation of a witness solely on the ground that the latter heard the testimony of another witness. It is the responsibility of respondent's counsel to protect the interest of his client during the presentation of other witnesses. If respondent actually believed that the testimony of Kenneth would greatly affect that of Stephen's, then respondent's counsel was clearly remiss in his duty to protect the interest of his client when he did not raise the issue of the exclusion of the witness in a timely manner.

APPEARANCES OF COUNSEL

Suarez & Narvasa Law Firm for petitioners.
Medialdea Ata Bello Guevarra & Suarez for respondent.

R E S O L U T I O N

SERENO, *C.J.*:

This is a Petition for Review on *Certiorari*[1] filed by Design Sources International, Inc. and Kenneth Sy (petitioners) under Rule 45 of the 1997 Rules of Civil Procedure. The Petition assails the Court of Appeals (CA) Decision[2] dated 1 June 2010 and Resolution[3] dated 30 September 2010 in CA G.R. SP No. 98763. The assailed Decision and Resolution sustained the Orders dated 8 February 2006, 1 June 2006 and 26 February 2007 issued by the Regional Trial Court (RTC) of Makati City in Civil Case No. 00-850.

Considering that there are no factual issues in this case, we adopt the findings of fact of the CA, as follows:

> Design Sources International, Inc. ("Petitioner Corporation") is a distributor of Pergo flooring. Sometime in 1998, the Private Respondent bought the said brand of flooring of the "Cherry Blocked" type from the Petitioner Corporation. The flooring was installed in her house.
>
> On February 24, 2000, the Private Respondent discovered that the Pergo flooring installed had unsightly bulges at the joints and seams. The Private Respondent informed the Petitioners of these defects and the former insisted on the repair or replacement of the flooring at the expense of the latter.
>
> After several inspections of the alleged defective flooring, meetings between the parties and exchanges of correspondence, the Petitioner

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[1] *Rollo*, pp. 2-22.

[2] *Id.* at 27-34; penned by Associate Justice Florito S. Macalino and concurred in by Associate Justices Juan Q. Enriquez, Jr. and Ramon M. Bato, Jr.

[3] *Id.* at 35.

Corporation was given until May 31, 2000 to replace the installed flooring. Nevertheless, on the deadline, the Petitioner Corporation did not comply with the demand of the Private Respondent. A complaint for damages, docketed as Civil Case No.00-850, was thus filed by the Private Respondent before the RTC on July 13, 2000.

On February 8, 2006, Kenneth Sy, one of the Petitioners' witnesses, testified in open court. Immediately after his testimony, the following occurred as evidenced by the transcript of stenographic notes ("TSN"):

COURT	:	(To Atty. Posadas) Who will be your next witness?
ATTY. POSADAS	:	Your honor, my next witness will be Stephen Sy, also of Design Source.
ATTY. FORTUN	:	Your honor, may I know if Mr. Stephen Sy around [sic] the courtroom?
ATTY. POSADAS	:	(Pointing to the said witness) He is here.
ATTY. FORTUN	:	So the witness is actually inside the Courtroom.
ATTY. POSADAS	:	But, your honor, please, I was asking about it, nahiya lang ako kay Atty. Fortun.
ATTY. FORTUN	:	But I was [sic] asked of the exclusion of the witness.
COURT	:	(To Atty. Posadas) You shall [sic] have to tell the Court of your ready witness.
ATTY. FORTUN	:	He already heard the whole testimony of his colleague.
ATTY. POSADAS	:	I'm sorry, your honor.
COURT	:	All right. When were [sic] you present him, today or next time.
ATTY. POSADAS	:	Next time, your honor.
COURT	:	All right. Next time, Atty. Posadas, if you have other witnesses present in Court inform us.

ATTY. FORTUN : No, your honor, in fact I will object to the presentation of Mr. Stephen Sy, because his [sic] here all the time when the witness was in [sic] cross-examined.

ATTY. POSADAS : Your honor, I will just preserve [sic] my right to present another witness on the technical aspect of this case.

COURT : Okay. All right. Order. After the completion of the testimony of defendant's second witness in the person of Mr. Kenneth Sy, [A]tty. Benjamin Posadas, counsel for the defendants, moved for continuance considering that he is not feeling well and that he needs time to secure another witness to testify on the technical aspect, because of the objection on the part of plaintiff's counsel Atty. Philip Sigfrid Fortun on his plan of presenting of Mr. Stephen Sy as their next witness due to his failure to inform the Court and the said counsel of the presence of the said intended witness while Mr. Kenneth Sy was testifying. There being no objection thereto on the part of Atty. Fortun, reset the continuation of the presentation of defendant's evidence to April 5, 2006 at 8:30 o'clock in the morning.

x x x x x x x x x

SO ORDERED.[4]

On 22 March 2006, petitioners moved for a reconsideration of the Order, but their motion was denied by the RTC on 1 June 2006 on the ground that "the Court deems it no longer necessary to allow Stephen Sy from testifying [sic] when a different witness could testify on matters similar to the intended testimony of the former."[5] The Order also stated that "to allow

[4] *Rollo*, pp. 27-29; CA Decision.

[5] *Id.* at 78; RTC Order dated 1 June 2006.

Stephen Sy from testifying [sic] would work to the disadvantage of the plaintiff as he already heard the testimony of witness Kenneth Sy."[6]

Petitioners filed a Second Motion for Reconsideration (with Leave of Court) dated 19 June 2006, which was likewise denied by the RTC in the assailed Order dated 26 February 2007.[7]

Petitioners sought recourse before the CA by way of a Petition for *Certiorari* under Rule 65 of the Rules of Court. They raised the sole issue of whether the RTC committed grave abuse of discretion when it refused to allow architect Stephen Sy (Stephen) to testify as to material matters.[8]

At the outset, the CA found no sufficient basis that herein respondent previously asked for the exclusion of other witnesses. It was the duty of respondent's counsel to ask for the exclusion of other witnesses, without which, there was nothing to prevent Stephen from hearing the testimony of petitioners' other witnesses. Nevertheless, following the doctrine laid down in *People v. Sandal* (*Sandal*),[9] the appellate court ruled that the RTC did not commit grave abuse of discretion in issuing the assailed Orders considering that petitioners failed to show that Stephen's testimony would bolster their position. Moreover, from the Manifestation of petitioners' counsel, it appears that petitioners had another witness who could give a testimony similar to Stephen's.

Petitioners elevated the case before us assailing the Decision of the CA. In the meantime, trial proceeded in the lower court. On 11 February 2014, they filed a Motion for Issuance of a Writ of Preliminary Mandatory Injunction or Temporary Restraining Order either to allow the presentation of Stephen as a witness or to suspend the trial proceedings pending the ruling in the instant Petition.

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[6] *Id.*

[7] *Id.* at 86; RTC Order dated 26 February 2007.

[8] *Id.* at 87-102.

[9] 54 Phil. 883 (1930).

ASSIGNMENT OF ERRORS

Petitioners raise the following errors allegedly committed by the CA:

Finding that the preclusion of Stephen Sy from testifying as a witness in the trial of the case did not amount to grave abuse of discretion on the part of Judge Pozon.

Applying the case of *People vs. Sandal* in justifying the order of exclusion issued by Judge Pozon, precluding Stephen Sy from testifying as witness.

Concluding that the petitioners had another witness that could have given a similar testimony as that of Stephen Sy.[10]

THE COURT'S RULING

We find the Petition to be impressed with merit.

The principal issue is whether the RTC committed grave abuse of discretion in issuing the assailed Orders disallowing petitioners from presenting Stephen as their witness.

The controversy arose from the objection of respondent's counsel to the presentation of Stephen as petitioners' witness considering that Stephen was already inside the courtroom during the presentation of witness Kenneth Sy (Kenneth). However, as aptly found by the CA, respondent failed to substantiate her claim that there was a prior request for the exclusion of other witnesses during the presentation of Kenneth. Respondent did not even allege in her Comment[11] that there was any such request.

Section 15, Rule 132 of the Revised Rules of Court provides:

SEC. 15.Exclusion and separation of witnesses. — On any trial or hearing, the judge may exclude from the court any witness not at the time under examination, so that he may not hear the testimony of other witnesses. The judge may also cause witnesses to be kept separate and to be prevented from conversing with one another until all shall have been examined.

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[10] *Rollo*, p. 9.

[11] *Id.* at 140-152.

Excluding future witnesses from the courtroom at the time another witness is testifying, or ordering that these witnesses be kept separate from one another, is primarily to prevent them from conversing with one another. The purpose is to ensure that the witnesses testify to the truth by preventing them from being influenced by the testimonies of the others. In other words, this measure is meant to prevent connivance or collusion among witnesses. The efficacy of excluding or separating witnesses has long been recognized as a means of discouraging fabrication, inaccuracy, and collusion. However, without any motion from the opposing party or order from the court, there is nothing in the rules that prohibits a witness from hearing the testimonies of other witnesses.

There is nothing in the records of this case that would show that there was an order of exclusion from the RTC, or that there was any motion from respondent's counsel to exclude other witnesses from the courtroom prior to or even during the presentation of the testimony of Kenneth. We are one with the CA in finding that under such circumstances, there was nothing to prevent Stephen from hearing the testimony of Kenneth. Therefore, the RTC should have allowed Stephen to testify for petitioners.

The RTC and the CA, however, moved on to determine the materiality of the testimony of Stephen, which became their basis for not allowing the latter to testify. Applying *Sandal*, the CA ruled that the absence of a showing of how his testimony would bolster the position of petitioners saved the judgment of the RTC in issuing the order of exclusion.

We agree with petitioners that the application of *Sandal* is misplaced. Contrary to the present case, in *Sandal* there was a court order for exclusion which was disregarded by the witness. The defiance of the order led to the exercise by the court of its discretion to admit or reject the testimony of the witness who had defied its order. Again, in this case, there was no order or motion for exclusion that was defied by petitioners and their witnesses. Thus, the determination of the materiality of Stephen's testimony in relation to the strengthening of petitioners' defense was uncalled for.

Without any prior order or at least a motion for exclusion from any of the parties, a court cannot simply allow or disallow the presentation of a witness solely on the ground that the latter heard the testimony of another witness. It is the responsibility of respondent's counsel to protect the interest of his client during the presentation of other witnesses. If respondent actually believed that the testimony of Kenneth would greatly affect that of Stephen's, then respondent's counsel was clearly remiss in his duty to protect the interest of his client when he did not raise the issue of the exclusion of the witness in a timely manner.

Respondent is bound by the acts of her counsel, including mistakes in the realm of procedural techniques.[12] The exception to the said rule does not apply herein, considering that there is no showing that she was thereby deprived of due process. At any rate, respondent is not without recourse even if the court allows the presentation of the testimony of Stephen, considering the availability of remedies during or after the presentation of witnesses, including but not limited to the impeachment of testimonies.

Therefore, this Court finds that the RTC committed grave abuse of discretion in not allowing Stephen to testify notwithstanding the absence of any order for exclusion of other witnesses during the presentation of Kenneth's testimony.

In view thereof, the RTC is hereby ordered to allow the presentation of Stephen Sy as witness for petitioners. Accordingly, petitioners' Motion for Issuance of a Writ of Preliminary Mandatory Injunction or Temporary Restraining Order is now rendered moot.

WHEREFORE, premises considered, the instant Petition is hereby **GRANTED**.

SO ORDERED.

Leonardo-de Castro, Bersamin, Villarama, Jr., and *Reyes, JJ.,* concur.

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[12] *Producers Bank of the Philippines v. Court of Appeals*, 430 Phil. 812 (2002).

SECOND DIVISION

[G.R. No. 198452. February 19, 2014]

PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **VICENTE ROM,** *accused-appellant.*

SYLLABUS

1. **REMEDIAL LAW; EVIDENCE; CREDIBILITY OF WITNESSES; FINDINGS OF THE TRIAL COURT; ACCORDED WITH RESPECT; RATIONALE.—** It is a fundamental rule that findings of the trial court which are factual in nature and which involve the credibility of witnesses are accorded with respect, more so, when no glaring errors, gross misapprehension of facts, and speculative, arbitrary, and unsupported conclusions can be gathered from such findings. The reason behind this rule is that the trial court is in a better position to decide the credibility of witnesses having heard their testimonies and observed their deportment and manner of testifying during the trial. The rule finds an even more stringent application where the trial court's findings are sustained by the Court of Appeals.

2. **CRIMINAL LAW; REPUBLIC ACT NO. 6425 (DANGEROUS DRUGS ACT OF 1972 AS AMENDED BY R.A. NO. 7659); ILLEGAL SALE OF DANGEROUS DRUGS; ELEMENTS. —** To secure a conviction for **illegal sale of dangerous drugs**, like *shabu,* the following essential elements must be duly established: (1) identity of the buyer and the seller, the object, and consideration; and (2) the delivery of the thing sold and the payment therefor. Succinctly, the delivery of the illicit drug to the *poseur*-buyer, as well as the receipt of the marked money by the seller, successfully consummates the buy-bust transaction. Hence, what is material is the proof that the transaction or sale transpired, coupled with the presentation in court of the *corpus delicti* as evidence.

3. **ID.; ID.; ILLEGAL POSSESSION OF DANGEROUS DRUGS; ELEMENTS.—** With regard to the offense of **illegal possession of dangerous drugs**, like *shabu*, the following elements must be proven: (1) the accused is in possession of an item or object

that is identified to be a prohibited drug; (2) such possession is not authorized by law; and (3) the accused freely and consciously possesses the said drug.

4. ID.; ID.; ID.; ID.; POSSESSION OF DANGEROUS DRUGS CONSTITUTES *PRIMA FACIE* EVIDENCE OF KNOWLEDGE OR *ANIMUS POSSIDENDI* SUFFICIENT TO CONVICT AN ACCUSED IN THE ABSENCE OF A SATISFACTORY EXPLANATION OF SUCH POSSESSION; CASE AT BAR.— Settled is the rule that possession of dangerous drugs constitutes *prima facie* evidence of knowledge or *animus possidendi* sufficient to convict an accused in the absence of a satisfactory explanation of such possession. As such, the burden of evidence is shifted to the accused to explain the absence of knowledge or *animus possidendi*, which the appellant in this case miserably failed to do. There is also no truth on the appellant's claim that the entry in the house was illegal making the search and the seizure in connection thereto invalid, rendering the pieces of evidence obtained by the police officers inadmissible for being the "fruit of a poisonous tree." x x x To repeat, the appellant, in this case, was caught *in flagrante delicto* selling *shabu*, thus, he was lawfully arrested. Following *Dimacuha*, the subsequent seizure of four heat-sealed plastic packets of *shabu* in the appellant's wallet that was tucked in his pocket was justified and admissible in evidence for being the fruit of the crime. With the foregoing, this Court is fully convinced that the prosecution had likewise proved beyond a shadow of reasonable doubt that the appellant is guilty of the offense of illegal possession of *shabu* in violation of Section 16, Article III of Republic Act No. 6425, as amended.

5. REMEDIAL LAW; EVIDENCE; TESTIMONY OF WITNESSES; MERE DENIAL, UNSUBSTANTIATED BY CLEAR AND CONVINCING EVIDENCE, IS A NEGATIVE SELF-SERVING EVIDENCE WHICH CANNOT BE GIVEN GREATER EVIDENTIARY WEIGHT THAN THE TESTIMONY OF THE PROSECUTION WITNESS WHO TESTIFIED ON AFFIRMATIVE MATTERS; APPLICATION IN CASE AT BAR.— Time and again, this Court held that denial is an inherently weak defense and has always been viewed upon with disfavor by the courts due to the ease with which it can be concocted. Inherently weak, denial

as a defense crumbles in the light of positive identification of the appellant, as in this case. The defense of denial assumes significance only when the prosecution's evidence is such that it does not prove guilt beyond reasonable doubt, which is not the case here. Verily, mere denial, unsubstantiated by clear and convincing evidence, is negative self-serving evidence which cannot be given greater evidentiary weight than the testimony of the prosecution witness who testified on affirmative matters. Moreover, there is a presumption that public officers, including the arresting officers, regularly perform their official duties. In this case, the defense failed to overcome this presumption by presenting clear and convincing evidence. Furthermore, this Court finds no ill motive that could be attributed to the police officers who had conducted the buy-bust operation. Even the allegation of the appellant that PO2 Martinez got angry with him when he failed to pinpoint the big time pusher cannot be considered as the ill motive in implicating the appellant on all the three charges against him for this is self-serving and uncorroborated.

APPEARANCES OF COUNSEL

The Solicitor General for plaintiff-appellee.
Adel Archival for accused-appellant.

D E C I S I O N

PEREZ, *J.*:

On appeal is the Decision[1] dated 9 August 2010 of the Court of Appeals in CA-G.R. CR-H.C. No. 00579 affirming with modification the Decision[2] dated 24 June 2002 of the Regional Trial Court (RTC) of Cebu City, Branch 10, in Criminal Case Nos. CBU-55062, CBU-55063 and CBU-55067, finding herein appellant Vicente Rom guilty beyond reasonable doubt of violating

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[1] Penned by Associate Justice Eduardo B. Peralta, Jr. with Associate Justices Edgardo L. Delos Santos and Agnes Reyes Carpio, concurring. *Rollo*, pp. 4-14.

[2] Penned by Presiding Judge Soliver C. Peras. CA *rollo*, pp. 24-57.

Sections 15[3] (illegal sale of *shabu*), 15-A[4] (maintenance of a drug den) and 16[5] (illegal possession of *shabu*), Article III of Republic Act No. 6425, also known as the Dangerous Drugs Act of 1972, as amended by Republic Act No. 7659.[6] In Criminal Case Nos. CBU-55062 and CBU-55063, for respectively violating Sections 15 and 16, Article III of Republic Act No. 6425, as amended, the trial court imposed on the appellant the penalty of *prision correccional* in its medium period ranging between two (2) years, four (4) months and one (1) day, as minimum, to four (4) years and two (2) months, as maximum. While in Criminal Case No. CBU-55067, that is for violating Section 15-A, Article III of Republic Act No. 6425, as amended, the trial court sentenced the appellant to *reclusion perpetua* and he was likewise ordered to pay a fine of ₱500,000.00. The Court of Appeals, however, modified and reduced the penalty in Criminal Case Nos. CBU-55062 and CBU-55063 to an imprisonment of six (6) months of *arresto mayor*, as minimum, to four (4) years and two (2) months of *prision correccional*, as maximum, after applying the Indeterminate Sentence Law.

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[3] Sec. 15. *Sale, Administration, Dispensation, Delivery, Transportation and Distribution of Regulated Drugs*. — The penalty of *reclusion perpetua* to death and a fine ranging from five hundred thousand pesos to ten million pesos shall be imposed upon any person who, unless authorized by law, shall sell, dispense, deliver, transport or distribute any regulated drug.

[4] Sec. 15-A. *Maintenance of a Den, Dive or Resort for Regulated Drug Users*. — The penalty of *reclusion perpetua* to death and a fine ranging from five hundred thousand pesos to ten million pesos shall be imposed upon any person or group of persons who shall maintain a den, dive or resort where any regulated drugs is used in any form, or where such regulated drugs in quantities specified in Section 20, paragraph 1 of this Act are found.

[5] Sec. 16. *Possession or Use of Regulated Drugs*. — The penalty of *reclusion perpetua* to death and a fine ranging from five hundred thousand pesos to ten million pesos shall be imposed upon any person who shall possess or use any regulated drug without the corresponding license or prescription, subject to the provisions of Section 20 hereof.

[6] Also known as "An Act To Impose The Death Penalty On Certain Heinous Crimes, Amending For That Purpose The Revised Penal Laws, As Amended, Other Special Penal Laws, And For Other Purposes."

In three separate Informations[7] all dated 1 September 2000, the appellant was charged with violation of Sections 15, 15-A and 16, Article III of Republic Act No. 6425, as amended. The three Informations read:

Criminal Case No. CBU-55062

That on or about the 31st day of August 2000, at about 10:30 P.M. in the City of Cebu, Philippines, and within the jurisdiction of this Honorable Court, [herein appellant], **with deliberate intent and without being authorized by law**, did then and there **sell, deliver or give away** to a poseur buyer **one (1) heat sealed plastic packet of white crystalline substance weighing 0.03 gram locally known as "*shabu*"**, containing Methylamphetamine Hydrochloride, a regulated drug.[8] (Emphasis and italics supplied).

Criminal Case No. CBU-55063

That on or about the 31st day of August 2000, at about 10:30 P.M., in the City of Cebu, Philippines, and within the jurisdiction of this Honorable Court, [appellant], **with deliberate intent and without being authorized by law**, did then and there **have in [his] possession and control or use** the following:

Four (4) heat sealed plastic packets of white crystalline substance weighing 0.15 gram

locally known as "*shabu*", containing Methylamphetamine Hydrochloride, a regulated drug, **without the corresponding license or prescription**.[9] (Emphasis and italics supplied).

Criminal Case No. CBU-55067

That on the 31s[t] day of August, 2000, at about 10:30 P.M., in the City of Cebu, Philippines, and within the jurisdiction of this Honorable Court, [appellant], **with deliberate intent**, did then and there **knowingly maintain a den for regulated users** along the interior portion of Barangay T. Padilla in violation to (sic) the provision of Sec. 15-A of Art. III of RA 6425.[10] (Emphasis supplied).

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[7] CA *rollo*, pp. 10-15.

[8] *Id.* at 10.

[9] *Id.* at 12.

[10] *Id.* at 14.

On arraignment, the appellant, with the assistance of counsel *de parte*, pleaded NOT GUILTY[11] to all the charges. A pre-trial conference was conducted on 2 April 2001, but no stipulation or agreement was arrived at.[12] The pre-trial conference was then terminated and trial on the merits thereafter ensued.

The prosecution presented as witnesses Police Officer 2 Marvin Martinez (PO2 Martinez), the designated *poseur*-buyer; PO3 Franco Mateo Yanson (PO3 Yanson); and Police Senior Inspector Marvin Sanchez (P/Sr. Insp. Sanchez), the team leader of the buy-bust operation against the appellant. They were all assigned at the Vice Control Section of the Cebu City Police Office (VCS-CCPO). The testimony, however, of P/Sr. Insp. Mutchit G. Salinas (P/Sr. Insp. Salinas), the forensic analyst, was dispensed[13] with in view of the admission made by the defense as to the authenticity and due existence of Chemistry Report No. D-1782-2000[14] dated 1 September 2000 and the expertise of the forensic analyst.

The prosecution's evidence established the following facts:

Two weeks prior to 31 August 2000, the VCS-CCPO received confidential information from their informant that *alias* Dodong, who turned out later to be the appellant, whose real name is Vicente Rom, was engaged in the illegal sale of *shabu* and also maintained a drug den at his residence in *Barangay* T. Padilla, Cebu City. Thus, the VCS-CCPO, particularly PO2 Martinez, conducted surveillance and monitoring operation.[15]

On 31 August 2000, at around 10:15 p.m., P/Sr. Insp. Sanchez, Chief of VCS-CCPO, formed a team to conduct a buy-bust

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[11] As evidenced by the Certificate of Arraignment and RTC Order both dated 2 October 2000. Records, pp. 31-32.

[12] *Id.* at 43.

[13] *Id.* at 48.

[14] *Id.* at 46.

[15] Testimony of PO2 Martinez, TSN, 29 November 2001, pp. 3 and 15; Testimony of PO3 Yanson, TSN, 6 December 2001, pp. 11-12; Testimony of P/Sr. Insp. Sanchez, TSN, 7 February 2002, pp. 10-12.

operation against the appellant. The buy-bust team was composed of PO2 Martinez (*poseur*-buyer), Senior Police Officer 1 Jesus Elmer Fernandez (SPO1 Fernandez), PO3 Yanson, PO3 Benicer Tamboboy (PO3 Tamboboy), PO3 Jaime Otadoy (PO3 Otadoy) and P/Sr. Insp. Sanchez (team leader). Being the designated *poseur*-buyer, PO2 Martinez was provided with a ₱100.00 peso bill and a ₱10.00 peso bill buy-bust money bearing Serial Nos. AD336230 and AM740786, respectively, and both were marked with the initials of PO2 Martinez, *i.e.* "MM." The former amount would be used to buy *shabu* while the latter amount would serve as payment for the use of the drug den.[16]

After the briefing, the buy-bust team proceeded to the target area and upon arrival there at around 10:20 p.m., PO2 Martinez proceeded directly to the appellant's house, which was earlier pointed to by their informant, who was also with them during the buy-bust operation. The rest of the buy-bust team strategically positioned themselves nearby. Once PO2 Martinez reached the appellant's house, he knocked on the door, which the appellant opened. PO2 Martinez subsequently told the appellant that he wanted to buy *shabu* worth ₱100.00. The appellant looked around to check if PO2 Martinez had a companion. Seeing none, the appellant took out his wallet from his pocket and got one heat-sealed plastic packet containing white crystalline substance, later confirmed to be *shabu*, and gave it to PO2 Martinez. The latter, in turn, gave the ₱100.00 peso bill marked money to the appellant. While this sale transaction was going on, PO3 Yanson and P/Sr. Insp. Sanchez were only five to eight meters away from PO2 Martinez and the appellant. P/Sr. Insp. Sanchez clearly witnessed the sale transaction as it happened right outside the door of the appellant's house.[17]

Afterwards, PO2 Martinez told the appellant that he wanted to sniff the *shabu*, so the latter required the former to pay an additional amount of ₱10.00 as rental fee for the use of his place. After paying the said amount, the appellant allowed PO2

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[16] *Id.* at 3-5; *Id.* at 3-4; *Id.* at 3-5.

[17] *Id.* at 6-7 and 16; *Id.* at 4-5 and 12; *Id.* at 5-6 and 13-14.

Martinez to enter his house. Once inside the house, PO2 Martinez was directed by the appellant to proceed to the room located at the right side of the *sala*. Upon entering the said room, PO2 Martinez saw three persons, later identified to be Jose Delloso (Delloso), Danilo Empuerto (Empuerto) and Arnie Ogong (Ogong), already sniffing *shabu*.[18]

Thereupon, PO2 Martinez made a missed call to P/Sr. Insp. Sanchez, which was their pre-arranged signal, to signify that the whole transaction was consummated. After the lapsed of about 10 to 15 seconds, the rest of the team, who were just few meters away from the appellant's house, barged in and identified themselves as police officers. PO2 Martinez then told PO3 Yanson to hold the appellant. PO3 Yanson grabbed the appellant and made a body search on the latter that led to the recovery of four heat-sealed transparent plastic packets containing white crystalline substance, which were inside the appellant's brown wallet that was tucked in his pocket; the buy-bust money consisting of ₱100.00 peso bill and ₱10.00 peso bill; and ₱280.00 consisting of two ₱100.00 peso bills, one ₱50.00 peso bill and three ₱10.00 peso bills believed to be the proceeds of the appellant's illegal activities. The one heat-sealed plastic packet of *shabu* bought by PO2 Martinez from the appellant remained in the possession of the former.[19]

The appellant, Delloso, Empuerto and Ogong were informed of their constitutional rights and were later brought by the buy-bust team to their office, together with the confiscated items, for documentation. At the office of the buy-bust team, the confiscated items were given to their investigator, SPO1 Fernandez, who marked the one heat-sealed plastic packet containing white crystalline substance, which was the subject of the sale transaction, with VRR-8-31-2000-01 (buy-bust) while the other four heat-sealed plastic packets containing white

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[18] *Id.* at 7-8; Testimony of P/Sr. Insp. Sanchez, TSN, 7 February 2002, *id.* at 8 and 13-14.

[19] *Id.* at 8-10 and 12; Testimony of PO3 Yanson, TSN, 6 December 2001, pp. 5-8 and 18; Testimony of P/Sr. Insp. Sanchez, *id.* at 6-7 and 15; Appellee's Brief dated 5 January 2005, CA *rollo*, p. 166.

crystalline substance, which were recovered from the appellant, were similarly marked with VRR-8-31-2000-02 to VRR-8-31-2000-05. The "VRR" in the markings are the initials of the appellant, *i.e.*, Vicente Ramonida Rom.[20]

Thereafter, all the five heat-sealed plastic packets containing white crystalline substance, together with the Request for Laboratory Examination, were brought by PO3 Yanson to the Philippine National Police (PNP) Crime Laboratory for chemical analysis, which examination yielded positive results for the presence of *methylamphetamine hydrochloride* or "*shabu*,"[21] as evidenced by Chemistry Report No. D-1782-2000.[22]

For its part, the defense presented the appellant and Teresita Bitos, whose testimonies consist of sheer denials. Their version of the 31 August 2000 incident is as follows:

At around 10:15 p.m. to 10:30 p.m. of 31 August 2000, the appellant was at the house of his daughter, Lorena Cochera (Lorena), in *Barangay* T. Padilla, Cebu City, as Lorena had asked her father to get the monthly house rental fee from Teresita Bitos, whose nickname is "Nene." While the appellant and Nene were talking, the police officers suddenly barged in. The appellant noticed that PO2 Martinez proceeded to the inner portion of the house and opened the door of the rooms. Nene stopped them but the police officers told her to just keep quiet. The police officers went on opening the door of the two rooms, where they saw three male persons. The police officers frisked the appellant and the three other men. The police officers likewise took appellant's wallet containing ₱360.00. The appellant then requested Nene to tell his daughter that he was arrested. Thereafter, the police officers brought the appellant and the three other men to the police station.[23]

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[20] *Id.* at 7 and 12-13; *Id.* at 6, 8-9 and 11; *Id.* at 8 and 10.

[21] *Id.* at 13; *Id.* at 9-11; *Id.* at 10.

[22] Records, p. 46.

[23] Testimony of the Appellant, TSN, 11 April 2002, pp. 2-3; Testimony of PO2 Martinez, TSN, 7 February 2002, pp. 3-5; Testimony of Teresita Bitos, TSN, 7 March 2002, p. 4.

The appellant denied that he sold *shabu* to PO2 Martinez. He also denied that he was maintaining a drug den and that he allowed persons to sniff *shabu* inside the house in *Barangay* T. Padilla, Cebu City, in exchange for a sum of money. The appellant likewise denied that he knew the three other men who were arrested inside the room in the said house. The appellant claimed instead that he knew PO2 Martinez prior to 31 August 2000 because the latter usually stayed at the house to apprehend snatchers. Also, a week before 31 August 2000, he and PO2 Martinez had a conversation and he was asked to pinpoint the "fat fish," which is the code for the big time pusher. When he said that he does not know of such pusher, PO2 Martinez got angry. The appellant maintained that on 31 August 2000, he was no longer living in the house in *Barangay* T. Padilla, Cebu City, as his daughter had already brought him to Minglanilla, Cebu, as early as July 1999. On the said date, Nene was already occupying the house and had subleased one of its rooms as his daughter Maya told him so. The appellant admitted that a year prior to 31 August 2000, and before he transferred to Minglanilla, he was apprehended for illegal possession of *shabu*.[24]

The narration of the appellant was corroborated by Nene on all material points.

Testifying on rebuttal, PO2 Martinez denied that he knew the appellant prior to 31 August 2000. PO2 Martinez clarified that he came to know the appellant only on the night that they conducted the buy-bust operation.[25]

Finding the testimonies of the prosecution witnesses to be credible, competent and convincing as they were able to satisfactorily prove all the elements of the offenses charged against the appellant, the trial court, in its Decision dated 24 June 2002, held the appellant guilty beyond reasonable doubt of violation of Sections 15, 15-A and 16, Article III of Republic Act No. 6425, as amended. The trial court disposed of the case as follows:

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[24] *Id.* at 4-9; *Id.* at 5 and 7.

[25] Testimony of PO2 Martinez (on rebuttal), TSN, 18 April 2002, pp. 4-5.

IN THE LIGHT OF THE FOREGOING CIRCUMSTANCES, the Court finds the [herein appellant] for –

1) **Criminal Case No. CBU-55062, for violating Section 15, Article III, Republic Act No. 6425, as amended, GUILTY**. There being no mitigating nor any aggravating circumstance proven, the Court hereby **imposes the penalty of *PRISION CORRECCIONAL* in the MEDIUM PERIOD ranging between TWO (2) YEARS, FOUR (4) MONTHS and ONE (1) DAY, as minimum[,] to FOUR (4) YEARS and TWO (2) MONTHS, as maximum**;

2) **Criminal Case No. CBU-55063, for violating Section 16, Article III, Republic Act No. 6425, as amended, GUILTY**. In the absence of any mitigating or aggravating circumstance, the Court **imposes the penalty of *PRISION CORRECCIONAL* in the MEDIUM PERIOD ranging between TWO (2) YEARS, FOUR (4) MONTHS and ONE (1) DAY, as minimum to FOUR (4) YEARS and TWO (2) MONTHS, as maximum**; and

3) **Criminal Case No. CBU-55067, for violating Section 15-A, Article III, Republic Act No. 6425, as amended, GUILTY**. The court hereby **imposes upon the [appellant] the penalty of *RECLUSION PERPETUA* and a FINE of FIVE HUNDRED THOUSAND (₱500,000.00) PESOS**.

The five (5) heat-sealed plastic packets of white crystalline substance containing methylamphetamine hydrochloride, locally known as *shabu*, are hereby **CONFISCATED** in favor of the government and shall be destroyed in accordance with the law prohibiting said drug.[26] (Emphasis, italics and underscoring supplied).

The appellant appealed the trial court's Decision to this Court *via* Notice of Appeal.[27] However, pursuant to this Court's decision in *People v. Mateo*,[28] the case was transferred to the Court of Appeals for intermediate review.

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[26] Records, pp. 125-126.

[27] CA *rollo*, p. 58.

[28] G.R. Nos. 147678-87, 7 July 2004, 433 SCRA 640.

On 9 August 2010, the Court of Appeals rendered the now assailed Decision affirming with modification the ruling of the trial court. Its decretal portion reads, thus:

WHEREFORE, in view of all the foregoing, the Decision of the RTC, Branch 10, Cebu City in Criminal Cases No. CBU-55062, CBU-55063 and CBU-55067 is hereby **AFFIRMED WITH MODIFICATION** concerning Criminal Cases No. CBU-55062 and CBU-55063, for which [the herein appellant] is sentenced to suffer the penalty of imprisonment from six months of *arresto mayor*, as minimum, to four years and two months of *prision correccional*, as maximum of the Indeterminate Sentence Law.[29]

The Court of Appeals upheld the conviction of the appellant on all the charges against him as the prosecution was able to establish his guilt beyond reasonable doubt since all the essential elements of illegal sale and possession of *shabu* were duly proven by the prosecution. As to the charge of maintaining a drug den, the same was also established by the fact that PO2 Martinez himself paid ₱10.00 to sniff the *shabu* in one of the rooms of the appellant's house. The appellant's denial, therefore, cannot prevail over the evidence hurled against him.

The Court of Appeals, however, deemed it necessary to modify the penalty in Criminal Case Nos. CBU-55062 and CBU-55063. It explained that the sale of less than 200 grams of *shabu* is punishable with a penalty ranging from *prision correccional* to *reclusion temporal*, depending on the quantity. In this case, the quantity of *shabu* illegally sold to the *poseur*-buyer by the appellant was 0.03 gram. Pursuant to the second paragraph of Section 20,[30] Article IV of Republic Act No. 6425, as amended,

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[29] *Rollo*, p. 14.

[30] Sec. 20. *Application of Penalties, Confiscation and Forfeiture of the Proceeds or Instruments of the Crime*. " The penalties for offenses under Section 3, 4, 7, 8 and 9 of Article II and Sections 14, 14-A, 15 and 16 of Article III of this Act shall be applied if the dangerous drugs involved is in any of the following quantities :

1. 40 grams or more of opium;

2. 40 grams or more of morphine;

the proper penalty to be imposed for the illegal sale of 0.03 gram of *shabu* would be *prision correccional*. Also, in this case, the appellant had in his possession 0.15 gram of *shabu*, which is punishable also with imprisonment of *prision correccional*. Thus, applying the Indeterminate Sentence Law, the appellant must be sentenced to an imprisonment of six months of *arresto mayor*, as minimum, to four years and two months of *prision correccional*, as maximum, in Criminal Case No. CBU-55062, as well as in Criminal Case No. CBU-55063.[31]

Still unsatisfied, the appellant appealed the Court of Appeals' Decision to this Court *via* Notice of Appeal.[32]

Both the appellant and the Office of the Solicitor General manifested[33] that they would no longer file their respective supplemental briefs as the issues have already been fully discussed in their respective appeal briefs[34] with the Court of Appeals.

The appellant's assignment of errors as stated in his Appellant's Brief are as follows:

I. The Regional Trial Court erred in convicting the [herein appellant] notwithstanding the inherent incredibility of evidence for the prosecution;

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3. 200 grams or more of *shabu* or *methylamphetamine hydrochloride*;

4. 40 grams or more of heroin;

5. 750 grams or more of Indian hemp or *marijuana*;

6. 50 grams or more of *marijuana* resin or *marijuana* resin oil;

7. 40 grams or more of cocaine or cocaine hydrochloride; or

8. In the case of other dangerous drugs, the quantity of which is far beyond therapeutic requirements, as determined and promulgated by the Dangerous Drugs Board, after public consultations/hearings conducted for the purpose.

Otherwise, if the quantity involved is less than the foregoing quantities, the penalty shall range from *prision correccional* to *reclusion perpetua* depending upon the quantity. (Emphasis and italics supplied).

[31] CA *rollo*, pp. 10-14.

[32] *Id.* at 222.

[33] *Rollo*, pp. 21 and 28-30.

[34] CA *rollo*, pp. 102-115 and 158-190.

II. The Regional Trial Court gravely erred in allowing the evidence of the prosecution despite the indubitable evidence that the [appellant] i[s] innocent of the crime[s] charged; [and]

III. The Regional Trial Court erred in convicting the [appellant] in spite of the failure of the prosecution to prove the guilt of the [appellant] beyond reasonable doubt.[35]

The appellant avers that the testimony of the *poseur*-buyer was absurd, illogical, contrary to reason and highly incredible for no person who is engaged in an illegal transaction would leave the door of the house open after such transaction. Moreover, no person would sell *shabu* to a buyer when he knew all along that the said buyer was a police officer as it was ridiculous to expose oneself to the danger of being caught and arrested.

The appellant similarly holds that the entry in the house was illegal and there was certainly no transaction that took place therein. The search and the seizure made in connection thereto were also invalid. Thus, the pieces of evidence allegedly obtained by the police officers were inadmissible for being the "fruit of a poisonous tree." The same cannot be used against him in violation of his rights.

The appellant believes that the prosecution failed to prove his guilt beyond reasonable doubt as their testimonies as to the facts and circumstances surrounding the case were contrary to human conduct, especially with regard to the allegation that he knowingly maintained a drug den, since he was no longer the owner of the house, which was the subject of the search, and he did not live there anymore.

The appellant's contentions are devoid of merit.

In essence, the issues in this case hinge on the credibility of the testimonies of the prosecution witnesses.

It is a fundamental rule that findings of the trial court which are factual in nature and which involve the credibility of witnesses

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[35] *Id.* at 108.

are accorded with respect, more so, when no glaring errors, gross misapprehension of facts, and speculative, arbitrary, and unsupported conclusions can be gathered from such findings. The reason behind this rule is that the trial court is in a better position to decide the credibility of witnesses having heard their testimonies and observed their deportment and manner of testifying during the trial.[36] The rule finds an even more stringent application where the trial court's findings are sustained by the Court of Appeals.[37]

After a careful perusal of the records, this Court finds no cogent or compelling reason to overturn the findings of both lower courts, which were adequately supported by the evidence on record.

To secure a conviction for **illegal sale of dangerous drugs**, like *shabu*, the following essential elements must be duly established: (1) identity of the buyer and the seller, the object, and consideration; and (2) the delivery of the thing sold and the payment therefor.[38] Succinctly, the delivery of the illicit drug to the *poseur*-buyer, as well as the receipt of the marked money by the seller, successfully consummates the buy-bust transaction. Hence, what is material is the proof that the transaction or sale transpired, coupled with the presentation in court of the *corpus delicti* as evidence.[39]

In the case at bench, the prosecution was able to establish the above-enumerated elements beyond moral certainty. The prosecution witnesses adequately proved that a buy-bust operation actually took place on which occasion the appellant was caught red-handed giving one heat-sealed plastic packet containing white

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[36] *People v. De Leon*, G.R. No. 186471, 25 January 2010, 611 SCRA 118, 127-128.

[37] *People v. Veloso*, G.R. No. 188849, 13 February 2013, 690 SCRA 586, 595; *Quinicot v. People*, G.R. No. 179700, 22 June 2009, 590 SCRA 458, 469.

[38] *People v. Santiago,* 564 Phil. 181, 193 (2007); *People v. De Vera*, 341 Phil. 89, 95 (1997).

[39] *People v. Torres*, G.R. No. 191730, 5 June 2013.

crystalline substance to PO2 Martinez, the *poseur*-buyer, in exchange for ₱100.00. PO2 Martinez, being the *poseur*-buyer, positively identified the appellant in open court to be the same person who sold to him the said one-heat sealed plastic packet of white crystalline substance for a consideration of ₱100.00,[40] which when examined was confirmed to be *methylamphetamine hydrochloride* or *shabu* per Chemistry Report No. D-1782-2000 issued by P/Sr. Insp. Salinas, Head, Chemistry Branch, PNP Regional Crime Laboratory Office 7. Upon presentation thereof in open court, PO2 Martinez duly identified it to be the same object sold to him by the appellant as it had the marking "VRR-8-31-2000 (buy-bust)," which SPO1 Fernandez had written thereon in their presence.[41] This testimony of PO2 Martinez was corroborated by P/Sr. Insp. Sanchez, who was just five to eight meters away from the former and the appellant during the sale transaction.[42]

Evidently, the prosecution had established beyond reasonable doubt the appellant's guilt for the offense of illegal sale of *shabu* in violation of Section 15, Article III of Republic Act No. 6425, as amended.

We already had occasion to show the unacceptability of the contention of the appellant that the testimony of the *poseur*-buyer was absurd, illogical, contrary to reason and highly incredible for no person who is engaged in an illegal transaction would leave the door of the house open after such transaction. In case after case, we observed that drug pushers sell their prohibited articles to any prospective customer, be he a stranger or not, in private **as well as in public places, even in the daytime**. Indeed, the drug pushers have become increasingly daring, dangerous and, worse, **openly defiant of the law**. Hence, what matters is not the existing familiarity between the buyer and the seller or the time and venue of the sale, but the fact of

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[40] Testimony of PO2 Martinez, TSN, 29 November 2011, pp. 6-7 and 11.

[41] *Id.* at 7; Testimony of PO3 Yanson, TSN, 6 December 2001, p. 11; Testimony of P/Sr. Insp. Sanchez, TSN, 7 February 2002, p. 8.

[42] Testimony of P/Sr. Insp. Sanchez, *id.* at 13.

agreement and the acts constituting the sale and the delivery of the prohibited drugs.[43]

With regard to the offense of **illegal possession of dangerous drugs**, like *shabu*, the following elements must be proven: (1) the accused is in possession of an item or object that is identified to be a prohibited drug; (2) such possession is not authorized by law; and (3) the accused freely and consciously possesses the said drug.[44] All these elements have been established in this case.

On the occasion of the appellant's arrest for having been caught in *flagrante delicto* selling *shabu*, PO3 Yanson conducted a body search on the former resulting to the recovery of four more heat-sealed plastic packets containing white crystalline substance inside his wallet that was tucked in his pocket with an aggregate weight of 0.15 gram, which were later confirmed to be *methylamphetamine hydrochloride* or *shabu*. PO3 Yanson identified in open the court the said four heat-sealed plastic packets of *shabu* with markings "VRR-8-31-2000-02" to "VRR-8-31-2000-05" written thereon by SPO1 Fernandez to be the same objects recovered from the appellant.[45] PO2 Martinez, the *poseur*-buyer, corroborated this testimony of PO3 Yanson.[46]

Definitely, the records do not show that the appellant has the legal authority to possess the four heat-sealed plastic packets of *shabu*. Settled is the rule that possession of dangerous drugs constitutes *prima facie* evidence of knowledge or *animus possidendi* sufficient to convict an accused in the absence of a satisfactory explanation of such possession. As such, the burden of evidence is shifted to the accused to explain the absence of knowledge or *animus possidendi*,[47] which the appellant in this case miserably failed to do.

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[43] *People v. Requiz*, 376 Phil. 750, 759-760 (1999).

[44] *Quinitcot v. People*, *supra* note 37 at 477.

[45] Testimony of PO3 Yanson, TSN, 6 December 2001, pp. 7-8.

[46] Testimony of PO2 Martinez, TSN, 29 November 2011, pp. 9-10.

[47] *Abuan v. People*, 536 Phil. 672, 695 (2006).

There is also no truth on the appellant's claim that the entry in the house was illegal making the search and the seizure in connection thereto invalid, rendering the pieces of evidence obtained by the police officers inadmissible for being the "fruit of a poisonous tree."

This Court in *Dimacuha v. People*[48] clearly states:

> The Constitution enshrines in the Bill of Rights 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. To give full protection to it, the Bill of Rights also ordains the exclusionary principle that any evidence obtained in violation of said right is inadmissible for any purpose in any proceeding.
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> In *People v. Chua Ho San* [citation omitted] we pointed out that the interdiction against warrantless searches and seizures is not absolute and that warrantless searches and seizures have long been deemed permissible by jurisprudence in the following instances: (1) search of moving vehicles; (2) seizure in plain view; (3) customs searches; (4) waiver or consented searches; (5) stop and frisk situations (Terry search); and **(6) search incidental to a lawful arrest**. **The last includes a valid warrantless search and seizure pursuant to an equally warrantless arrest**, for, while as a rule, an arrest is considered legitimate if effected with a valid warrant of arrest, the **Rules of Court recognizes permissible warrantless arrest, to wit: (1) arrest in *flagrante delicto***; (2) arrest effected in hot pursuit; and (3) arrest of escaped prisoners.
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> Here, the petitioner was caught in *flagrante delicto* while in the act of delivering 1.15 grams and in actual possession of another 10.78 grams of methamphetamine hydrochloride (*shabu*) as a result of an entrapment operation conducted by the police on the basis of information received from Benito Marcelo regarding petitioner's illegal drug trade. Petitioner's arrest, therefore, was lawful and the subsequent seizure of a bag of *shabu* inserted inside the cover of her checkbook was justified and legal in light of the prevailing rule that an officer making an arrest may take from the person arrested any property found upon his person in order to find and seize things connected with the crime. **The seized regulated drug is, therefore,**

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[48] 545 Phil. 406 (2007).

admissible in evidence, being the fruit of the crime.[49] (Emphasis supplied).

To repeat, the appellant, in this case, was caught in *flagrante delicto* selling *shabu*, thus, he was lawfully arrested. Following *Dimacuha*, the subsequent seizure of four heat-sealed plastic packets of *shabu* in the appellant's wallet that was tucked in his pocket was justified and admissible in evidence for being the fruit of the crime.

With the foregoing, this Court is fully convinced that the prosecution had likewise proved beyond a shadow of reasonable doubt that the appellant is guilty of the offense of illegal possession of *shabu* in violation of Section 16, Article III of Republic Act No. 6425, as amended.

Going to the charge of maintaining a drug den in violation of Section 15-A, Article III of Republic Act No. 6425, as amended, the prosecution had also established appellant's guilt beyond reasonable doubt.

A drug den is a lair or hideaway where prohibited or regulated drugs are used in any form or are found. Its existence may be proved not only by direct evidence but may also be established by proof of facts and circumstances, including evidence of the general reputation of the house, or its general reputation among police officers.[50] In this case, this fact was proven by none other than the testimony of PO2 Martinez, the *poseur*-buyer, who after buying the *shabu* had told the appellant that he wanted to sniff the same to which the latter responded by requiring the former to pay a rental fee of ₱10.00. The appellant, thereafter, allowed PO2 Martinez to enter his house and directed him to proceed to one of the rooms located at the right side of the *sala*. Upon entering the said room, PO2 Martinez saw three other persons already sniffing *shabu*.[51] This testimony of PO2

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[49] *Id.* at 420-421.

[50] *People v. Ladjaalam*, 395 Phil. 1, 19-20.

[51] Testimony of PO2 Martinez, TSN, 29 November 2011, pp. 7-8.

Martinez was corroborated by PO3 Yanson and P/Sr. Insp. Sanchez.[52]

Moreover, as aptly observed by the Court of Appeals, several peso bills were found in the appellant's wallet, including three ₱10.00 peso bills, which circumstances bolstered the prosecution's assertion that the appellant has indeed allowed his house to be used as a drug den for a fee of ₱10.00 per person.[53]

In his attempt to exonerate himself, the appellant vehemently asserts that he was no longer the owner of the house in *Barangay* T. Padilla, Cebu City, and he was no longer residing therein. The defense also presented Teresita Bitos to corroborate this claim of the appellant.

The testimony of Teresita Bitos corroborating the appellant's testimony was not credible. She herself admitted that the appellant requested her to testify in his favor.[54]

Also, considering the seriousness of the charges against the appellant, he did not bother to present his daughter, who is the alleged owner of the house in *Barangay* T. Padilla, Cebu City, to bolster his claim.

Time and again, this Court held that denial is an inherently weak defense and has always been viewed upon with disfavor by the courts due to the ease with which it can be concocted. Inherently weak, denial as a defense crumbles in the light of positive identification of the appellant, as in this case. The defense of denial assumes significance only when the prosecution's evidence is such that it does not prove guilt beyond reasonable doubt, which is not the case here. Verily, mere denial, unsubstantiated by clear and convincing evidence, is negative self-serving evidence which cannot be given greater evidentiary weight than the

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[52] Testimony of PO3 Yanson, TSN, 6 December 2001, pp. 6-8; Testimony of P/Sr. Insp. Sanchez, TSN, 7 February 2002, pp. 7 and 10.

[53] CA Decision dated 9 August 2010. *Rollo*, p. 12; Testimony of PO2 Martinez, TSN 29 November 2011, p. 10.

[54] Testimony of Teresita Bitos, TSN, 7 March 2002, p. 7.

testimony of the prosecution witness who testified on affirmative matters.[55] Moreover, there is a presumption that public officers, including the arresting officers, regularly perform their official duties.[56] In this case, the defense failed to overcome this presumption by presenting clear and convincing evidence. Furthermore, this Court finds no ill motive that could be attributed to the police officers who had conducted the buy-bust operation. Even the allegation of the appellant that PO2 Martinez got angry with him when he failed to pinpoint the big time pusher cannot be considered as the ill motive in implicating the appellant on all the three charges against him for this is self-serving and uncorroborated.

Given all the foregoing, this Court sustains the appellant's conviction on all the charges against him.

WHEREFORE, premises considered, the Decision of the Court of Appeals in CA-G.R. CR-H.C. No. 00579 dated 9 August 2010 is hereby **AFFIRMED *in toto***. No Costs.

SO ORDERED.

Carpio (Chairperson), del Castillo, Reyes,[*] and *Leonen,*[**] *JJ.,* concur.

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[55] *People v. Mabonga,* G.R. No. 134773, 29 June 2004, 433 SCRA 51, 65-66.

[56] *People v. Chen Tiz Chang,* 382 Phil. 669, 696 (2000).

[*] Per Special Order No. 1633 dated 17 February 2014.

[**] Per Special Order No. 1636 dated 17 February 2014.

FIRST DIVISION

[G.R. No. 199310. February 19, 2014]

REPUBLIC OF THE PHILIPPINES, *petitioner, vs.* **REMMAN ENTERPRISES, INC., represented by RONNIE P. INOCENCIO,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; APPEALS; FINDINGS OF FACTS OF THE LOWER COURTS; THE SUPREME COURT IS NOT A TRIER OF FACTS AND WILL NOT DISTURB THE FACTUAL FINDINGS OF THE LOWER COURTS UNLESS THERE ARE SUBSTANTIAL REASONS FOR DOING SO; APPLICATION IN CASE AT BAR.— That the elevations of the subject properties are above the reglementary level of 12.50 m is a finding of fact by the lower courts, which this Court, generally may not disregard. It is a long-standing policy of this Court that the findings of facts of the RTC which were adopted and affirmed by the CA are generally deemed conclusive and binding. This Court is not a trier of facts and will not disturb the factual findings of the lower courts unless there are substantial reasons for doing so. That the subject properties are not part of the bed of Laguna Lake, however, does not necessarily mean that they already form part of the alienable and disposable lands of the public domain. It is still incumbent upon the respondent to prove, with well-nigh incontrovertible evidence, that the subject properties are indeed part of the alienable and disposable lands of the public domain. While deference is due to the lower courts' finding that the elevations of the subject properties are above the reglementary level of 12.50 m and, hence, no longer part of the bed of Laguna Lake pursuant to Section 41(11) of R.A. No. 4850, the Court nevertheless finds that the respondent failed to substantiate its entitlement to registration of title to the subject properties.

2. POLITICAL LAW; NATIONAL ECONOMY AND PATRIMONY; REGALIAN DOCTRINE; ALL LANDS NOT APPEARING TO BE CLEARLY WITHIN PRIVATE OWNERSHIP ARE PRESUMED TO BELONG TO THE

STATE; RATIONALE.— "Under the Regalian Doctrine, which is embodied in our Constitution, all lands of the public domain belong to the State, which is the source of any asserted right to any ownership of land. All lands not appearing to be clearly within private ownership are presumed to belong to the State. Accordingly, public lands not shown to have been reclassified or released as alienable agricultural land, or alienated to a private person by the State, remain part of the inalienable public domain. The burden of proof in overcoming the presumption of State ownership of the lands of the public domain is on the person applying for registration, who must prove that the land subject of the application is alienable or disposable. To overcome this presumption, incontrovertible evidence must be presented to establish that the land subject of the application is alienable or disposable."

3. CIVIL LAW; PROPERTY; PRESIDENTIAL DECREE NO. 1529 (THE PROPERTY REGISTRATION DECREE); JUDICIAL CONFIRMATION OF IMPERFECT OR INCOMPLETE TITLES TO PUBLIC LAND; REQUIREMENTS; NOT SATISFIED IN CASE AT BAR.— Section 14(1) of P.D. No. 1529 refers to the judicial confirmation of imperfect or incomplete titles to public land acquired under Section 48(b) of Commonwealth Act (C.A.) No. 141, or the Public Land Act, as amended by P.D. No. 1073. Under Section 14(1) of P.D. No. 1529, applicants for registration of title must sufficiently establish: *first*, that the subject land forms part of the disposable and alienable lands of the public domain; *second*, that the applicant and his predecessors-in-interest have been in open, continuous, exclusive, and notorious possession and occupation of the same; and *third*, that it is under a *bona fide* claim of ownership since June 12, 1945, or earlier. The first requirement was not satisfied in this case. To prove that the subject property forms part of the alienable and disposable lands of the public domain, the respondent presented two certifications issued by Calamno, attesting that Lot Nos. 3068 and 3077 form part of the alienable and disposable lands of the public domain "under Project No. 27-B of Taguig, Metro Manila as per LC Map 2623, approved on January 3, 1968." However, the said certifications presented by the respondent are insufficient to prove that the subject properties are alienable and disposable. In *Republic of the*

Philippines v. T.A.N. Properties, Inc., the Court clarified that, in addition to the certification issued by the proper government agency that a parcel of land is alienable and disposable, applicants for land registration must prove that the DENR Secretary had approved the land classification and released the land of public domain as alienable and disposable. They must present a copy of the original classification approved by the DENR Secretary and certified as true copy by the legal custodian of the records.

4. ID.; ID.; ID.; ID.; ACTUAL POSSESSION CONSISTS IN THE MANIFESTATION OF ACTS OF DOMINION OVER IT OF SUCH A NATURE AS A PARTY WOULD ACTUALLY EXERCISE OVER HIS OWN PROPERTY; NOT PRESENT IN CASE AT BAR.— For purposes of land registration under Section 14(1) of P.D. No. 1529, proof of specific acts of ownership must be presented to substantiate the claim of open, continuous, exclusive, and notorious possession and occupation of the land subject of the application. Applicants for land registration cannot just offer general statements which are mere conclusions of law rather than factual evidence of possession. Actual possession consists in the manifestation of acts of dominion over it of such a nature as a party would actually exercise over his own property. Although Cerquena testified that the respondent and its predecessors-in-interest cultivated the subject properties, by planting different crops thereon, his testimony is bereft of any specificity as to the nature of such cultivation as to warrant the conclusion that they have been indeed in possession and occupation of the subject properties in the manner required by law. There was no showing as to the number of crops that are planted in the subject properties or to the volume of the produce harvested from the crops supposedly planted thereon. Further, assuming *ex gratia argumenti* that the respondent and its predecessors-in-interest have indeed planted crops on the subject properties, it does not necessarily follow that the subject properties have been possessed and occupied by them in the manner contemplated by law. The supposed planting of crops in the subject properties may only have amounted to mere casual cultivation, which is not the possession and occupation required by law. "A mere casual cultivation of portions of the land by the claimant does not constitute possession under claim of ownership. For him, possession is

not exclusive and notorious so as to give rise to a presumptive grant from the state. The possession of public land, however long the period thereof may have extended, never confers title thereto upon the possessor because the statute of limitations with regard to public land does not operate against the state, unless the occupant can prove possession and occupation of the same under claim of ownership for the required number of years."

5. POLITICAL LAW; JUDICIAL DEPARTMENT; SUPREME COURT; A JUDICIAL DOCTRINE DOES NOT AMOUNT TO THE PASSAGE OF A NEW LAW BUT MERELY INTERPRETS A PRE-EXISTING ONE.— It is elementary that the interpretation of a law by this Court constitutes part of that law from the date it was originally passed, since this Court's construction merely establishes the contemporaneous legislative intent that the interpreted law carried into effect. "Such judicial doctrine does not amount to the passage of a new law, but consists merely of a construction or interpretation of a pre-existing one."

APPEARANCES OF COUNSEL

The Solicitor General for petitioner.
Alvarez Ballega Zamora for respondent.

D E C I S I O N

REYES, *J.*:

Before this Court is a petition for review on *certiorari*[1] under Rule 45 of the Rules of Court seeking to annul and set aside the Decision[2] dated November 10, 2011 of the Court of Appeals (CA) in CA-G.R. CV No. 90503. The CA affirmed the Decision[3]

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[1] *Rollo*, pp. 7-30.

[2] Penned by Associate Justice Agnes Reyes-Carpio, with Associate Justices Fernanda Lampas Peralta and Normandie B. Pizarro, concurring; *id.* at 33-50.

[3] Issued by Judge Lorifel Lacap Pahimna; *id.* at 64-75.

dated May 16, 2007 of the Regional Trial Court (RTC) of Pasig City, Branch 69, in Land Registration Case No. N-11465.

The Facts

On December 3, 2001, Remman Enterprises, Inc. (respondent), filed an application[4] with the RTC for judicial confirmation of title over two parcels of land situated in *Barangay* Napindan, Taguig, Metro Manila, identified as Lot Nos. 3068 and 3077, Mcadm-590-D, Taguig Cadastre, with an area of 29,945 square meters and 20,357 sq m, respectively.

On December 13, 2001, the RTC issued the Order[5] finding the respondent's application for registration sufficient in form and substance and setting it for initial hearing on February 21, 2002. The scheduled initial hearing was later reset to May 30, 2002.[6] The Notice of Initial Hearing was published in the Official Gazette, April 1, 2002 issue, Volume 98, No. 13, pages 1631-1633[7] and in the March 21, 2002 issue of *People's Balita*,[8] a newspaper of general circulation in the Philippines. The Notice of Initial Hearing was likewise posted in a conspicuous place on Lot Nos. 3068 and 3077, as well as in a conspicuous place on the bulletin board of the City hall of Taguig, Metro Manila.[9]

On May 30, 2002, when the RTC called the case for initial hearing, only the Laguna Lake Development Authority (LLDA) appeared as oppositor. Hence, the RTC issued an order of general default except LLDA, which was given 15 days to submit its comment/opposition to the respondent's application for registration.[10]

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[4] *Id.* at 51-55.

[5] Records, p. 15.

[6] *Id.* at 19.

[7] *Id.* at 111-112.

[8] *Id.* at 118.

[9] *Id.* at 36.

[10] *Id.* at 50-51.

On June 4, 2002, the LLDA filed its Opposition[11] to the respondent's application for registration, asserting that Lot Nos. 3068 and 3077 are not part of the alienable and disposable lands of the public domain. On the other hand, the Republic of the Philippines (petitioner), on July 16, 2002, likewise filed its Opposition,[12] alleging that the respondent failed to prove that it and its predecessors-in-interest have been in open, continuous, exclusive, and notorious possession of the subject parcels of land since June 12, 1945 or earlier.

Trial on the merits of the respondent's application ensued thereafter.

The respondent presented four witnesses: Teresita Villaroya, the respondent's corporate secretary; Ronnie Inocencio, an employee of the respondent and the one authorized by it to file the application for registration with the RTC; Cenon Cerquena (Cerquena), the caretaker of the subject properties since 1957; and Engineer Mariano Flotildes (Engr. Flotildes), a geodetic engineer hired by the respondent to conduct a topographic survey of the subject properties.

For its part, the LLDA presented the testimonies of Engineers Ramon Magalonga (Engr. Magalonga) and Christopher A. Pedrezuela (Engr. Pedrezuela), who are both geodetic engineers employed by the LLDA.

Essentially, the testimonies of the respondent's witnesses showed that the respondent and its predecessors-in-interest have been in open, continuous, exclusive, and notorious possession of the said parcels of land long before June 12, 1945. The respondent purchased Lot Nos. 3068 and 3077 from Conrado Salvador (Salvador) and Bella Mijares (Mijares), respectively, in 1989. The subject properties were originally owned and possessed by Veronica Jaime (Jaime), who cultivated and planted different kinds of crops in the said lots, through her caretaker and hired farmers, since 1943. Sometime in 1975, Jaime sold

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[11] *Id.* at 126-130.

[12] *Id.* at 135-137.

the said parcels of land to Salvador and Mijares, who continued to cultivate the lots until the same were purchased by the respondent in 1989.

The respondent likewise alleged that the subject properties are within the alienable and disposable lands of the public domain, as evidenced by the certifications issued by the Department of Environment and Natural Resources (DENR).

In support of its application, the respondent, *inter alia*, presented the following documents: (1) Deed of Absolute Sale dated August 28, 1989 executed by Salvador and Mijares in favor of the respondent;[13] (2) survey plans of the subject properties;[14] (3) technical descriptions of the subject properties;[15] (4) Geodetic Engineer's Certificate;[16] (5) tax declarations of Lot Nos. 3068 and 3077 for 2002;[17] and (6) certifications dated December 17, 2002, issued by Corazon D. Calamno (Calamno), Senior Forest Management Specialist of the DENR, attesting that Lot Nos. 3068 and 3077 form part of the alienable and disposable lands of the public domain.[18]

On the other hand, the LLDA alleged that the respondent's application for registration should be denied since the subject parcels of land are not part of the alienable and disposable lands of the public domain; it pointed out that pursuant to Section 41(11) of Republic Act No. 4850[19] (R.A. No. 4850), lands, surrounding the Laguna de Bay, located at and below the reglementary elevation of 12.50 meters are public lands which

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[13] *Id.* at 277-280.

[14] *Id.* at 281-282.

[15] *Id.* at 283-284.

[16] *Id.* at 285-286.

[17] *Id.* at 287-288.

[18] *Id.* at 291A-292.

[19] AN ACT CREATING THE LAGUNA LAKE DEVELOPMENT AUTHORITY, PRESCRIBING ITS POWERS, FUNCTIONS AND DUTIES, PROVIDING FUNDS THEREFOR, AND FOR OTHER PURPOSES.

form part of the bed of the said lake. Engr. Magalonga, testifying for the oppositor LLDA, claimed that, upon preliminary evaluation of the subject properties, based on the topographic map of Taguig, which was prepared using an aerial survey conducted by the then Department of National Defense-Bureau of Coast in April 1966, he found out that the elevations of Lot Nos. 3068 and 3077 are below 12.50 m. That upon actual area verification of the subject properties on September 25, 2002, Engr. Magalonga confirmed that the elevations of the subject properties range from 11.33 m to 11.77 m.

On rebuttal, the respondent presented Engr. Flotildes, who claimed that, based on the actual topographic survey of the subject properties he conducted upon the request of the respondent, the elevations of the subject properties, contrary to LLDA's claim, are above 12.50 m. Particularly, Engr. Flotildes claimed that Lot No. 3068 has an elevation ranging from 12.60 m to 15 m while the elevation of Lot No. 3077 ranges from 12.60 m to 14.80 m.

The RTC Ruling

On May 16, 2007, the RTC rendered a Decision,[20] which granted the respondent's application for registration of title to the subject properties, *viz*:

> **WHEREFORE**, premises considered, judgment is rendered confirming the title of the applicant Remman Enterprises Incorporated over a parcels of land [sic] consisting of 29,945 square meters (Lot 3068) and 20,357 (Lot 3077) both situated in Brgy. Napindan, Taguig, Taguig, Metro Manila more particularly described in the Technical Descriptions Ap-04-003103 and Swo-00-001769 respectively and ordering their registration under the Property Registration Decree in the name of Remman Enterprises Incorporated.
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> SO ORDERED.[21]

The RTC found that the respondent was able to prove that the subject properties form part of the alienable and disposable

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[20] *Rollo*, pp. 64-75.

[21] *Id.* at 74-75.

lands of the public domain. The RTC opined that the elevations of the subject properties are very much higher than the reglementary elevation of 12.50 m and, thus, not part of the bed of Laguna Lake. The RTC pointed out that LLDA's claim that the elevation of the subject properties is below 12.50 m is hearsay since the same was merely based on the topographic map that was prepared using an aerial survey on March 2, 1966; that nobody was presented to prove that an aerial survey was indeed conducted on March 2, 1966 for purposes of gathering data for the preparation of the topographic map.

Further, the RTC posited that the elevation of a parcel of land does not always remain the same; that the elevations of the subject properties may have already changed since 1966 when the supposed aerial survey, from which the topographic map used by LLDA was based, was conducted. The RTC likewise faulted the method used by Engr. Magalonga in measuring the elevations of the subject properties, pointing out that:

> Further, in finding that the elevation of the subject lots are below 12.5 meters, oppositor's witness merely compared their elevation to the elevation of the particular portion of the lake dike which he used as his [benchmark] or reference point in determining the elevation of the subject lots. Also, the elevation of the said portion of the lake dike that was then under the construction by FF Cruz was allegedly 12.79 meters and after finding that the elevation of the subject lots are lower than the said [benchmark] or reference point, said witness suddenly jumped to a conclusion that the elevation was below 12.5 meters. x x x.
>
> Moreover, the finding of LLDA's witness was based on hearsay as said witness admitted that it was DPWH or the FF Cruz who determined the elevation of the portion of the lake dike which he used as the [benchmark] or reference point in determining the elevation of the subject lots and that he has no personal knowledge as to how the DPWH and FF Cruz determined the elevation of the said [benchmark] or reference point and he only learn[ed] that its elevation is 12.79 meters from the information he got from FF Cruz.[22]

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[22] *Id.* at 71-72.

Even supposing that the elevations of the subject properties are indeed below 12.50 m, the RTC opined that the same could not be considered part of the bed of Laguna Lake. The RTC held that, under Section 41(11) of R.A. No. 4850, Laguna Lake extends only to those areas that can be covered by the lake water when it is at the average annual maximum lake level of 12.50 m. Hence, the RTC averred, only those parcels of land that are adjacent to and near the shoreline of Laguna Lake form part of its bed and not those that are already far from it, which could not be reached by the lake water. The RTC pointed out that the subject properties are more than a kilometer away from the shoreline of Laguna Lake; that they are dry and waterless even when the waters of Laguna Lake is at its maximum level. The RTC likewise found that the respondent was able to prove that it and its predecessors-in-interest have been in open, continuous, exclusive, and notorious possession of the subject properties as early as 1943.

The petitioner appealed the RTC Decision dated May 16, 2007 to the CA.

The CA Ruling

On November 10, 2011, the CA, by way of the assailed Decision,[23] affirmed the RTC Decision dated May 16, 2007. The CA found that the respondent was able to establish that the subject properties are part of the alienable and disposable lands of the public domain; that the same are not part of the bed of Laguna Lake, as claimed by the petitioner. Thus:

> The evidence submitted by the appellee is sufficient to warrant registration of the subject lands in its name. Appellee's witness Engr. Mariano Flotildes, who conducted an actual area verification of the subject lots, ably proved that the elevation of the lowest portion of Lot No. 3068 is 12.6 meters and the elevation of its highest portion is 15 meters. As to the other lot, it was found [out] that the elevation of the lowest portion of Lot No. 3077 is also 12.6 meters and the elevation of its highest portion is 15 meters. Said elevations are higher than the reglementary elevation

[23] *Id.* at 33-50.

of 12.5 meters as provided for under paragraph 11, Section 41 of R.A. No. 4850, as amended.

In opposing the instant application for registration, appellant relies merely on the Topographic Map dated March 2, 1966, prepared by Commodore Pathfinder, which allegedly shows that the subject parcels of land are so situated in the submerge[d] [lake water] of Laguna Lake. The said data was gathered through aerial photography over the area of Taguig conducted on March 2, 1966. However, nobody testified on the due execution and authenticity of the said document. As regards the testimony of the witness for LLDA, Engr. Ramon Magalonga, that the subject parcels of land are below the 12.5 meter elevation, the same can be considered inaccurate aside from being hearsay considering his admission that his findings were based merely on the evaluation conducted by DPWH and FF Cruz. x x x.[24] (Citations omitted)

The CA likewise pointed out that the respondent was able to present certifications issued by the DENR, attesting that the subject properties form part of the alienable and disposable lands of the public domain, which was not disputed by the petitioner. The CA further ruled that the respondent was able to prove, through the testimonies of its witnesses, that it and its predecessors-in-interest have been in open, continuous, exclusive, and notorious possession of the subject properties prior to June 12, 1945.

Hence, the instant petition.

The Issue

The sole issue to be resolved by the Court is whether the CA erred in affirming the RTC Decision dated May 16, 2007, which granted the application for registration filed by the respondent.

The Court's Ruling

The petition is meritorious.

The petitioner maintains that the lower courts erred in granting the respondent's application for registration since the subject

[24] *Id.* at 41-42.

properties do not form part of the alienable and disposable lands of the public domain. The petitioner insists that the elevations of the subject properties are below the reglementary level of 12.50 m and, pursuant to Section 41(11) of R.A. No. 4850, are considered part of the bed of Laguna Lake.

That the elevations of the subject properties are above the reglementary level of 12.50 m is a finding of fact by the lower courts, which this Court, generally may not disregard. It is a long-standing policy of this Court that the findings of facts of the RTC which were adopted and affirmed by the CA are generally deemed conclusive and binding. This Court is not a trier of facts and will not disturb the factual findings of the lower courts unless there are substantial reasons for doing so.[25]

That the subject properties are not part of the bed of Laguna Lake, however, does not necessarily mean that they already form part of the alienable and disposable lands of the public domain. It is still incumbent upon the respondent to prove, with well-nigh incontrovertible evidence, that the subject properties are indeed part of the alienable and disposable lands of the public domain. While deference is due to the lower courts' finding that the elevations of the subject properties are above the reglementary level of 12.50 m and, hence, no longer part of the bed of Laguna Lake pursuant to Section 41(11) of R.A. No. 4850, the Court nevertheless finds that the respondent failed to substantiate its entitlement to registration of title to the subject properties.

"Under the Regalian Doctrine, which is embodied in our Constitution, all lands of the public domain belong to the State, which is the source of any asserted right to any ownership of land. All lands not appearing to be clearly within private ownership are presumed to belong to the State. Accordingly, public lands not shown to have been reclassified or released as alienable agricultural land, or alienated to a private person by the State, remain part of the inalienable public domain. The

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[25] *Padilla v. Velasco*, G.R. No. 169956, January 19, 2009, 576 SCRA 219, 227.

burden of proof in overcoming the presumption of State ownership of the lands of the public domain is on the person applying for registration, who must prove that the land subject of the application is alienable or disposable. To overcome this presumption, incontrovertible evidence must be presented to establish that the land subject of the application is alienable or disposable."[26]

The respondent filed its application for registration of title to the subject properties under Section 14(1) of Presidential Decree (P.D.) No. 1529,[27] which provides that:

> Sec. 14. Who may apply. The following persons may file in the proper Court of First Instance an application for registration of title to land, whether personally or through their duly authorized representatives:
>
> (1) Those who by themselves or through their predecessors-in interest have been in open, continuous, exclusive and notorious possession and occupation of alienable and disposable lands of the public domain under a bona fide claim of ownership since June 12, 1945, or earlier.
>
> x x x x x x x x x

Section 14(1) of P.D. No. 1529 refers to the judicial confirmation of imperfect or incomplete titles to public land acquired under Section 48(b) of Commonwealth Act (C.A.) No. 141, or the Public Land Act, as amended by P.D. No. 1073.[28]

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[26] *Republic v. Medida*, G.R. No. 195097, August 13, 2012, 678 SCRA 317, 325-326, citing *Republic v. Dela Paz*, G.R. No. 171631, November 15, 2010, 634 SCRA 610, 621-622.

[27] The Property Registration Decree.

[28] Sec. 48(b) of the Public Land Act, as amended by P.D. No. 1073, provides that:

> Sec. 48. The following described citizens of the Philippines, occupying lands of the public domain or claiming to own any such lands or an interest therein, but whose titles have not been perfected or completed, may apply to the Court of First Instance of the province where the land is located for confirmation of their claims and the issuance of a certificate of title therefor, under the Land Registration Act, to wit:

Under Section 14(1) of P.D. No. 1529, applicants for registration of title must sufficiently establish: *first*, that the subject land forms part of the disposable and alienable lands of the public domain; *second*, that the applicant and his predecessors-in-interest have been in open, continuous, exclusive, and notorious possession and occupation of the same; and *third*, that it is under a *bona fide* claim of ownership since June 12, 1945, or earlier.[29]

The first requirement was not satisfied in this case. To prove that the subject property forms part of the alienable and disposable lands of the public domain, the respondent presented two certifications[30] issued by Calamno, attesting that Lot Nos. 3068 and 3077 form part of the alienable and disposable lands of the public domain "under Project No. 27-B of Taguig, Metro Manila as per LC Map 2623, approved on January 3, 1968."

However, the said certifications presented by the respondent are insufficient to prove that the subject properties are alienable and disposable. In *Republic of the Philippines v. T.A.N. Properties, Inc.*,[31] the Court clarified that, in addition to the certification issued by the proper government agency that a parcel of land is alienable and disposable, applicants for land registration must prove that the DENR Secretary had approved the land classification and released the land of public domain as alienable and disposable. They must present a copy of the original

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x x x x x x x x x

(b) Those who by themselves or through their predecessors-in-interest have been in open, continuous, exclusive, and notorious possession and occupation of alienable and disposable lands of the public domain, under a *bona fide* claim of acquisition or ownership, since June 12, 1945, or earlier, immediately preceding the filing of the application for confirmation of title except when prevented by war or *force majeure*. These shall be conclusively presumed to have performed all the conditions essential to a Government grant and shall be entitled to a certificate of title under the provisions of this chapter.

[29] See *Republic v. Rizalvo, Jr.*, G.R. No. 172011, March 7, 2011, 644 SCRA 516, 523.

[30] Records, pp. 291A-292.

[31] 578 Phil. 441 (2008).

classification approved by the DENR Secretary and certified as true copy by the legal custodian of the records. Thus:

> Further, it is not enough for the PENRO or CENRO to certify that a land is alienable and disposable. The applicant for land registration must prove that the DENR Secretary had approved the land classification and released the land of the public domain as alienable and disposable, and that the land subject of the application for registration falls within the approved area per verification through survey by the PENRO or CENRO. **In addition, the applicant for land registration must present a copy of the original classification approved by the DENR Secretary and certified as a true copy by the legal custodian of the official records. These facts must be established to prove that the land is alienable and disposable.** Respondent failed to do so because the certifications presented by respondent do not, by themselves, prove that the land is alienable and disposable.[32] (Emphasis ours)

In *Republic v. Roche*,[33] the Court deemed it appropriate to reiterate the ruling in *T.A.N. Properties*, *viz*:

> Respecting the third requirement, the applicant bears the burden of proving the status of the land. In this connection, the Court has held that he **must present a certificate of land classification status issued by the Community Environment and Natural Resources Office (CENRO) or the Provincial Environment and Natural Resources Office (PENRO) of the DENR. He must also prove that the DENR Secretary had approved the land classification and released the land as alienable and disposable, and that it is within the approved area per verification through survey by the CENRO or PENRO. Further, the applicant must present a copy of the original classification approved by the DENR Secretary and certified as true copy by the legal custodian of the official records.** These facts must be established by the applicant to prove that the land is alienable and disposable.
>
> Here, Roche did not present evidence that the land she applied for has been classified as alienable or disposable land of the public domain. She submitted only the survey map and technical description

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[32] *Id.* at 452-453.

[33] G.R. No. 175846, July 6, 2010, 624 SCRA 116.

of the land which bears no information regarding the land's classification. She did not bother to establish the status of the land by any certification from the appropriate government agency. Thus, it cannot be said that she complied with all requisites for registration of title under Section 14(1) of P.D. 1529.[34] (Citations omitted and emphasis ours)

The DENR certifications that were presented by the respondent in support of its application for registration are thus not sufficient to prove that the subject properties are indeed classified by the DENR Secretary as alienable and disposable. It is still imperative for the respondent to present a copy of the original classification approved by the DENR Secretary, which must be certified by the legal custodian thereof as a true copy. Accordingly, the lower courts erred in granting the application for registration in spite of the failure of the respondent to prove by well-nigh incontrovertible evidence that the subject properties are alienable and disposable.

Nevertheless, the respondent claims that the Court's ruling in *T.A.N. Properties*, which was promulgated on June 26, 2008, must be applied prospectively, asserting that decisions of this Court form part of the law of the land and, pursuant to Article 4 of the Civil Code, laws shall have no retroactive effect. The respondent points out that its application for registration of title to the subject properties was filed and was granted by the RTC prior to the Court's promulgation of its ruling in *T.A.N. Properties*. Accordingly, that it failed to present a copy of the original classification covering the subject properties approved by the DENR Secretary and certified by the legal custodian thereof as a true copy, the respondent claims, would not warrant the denial of its application for registration.

The Court does not agree.

Notwithstanding that the respondent's application for registration was filed and granted by RTC prior to the Court's ruling in *T.A.N. Properties*, the pronouncements in that case

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[34] *Id.* at 121-122.

may be applied to the present case; it is not antithetical to the rule of non-retroactivity of laws pursuant to Article 4 of the Civil Code. It is elementary that the interpretation of a law by this Court constitutes part of that law from the date it was originally passed, since this Court's construction merely establishes the contemporaneous legislative intent that the interpreted law carried into effect.[35] "Such judicial doctrine does not amount to the passage of a new law, but consists merely of a construction or interpretation of a pre-existing one."[36]

Verily, the ruling in *T.A.N. Properties* was applied by the Court in subsequent cases notwithstanding that the applications for registration were filed and granted by the lower courts prior to the promulgation of *T.A.N. Properties*.

In *Republic v. Medida*,[37] the application for registration of the subject properties therein was filed on October 22, 2004 and was granted by the trial court on June 21, 2006. Similarly, in *Republic v. Jaralve*,[38] the application for registration of the subject property therein was filed on October 22, 1996 and was granted by the trial court on November 15, 2002. In the foregoing cases, notwithstanding that the applications for registration were filed and granted by the trial courts prior to the promulgation of *T.A.N. Properties*, this Court applied the pronouncements in *T.A.N. Properties* and denied the applications for registration on the ground, *inter alia*, that the applicants therein failed to present a copy of the original classification approved by the DENR Secretary and certified by the legal custodian thereof as a true copy.

Anent the second and third requirements, the Court finds that the respondent failed to present sufficient evidence to prove

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[35] *Accenture, Inc. v. Commissioner of Internal Revenue*, G.R. No. 190102, July 11, 2012, 676 SCRA 325, 339; *Senarillos v. Hermosisima*, 100 Phil. 501, 504 (1956).

[36] *Eagle Realty Corporation v. Republic*, G.R. No. 151424, July 31, 2009, 594 SCRA 555, 558, citing *Senarillos v. Hermosisima*, *id.*

[37] G.R. No. 195097, August 13, 2012, 678 SCRA 317.

[38] G.R. No. 175177, October 24, 2012, 684 SCRA 495.

that it and its predecessors-in-interest have been in open, continuous, exclusive, and notorious possession and occupation of the subject properties since June 12, 1945, or earlier.

To prove that it and its predecessors-in-interest have been in possession and occupation of the subject properties since 1943, the respondent presented the testimony of Cerquena. Cerquena testified that the subject properties were originally owned by Jaime who supposedly possessed and cultivated the same since 1943; that sometime in 1975, Jaime sold the subject properties to Salvador and Mijares who, in turn, sold the same to the respondent in 1989.

The foregoing are but unsubstantiated and self-serving assertions of the possession and occupation of the subject properties by the respondent and its predecessors-in-interest; they do not constitute the well-nigh incontrovertible evidence of possession and occupation of the subject properties required by Section 14(1) of P.D. No. 1529. Indeed, other than the testimony of Cerquena, the respondent failed to present any other evidence to prove the character of the possession and occupation by it and its predecessors-in-interest of the subject properties.

For purposes of land registration under Section 14(1) of P.D. No. 1529, proof of specific acts of ownership must be presented to substantiate the claim of open, continuous, exclusive, and notorious possession and occupation of the land subject of the application. Applicants for land registration cannot just offer general statements which are mere conclusions of law rather than factual evidence of possession. Actual possession consists in the manifestation of acts of dominion over it of such a nature as a party would actually exercise over his own property.[39]

Although Cerquena testified that the respondent and its predecessors-in-interest cultivated the subject properties, by planting different crops thereon, his testimony is bereft of any

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[39] See *Valiao v. Republic*, G.R. No. 170757, November 28, 2011, 661 SCRA 299, 308-309.

specificity as to the nature of such cultivation as to warrant the conclusion that they have been indeed in possession and occupation of the subject properties in the manner required by law. There was no showing as to the number of crops that are planted in the subject properties or to the volume of the produce harvested from the crops supposedly planted thereon.

Further, assuming *ex gratia argumenti* that the respondent and its predecessors-in-interest have indeed planted crops on the subject properties, it does not necessarily follow that the subject properties have been possessed and occupied by them in the manner contemplated by law. The supposed planting of crops in the subject properties may only have amounted to mere casual cultivation, which is not the possession and occupation required by law.

"A mere casual cultivation of portions of the land by the claimant does not constitute possession under claim of ownership. For him, possession is not exclusive and notorious so as to give rise to a presumptive grant from the state. The possession of public land, however long the period thereof may have extended, never confers title thereto upon the possessor because the statute of limitations with regard to public land does not operate against the state, unless the occupant can prove possession and occupation of the same under claim of ownership for the required number of years."[40]

Further, the Court notes that the tax declarations over the subject properties presented by the respondent were only for 2002. The respondent failed to explain why, despite its claim that it acquired the subject properties as early as 1989, and that its predecessors-in-interest have been in possession of the subject property since 1943, it was only in 2002 that it started to declare the same for purposes of taxation. "While tax declarations are not conclusive evidence of ownership, they constitute proof of claim of ownership."[41] That the subject

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[40] *Del Rosario v. Republic of the Philippines*, 432 Phil. 824, 838 (2002).

[41] *Alde v. Bernal*, G.R. No. 169336, March 18, 2010, 616 SCRA 60, 69.

properties were declared for taxation purposes only in 2002 gives rise to the presumption that the respondent claimed ownership or possession of the subject properties starting that year. Likewise, no improvement or plantings were declared or noted in the said tax declarations. This fact belies the claim that the respondent and its predecessors-in-interest, contrary to Cerquena's testimony, have been in possession and occupation of the subject properties in the manner required by law.

Having failed to prove that the subject properties form part of the alienable and disposable lands of the public domain and that it and its predecessors-in-interest have been in open, continuous, exclusive, and notorious possession and occupation of the same since June 12, 1945, or earlier, the respondent's application for registration should be denied.

WHEREFORE, in consideration of the foregoing disquisitions, the instant petition is **GRANTED**. The Decision dated November 10, 2011 of the Court of Appeals in CA-G.R. CV No. 90503, which affirmed the Decision dated May 16, 2007 of the Regional Trial Court of Pasig City, Branch 69, in Land Registration Case No. N-11465 is hereby **REVERSED** and **SET ASIDE**. The Application for Registration of Remman Enterprises, Inc. in Land Registration Case No. N-11465 is **DENIED** for lack of merit.

SO ORDERED.

Sereno, C.J. (Chairperson), Leonardo-de Castro, Bersamin, and *Villarama, Jr., JJ.,* concur.

FIRST DIVISION

[G.R. No. 200597. February 19, 2014]

EMILIO RAGA *Y* CASIKAT, *petitioner, vs.* **PEOPLE OF THE PHILIPPINES,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; EVIDENCE; CREDIBILITY OF WITNESSES; THE TRIAL COURT'S OBSERVATIONS AND CONCLUSIONS DESERVE GREAT RESPECT AND ARE OFTEN ACCORDED FINALITY; RATIONALE; EXCEPTION.— Time and again, we have held that when the decision hinges on the credibility of witnesses and their respective testimonies, the trial court's observations and conclusions deserve great respect and are often accorded finality, unless there appears in the record some fact or circumstance of weight which the lower court may have overlooked, misunderstood or misappreciated and which, if properly considered, would alter the result of the case. The trial judge enjoys the advantage of observing the witness's deportment and manner of testifying, her "furtive glance, blush of conscious shame, hesitation, flippant or sneering tone, calmness, sigh, or the scant or full realization of an oath" — all of which are useful aids for an accurate determination of a witness's honesty and sincerity. The trial judge, therefore, can better determine if such witnesses were telling the truth, being in the ideal position to weigh conflicting testimonies. Unless certain facts of substance and value were overlooked which, if considered, might affect the result of the case, its assessment must be respected for it had the opportunity to observe the conduct and demeanor of the witnesses while testifying and detect if they were lying. The rule finds an even more stringent application where said findings are sustained by the Court of Appeals.

2. CRIMINAL LAW; REVISED PENAL CODE; RAPE BY SEXUAL ASSAULT; IMPOSABLE PENALTY.— Nonetheless, while this Court also upholds petitioner's conviction, we modify the penalty imposed on petitioner, particularly the maximum term. In the case at bar, the circumstances of minority and relationship were alleged and duly proven during trial. Under

Article 266-B of the Revised Penal Code, the penalty for rape by sexual assault is *reclusion temporal* when any of the aggravating or qualifying circumstances is mentioned in said Article is present. Thus applying the Indeterminate Sentence Law, the maximum term of the indeterminate penalty shall be that which could be properly imposed under the Revised Penal Code. Other than the circumstances of minority and relationship that raised the penalty to *reclusion temporal*, no other aggravating circumstance was alleged and proven. Thus, the penalty imposed shall be imposed in its medium period or, from fourteen (14) years, eight (8) months and one (1) day to seventeen (17) years and four (4) months. The minimum of the indeterminate sentence should be within the range of the penalty next lower in degree than that prescribed by the Code which is *prision mayor* or six (6) years and one (1) day to twelve (12) years. Therefore, the trial court correctly set the minimum of the indeterminate sentence to twelve (12) years. As to the maximum period, however, the trial court set it to 20 years of *reclusion temporal* which is beyond the limit of seventeen (17) years and four (4) months. Thus, we deem as proper the indeterminate penalty of imprisonment ranging from twelve (12) years of *prision mayor*, as minimum, to seventeen (17) years of *reclusion temporal*, as maximum, for each count of sexual assault.

APPEARANCES OF COUNSEL

Public Attorney's Office for petitioner.
The Solicitor General for respondent.

D E C I S I O N

VILLARAMA, JR., *J.*:

Before us is a petition for review on *certiorari*[1] under Rule 45 of the 1997 Rules of Civil Procedure, as amended, assailing the October 3, 2011 Decision[2] and February 9, 2012 Resolution[3]

[1] *Rollo*, pp. 9-29.

[2] *Id.* at 32-41. Penned by Associate Justice Edwin D. Sorongon with Associate Justices Ramon M. Bato, Jr. and Romeo F. Barza concurring.

[3] *Id.* at 43-44.

of the Court of Appeals in CA-G.R. CR No. 33447 which affirmed the May 24, 2010 Decision[4] of the Regional Trial Court of Quezon City, Branch 94 in Criminal Case Nos. 04-130269 and 04-130270 convicting petitioner Emilio Raga *y* Casikat of two counts of rape by sexual assault under Article 266-A, paragraph 2[5] of the Revised Penal Code. He was sentenced to suffer an indeterminate penalty of twelve (12) years of *prision mayor* as minimum to twenty (20) years of *reclusion temporal* as maximum for each count in accordance with Section 5(b) of Republic Act No. 7610[6] (RA 7610). He was likewise ordered to pay ₱50,000 as actual damages, ₱50,000 as moral damages and ₱25,000 as exemplary damages plus costs of suit.

On September 2, 2004, the following Informations were filed against petitioner:

Criminal Case No. 04-130269:

That on or about the month of May 2004, in Quezon City[,] Philippines, the above-named accused, being then the father of said [AAA],[7] a minor nine (9) years of age, did then and there willfully, unlawfully and feloniously commit acts of sexual abuse upon the person of said [AAA], by then and there undressing her and forcibly trying to insert his penis inside her vagina, and when he failed, he instead inserted his finger inside her vagina, against her will and without her consent, to the damage and prejudice of the said offended party in violation of the said law.

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[4] *Id.* at 65-73. Penned by Presiding Judge Roslyn M. Rabara-Tria.

[5] ART. 266-A. *Rape; When and How Committed.*–Rape is committed:

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2) By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person.

[6] Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act.

[7] The victim's real name and personal circumstances and those of the victim's immediate family or household members are withheld per *People v. Cabalquinto*, 533 Phil. 703, 709 (2006).

CONTRARY TO LAW.[8]

Criminal Case No. 04-130270:

That on or about the year 2000, in Quezon City[,] Philippines, the above-named accused, being then the father of said [AAA], a minor five (5) years of age, did then and there willfully, unlawfully and feloniously commit acts of sexual abuse upon the person of said [AAA], by then and there undressing her and forcibly trying to insert his penis inside her vagina, and when he failed, he instead inserted his finger inside her vagina, against her will and without her consent, to the damage and prejudice of the said offended party in violation of the said law.

CONTRARY TO LAW.[9]

Upon arraignment, petitioner pleaded not guilty to the crimes charged. Trial on the merits thereafter ensued. During the hearing, the prosecution and the defense stipulated that PCI Ruby Grace D. Sabino-Diangson was the one who physically examined AAA after the alleged sexual abuse and that the results of her examination are contained in Official Medico-Legal Report No. 0089-05-14-04. It was also stipulated that PCI Sabino-Diangson has no personal knowledge of the commission of the crime against AAA.

The other witnesses presented by the prosecution were AAA, PO2 Lucita B. Apurillo, and Marita Francisco, whose combined testimonies established the following facts:

Complainant AAA is the daughter of petitioner and BBB. They live in Payatas, Quezon City together with AAA's two younger siblings. Petitioner was a painter while BBB was a bit player in movies.

One night, sometime in the year 2000, while AAA's mother, BBB, was out of the house and while AAA and her other siblings were sleeping, AAA, who was then five years old, was suddenly awakened when petitioner removed her clothes and tried to insert

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[8] *Rollo*, p. 11.

[9] *Id.* at 11-12.

his penis into her vagina. When petitioner was unsuccessful in inserting his penis into AAA's vagina, he inserted his finger instead. He did that several times while holding his penis. A white substance later came out of his penis.

AAA told BBB what petitioner did to her, but BBB did nothing.

One night in May 2004, AAA, who was then already nine years old, was sleeping in the room while her siblings were sleeping with their father in the living room. AAA was suddenly awakened when her father carried her from the room to the living room. Petitioner then let AAA watch bold movies but AAA turned away. Petitioner, who was half-naked waist down, thereafter removed AAA's clothes. He then laid on top of AAA and tried to insert his penis into her vagina. As he was unsuccessful in inserting his penis into her vagina, he inserted his finger instead. Because AAA was afraid of petitioner who used to whip her, she did not do anything.

According to AAA, petitioner raped her several times but she could only remember two dates: one during the year 2000 and the other in May 2004. She testified that she was born on December 16, 1994 which fact was duly substantiated by her birth certificate. She likewise identified petitioner during the March 7, 2006 hearing.

Petitioner, for his part, raised the defenses of denial and alibi. He testified that he was a stay-in worker in his place of work in the year 2000. He also testified that on May 13, 2004, he saw AAA watching an X-rated movie. He then reprimanded her and hit her buttocks with a slipper to discipline her. On the same day, upon waking up, he saw his wife and AAA talking to a group of women from Bantay Bata. He claimed that that was the last time that he saw AAA. He claimed that he was surprised upon learning of the complaints for rape filed against him by AAA but upon learning of the charges, he voluntarily surrendered.

On May 24, 2010, the RTC rendered a decision finding petitioner guilty beyond reasonable doubt of the crimes charged. The *fallo* of the RTC Decision reads:

WHEREFORE, premises considered, judgment is hereby rendered as follows:

1. In Criminal Case No. 04-130269:

Finding accused Emilio Raga a.k.a. "Bebot" **GUILTY** beyond reasonable doubt of the crime of rape by sexual assault under Article 266-A paragraph 2 of the Revised Penal Code and he is hereby sentenced to suffer an indeterminate penalty of TWELVE (12) YEARS OF *PRISION MAYOR* AS MINIMUM TO TWENTY (20) YEARS OF *RECLUSION TEMPORAL* AS MAXIMUM in accordance with Section 5(b) of Republic Act No. 7610, otherwise known as the Special Protection of Children Against Child Abuse, Exploitation and Discrimination; and

2. In Criminal Case No. 04-130270:

Finding accused Emilio Raga a.k.a. "Bebot" **GUILTY** beyond reasonable doubt of the crime of rape by sexual assault under Article 266-A paragraph 2 of the Revised Penal Code and he is hereby sentenced to suffer an indeterminate penalty of TWELVE (12) YEARS OF *PRISION MAYOR* AS MINIMUM TO TWENTY (20) YEARS OF *RECLUSION TEMPORAL* AS MAXIMUM in accordance with Section 5(b) of Republic Act No. 7610, otherwise known as the Special Protection of Children Against Child Abuse, Exploitation and Discrimination.

Accused Emilio Raga is likewise ordered to pay FIFTY THOUSAND PESOS (₱50,000.00) as actual damages, FIFTY THOUSAND PESOS (₱50,000.00) as moral damages, TWENTY FIVE THOUSAND PESOS (₱25,000.00) as exemplary damages plus costs of suit.

SO ORDERED.[10]

The RTC ruled that the elements of statutory rape were established beyond reasonable doubt by the evidence of the prosecution. The RTC gave credence to AAA's narration of the details of her ordeal in the hands of her own father. It found her testimony as categorical and straightforward and far more credible than the negative assertions interposed by petitioner.

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[10] *Id.* at 72-73.

Petitioner appealed his conviction to the appellate court. The Court of Appeals, however, sustained the conviction of petitioner and affirmed *in toto* the decision of the RTC.

Hence this petition raising a sole issue:

WHETHER THE HONORABLE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DECISION DESPITE THE PROSECUTION'S FAILURE TO PROVE BEYOND REASONABLE DOUBT THE PETITIONER'S GUILT FOR THE CRIMES CHARGED.[11]

Petitioner submits that AAA's testimony as to circumstances surrounding the alleged rape was marred with inconsistencies and contrary to human experience. He claims that AAA has no recollection of the year when the incident took place. Petitioner also contends that the information filed against him was too vague since it stated that one incident happened "on or about the year 2000" but AAA cannot even remember when the rape happened. He also argues as incredulous that in both instances of the alleged rape, AAA did not shout for help or make a loud sound to awaken her siblings considering that they were just sleeping nearby. Petitioner likewise argues that the nonchalance of his wife when AAA told her about the alleged rape only suggests that no rape took place.

We uphold petitioner's conviction.

Time and again, we have held that when the decision hinges on the credibility of witnesses and their respective testimonies, the trial court's observations and conclusions deserve great respect and are often accorded finality, unless there appears in the record some fact or circumstance of weight which the lower court may have overlooked, misunderstood or misappreciated and which, if properly considered, would alter the result of the case. The trial judge enjoys the advantage of observing the witness's deportment and manner of testifying, her "furtive glance, blush of conscious shame, hesitation, flippant or sneering tone, calmness, sigh, or the scant or full realization of an oath" —

[11] *Id.* at 17.

all of which are useful aids for an accurate determination of a witness's honesty and sincerity. The trial judge, therefore, can better determine if such witnesses were telling the truth, being in the ideal position to weigh conflicting testimonies. Unless certain facts of substance and value were overlooked which, if considered, might affect the result of the case, its assessment must be respected for it had the opportunity to observe the conduct and demeanor of the witnesses while testifying and detect if they were lying. The rule finds an even more stringent application where said findings are sustained by the Court of Appeals.[12]

From our own careful examination of the records, we are convinced that there is no reason to disturb the assessment and determination of AAA's credibility by the trial court as affirmed by the Court of Appeals. The straightforward, candid and intrepid revelation in coming forward to avenge the immoral defilement upon her person is more convincing and plausible compared to the weak and uncorroborated defense of petitioner. Despite the minor inconsistencies in her testimony, her general statements remained consistent throughout the trial as she recounted the sordid details of her tormenting experience in the hands of her own father.

Nonetheless, while this Court also upholds petitioner's conviction, we modify the penalty imposed on petitioner, particularly the maximum term. In the case at bar, the circumstances of minority and relationship were alleged and duly proven during trial. Under Article 266-B of the Revised Penal Code, the penalty for rape by sexual assault is *reclusion temporal* when any of the aggravating or qualifying circumstances is mentioned in said Article is present. Thus applying the Indeterminate Sentence Law, the maximum term of the indeterminate penalty shall be that which could be properly imposed under the Revised Penal Code. Other than the circumstances of minority and relationship that raised the penalty to *reclusion temporal*, no other aggravating circumstance was alleged and proven. Thus, the penalty imposed

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[12] *People v. Espino, Jr.*, 577 Phil. 546, 562-563 (2008), citing *People v. Belga*, 402 Phil. 734, 742-743 (2001) and *People v. Cabugatan*, 544 Phil. 468, 479 (2007).

shall be imposed in its medium period or, from fourteen (14) years, eight (8) months and one (1) day to seventeen (17) years and four (4) months.[13] The minimum of the indeterminate sentence should be within the range of the penalty next lower in degree than that prescribed by the Code which is *prision mayor* or six (6) years and one (1) day to twelve (12) years. Therefore, the trial court correctly set the minimum of the indeterminate sentence to twelve (12) years. As to the maximum period, however, the trial court set it to 20 years of *reclusion temporal* which is beyond the limit of seventeen (17) years and four (4) months. Thus, we deem as proper the indeterminate penalty of imprisonment ranging from twelve (12) years of *prision mayor*, as minimum, to seventeen (17) years of *reclusion temporal*, as maximum, for each count of sexual assault.

This Court likewise modifies petitioner's civil liability. In line with recent jurisprudence, petitioner is ordered to pay AAA civil indemnity of ₱30,000, moral damages of ₱30,000 and exemplary damages of ₱30,000 for each count of sexual assault.[14]

WHEREFORE, the October 3, 2011 Decision and February 9, 2012 Resolution of the Court of Appeals in CA-G.R. CR No. 33447 is **AFFIRMED WITH MODIFICATIONS**. Petitioner Emilio Raga *y* Casikat is hereby found **GUILTY** of Rape Through Sexual Assault in Criminal Case Nos. 04-130269 and 04-130270. He is hereby sentenced, in each case, to suffer the indeterminate penalty ranging from twelve (12) years of *prision mayor*, as minimum, to seventeen (17) years of *reclusion temporal*, as maximum, and ordered to pay his victim AAA civil indemnity of ₱30,000, moral damages of ₱30,000 and exemplary damages of ₱30,000 with interest thereon at the rate of six percent (6%) per annum reckoned from the finality of this Decision until fully paid.

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[13] *People v. Subesa*, G.R. No. 193660, November 16, 2011, 660 SCRA 390, 404, citing *People v. Bonaagua*, G.R. No. 188897, June 6, 2011, 650 SCRA 620, 640-641.

[14] *People v. Subesa*, *id.* at 405.

With costs against the petitioner.

SO ORDERED.

Sereno, C.J. (Chairperson), Leonardo-de Castro, Bersamin, and *Reyes, JJ.*, concur.

FIRST DIVISION

[G.R. No. 202071. February 19, 2014]

PROCTER & GAMBLE ASIA PTE LTD., *petitioner, vs.* **COMMISSIONER OF INTERNAL REVENUE,** *respondent.*

SYLLABUS

TAXATION; NATIONAL INTERNAL REVENUE CODE (NIRC); TAX REFUND OR CREDIT; THE 120-DAY PERIOD TO FILE JUDICIAL CLAIMS FOR A REFUND OR TAX CREDIT IS MANDATORY AND JURISDICTIONAL; EXCEPTION; PRESENT IN CASE AT BAR.— Citing the recent case *CIR v. San Roque Power Corporation*, respondent counters that the 120-day period to file judicial claims for a refund or tax credit is mandatory and jurisdictional. Failure to comply with the waiting period violates the doctrine of exhaustion of administrative remedies, rendering the judicial claim premature. Thus, the CTA does not acquire jurisdiction over the judicial claim. Respondent is correct on this score. However, it fails to mention that *San Roque* also recognized the validity of BIR Ruling No. DA-489-03. The ruling expressly states that the "taxpayer-claimant need not wait for the lapse of the 120-day period before it could seek judicial relief with the CTA by way of Petition for Review." The Court, in *San Roque*, ruled that equitable estoppel had set in when respondent issued BIR Ruling No. DA-489-03.

> This was a general interpretative rule, which effectively misled all taxpayers into filing premature judicial claims with the CTA. Thus, taxpayers could rely on the ruling from its issuance on 10 December 2003 up to its reversal on 6 October 2010, when *CIR v. Aichi Forging Company of Asia, Inc.* was promulgated. The judicial claims in the instant petition were filed on 2 October and 29 December 2006, well within the ruling's period of validity. Petitioner is in a position to "claim the benefit of BIR Ruling No. DA-489-03, which shields the filing of its judicial claim from the vice of prematurity."

APPEARANCES OF COUNSEL

A.M. Sison, Jr. and Partners and *Zambrano and Gruba Law Offices* for petitioner.

The Solicitor General for respondent.

R E S O L U T I O N

SERENO, *C.J.*:

This is a Petition for Review on *Certiorari* under Rule 45 of the Rules of Court assailing the Court of Tax Appeals (CTA) *En Banc* Decision[1] and Resolution[2] in CTA EB No. 746, which denied petitioner's claim for refund of unutilized input value-added tax (VAT) for not observing the mandatory 120-day waiting period under Section 112[3] of the National Internal Revenue Code.

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[1] *Rollo*, pp. 9-23. The Decision dated 20 December 2011 was penned by Associate Justice Olga Palanca-Enriquez, with Presiding Justice Ernesto D. Acosta and Associate Justices Juanito C. Castañeda, Jr., Erlinda P. Uy, Caesar A. Casanova, Esperanza R. Fabon-Victorino, Cielito N. Mindaro-Grulla and Amelia R. Cotangco-Manalastas concurring. Associate Justice Lovell R. Bautista penned a Dissenting Opinion.

[2] *Id.* at 29-35. The Resolution dated 24 May 2012 was penned by Associate Justice Olga Palanca-Enriquez, with Presiding Justice Ernesto D. Acosta and Associate Justices Juanito C. Castañeda, Jr., Erlinda P. Uy, Caesar A. Casanova, Esperanza R. Fabon-Victorino and Amelia R. Cotangco-Manalastas concurring.

[3] SEC. 112. *Refunds or Tax Credits of Input Tax.* —

On 26 September and 13 December 2006, petitioner filed administrative claims with the Bureau of Internal Revenue (BIR) for the refund or credit of the input VAT attributable to the former's zero-rated sales covering the periods 1 July-30 September 2004 and 1 October-31 December 2004, respectively.[4]

On 2 October and 29 December 2006, petitioner filed judicial claims docketed as CTA Case Nos. 7523 and 7556, respectively, for the aforementioned refund or credit of its input VAT.[5] Respondent filed separate Answers to the two cases, which were

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(A) *Zero-Rated or Effectively Zero-Rated Sales*. — Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: *Provide, however*, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (b) and Section 108(B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): *Provided, further*, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales: *Provided, finally*, That for a person making sales that are zero-rated under Section 108(B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales.

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(C) *Period within which Refund or Tax Credit of Input Taxes shall be Made*. — In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsection (A) hereof.

In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals.

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[4] *Rollo*, p. 40.

[5] *Id.* at 41.

later consolidated, basically arguing that petitioner failed to substantiate its claims for refund or credit.[6]

Trial on the merits ensued.[7] On 17 January 2011, the CTA First Division rendered a Decision[8] dismissing the judicial claims for having been prematurely filed. It ruled that petitioner had failed to observe the mandatory 120-day waiting period to allow the Commissioner of Internal Revenue (CIR) to decide on the administrative claim.[9] Petitioner's Motion for Reconsideration was denied on 15 March 2011.[10]

Petitioner thereafter filed a Petition for Review before the CTA *En Banc*. The latter, however, issued the assailed Decision affirming the ruling of the CTA First Division. Petitioner's Motion for Reconsideration was denied in the assailed Resolution.

Petitioner filed the present petition[11] arguing mainly that the 120-day waiting period, reckoned from the filing of the administrative claim for the refund or credit of unutilized input VAT before the filing of the judicial claim, is not jurisdictional. According to petitioner, the premature filing of its judicial claims was a mere failure to exhaust administrative remedies, amounting to a lack of cause of action. When respondent did not file a motion to dismiss based on this ground and opted to participate in the trial before the CTA, it was deemed to have waived such defense.

On 3 June 2013, we required[12] respondent to submit its Comment,[13] which it filed on 4 December 2013. Citing the recent case *CIR v. San Roque Power Corporation*,[14] respondent counters

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[6] *Id.* at 171-172.

[7] *Id.* at 172.

[8] *Id.* at 168-180.

[9] *Id.* at 178-179.

[10] *Id.* at 202-207.

[11] *Id.* at 37-85.

[12] *Id.* at 650.

[13] *Id.* at 670-696.

[14] G.R. Nos. 187485, 196113 and 197156, 12 February 2013, 690 SCRA 336.

that the 120-day period to file judicial claims for a refund or tax credit is mandatory and jurisdictional. Failure to comply with the waiting period violates the doctrine of exhaustion of administrative remedies, rendering the judicial claim premature. Thus, the CTA does not acquire jurisdiction over the judicial claim.

Respondent is correct on this score. However, it fails to mention that *San Roque* also recognized the validity of BIR Ruling No. DA-489-03. The ruling expressly states that the "taxpayer-claimant need not wait for the lapse of the 120-day period before it could seek judicial relief with the CTA by way of Petition for Review."[15]

The Court, in *San Roque*, ruled that equitable estoppel had set in when respondent issued BIR Ruling No. DA-489-03. This was a general interpretative rule, which effectively misled all taxpayers into filing premature judicial claims with the CTA. Thus, taxpayers could rely on the ruling from its issuance on 10 December 2003 up to its reversal on 6 October 2010, when *CIR v. Aichi Forging Company of Asia, Inc.*[16] was promulgated.

The judicial claims in the instant petition were filed on 2 October and 29 December 2006, well within the ruling's period of validity. Petitioner is in a position to "claim the benefit of BIR Ruling No. DA-489-03, which shields the filing of its judicial claim from the vice of prematurity."[17]

WHEREFORE, the petition is **GRANTED.** The Decision and Resolution of the Court of Tax Appeals *En Banc* in CTA EB No. 746 are **REVERSED** and **SET ASIDE**. This case is hereby **REMANDED** to the CTA First Division for further proceedings and a determination of whether the claims of petitioner for refund or tax credit of unutilized input value-added tax are valid.

SO ORDERED.

Leonardo-de Castro, Bersamin, Villarama, Jr., and *Reyes, JJ.,* concur.

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[15] *Id.* at 388.

[16] G.R. No. 184823, 6 October 2010, 632 SCRA 422.

[17] *Supra* note 14, at 405.

FIRST DIVISION

[G.R. No. 202976. February 19, 2014]

PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **MERVIN GAHI,** *accused-appellant.*

SYLLABUS

1. CRIMINAL LAW; REVISED PENAL CODE; RAPE; ESTABLISHED BY THE CLEAR AND STRAIGHTFORWARD TESTIMONY OF THE VICTIM THAT APPELLANT HAD CARNAL KNOWLEDGE OF HER TWICE WITH THE USE OF A KNIFE TO COERCE HER INTO SUBMITTING TO HIS EVIL SEXUAL DESIRE.— According to the prosecution, appellant used force or intimidation in order to successfully have unlawful carnal knowledge of AAA. To be exact, appellant is alleged to have utilized, on two occasions, a knife and the threat of bodily harm to coerce AAA into submitting to his evil sexual desires. A careful perusal of AAA's testimony in open court reveals that she was clear and straightforward in her assertion that appellant raped her twice in the manner described by the prosecution.

2. ID.; ID.; ID.; IMPREGNATION IS NOT AN ELEMENT OF RAPE.— In a bid to exculpate himself, appellant argues that he could not have possibly been guilty of rape because the time period between the rape incidents and the birth of the alleged fruit of his crime is more than the normal period of pregnancy. He also points out that defense witness Jackie Gucela's admission that he was AAA's lover and the father of her child should suffice to negate any notion that he raped AAA twice. Lastly, he puts forward the defense of alibi. We are not convinced by appellant's line of reasoning which appears ostensibly compelling, at the outset, but is ultimately rendered inutile by jurisprudence and the evidence at hand. With regard to appellant's first point, we express our agreement with the statement made by the Court of Appeals that it is not absurd nor contrary to human experience that AAA gave birth ten (10) months after the alleged sexual assault as there may be cases of long gestations. In any event, we dismiss appellant's

contention as immaterial to the case at bar because jurisprudence tells us that impregnation is not an element of rape.

3. REMEDIAL LAW; EVIDENCE; RAPE; THE "SWEETHEART THEORY"; TO PROSPER, THE ROMANTIC OR SEXUAL RELATIONSHIP MUST BE ESTABLISHED BY SUBSTANTIAL EVIDENCE; CASE AT BAR.— We assign no significance to the testimony of defense witness Jackie Gucela. Firstly, AAA categorically denied that Jackie Gucela was her boyfriend or that she had sexual relations with him or any other person other than appellant near the time of the rape incidents at issue. For the sweetheart theory to be believed when invoked by the accused, convincing evidence to prove the existence of the supposed relationship must be presented by the proponent of the theory. x x x The defense failed to discharge the burden of proving that AAA and Jackie Gucela had any kind of romantic or sexual relationship which resulted in AAA's pregnancy. x x x In any event, even assuming for the sake of argument that AAA had a romantic attachment with a person other than the accused at the time of the rape incidents or thereafter, this circumstance would not necessarily negate the truth of AAA's statement that the appellant, her aunt's husband, twice had carnal knowledge of her through force and intimidation and without her consent.

4. ID.; ID.; CREDIBILITY OF WITNESSES; CREDIBILITY OF THE VICTIM'S SOLE TESTIMONY IS SUFFICIENT TO CONVICT THE ACCUSED IN RAPE CASES.— [W]e would like to remind appellant that it is a fundamental principle in jurisprudence involving rape that the accused may be convicted based solely on the testimony of the victim, provided that such testimony is credible, natural, convincing and consistent with human nature and the normal course of things. It is likewise jurisprudentially settled that when a woman says she has been raped, she says in effect all that is necessary to show that she has been raped and her testimony alone is sufficient if it satisfies the exacting standard of credibility needed to convict the accused. Thus, in this jurisdiction, the fate of the accused in a rape case, ultimately and oftentimes, hinges on the credibility of the victim's testimony. In this regard, we defer to the trial court's assessment of the credibility of AAA's testimony, most especially, when it is affirmed by the Court of Appeals.

5. ID.; ID.; ID.; FEW DISCREPANCIES AND INCONSISTENCIES IN THE TESTIMONIES OF WITNESSES REFERRING TO MINOR DETAILS DO NOT IMPAIR THEIR CREDIBILITY BECAUSE THEY DISCOUNT THE POSSIBILITY OF THEIR BEING REHEARSED.— Anent the inconsistent statements made by AAA in her testimony which were pointed out by appellant, we agree with the assessment made by the Court of Appeals that these are but minor discrepancies that do little to affect the central issue of rape which is involved in this case. Instead of diminishing AAA's credibility, such variance on minor details has the net effect of bolstering the truthfulness of AAA's accusations. We have constantly declared that a few discrepancies and inconsistencies in the testimonies of witnesses referring to minor details and not in actuality touching upon the central fact of the crime do not impair the credibility of the witnesses because they discount the possibility of their being rehearsed testimony.

6. ID.; ID.; ID.; A RAPE VICTIM'S TESTIMONY AS TO WHO ABUSED HER IS CREDIBLE WHERE SHE HAS ABSOLUTELY NO MOTIVE TO INCRIMINATE AND TESTIFY AGAINST THE ACCUSED.— Notable is the fact that no ill motive on the part of AAA to falsely accuse appellant was ever brought up by the defense during trial. This only serves to further strengthen AAA's case since we have consistently held that a rape victim's testimony as to who abused her is credible where she has absolutely no motive to incriminate and testify against the accused. It is also equally important to highlight AAA's young age when she decided to accuse her kin of rape and go through the ordeal of trial. In fact, when she painfully recounted her tribulation in court, she was just at the tender age of sixteen (16) years old. Jurisprudence instructs us that no young woman, especially of tender age, would concoct a story of defloration, allow an examination of her private parts, and thereafter pervert herself by being subjected to public trial, if she was not motivated solely by the desire to obtain justice for the wrong committed against her.

7. ID.; ID.; ID.; DEFENSE OF ALIBI; REJECTED; IT WAS NOT PHYSICALLY IMPOSSIBLE FOR APPELLANT TO BE AT THE *LOCUS CRIMINIS* ON THE OCCASION OF THE ALLEGED RAPES IN CASE AT BAR.— We are similarly unconvinced with appellant's defense of alibi. We

have consistently held that alibi is an inherently weak defense because it is easy to fabricate and highly unreliable. Moreover, we have required that for the defense of alibi to prosper, the appellant must prove that he was somewhere else when the offense was committed and that he was so far away that it was not possible for him to have been physically present at the place of the crime or at its immediate vicinity at the time of its commission. In the case at bar, the testimony of defense witness Filomeno Suson made known to the trial court that the distance between the scene of the crime and the copra kiln dryer where appellant claimed to have been working the entire time during which the incidents of rape occurred can be traversed in less than an hour. Thus, it was not physically impossible for appellant to be at the *locus criminis* on the occasion of the rapes owing to the relatively short distance. This important detail coupled with AAA's positive and categorical identification of appellant as her rapist demolishes appellant's alibi since it is jurisprudentially-settled that alibi and denial cannot prevail over the positive and categorical testimony and identification of an accused by the complainant.

APPEARANCES OF COUNSEL

The Solicitor General for plaintiff-appellee.
Public Attorney's Office for accused-appellant.

D E C I S I O N

LEONARDO-DE CASTRO, *J.*:

This is an appeal from a Decision[1] dated August 31, 2011 of the Court of Appeals in CA-G.R. CEB-CR.-H.C. No. 00335, entitled *People of the Philippines v. Mervin Gahi*, which affirmed the Decision[2] dated April 22, 2005 of the Regional Trial Court of Carigara, Leyte, Branch 13 in Criminal Case Nos. 4202 and

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[1] *Rollo*, pp. 4-33; penned by Associate Justice Ramon Paul L. Hernando with Associate Justices Edgardo L. de los Santos and Victoria Isabel A. Paredes, concurring.

[2] CA *rollo*, pp. 26-42.

4203. The trial court convicted appellant Mervin Gahi of two counts of rape defined under Article 266-A of the Revised Penal Code.

The accusatory portions of the two criminal Informations, both dated October 9, 2002, each charging appellant with one count of rape are reproduced below:

[Criminal Case No. 4202]

That on or about the 11th day of March, 2002, in the Municipality of Capoocan, Province of Leyte, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, with deliberate intent and with lewd designs and by use of force and intimidation, armed with a knife, did then and there willfully, unlawfully and feloniously had carnal knowledge with (sic) [AAA[3]] against her will and a 16[-]year old girl, to her damage and prejudice.[4]

[Criminal Case No. 4203]

That on or about the 12th day of March, 2002, in the Municipality of Capoocan, Province of Leyte, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, with deliberate intent and with lewd designs and by use of force and intimidation, armed with a knife, did then and there willfully, unlawfully and feloniously had carnal knowledge with (sic) [AAA] against her will and a 16[-]year old girl, to her damage and prejudice.[5]

When he was arraigned on November 4, 2002, appellant pleaded "NOT GUILTY" to the charges leveled against him.[6] Thereupon, the prosecution and the defense presented their evidence.

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[3] The Court withholds the real name of the victim-survivor and uses fictitious initials instead to represent her. Likewise, the personal circumstances of the victims-survivors or any other information tending to establish or compromise their identities, as well as those of their immediate families or household members, are not to be disclosed. (See *People v. Cabalquinto*, 533 Phil. 703 [2006].)

[4] Records, p. 16.

[5] *Id.* at 1.

[6] *Id.* at 15.

The pertinent facts of this case were synthesized by the Court of Appeals and presented in the assailed August 31, 2011 Decision in this manner:

The Prosecution's Story

The following witnesses were presented by the prosecution, who testified, as follows:

AAA is sixteen years old and a resident of x x x, Leyte. She testified that she knows accused Mervin Gahi, the latter being the husband of her aunt DDD.

The First Rape

AAA recounted that on March 11, 2002 at about 11:30 in the morning, she was in her grandmother BBB's house with her epileptic teenage cousin, CCC. At that time BBB was out of the house to collect money from debtors. While she was in the living room mopping the floor, accused Mervin arrived in the house. The latter was a frequent visitor as he used to make charcoal in the premises. When Mervin arrived, AAA was by her lonesome as CCC was out of the house.

AAA recounted that Mervin came near her and instructed her to "Lie down, lie down." Fearful upon hearing Mervin's orders, AAA stopped mopping the floor. Mervin, with his right hand, then held AAA's right arm. He pushed AAA, causing her to lose her balance and fall on the floor. Mervin raised AAA's skirt and proceeded to take off her underwear. All this time, Mervin was holding a knife with a blade of about 6 inches long, poking it at AAA's right breast. Fearful for her life, AAA did not resist Mervin's initial advances. After taking off AAA's underwear, Mervin went on top of her and while in that position, he took off his shorts, inserted his penis inside her vagina and ejaculated. AAA's efforts to free herself from Mervin's hold were unsuccessful. As a result of her struggle, she felt tired and weak. After satisfying his lust, Mervin warned AAA to keep secret what transpired or else he would kill her. Afraid that he would make good his threat, AAA did not mention to anybody what happened, even to her aunt DDD, the wife of the accused.

The Second Rape

AAA recalled that the second rape occurred on March 12, 2002 at about three o'clock in the afternoon. On her way to the field and

with a carabao in tow, she was met by Mervin along the foot trail. While on the foot trail, Mervin went near AAA, prompting her to hurriedly scamper to BBB's house. Mervin followed her. Once in the living room of BBB's house, Mervin approached AAA, poked a knife at the right side of her body, pushed her and made her lie down. Out of fear, she didn't resist Mervin's advances. He threatened and ordered her to "*keep quiet, don't talk.*" Then he raised her skirt and took off her underwear, after which, he took off his short pants and his brief, laid himself on top of her, and made pumping motions until he ejaculated. Blood came out of AAA's vagina. After the rape, AAA cried while the accused left the house. Just like before, she did not mention the incident to anybody, not even to her grandmother and to her aunt DDD, for fear that Mervin might kill them.

AAA narrated that the first person she told about her ordeal was Lynlyn, her employer in Ormoc, where AAA spent three months working, when the former was able to detect her pregnancy. It was also Lynlyn who accompanied her to the Capoocan Police Station to report and file the case. After reporting the matter to the police, AAA did not go back to Ormoc anymore and later gave birth. Instead, she and her baby stayed with the Department of Social Welfare and Development (DSWD).

Dr. Bibiana O. Cardente, the Municipal Health Officer of Capoocan, Leyte testified that upon the request of the Chief of Police of Capoocan, Leyte, she attended to AAA, a sixteen[-]year old who was allegedly raped by the husband of her aunt. The findings of Dr. Cardente were reduced in the form of a Medical Certificate issued on August 23, 2002, which she also identified and read the contents thereof in open court, as follows:

> "Patient claimed that she was allegedly raped by the husband of her aunt. The patient can't recall the exact date when she was raped.
>
> Phernache – at the age of 13 years old,
> Pregnancy test done at Carigara District Hospital today at August 23, 2002.
> Result: Positive for UGC, LMP-unknown
> Findings: Fundal Height-1 inch above the umbilicus compatible with 5 months pregnancy
> Presentation: cephalic
> FHB – RLQ"

Ofelia Pagay, a Social Welfare Officer III of the DSWD Regional Haven, Pawing, Palo, Leyte testified that she interviewed AAA upon the latter's admission to their office on August 29, 2002. Also interviewed were her mother, the MSWD of Capoocan, Leyte and the Social Welfare Crisis Unit of the DSWD. In her case study report on AAA, Ofelia recommended the necessary intervention for her because of an existing conflict in their family.

The Version of the Defense

BBB, AAA's 74-year old grandmother, testified that AAA is the daughter of her son DDD and EEE. She took custody of AAA after her parents got separated. Along with AAA her epileptic granddaughter, CCC was also living with them.

BBB recounted that on March 11, 2002, she was at her house doing household chores from morning until noon. She denied that a rape incident ever occurred at the said date as she stayed at home the whole day and did not chance upon Mervin at her house nor did AAA inform her about any rape incident.

BBB also recalled that on March 12, 2002 she stayed at home the whole day. She narrated that after having breakfast at about seven o'clock in the morning, AAA took a bath. She also saw AAA writing notes. At around three o'clock in the afternoon, AAA went to herd the carabao at the uphill portion of the place. Later, AAA returned and stayed in the house the rest of the afternoon. BBB again denied that a rape occurred on that day of March 12, 2002, as she did not see Mervin in her house. Neither did she observe any unusual behavior on the part of AAA nor did she receive a complaint from the latter that she was raped by Mervin.

Filomeno Suson, 51 years old, married, a farmer and a resident of Brgy. Visares, Capoocan, Leyte testified that on March 11, 2002 he was with Mervin at the copra kiln dryer situated in Sitio Sandayong, Brgy. Visares, Capoocan, Leyte from eight o'clock in the morning until twelve o'clock noon. Mervin was with his wife and two children and never left the place. He recalled that he left the place at 12:30 in the afternoon, and returned at 1:30 in the afternoon. He saw Mervin still processing the copra. He stayed at the dryer until five o'clock in the afternoon and did not see Mervin leave the place. The following day, March 12, 2002, he went back to the dryer at eight o'clock in the morning and saw Mervin near the copra kiln dryer regulating the fire so that the copra will not get burned. He

stayed there until past noontime and did not see Mervin leave the place. When he returned at one o'clock in the afternoon, Mervin was already placing the copra inside the sack. He stayed until five o'clock in the afternoon. The following day, March 13, 2002, he saw Mervin hauling the copra. He did not observe any unusual behavior from him.

Jackie Gucela, 18 years old, single, a farm laborer and a resident of Brgy. Lonoy, Kanaga, Leyte testified that he and AAA were sweethearts. Jackie recounted that the first time he got intimate and had sex with AAA was sometime in March 2000. He recalled that the last time he and AAA had sex was sometime in April 2002. He admitted that it was he who got AAA pregnant.

Mervin Gahi, 35 years old, married, a farmer and a resident of Brgy. Visares, Capoocan, Leyte denied having been at the place of the alleged rapes on the days asserted by the complainant. He recalled that on March 11, 2002, he was at the area of Sandayong, Sitio Agumayan, Brgy. Visares, Capoocan, Leyte processing copra owned by Mrs. Josefina Suson. He started processing copra at six o'clock in the morning until about nine o'clock in the evening. With him were his wife and two children, May Jane and Mervin Jr. His landlord, Filomeno arrived later in the morning, and stayed until twelve o'clock noon. After having lunch at his house, Filomeno returned at one o'clock in the afternoon. Mervin recounted that he stopped working when he had lunch at his nearby house with his family, and during the intervening time, he did not leave the place to watch over the copra. After eating his lunch, he went back to the copra kiln drier to refuel and again watched over the copra. He stayed there and never left the place until nine o'clock in the evening.

On March 12, 2002, Mervin recalled that he was at the copra kiln drier segregating the cooked copra from the uncooked ones until nine o'clock in the morning. When he was finished segregating, he smoked the uncooked copra. With him were his wife and children, and he stayed at the copra kiln dryer until six o'clock in the evening. The only time that he left the said place was when he had his lunch at eleven o'clock in the morning at his house. After having his lunch, he returned to the copra kiln drier. He admitted that he was familiar with Brgy. Sto. Nino, Capoocan, Leyte.

Mervin testified that on March 13, 2002 at twelve o'clock noon, he delivered the copra for weighing to the house of his landlord at Brgy. Visares, Capoocan, Leyte. It was his Kuya Noni (Filomino)

and Ate Pensi (Maria Esperanza) who actually received the copra, with the latter even recording the delivery. According to him, it was impossible for him to have raped AAA on the alleged dates as he was at Brgy. Visares processing copra. He argued that a mistake was committed by AAA in accusing him considering the similarity between his name Mervin and x x x Jack[ie] Gucela's nickname, Melvin, who was known to be a suitor of AAA.

Ma. Esperanza V. Villanueva, 48 years old, married, a housewife and a resident of Brgy. Visares, Capoocan, Leyte testified that she knows Mervin. According to her, Mervin was a tenant and has been working as a copra drier for them for a couple of years. Esperanza recalled that on March 13, 2002, Mervin and his wife delivered copra to her house. The delivery, she said, was also recorded by her.[7] (Citations omitted.)

At the conclusion of trial, the April 22, 2005 Decision convicting appellant was rendered by the trial court. Dispositively, the said ruling states:

WHEREFORE, premises considered, applying Article 266-A and 266-B of the Revised Penal Code as amended, and the amendatory provisions of R.A. 8353, (The Anti-Rape Law of 1997), in relation to Section 11 of R.A. 7659 (The Death Penalty Law), the Court found accused, **MERVIN GAHI**, **GUILTY**, beyond reasonable doubt for two counts of **RAPE** charged under Criminal Cases No. 4202 and 4203, and sentenced to suffer the maximum penalty of **DEATH** in both cases and to pay civil indemnity in the amount of Seventy[-]Five Thousand (₱75,000.00) Pesos for each case and exemplary damages in the amount of Twenty[-]Five (₱25,000.00) Thousand Pesos for each case, to the victim [AAA]; and pay the costs.[8]

The case was subsequently elevated to the Court of Appeals. After due deliberation, the Court of Appeals affirmed with modification the appealed decision of the trial court in the now assailed August 31, 2011 Decision, the dispositive portion of which is reproduced here:

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[7] *Rollo*, pp. 6-14.

[8] CA *rollo*, p. 42.

WHEREFORE, premises considered, the assailed Decision dated April 22, 2005 of the Regional Trial Court, Eight Judicial Region, Branch 13 of Carigara, Leyte in Criminal Case Nos. 4202 and 4203, finding appellant Mervin Gahi guilty of two counts of Rape, is hereby AFFIRMED with the modification that accused-appellant is sentenced to suffer the penalty of *reclusion perpetua* for each count. Further, he is ordered to pay AAA the amount of Php50,000.00 for each count of rape as moral damages.[9]

Having been thwarted twice in his quest for the courts to proclaim his innocence, appellant comes before this Court for one last attempt at achieving that purpose. In his Brief, appellant submits a single assignment of error for consideration, to wit:

THE TRIAL COURT ERRED IN CONVICTING THE ACCUSED-APPELLANT OF TWO COUNTS OF RAPE DESPITE FAILURE OF THE PROSECUTION TO PROVE HIS GUILT BEYOND REASONABLE DOUBT.[10]

Appellant maintains that AAA's incredible and inconsistent testimony does not form sufficient basis for him to be convicted of two counts of rape. He argues that his testimony along with that of other defense witnesses should have been accorded greater weight and credibility. He faults the trial court for ignoring the extended time period between the alleged rapes and the birth of AAA's baby; and for disbelieving Jackie Gucela's testimony which stated that the latter was AAA's lover and the father of AAA's child, contrary to AAA's claim that the baby was the fruit of appellant's unlawful carnal congress with her. He also insists that his alibi should have convinced the trial court that he is innocent because he was at another place at the time the rapes were allegedly committed by him. On the strength of these assertions, appellant believes that he is deserving of an acquittal that is long overdue because the prosecution failed miserably to prove his guilt beyond reasonable doubt.

We are not persuaded.

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[9] *Rollo,* p. 32.

[10] CA *rollo,* p. 52.

Article 266-A of the Revised Penal Code defines when and how the felony of rape is committed, to wit:

> Rape is committed —
>
> 1) By a man who shall have carnal knowledge of a woman under any of the following circumstances:
>
> (a) Through force, threat or intimidation;
>
> (b) When the offended party is deprived of reason or is otherwise unconscious;
>
> (c) By means of fraudulent machination or grave abuse of authority;
>
> (d) When the offended party is under twelve (12) years of age or is demented, even though none of the circumstances mentioned above be present.
>
> 2) By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person.

According to the prosecution, appellant used force or intimidation in order to successfully have unlawful carnal knowledge of AAA. To be exact, appellant is alleged to have utilized, on two occasions, a knife and the threat of bodily harm to coerce AAA into submitting to his evil sexual desires. A careful perusal of AAA's testimony in open court reveals that she was clear and straightforward in her assertion that appellant raped her twice in the manner described by the prosecution. We sustain as proper the appellate court's reliance on the following portions of AAA's testimony regarding the first instance of rape:

> [PROSECUTOR MERIN]
>
> Q And you were alone in the house of your lola?
> A Yes, sir.
>
> Q And when you were alone in your lola's house at the sala, what did this accused do to you?

A He suddenly went inside the sala and at that time I was mopping the floor.

Q What did you use in mopping the floor?
A Coconut husk.

Q And when the accused suddenly appeared [at] the sala, while you were mopping the floor with a coconut husk, what did the accused do next, tell this court?
A He said, lie down, lie down.

Q You mean he was fronting at (sic) you?
A Yes, sir.

Q And what did you do with his instruction to let you lie down?
A Nothing.

Q You mean you stop[ped] mopping the floor?
A Yes, sir.

Q Now, after you stop[ped] mopping, what next transpired if any, tell this court?
A He held me and let me lie down.

x x x x x x x x x

Q And after you were laid down by the accused and you already [were lying] on the floor, what next transpired if any, tell the court?
A He raised my skirt and took off my panty.

Q What did you do when he tried to raise your skirt and took off your panty?
A I was trembling.

Q Why were you trembling?
A Because I was afraid.

Q Why were you afraid of Mervin Gahi x x x?
A Because he held something.

Q What was he holding?
A A knife.

x x x x x x x x x

Q And what did he do with that knife he was holding?
A It was poked [at] me.

Q What part of your body was poked upon (sic)?
A (Witness indicated her right breast)

x x x x x x x x x

Q While the accused was on top of you and took off his pants, what did the accused do upon your person?
A He inserted his penis.

Q You mean his penis was inserted [in]to what?
A To my vagina.

Q Now, how did you feel when he tried to insert his penis [in]to your vagina?
A I became weak.[11]

As for the second instance of rape, we agree with the lower courts that AAA was likewise clear and straightforward in recounting that:

[PROSECUTOR MERIN]

Q Where were you on March 12, 2002 when raped again by the accused?
A I was tethering a carabao.

x x x x x x x x x

Q When you were trying to bring that carabao what happened tell the court?
A At that time when I was able to bring the carabao to be fed I saw him.

Q Whereat did you see him?
A He was on the foot trail.

x x x x x x x x x

Q When you saw the accused on your way to tether the carabao of your lola, what did the accused do [to] you?
A He drew nearer to me.

Q After he drew nearer to you, what did he do next?
A He poked a knife [at] me.

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[11] TSN, February 28, 2003, pp. 6-9.

x x x x x x x x x

Q After you were poked by that knife by the accused, what else happened?
A He said, "Keep quiet, don't talk."

Q After he said that what next happened?
A He made me to (sic) lie.

Q Whereat?
A When he poked his knife at me he held my upper arms.

Q Were you already lying?
A He pushed me and I was made to lie.

Q You mean on the roadside?
A No, at the sala of the house of my grandmother.

Q You mean you were led to the house of your Lola?
A No sir.

Q Where were you brought?
A At that time when I was able to bring the carabao to be [fed] when I saw him I ran back to the house of my grandmother.

x x x x x x x x x

Q And when you were already inside the house of your Lola what happened, tell the Court?
A He was already there.

x x x x x x x x x

Q After your skirt was raised up by the accused, what did the accused do next, tell the Court?
A He took off my panty.

x x x x x x x x x

Q Did you not prevent Mervin from taking off your panty?
A No sir.

Q Why did you not wrestle out?
A I am afraid because of the knife.

x x x x x x x x x

Q After he took off his brief, what did accused do, tell the Court?
A He laid himself on top of me.

Q After he laid himself on top of you, what else did he do?
A He inserted his penis [in]to my vagina.

x x x x x x x x x

Q Was he successful in inserting his penis [in]to your vagina?
A Yes sir.

Q After inserting his penis [in]to your vagina, what else did accused do to his penis?
A He kept on pumping himself, meaning making a going and out movement.

Q You mean he was making in and out movement of (sic) your vagina?
A Yes, sir.

Q Was he able to reach ejaculation?
A Blood.

Q You mean blood came out?
A Yes, sir.

Q From where?
A From my vagina.[12]

Appellant questions the weighty trust placed by the trial court on the singular and uncorroborated testimony of AAA as the basis for his conviction. On this point, we would like to remind appellant that it is a fundamental principle in jurisprudence involving rape that the accused may be convicted based solely on the testimony of the victim, provided that such testimony is credible, natural, convincing and consistent with human nature and the normal course of things.[13]

It is likewise jurisprudentially settled that when a woman says she has been raped, she says in effect all that is necessary

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[12] TSN, July 3, 2003, pp. 9-13.

[13] *People v. Penilla*, G.R. No. 189324, March 20, 2013, 694 SCRA 141, 149.

to show that she has been raped and her testimony alone is sufficient if it satisfies the exacting standard of credibility needed to convict the accused.[14] Thus, in this jurisdiction, the fate of the accused in a rape case, ultimately and oftentimes, hinges on the credibility of the victim's testimony.

In this regard, we defer to the trial court's assessment of the credibility of AAA's testimony, most especially, when it is affirmed by the Court of Appeals. In *People v. Amistoso*,[15] we reiterated the rationale of this principle in this wise:

> Time and again, we have held that when it comes to the issue of credibility of the victim or the prosecution witnesses, the findings of the trial courts carry great weight and respect and, generally, the appellate courts will not overturn the said findings unless the trial court overlooked, misunderstood or misapplied some facts or circumstances of weight and substance which will alter the assailed decision or affect the result of the case. This is so because trial courts are in the best position to ascertain and measure the sincerity and spontaneity of witnesses through their actual observation of the witnesses' manner of testifying, their demeanor and behavior in court. Trial judges enjoy the advantage of observing the witness' deportment and manner of testifying, her "furtive glance, blush of conscious shame, hesitation, flippant or sneering tone, calmness, sigh, or the scant or full realization of an oath" – all of which are useful aids for an accurate determination of a witness' honesty and sincerity. Trial judges, therefore, can better determine if such witnesses are telling the truth, being in the ideal position to weigh conflicting testimonies. Again, unless certain facts of substance and value were overlooked which, if considered, might affect the result of the case, its assessment must be respected, for it had the opportunity to observe the conduct and demeanor of the witnesses while testifying and detect if they were lying. The rule finds an even more stringent application where the said findings are sustained by the Court of Appeals.

Anent the inconsistent statements made by AAA in her testimony which were pointed out by appellant, we agree with

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[14] *People v. Monticalvo*, G.R. No. 193507, January 30, 2013, 689 SCRA 715, 734.

[15] G.R. No. 201447, January 9, 2013, 688 SCRA 376, 387-388 citing *People v. Aguilar*, 565 Phil. 233, 247-248 (2007).

the assessment made by the Court of Appeals that these are but minor discrepancies that do little to affect the central issue of rape which is involved in this case. Instead of diminishing AAA's credibility, such variance on minor details has the net effect of bolstering the truthfulness of AAA's accusations. We have constantly declared that a few discrepancies and inconsistencies in the testimonies of witnesses referring to minor details and not in actuality touching upon the central fact of the crime do not impair the credibility of the witnesses because they discount the possibility of their being rehearsed testimony.[16]

Notable is the fact that no ill motive on the part of AAA to falsely accuse appellant was ever brought up by the defense during trial. This only serves to further strengthen AAA's case since we have consistently held that a rape victim's testimony as to who abused her is credible where she has absolutely no motive to incriminate and testify against the accused.[17] It is also equally important to highlight AAA's young age when she decided to accuse her kin of rape and go through the ordeal of trial. In fact, when she painfully recounted her tribulation in court, she was just at the tender age of sixteen (16) years old.[18] Jurisprudence instructs us that no young woman, especially of tender age, would concoct a story of defloration, allow an examination of her private parts, and thereafter pervert herself by being subjected to public trial, if she was not motivated solely by the desire to obtain justice for the wrong committed against her.[19]

In a bid to exculpate himself, appellant argues that he could not have possibly been guilty of rape because the time period between the rape incidents and the birth of the alleged fruit of

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[16] *People v. Batula*, G.R. No. 181699, November 28, 2012, 686 SCRA 575, 586-587.

[17] *People v. Cabungan*, G.R. No. 189355, January 23, 2013, 689 SCRA 236, 246.

[18] TSN, February 28, 2003, p. 2.

[19] *People v. Tolentino*, G.R. No. 187740, April 10, 2013, 695 SCRA 545, 554.

his crime is more than the normal period of pregnancy. He also points out that defense witness Jackie Gucela's admission that he was AAA's lover and the father of her child should suffice to negate any notion that he raped AAA twice. Lastly, he puts forward the defense of alibi.

We are not convinced by appellant's line of reasoning which appears ostensibly compelling, at the outset, but is ultimately rendered inutile by jurisprudence and the evidence at hand.

With regard to appellant's first point, we express our agreement with the statement made by the Court of Appeals that it is not absurd nor contrary to human experience that AAA gave birth ten (10) months after the alleged sexual assault as there may be cases of long gestations. In any event, we dismiss appellant's contention as immaterial to the case at bar because jurisprudence tells us that impregnation is not an element of rape.[20] This rule was eloquently explained in *People v. Bejic*:[21]

> It is well-entrenched in our case law that the rape victim's pregnancy and resultant childbirth are irrelevant in determining whether or not she was raped. Pregnancy is not an essential element of the crime of rape. Whether the child which the rape victim bore was fathered by the accused, or by some unknown individual, is of no moment. What is important and decisive is that the accused had carnal knowledge of the victim against the latter's will or without her consent, and such fact was testified to by the victim in a truthful manner. (Citation omitted.)

Likewise, we assign no significance to the testimony of defense witness Jackie Gucela. Firstly, AAA categorically denied that Jackie Gucela was her boyfriend [22] or that she had sexual relations with him or any other person other than appellant near the time of the rape incidents at issue.[23] For the sweetheart theory to be believed when invoked by the accused, convincing evidence to

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[20] *People v. Maglente*, 578 Phil. 980, 996 (2008).

[21] 552 Phil. 555, 573 (2007).

[22] TSN, August 6, 2003, p. 6.

[23] TSN, December 5, 2003, p. 11.

prove the existence of the supposed relationship must be presented by the proponent of the theory. We elucidated on this principle in *People v. Bayrante*,[24] to wit:

> For the ["sweetheart"] theory to prosper, the existence of the supposed relationship must be proven by convincing substantial evidence. Failure to adduce such evidence renders his claim to be self-serving and of no probative value. For the satisfaction of the Court, there should be a corroboration by their common friends or, if none, a substantiation by tokens of such a relationship such as love letters, gifts, pictures and the like. (Citation omitted.)

In the present case, although it is a person other than the accused who is claiming to be the victim's sweetheart and the father of her child, such an assertion must nonetheless be believably demonstrated by the evidence.

The defense failed to discharge the burden of proving that AAA and Jackie Gucela had any kind of romantic or sexual relationship which resulted in AAA's pregnancy. We quote with approval the discussion made by the Court of Appeals on this matter:

> Like the trial court, We have our reservations on [Jackie]'s credibility. AAA, from the outset, has denied any romantic involvement with [Jackie]. On the other hand, to prove his claim that they were sweethearts, [Jackie] presented three love letters purportedly authored by AAA. An examination of the contents of the letters however fails to indicate any intimate relations between AAA and [Jackie]. Nowhere in the contents of the said letters did AAA even profess her love for [Jackie]. In the first letter, [Jackie] maintained that AAA signed the letter as "*SHE*" to hide her identity. Other than such assertion, he however failed to establish by any conclusive proof that the "*SHE*" and AAA were one and the same person. Neither did he explain if he was the "*Boy*" being alluded to in the first letter. The second letter, which was also unsigned by AAA, was a poem written by Joyce Kilmer entitled Trees, and the third letter although vague as to its contents, does not appear to be a love letter at all. Our inevitable conclusion: the letters are not love letters at all between AAA and [Jackie]. Even if We were to

[24] G.R. No. 188978, June 13, 2012, 672 SCRA 446, 465.

assume for the sake of argument that [Jackie] fathered AAA's child, We are hard pressed to find malice or any ill motive on the part of AAA to falsely accuse no less than her uncle, if the same was not true. At most, We believe that [Jackie]'s testimony is a desperate attempt on his part to let Mervin off the hook, so to speak.[25] (Citations omitted.)

In any event, even assuming for the sake of argument that AAA had a romantic attachment with a person other than the accused at the time of the rape incidents or thereafter, this circumstance would not necessarily negate the truth of AAA's statement that the appellant, her aunt's husband, twice had carnal knowledge of her through force and intimidation and without her consent.

We are similarly unconvinced with appellant's defense of alibi. We have consistently held that alibi is an inherently weak defense because it is easy to fabricate and highly unreliable.[26] Moreover, we have required that for the defense of alibi to prosper, the appellant must prove that he was somewhere else when the offense was committed and that he was so far away that it was not possible for him to have been physically present at the place of the crime or at its immediate vicinity at the time of its commission.[27]

In the case at bar, the testimony of defense witness Filomeno Suson made known to the trial court that the distance between the scene of the crime and the copra kiln dryer where appellant claimed to have been working the entire time during which the incidents of rape occurred can be traversed in less than an hour.[28] Thus, it was not physically impossible for appellant to be at the *locus criminis* on the occasion of the rapes owing to the relatively short distance. This important detail coupled with AAA's positive and categorical identification of appellant as

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[25] *Rollo*, pp. 25-26.

[26] *People v. Gani*, G.R. No. 195523, June 5, 2013.

[27] *People v. Piosang*, G.R. No. 200329, June 5, 2013.

[28] TSN, October 6, 2004, pp. 18-19.

her rapist demolishes appellant's alibi since it is jurisprudentially-settled that alibi and denial cannot prevail over the positive and categorical testimony and identification of an accused by the complainant.[29]

Having affirmed the factual bases of appellant's conviction for two (2) counts of simple rape, we now progress to clarify the proper penalties of imprisonment and damages that should be imposed upon him owing to the conflicting pronouncements made by the trial court and the Court of Appeals. To recall, the Court of Appeals downgraded the penalty imposed on appellant from death (as decreed by the trial court) to *reclusion perpetua*. It has been established that appellant committed the aforementioned felonies with the use of a deadly weapon which according to Article 266-B, paragraph 2 of the Revised Penal Code[30] is punishable by *reclusion perpetua* to death. There being no aggravating circumstance present in this case, the proper penalty of imprisonment should be *reclusion perpetua* for each instance of rape.

It is worth noting that appellant is an uncle by affinity of AAA. Following the 5th paragraph (1) of Article 266-B of the Revised Penal Code,[31] a relationship within the third degree of consanguinity or affinity taken with the minority of AAA would have merited the imposition of the death penalty. However, no such close relationship was shown in this case as accused appears to be the husband of AAA's father's cousin. In any case, the

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[29] *People v. Gani*, *supra* note 26.

[30] Article 266-B. *Penalties.* – x x x.

Whenever the rape is committed with the use of a deadly weapon or by two or more persons, the penalty shall be *reclusion perpetua* to death.

[31] Article 266-B. *Penalties.* – x x x.

The death penalty shall also be imposed if the crime of rape is committed with any of the following aggravating/qualifying circumstances:

1. When the victim is under eighteen (18) years of age and the offender is a parent, ascendant, stepparent, guardian, relative by consanguinity or affinity within the third civil degree, or the common law spouse of the parent of the victim.

death penalty has been abolished by the enactment of Republic Act No. 9346 which also mandated that the outlawed penalty be replaced with *reclusion perpetua*. A qualifying or aggravating circumstance, if properly alleged and proven, might not have the effect of changing the term of imprisonment but it would, nevertheless, be material in determining the amount of pecuniary damages to be imposed.

Thus, in view of the foregoing, we affirm the penalty imposed by the Court of Appeals which was *reclusion perpetua* for each conviction of simple rape. The award of moral damages in the amount ₱50,000.00 is likewise upheld. However, the award of civil indemnity should be reduced from ₱75,000.00 to ₱50,000.00 in line with jurisprudence.[32] For the same reason, the award of exemplary damages should be increased from ₱25,000.00 to ₱30,000.00.[33] Moreover, the amounts of damages thus awarded are subject further to interest of 6% per annum from the date of finality of this judgment until they are fully paid.[34]

WHEREFORE, premises considered, the Decision dated August 31, 2011 of the Court of Appeals in CA-G.R. CEB-CR.-H.C. No. 00335, affirming the conviction of appellant Mervin Gahi in Criminal Case Nos. 4202 and 4203, is hereby **AFFIRMED with MODIFICATIONS** that:

(1) The civil indemnity to be paid by appellant Mervin Gahi is decreased from Seventy-Five Thousand Pesos (₱75,000.00) to Fifty Thousand Pesos (₱50,000.00);

(2) The exemplary damages to be paid by appellant Mervin Gahi is increased from Twenty-Five Thousand Pesos (₱25,000.00) to Thirty Thousand Pesos (₱30,000.00); and

(3) Appellant Mervin Gahi is ordered to pay the private offended party interest on all damages at the legal rate of six percent (6%) per annum from the date of finality of this judgment.

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[32] *People v. Lomaque*, G.R. No. 189297, June 5, 2013.

[33] *People v. Basallo*, G.R. No. 182457, January 30, 2013, 689 SCRA 616, 645.

[34] *People v. Vitero*, G.R. No. 175327, April 3, 2013, 695 SCRA 54, 69.

No pronouncement as to costs.

SO ORDERED.

Sereno, C.J. (Chairperson), Bersamin, Villarama, Jr., and *Reyes, JJ.,* concur.

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(3) the accused freely and consciously possessed the drug. (People *vs.* Rom, G.R. No. 198452, Feb. 19, 2014) p. 587

— Possession of dangerous drugs constitutes *prima facie* evidence of knowledge or *animus possidendi* sufficient to convict an accused in the absence of a satisfactory explanation of such possession. *(Id.)*

Illegal sale of dangerous drugs — Elements that must be established are: (1) identity of the buyer and the seller, the object and the consideration of the sale; and (2) the delivery to the buyer of the thing sold and receipt by the seller of the payment therefor. (People *vs.* Rom, G.R. No. 198452, Feb. 19, 2014) p. 587

CONTEMPT

Contempt of court — Defined as a disobedience to the court by acting in opposition to its authority, justice and dignity. (City Gov't. of Baguio *vs.* Atty. Masweng, G.R. No. 188913, Feb. 19, 2014) p. 540

— Signifies not only a wilful disregard or disobedience of the court's orders, but such conduct which tends to bring the authority of the court and the administration of justice. *(Id.)*

Power to punish for contempt — Inherent in all courts and is essential to the reservation of order in judicial proceedings. (City Gov't. of Baguio *vs.* Atty. Masweng, G.R. No. 188913, Feb. 19, 2014) p. 540

CONTRACTS

Relativity of contracts — Contract can only bind the parties who entered into it, and cannot favor or prejudice a third person, even if he is aware of such contract and has acted with knowledge thereof. (Phil. National Bank *vs.* Tan Dee, G.R. No. 182128, Feb. 19, 2014) p. 473

CORPORATE REHABILITATION

Application — Corporate rehabilitation allows a court-supervised process to rejuvenate a corporation. (Pryce Corp. *vs.* China Banking Corp., G.R. No. 172302, Feb. 18, 2014) p. 1

conditionally protected. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014; *Carpio, J., concurring opinion and dissenting*) p. 28

— Section 12 of the Act allowing access or intrusion into the private information must be so narrowly drawn to ensure that the other constitutionally-protected rights outside the ambit of the overriding state interests are fully protected. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014; *Brion, J., separate concurring opinion*) p. 28

— Sections 5, 6, & 7 of the Act should not apply to cyber-libel, as they unduly increase the prohibitive effect of libel law on on-line speech, and can have the effect of imposing self-censorship in the interest, as they open the door to application and overreach into matters other than libellous and can thus prevent protected speech from being uttered. *(Id.)*

— The application of Section 7 of the Act which allows multiple prosecutions post-conviction to the offense of online libel under Section 4 (c) (4) of the Act in relation to the offense of libel under Article 353 of the Revised Penal Code is unconstitutional for trenching the double jeopardy and free speech clauses. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014; *Carpio, J., concurring opinion and dissenting*) p. 28

— The application of Section 7 of the Act which authorizes the prosecution of the offender under both the Revised Penal Code and R.A. No. 10175 to the offense of on-line libel under Section 4 (c) (4) of R.A. No. 10175 in relation to the offense of libel under Article 353 of the Revised Penal Code on libel constitutes a violation of the proscription against double jeopardy. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014) p. 28

— The cybersex provisions stifle speech, aggravate inequalities between genders, and will only succeed to encrust the view of the powerful. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014; *Leonen, J., dissenting and concurring opinion*) p. 28

— Allowing a criminal statutory provision clearly repugnant to the Constitution, and directly attacked for such repugnancy, to nevertheless remain in the statute books, is a gross constitutional anomaly which, if tolerated, weakens the foundation of constitutionalism. *(Id.)*

— Does not suffer from over breath and therefore valid and constitutional; it does not encroach protected freedoms nor creates tendency to intimidate the free exercise of one's constitutional right, but is punishing only the act of wilfully destroying without the right of other people's computer data, electronic document or electronic data message. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014) p. 28

Section 4 (a) (6) of the Act which penalizes cyber-squatting or acquiring domain name over the internet — Valid and constitutional as the law is reasonable in punishing the offender for acquiring the domain name in bad faith to profit, mislead, destroy reputation, or deprive others who are not ill-motivated of the rightful opportunity of registering the same. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014) p. 28

Section 4 (b) (3) of the Act which penalizes identity theft or the use or misuse of identifying information belonging to another — Not violative of the freedom of the press as the Act punishes the theft of identity information for an illegitimate purpose or with intent to gain. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014) p. 28

— Not violative of the right to privacy and correspondence as well as the right to due process, as the law punishes those who acquire or use such identifying information without right, implicitly to cause damage, for there is no fundamental right to acquire another's personal data. *(Id.)*

Section 4 (c) (1) of the Act which penalizes cybersex or the lascivious exhibition of sexual organs or sexual activity for favor or consideration — Unconstitutional because it expands the prohibition to cybersex acts involving both minors and adults when the justification for the prohibition

— Repugnant to the free speech clause as it penalizes the transmission online of commercial speech with no "opt-out" feature to non-subscribers, even if truthful and non-misleading, and of commercial speech which does not relay announcements to subscribers, even if truthful and non-misleading. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014; *Carpio, J., concurring opinion and dissenting*) p. 28

— Should not be declared unconstitutional for it will not call speech of fundamental value. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014; *Leonen, J., dissenting and concurring opinion*) p. 28

— Void as unsolicited advertisements are legitimate forms of expression which are also entitled to protection; commercial 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. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014) p. 28

Section 4 (c) (4) of the Act which penalizes on-line libel — Constitutional for it does not, by itself, redefine libel or create a new crime, but it merely extends the application of Article 355 of the Revised Penal Code to communications committed through a computer system, or any other similar means which may be devised in the future. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014; *Brion, J., separate concurring opinion*) p. 28

— Impliedly re-adopts Article 354 of the Revised Penal Code without qualification, giving rise to a clear and direct conflict between the re-adopted Article 354 and the free speech clause based on the prevailing jurisprudence; hence, the Court must strike down Article 354, insofar as it applies to public officers and public figures. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014; *Carpio, J., concurring opinion and dissenting*) p. 28

Section 5 of the Act that punishes "aiding or abetting" libel on cyberspace — A nullity; a governmental purpose which

Section 12 of the Act authorizes law enforcement agents to collect and record in real-time traffic data associated with specified communication — Can never negate the constitutional requirement under the search and seizure clause that when the intrusion into the privacy of communication and correspondence rises to the level of a search and seizure of personal effects, a warrant issued by a judge becomes mandatory for such search and seizure. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014; *Carpio, J., concurring opinion and dissenting*) p. 28

— Considered void as the authority given to law enforcement agencies is too sweeping, lacks restraint and virtually limitless and therefore threatens the right of individuals to privacy; the grant of the power to track cyberspace communications in real time and determine their sources and destinations must be narrowly drawn to preclude abuses. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014) p. 28

— Impermissibly narrows the sphere of privacy afforded by the privacy of communication clause. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014; *Carpio, J., concurring opinion and dissenting*) p. 28

— Impermissibly tilts the balance in favor of state surveillance at the expense of communicative and expressive privacy; the government consistent with its national security needs, may enact legislation allowing surveillance and data collection in bulk only if based on individualized suspicion and subject to meaningful judicial oversight. *(Id.)*

— Must not only be based on compelling state interest but must also provide safeguards to ensure that no unwarranted intrusion would take place to lay open the information or activities not covered by the state interest involved. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014; *Brion, J., separate concurring opinion*) p. 28

— No reasonable expectation in privacy in traffic data *per se*; hence, the real-time collection thereof may be done

Section 13 of the Act which permits law enforcement authorities to require service providers to preserve traffic data and subscriber information as well as specified content data for six months — Valid and constitutional as the process of preserving data will not unduly hamper the normal transmission or use of the same. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014) p. 28

Section 14 of the Act which authorizes the disclosure of computer data under a court-issued warrant — Valid and constitutional as the prescribed procedure for disclosure would not constitute an unlawful search or seizure nor would it violate the privacy of communications and correspondence for disclosure can be made only after judicial intervention. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014) p. 28

Section 15 of the Act which authorizes the search, seizure, and examination of computer data under a court-issued warrant — Valid and constitutional as the law enforcement authorities' exercise of the powers and duties, as enumerated therein, to ensure the proper collection, preservation, and use of computer data that have been seized by virtue of a court warrant, do not pose any threat on the rights of the person from whom they were taken. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014) p. 28

Section 17 of the Act which authorizes the destruction of previously preserved computer data after the expiration of the prescribed holding periods — Valid and constitutional as the user could request the service provider for a copy of them before it is deleted, or if he wants them preserved, he must save them in his computer when he generated the data or received it. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014) p. 28

Section 19 of the Act which authorizes the Department of Justice to restrict or block access to suspected computer data — Unconstitutional because it allows prior restraint within vague parameters. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014; *Leonen, J., dissenting and concurring opinion*) p. 28

— Two constitutional guarantees create these zones of privacy: (1) the right against unreasonable searches and seizures, which is the basis of the right to be let alone; and (2) the right to privacy of communication and correspondence. *(Id.)*

DENIAL OF THE ACCUSED

Defense of — When unsupported and unsubstantiated by clear and convincing evidence, it becomes negative and self-serving, deserving no weight in law, and cannot be given greater evidentiary value over convincing, straightforward and probable testimony on affirmative matters. (People *vs*. Rom, G.R. No. 198452, Feb. 19, 2014) p. 587

EVIDENCE

Offer of evidence — When the sworn statement has been formally offered as evidence, it forms an integral part of the prosecution evidence which complements and completes the testimony on the witness stand. (People *vs*. Castillo, G.R. No. 193666, Feb. 19, 2014) p. 556

EXCISE TAX

Imposition of — Excise tax is imposed upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation, profession or business. (Commissioner of Internal Revenue *vs*. Pilipinas Shell Petroleum Corp., G.R. No. 188497, Feb. 19, 2014; *Bersamin, J., separate opinion*) p. 506

— The accrual of tax liability is contingent on the production, manufacture or importation of the taxable goods and the intention of the manufacturer, producer or importer to have the goods locally sold or consumed or disposed in any other manner. *(Id.)*

— The excise tax imposed on petroleum product is a direct liability of the manufacturer who cannot thus invoke the exercise of exemption granted to its buyers who are international carriers. (Commissioner of Internal Revenue *vs*. Pilipinas Shell Petroleum Corp., G.R. No. 188497, Feb. 19, 2014) p. 506

LOCAL GOVERNMENTS

Local ordinances — To strike down a law or ordinance, the petitioner has the burden to prove a clear and equivocal breach of the Constitution. (Smart Communications, Inc. *vs*. Municipality of Malvar, Batangas, G.R. No. 204429, Feb. 18, 2014) p. 430

Power to tax — Each local government unit has the power to create its own sources of revenues and to levy taxes, fees and charges; subject to such guidelines and limitations as the Congress may provide, consistent with the basic policy of local autonomy. (Smart Communications, Inc. *vs*. Municipality of Malvar, Batangas, G.R. No. 204429, Feb. 18, 2014) p. 430

MORTGAGES

Contract of — Merely an accessory contract to the principal loan contract. (Phil. National Bank *vs*. Tan Dee, G.R. No. 182128, Feb. 19, 2014) p. 473

— While the contract of mortgage is valid, it cannot claim any superior right as against the instalment buyer. *(Id.)*

OBLIGATIONS, EXTINGUISHMENT OF

Dation in payment (dacion en pago) — Extinguishes the obligation to the extent of the value of the thing delivered. (Phil. National Bank *vs*. Tan Dee, G.R. No. 182128, Feb. 19, 2014) p. 473

PRESCRIPTIONS

Prescription of crimes — Refers to the loss or waiver by the State of its right to prosecute an act prohibited and punished by law; it commences from the day on which the crime is discovered by the offended party, the authorities or their agents. (Disini *vs*. Sec. of Justice, G.R. No. 203335, Feb. 18, 2014; *Sereno, CJ., concurring opinion and dissenting*) p. 28

Prescription of penalties — Refers to the loss or waiver by the State of its right to punish the convict; it commences from

TAXES

Classification of — Taxes are classified, according to subject matter or object, into three groups, to wit: (1) personal, capitation or poll taxes; (2) property taxes; and (3) excise or license taxes. (Commissioner of Internal Revenue *vs.* Pilipinas Shell Petroleum Corp., G.R. No. 188497, Feb. 19, 2014; *Bersamin, J., separate opinion*) p. 506

Excise or license tax — Imposed upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation, profession or business. (Commissioner of Internal Revenue *vs.* Pilipinas Shell Petroleum Corp., G.R. No. 188497, Feb. 19, 2014; *Bersamin, J., separate opinion*) p. 506

Personal, capitation or poll taxes — Fixed amounts imposed upon residents or persons of a certain class without regard to their property or business. (Commissioner of Internal Revenue *vs.* Pilipinas Shell Petroleum Corp., G.R. No. 188497, Feb. 19, 2014; *Bersamin, J., separate opinion*) p. 506

Property taxes — Assessed on property or things of a certain class, whether real or personal, in proportion to their value or other reasonable method of apportionment. (Commissioner of Internal Revenue *vs.* Pilipinas Shell Petroleum Corp., G.R. No. 188497, Feb. 19, 2014; *Bersamin, J., separate opinion*) p. 506

VALUE-ADDED TAX

Refunds or tax credit of input tax — The 120-day rule is mandatory and jurisdictional and non-observance of the prescriptive period bars a taxpayer's claim for tax refund or credit. (Procter & Gamble Asia PTE Ltd. *vs.* Commissioner of Internal Revenue, G.R. No. 202071, Feb. 19, 2014) p. 637

(Silicon Phils., Inc. *vs.* Commissioner of Internal Revenue, G.R. Nos. 184360 & 184361, Feb. 19, 2014) p. 487

WITNESSES

Credibility — Findings of trial court, especially affirmed by the Court of Appeals is respected, in the absence of any clear

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