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CYRILLA



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PHILIPPINES REPORT

INDEX

<i>Introduction</i>	01
<hr/>	
<i>Methodology</i>	02
<hr/>	
<i>Legal Foundations and Fundamental Laws and Freedoms</i>	03
<hr/>	
<i>Governance of Online and Networked Spaces</i>	09
<hr/>	
<i>Sectoral Laws</i>	15
<hr/>	
<i>Curtailment of Freedom of Expression</i>	21
<hr/>	
<i>Future Violations Through Draft Laws</i>	38
<hr/>	
<i>Summary and Conclusion</i>	40

Introduction

The Philippines spends more time in social media than any other country.¹ In the early days of the coronavirus pandemic, it even reported the greatest increase globally of users spending more time in social media.² This does not mean that the state of its freedom of expression online is at its healthiest. Various governmental restrictions, limitations, attacks, and even abuses of this freedom exist, keeping the Philippines consistently near the top of “most dangerous countries for journalists” lists. (It’s the fifth worldwide.)³ The Philippines is only partly free on the 2019 Freedom on the Net Report and dropped three notches from last year.

Globally, social media, which was once thought to level the playing field on civil discussion, now “tilts dangerously toward illiberalism, exposing citizens to

an unprecedented crackdown on their fundamental freedoms.”⁴ Commenting on attacks from online ‘trolls,’ a former Philippine senator expressed that “we used to say the internet was a marketplace of ideas, [but] now it’s a battlefield.”⁵

In the Philippines, social media is where freedom of expression is usually realized. It is also a crime scene, scoured by law personnel for evidence of utterances which they may find illegal, but may also be valid expressions of discontent and dissent. Considering the current political climate—one dominated by a president often described as ‘authoritarian’ and ‘dictatorial’ and a police and military force that takes his word as law—the line blurs and one is usually mistaken for the other. A pandemic of ‘fake news’—i.e., disinformation, misinformation, and false information—also muddle the

1 Buchols, K. (2020, 19 June). These are the countries that spend the most and least time on social media. World Economic Forum. <https://www.weforum.org/agenda/2020/06/social-media-countries-chart-online-digital-survey/>

2 Kemp, S. (2020, 23 April). Digital around the world in 2020. We Are Social. <https://wearesocial.com/blog/2020/04/digital-around-the-world-in-april-2020>

3 Salaverria, L. (2019, 31 October). PH is the fifth deadliest country for journalists. Inquirer.net. <https://newsinfo.inquirer.net/1183887/ph-is-fifth-deadliest-country-for-journalists>

4 Shahbaz, A. & Funk, A. (2020). Freedom on the Net 2019: The Crisis of Social Media. <https://freedomhouse.org/report/freedom-net/2019/crisis-social-media>

5 Bueno, A. (2017, 4 October). ‘The internet was a marketplace of ideas, now it’s a battlefield’. CNN Philippines. <https://cnnphilippines.com/life/culture/politics/2017/04/26/bam-aquino-interview.html>

waters by which Filipinos navigate their sources of information. As of date, Congress has found a way to criminalize “perpetration” and “spreading” of fake news, which does not bode well for a citizenry that desperately needs digital literacy, in light of a collective susceptibility to believe, on face value, whatever they see online.

Freedom of expression thus grapples not only with restrictions or limitations to speech; in the age of social media and increased internet access, it also forces us to rethink the context and environment that *enables* and *assures* its meaningful realization, as will be discussed below.

Methodology

Writing this report initially entailed looking at the sources of law in this jurisdiction: the Constitution, international law, domestic law, legal decisions, and other rules and issuances. Whenever applicable, all provisions of law are supported by judicial interpretations by the Supreme Court, especially when penalties or restrictions evincing the harshness of the law are tempered or better clarified by court justices.

We took a multi-level approach by *first* going through government restrictions directly affecting and may result to violations of freedom of expression online and offline, especially in light of a law that transformed all penal provisions into cybercrimes. *Second*, the report also noted government actions and restrictions that, on their face, appear unrelated to clampdowns on freedom of expression, but nonetheless have the effect of self-censorship and chilling free speech and therefore may be cited again in the future as an indirect intrusion to free speech. In an environment overwhelmed day to day with attacks on freedom of expression, led by a president openly hostile to the press, the government seems determined to strategically bombard the public with attacks not just on the freedom of expression front—whether online or offline—but in all fronts where there is an opportunity to diminish or render inutility the capacity of individuals or groups to even exercise their rights and freedoms in the first place. This makes it important that, *third*, the report discusses related issues and their mutual impact, since these rights and responsibilities do not exist in a vacuum.

Legal Foundations and Fundamental Laws and Freedoms

Constitutional foundations

At the outset, the Constitution⁶ readily provides in its Art. II, Sec. 24, that it “recognizes the vital role of communication and information in nation-building.” Free speech, expression, and freedom of the press are among the fundamental rights included in the Bill of Rights (the entirety of Art. III) of the 1987 Philippine Constitution, and are superior to property rights in the hierarchy of civil liberties in this jurisdiction,⁷ as these rights, among other rights (such as the right to free assembly) are essential to the preservation and validity of civil and political institutions.⁸

Art. III, Sec. 4 of the Constitution thus provides that “no law shall be passed abridging the freedom of

speech, of expression, or of the press, or of the right of people peaceably to assemble and petition the government for the redress of grievances.”

According to one of the Constitution’s drafters, “speech, expression, and press include every form of expression, whether oral, written, tape or disc recorded,” as well as movies, symbolic speech (wearing of an armband as a symbol of protest) and peaceful picketing.⁹

Article III, Sec. 4 is a provision copied almost word-for-word from the First Amendment of the U.S. Bill of Rights.¹⁰ Its consequences are twofold: first, it is a prohibition against prior restraint, or official governmental restrictions in advance of publication or dissemination. Second, it is also a prohibition against systems of subsequent punishment that unduly curtail expression.

The rule against prior restraint only admits exceptions in cases of utterances of sensitive information while the nation is at war, obscene publications, incitements to violence, and the overthrow by force of orderly governments.¹¹ Any system

⁶ Philippine Constitution. <https://www.officialgazette.gov.ph/constitutions/1987-constitution/>

⁷ Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Co., Inc., 50 SCRA 189, 202-3 (1973). https://www.lawphil.net/judjuris/juri1973/jun1973/gr_31195_1973.html

⁸ Ibid.

⁹ Bernas, SJ, J.G. (2010). Constitutional Rights and Social Demands: Notes and Cases (Part II) (p. 259). Rex Book Store.

¹⁰ Chavez v. Gonzales, 545 SCRA 441, 481 (2008). <https://www.officialgazette.gov.ph/2008/02/15/chavez-v-gonzales-g-r-no-168338-february-15-2008>. The U.S. provision goes: “Congress shall make no law...abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

¹¹ Near v. Minnesota, 238 US 697 (1931). <https://supreme.justia.com/cases/federal/us/238/697/>

of prior restraint comes with a heavy presumption against its constitutional validity.¹² Meanwhile, the rule against subsequent punishment is subject only to exceptions determined by courts in cases where the right to free speech clashes with other government interests. In both prohibitions above, courts may thus apply rules concerning a ‘clear and present danger’¹³ or a ‘dangerous tendency’¹⁴ justifying the free speech restriction, or may conduct a ‘balancing of interests’.¹⁵ The courts also utilize another test in determining content-based from content-neutral legislation: the *O’Brien* test.

It is helpful to clarify at this point, with regard to such exceptions and tests determined by courts, that the Philippine Civil Code explicitly states that “judicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines.”¹⁶ Thus these tests, alongside Art. III, Sec. 4 of the Constitution itself, have been consistently cited in cases deciding the constitutionality of legislation restricting free speech.

A dissenting and concurring

justice in *Gonzales v. Comelec*— subsequently cited in later cases— defined that the ‘clear and present danger’ rule required the government to “defer application of restrictions until the apprehended danger was much more visible until its realization was imminent and nigh at hand”— which was more permissive of speech than the ‘dangerous tendency’ rule, which “permitted the application of restrictions once a rational connection between the speech restrained and the danger apprehended—the ‘tendency’ of one to create the other—was shown.”¹⁷ Meanwhile, the ‘balancing of interests’ rule “requires a court to take conscious and detailed consideration of the interplay of interests observable in a given situation or type of situation.”¹⁸

The first two tests have been used in a spectrum of cases in the context of maintaining public order and security; meanwhile, the third test is “premised on a judicial balancing of conflicting social values and individual interests competing for ascendancy in legislation which restricts expression”—in one case, in the context of the constitutionality

12 *SWS v. Comelec*, G.R. No. 14751 (2001). <http://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/52161>

13 *Gonzales v. Comelec*, 27 SCRA 835, 838 (1969). https://lawphil.net/judjuris/juri1969/apr1969/gr_l-27833_1969.html

14 *People v. Perez*, 45 Phil. 599 (1923). https://lawphil.net/judjuris/juri1923/dec1923/gr_l-21049_1923.html

15 *Ayer Productions Pty. Ltd. V. Judge Capulong*, 160 SCRA 865 (1988). https://lawphil.net/judjuris/juri1988/apr1988/gr_82380_1988.html

16 Philippine Civil Code, Art. 8. <https://www.officialgazette.gov.ph/1949/06/18/republic-act-no-386/>

17 *Gonzales v. Comelec* (1969). *Op. cit.*

18 *Ibid.*

of prolonged electoral campaigns.¹⁹ All were shown to be inapplicable in *Social Weather Stations v. Comelec*, where the court, asked to rule on the constitutionality of a law prohibiting the publication of electoral surveys, referred to another test for distinguishing content-based from content-neutral content for restrictions with both speech and non-speech elements: the O'Brien test (adopted from *United States v. O'Brien*). In the case, the court said: Under this test, even if a law furthers an important or substantial governmental interest, it should be invalidated if such governmental interest is 'not unrelated to the suppression of free expression.' Moreover, even if the purpose is unrelated to the suppression of free speech, the law should nevertheless be invalidated if the restriction on freedom of expression is greater than is necessary to achieve the governmental purpose in question.²⁰

The rights to free speech, expression, and of the press are closely intertwined with other rights for their full realization. Foremost is Art. I, which provides for the due

process clause: "No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." Due process herein has both a procedural and substantive aspect: first, it guarantees procedural fairness (a mode of procedure which government must follow in the enforcement and implementation of laws), and second, it is a prohibition against arbitrary laws.²¹

Art. II, on State policies, provides that subject to reasonable conditions as provided by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest, thus enshrining the concept of freedom of information (FOI).²²

The Constitution's Bill of Rights also protects the right to information in Art. III, Sec. 7, which guarantees the right to information for matters of public concern and the related right to access to official records and documents. However, this is a right available to citizens only.²³ These rights may also be considered to be limited by the same standards for the

19 Ibid.

20 *SWS v. Comelec* (2001). Op. cit.

21 Bernas (2010). Op. cit.

22 Jacob, J., Miranda, M. & Pacis, J. (2018, August). Freedom of Information and Data Protection. Foundation for Media Alternatives. <https://www.fma.ph/wp-content/uploads/2018/08/FOI-and-Privacy-FINAL.pdf>

23 Bernas (2010). Op. cit.

regulation of speech, expression, and of the press, and the regulation of the right to assembly, petition, and association.²⁴ Specifically, courts have recognized that national security matters, trade secrets and banking transactions, criminal matters, and other confidential matters are valid limitations to the rights to information.²⁵

Art. III, Sec. 3(1) also recognizes that the right to privacy of communication and correspondence shall be inviolable, except upon lawful order of the court or when public safety or order requires otherwise. In this regard, *Ayer Productions Pty. Ltd. v. Judge Capulong* confirms that the Philippine Constitution and law recognize a right to privacy, but left it to case law to mark out its scope and content in different situations.²⁶ The court maintained, however, that the right to privacy is not an absolute right, and cannot be invoked to resist publication and dissemination of matters of public interest, as the interest sought to be protected by the right to privacy is the right to be free from unwarranted publicity or

the wrongful publicizing of private affairs, which are outside the scope of legitimate public concern.²⁷ Thus, in ruling that a filmmaker may proceed with the filming of a movie about the EDSA People Power Revolution, despite the objection of one of its public figures / characters, the court also stated that “the right to privacy of a public figure is necessarily narrower than that of an ordinary citizen.”²⁸

Art. III, Sec. 5 guarantees the free exercise and enjoyment of religious profession and worship, which carries with it the right to disseminate religious information—thus any restraint of the same right may only be justified by the same standards applied to freedom of expression, based on clear and present danger of any substantive evil which the State has the right to prevent.²⁹

Art. III, Sec. 8 states that the right to form unions, associations, and societies for purposes not contrary to law (including the advancement of ideas and beliefs, as an aspect of freedom of expression) shall not be impaired.

Outside of the Bill of Rights,

24 Ibid.

25 Chavez v. Presidential Commission on Good Government, G.R. No. 130716 (1998). https://lawphil.net/judjuris/juri1998/dec1998/gr_130716_1998.html

26 Ayer Productions v. Judge Capulong, G.R. No. 82380 (1988). https://lawphil.net/judjuris/juri1988/apr1988/gr_82380_1988.html

27 Ibid.

28 Ibid.

29 American Bible Society v. City of Manila, 101 Phil. 398 (1957). https://lawphil.net/judjuris/juri1957/apr1957/gr_l-9637_1957.html

Art. VI, Sec. 11 provides that while Congress is in session, no senator or a member of the House of Representatives shall be questioned or held liable in any other place for any speech or debate in Congress or in any committee thereof.

On State obligations, Art. XVI, Sec. 10 mandates the State to provide “the policy environment for the full development of Filipino capability and the emergence of communication structures suitable to the needs and aspirations of the nation and the balanced flow of information into, out of, and across the country, in accordance with a policy that respects the freedom of speech and of the press.” Art. XIV, Sec. 14, on arts and culture, provides that “the State shall foster the preservation, enrichment, and dynamic evolution of a Filipino national culture based on the principle of unity in diversity in a climate of free artistic and intellectual expression.”

While the seat of online freedom of expression—the internet—is unregulated, many broadcasting and radio entities that also publish their content online are heavily regulated by franchise, licensing, and permitting requirements for their broadcast and radio service, which may have incidental impacts to the operation of such entities online. Art. IX (C), Sec.

4, provides that the Commission on Elections (Comelec) “may, during the election period, supervise or regulate the enjoyment or utilization of all franchises or permits for the operation of transportation and other public utilities, media of communication or information... [and] such supervision or regulation shall aim to ensure equal opportunity, time, and space, and the right to reply, including reasonable, equal rates therefor, for public information campaigns and forums among candidates in connection with the objective of holding free, orderly, honest, peaceful, and credible elections.”

Art. XVI, Sec. 11 (1) states that “the ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens.” Congress is empowered to regulate or prohibit monopolies in commercial mass media when the public interest so requires, with the provision stressing that “no combinations in restraint of trade or unfair competition therein shall be allowed.”

In Art. XVI, Sec. 11 (2), the advertising industry is stated to be impressed with public interest subject to legal regulation, and thus “only Filipino citizens or corporations

or associations at least seventy per centum of the capital of which is owned by such citizens shall be allowed to engage in the advertising industry.” In addition, foreign investors are allowed to participate in governing bodies of corporations in the advertising industry only to the extent of their proportionate share in capital—but all executive and managing officers of such entities shall be Filipinos.

Adherence to international law

In Art. I, Sec. 2 of the Constitution, the Philippines adopts the generally-accepted principles of international law as part of the law of the land, in what has been called the doctrine of incorporation, where rules of international law need no further legislative action to be applicable in the domestic sphere.³⁰ Rules of international law are given the same standing as national legislative enactments.³¹ Based on *pacta sunt servanda*—a principle of international law requiring parties to comply with treaties in good faith— the Philippines is bound, among others, by international human rights standards on freedom of expression as codified

in numerous instruments to which it is a State-party, such as Art. 19 of the International Convention on Civil and Political Rights (ICCPR).

Art. 19 of the ICCPR provides for the right to hold opinions without interference; the right to freedom of expression; and this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. Such rights are subject to restrictions, as may be provided by law and are necessary to respect of the rights or reputations of others and for the protection of national security or of public order, or of public health or morals.

Such article applies with the same force as online speech. The Human Rights Council has affirmed that offline human rights must be equally protected and guaranteed online. In its 20th session (29 June 2012), the Human Rights Council adopted a resolution which unanimously declared: “[T]he same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and

30 Sec. of Justice v. Lantion, G.R. No. 139465 (2000). https://lawphil.net/judjuris/juri2000/jan2000/gr_139465_2000.html

31 Ibid.

through any media of one's choice, in accordance with articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights."³²

Governance Of Online And Networked Spaces

Philippine laws, rules, and regulations struggle to keep up with the rapid evolution of technology, and there is no aspect in which this is more apparent than in the governance of online and networked spaces. While digital and electronic technologies have been entrenched in Philippine society ever since the 90s, many laws on this field were passed only by the turn of the new century: the Cybercrime Prevention Act and the Data Privacy Act in 2012, the Anti-Child

Pornography Act and the Anti-Photo and Video Voyeurism Act in 2009, and the Electronic Commerce Act in 2000.

Cybercrime Prevention Act of 2012

The Cybercrime Prevention Act³³ is the main governing law for activities online. It takes its cue from the Budapest Convention on Cybercrime, which binds States (including the Philippines, as a State-party) to adopt legislation and foster international cooperation to combat crimes committed via the internet and computer networks.³⁴ Yet the resulting Philippine cybercrime law contains a few unique additions beyond the contemplation of the Convention.

The Philippine cybercrime law penalizes offenses against the confidentiality, integrity, and availability of computer systems (illegal access, illegal interception, data interference, system interference, and misuse of devices); computer-related offenses (computer-related forgery and computer-related fraud); content-related offenses (child pornography, online libel, cybersex); and offenses related to infringements

32 Human Rights Council. (2012). The promotion, protection and enjoyment of human rights on the Internet. A/HRC/20/L.13. <https://daccess-ods.un.org/TMP/3578843.1763649.html>

33 Cybercrime Prevention Act. <https://www.officialgazette.gov.ph/2012/09/12/republic-act-no-10175/>

34 Budapest Convention on Cybercrime. <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680081561>

of copyright and related rights. It also contains a catch-all provision, creating hundreds of online crimes simply by way of stating that “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 (ICT)” shall be covered by the cybercrime law, and 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.”³⁵

The Budapest Convention does not contain a provision on online libel or cybersex; nor do any other related instruments suggest its inclusion. It has been observed that the inclusion of online libel and cybersex as cybercrimes in implementing statutes is inappropriate and does not represent international best practice.³⁶

Further, the Philippine cybercrime law provided for criminal liability for “aiding and abetting” of cybercrimes,³⁷ which had been declared unconstitutional by the Supreme Court. It also provided

for corporate liability aside from individual liability.

The law also grants the National Bureau of Investigation (NBI) and the Philippine National Police (PNP) responsibility for the implementation of the law, via a cybercrime unit,³⁸ with reporting duties to the Department of Justice (DOJ). It previously provided for authority for law enforcement to collect real-time traffic data—or data about a communication’s origin, destination, route, time, date, size, duration, or type of underlying service, but not content, nor identities—which was held unconstitutional by the Supreme Court in *Disini v. Secretary of Justice*.³⁹

Yet the law’s implementing rules subsequently stated that law enforcement authorities are authorized, upon the issuance of a court warrant, to collect or record “computer data” that are associated with specific communications transmitted by means of a computer system” from service providers, which are mandated to cooperate in such collection or recording.⁴⁰ “Computer data” in the implementing rules is an

35 Cybercrime Prevention Act, Sec. 6.

36 Jamil, Z. (2014, 9 December). Cybercrime Model Laws. A discussion paper presented for the Cybercrime Convention Committee of the Council of Europe. <https://rm.coe.int/1680303ee1>

37 Cybercrime Prevention Act, Sec. 5.

38 Cybercrime Prevention Act, Sec. 10.

39 *Disini v. Secretary of Justice*, G.R. No. 203335 (2014). <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/56650>

40 Implementing Rules and Regulations of the Cybercrime Prevention Act, Sec. 13. <https://www.officialgazette.gov.ph/2015/08/12/implementing-rules-and-regulations-of-republic-act-no-10175/>

overbroad term that encompasses all sorts of data, or “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.”⁴¹

Related to the implementation of the cybercrime law, the rule on cybercrime warrants,⁴² applicable to all cybercrime cases, provided a procedure to handle “computer data” in the implementing rules. The rule on cyberwarrants enumerated four distinct types of cyberwarrants, each limiting specific actions related to data collection, thus: (a) a preservation warrant, for the preservation of computer data usually while authorities secure a disclosure warrant, (b) a disclosure warrant, for the disclosure of a subscriber’s data, including network and traffic data, (c) an interception warrant, for activities such listening, recording, monitoring, and surveillance of computer data, and (d), a search, seizure, and examination warrant, for the search,

seizure, and examination of computer data. Among many others, the rule on cyberwarrants delineated the purposes of each warrant, their prerequisites, the periods of their validity, as well as provisions for data return. The rule also provided a process for the destruction of data.

Yet while the rule above delineated a clear process by which to handle computer data, it remains that the all-encompassing “computer data” is still the term used to refer to the data collected. It also remains that the rule on cyberwarrants may also allow content posted online to be easily gathered as evidence even without a cyberwarrant if these are posted without a “reasonable expectation of privacy.”⁴³

In the context of free speech online, the Supreme Court has decided only a handful of cases utilizing the cybercrime law, and such cases may not hold significant doctrinal value. In *Dio v. People*, the court asked whether sending a supposedly defamatory email to a public officer is ‘public’ enough to meet the publication requirement as required by the penal code and the cybercrime law, but left it to the

41 Implementing Rules and Regulations of the Cybercrime Prevention Act, Sec. 3 (e).

42 Rule on Cybercrime Warrants, A.M. No. 17-11-03-SC. <http://sc.judiciary.gov.ph/1420/>

43 *Vivares v. St. Theresa’s College*, G.R. No. 202666 (2014). <http://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/57754>

lower courts to receive evidence on that regard.⁴⁴ Nevertheless, in *Dio*, the court stated that “[p]assionately and emphatically channeled through proper public authorities, partakes of a degree of protected freedom of expression... Certainly, if we remain faithful to the dictum that public office is a public trust, some leeway should be given to the public to express disgust.”

In an unsigned resolution, the Supreme Court in *Tolentino v. People* stated that the prescriptive period for online libel under the cybercrime law is 15 years (compared to the one-year prescriptive period for libel in the penal code). It stated that a complaint filed on August 8, 2017, against Tolentino’s Facebook post dated April 29, 2015 (when he berated a doctor for selling allegedly bogus products) “was well within the prescriptive period for libel” in relation to online libel.⁴⁵ As this was an unsigned resolution, the ruling is only meaningful for the parties and arguably cannot set a precedent. In any case, Tolentino was acquitted, with the lower court stating that the mere use of offensive language was

not enough to constitute libel.⁴⁶

The prescriptive period for online libel is a definitive issue in a high-profile ongoing case involving online news platform Rappler. A judge from the Regional Trial Court of Manila ruled that a complaint for online libel against Rappler writers, filed on February 5, 2019, has not prescribed even as the article was originally published a few months before the cybercrime law took effect, since it was corrected and therefore republished in 2014. Citing a law promulgated in 1926, the judge ruled the prescriptive period for online libel was 12 years, and the reckoning point was from Rappler’s republication.⁴⁷

Many other cases that do not reach the Supreme Court may shed light on the specific contexts in which online libel complaints are filed. In one case, screenshots of a Facebook post were used as evidence during the trial of a municipal councilor who accused a former mayor of murder, even as the councilor deleted both the post and the account where he posted the accusation and apologized afterward. The councilor was convicted of online libel and

44 G.R. No. 208146 (2016). <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/62001>

45 G.R. No. 240310 (2018). Online copy only available upon signing in to the Supreme Court e-library; see Nonato, V. (2020, 19 June). In 2018, SC ruled filing of cyber libel can be done within 15 years. But is this binding? One News. <https://www.onenews.ph/in-2018-sc-ruled-filing-of-cyber-libel-can-be-done-within-15-years-but-is-this-binding>

46 Nonato, V. (2020, 19 June). Op. cit.

47 *People v. Santos, Ressa, & Rappler*. Criminal Case No. R-MNL-19-01141-CR (2020). https://www.scribd.com/document/465645230/FULL-TEXT-DECISION-FROM-SC-PIO#from_embed

sentenced to an eight-year jail term, and was ordered to pay damages.⁴⁸ In another case, a call center agent who used multiple names on Facebook was arrested for online libel after a complaint was filed against him by someone who knew about his multiple user names, and who was the alleged target of one of his posts.⁴⁹

In 2018, the Department of Justice (DOJ) noted the increasing number of complaints of online libel filed with various government agencies, pointing out that most involve complainants and suspects who know each other, i.e. friends or family.⁵⁰

Anti-Child Pornography Act of 2009

The Anti-Child Pornography Act⁵¹—reiterated in the cybercrime law—penalizes a series of prohibited acts related to child pornography, defined therein as “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.”

The law is expansive and obligates internet service providers (ISPs) to (a) notify law enforcement of facts and circumstances involving child pornography committed using its server or facility, (b) preserve such evidence for investigation and prosecution, and (c) install software to ensure access or transmittal to child pornography shall be blocked or filtered, providing in the same breath that this may not be construed as a requirement for the service provider to monitor its users.⁵² ISPs are also subject to civil liability for non-compliance.

Similarly, mall owners-operators, owners-lessors of establishments, including photo developers, information technology professionals, credit card companies and banks are accorded reporting duties to law enforcement to combat child pornography with penalties for non-compliance.⁵³ Local government units are given authority by law to monitor and regulate the operation of internet

48 The Manila Times (2020, 19 May). Zamboanga councilor: 8 years for cyberlibel. The Manila Times. <https://www.manilatimes.net/2020/05/19/news/regions/zamboanga-councilor-8-years-for-cyber-libel/725739/>

49 Sun Star Cebu. (2019, 19 March). Call center agent nabbed for cyber libel. Sun Star Cebu. <https://www.sunstar.com.ph/article/1797703/Cebu/Local-News/Call-center-agent-nabbed-for-cyber-libel>

50 San Juan, J.R. (2018, 19 March). Cyber-libel cases rising, as friends turn into foes via online platforms. Business Mirror. <https://businessmirror.com.ph/2018/03/19/cyber-libel-cases-rising-as-friends-turn-into-foes-via-online-platforms/>

51 Anti-Child Pornography Act, https://www.lawphil.net/statutes/repacts/ra2009/ra_9775_2009.html

52 Anti-Child Pornography Act, Sec. 9.

53 Anti-Child Pornography Act, Sec. 10.

kiosks or internet cafes in order to prevent violations of the law.⁵⁴

Anti-Photo and Video Voyeurism Act of 2009

The Anti-Photo and Video Voyeurism Act⁵⁵ prohibits (a) the unconsented taking of a photo or video of a person or group of persons engaged in a sexual act or any similar activity, or capturing an image of the private area of a person, under circumstances in which the said person has a reasonable expectation of privacy, and, even if the photo or video itself was taken with consent, (b) the copying or reproduction of such photo or video recording of the sexual act, (c) the selling or distribution of such photo or video recording, and (d) the publication or broadcasting, whether in print or broadcast media, or the showing of such sexual act or any similar activity through VCD/DVD, the internet, cellular phones, and other similar means or devices, in all instances without the written consent of the persons featured.⁵⁶

Electronic Commerce Act of 2000

The E-Commerce Act⁵⁷ seeks to facilitate dealings through the use of ICT and “to promote the universal use of electronic transaction in the government and general public,”⁵⁸ and applies to “any kind of data message and electronic document used in the context of commercial and non-commercial activities to include domestic and international dealings, transactions, arrangements, agreements, contracts and exchanges and storage of information.”⁵⁹

Its penal provisions include criminal liability for “broadcasting of protected material, electronic signature or copyrighted works including legally protected sound recordings or phonograms or information material on protected works, through the use of telecommunication networks, such as, but not limited to, the internet, in a manner that infringes intellectual property rights.”⁶⁰ A person or party acting as service provider may also

54 Anti-Child Pornography Act, Sec. 12.

55 Anti-Photo and Video Voyeurism Act. https://www.lawphil.net/statutes/repacts/ra2010/ra_9995_2010.html

56 Anti-Photo and Video Voyeurism Act, Sec. 4.

57 E-Commerce Act. <http://www.bsp.gov.ph/downloads/laws/RA8792.pdf>

58 E-Commerce Act, Sec. 3.

59 E-Commerce Act, Sec. 4.

60 E-Commerce Act, Sec. 33(b).

have criminal or civil liability for “the making, publication, dissemination or distribution of such material or any statement made in such material, including possible infringement of any right subsisting in or in relation to such material,” unless otherwise provided in the law.⁶¹

Revised Penal Code and all other special laws with penal provisions

As mentioned, because of Sec. 6 of the cybercrime law, the entire book of crimes in the Revised Penal Code,⁶² as well as all offenses designated as crimes in special laws (or penal laws outside of the penal code)—which are too exhaustive to enumerate—are also automatically rendered as cybercrimes if committed via ICT, without exception or qualification.

Sectoral Laws

Data Privacy Act of 2012 and related laws

Data privacy “gives individuals control over their personal data, except in certain cases recognized by law.”⁶³ The Data Privacy Act⁶⁴ recognizes as a state policy the human right to privacy. Even as it reiterates the Constitutional role of information and communication in nation-building, it also recognizes the State’s “inherent obligation to ensure that personal information in information and communications systems in the government and in the private sector are secured and protected.”⁶⁵

The law penalizes the following:

- (a) unauthorized processing of personal information and sensitive personal information, (b) accessing personal information and sensitive personal information due to negligence, (c) improper disposal of personal information and sensitive personal information, (d) processing of personal information

61 E-Commerce Act, Sec. 30.

62 Revised Penal Code. <https://www.officialgazette.gov.ph/1930/12/08/act-no-3815-s-1930/>

63 Jacob, J., Miranda, M. & Pacis, J. (2018, August). Op. cit.

64 Data Privacy Act. <https://www.privacy.gov.ph/data-privacy-act/#5>

65 Data Privacy Act, Sec. 2.

and sensitive personal information for unauthorized purposes, (e) unauthorized access or intentional breach, (f) concealment of security breaches involving sensitive personal information, (g) malicious disclosure of unwarranted or false information, (h) unauthorized disclosure, or (i) any combination or series of the acts provided.⁶⁶

Online freedom of expression may be impeded by an uninformed invocation of data privacy by individuals who would want to restrict the publication of their personal information, even when warranted by law and public interest. Thus the scope of the law excludes from its application “personal information processed for journalistic, artistic, literary or research purposes.”⁶⁷ It also includes protection to journalists and their sources, based on the provisions of Republic Act No. 53, “which affords the publishers, editors or duly accredited reporters of any newspaper, magazine or periodical of general circulation protection from being compelled to reveal the source of any news report or information appearing in said publication which was related in any confidence to such publisher, editor, or reporter.”⁶⁸

The law also excludes from its scope—thus allowing the processing of personal and sensitive personal information—(a) information about any individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual, (b) information about an individual who is or was performing service under contract for a government institution that relates to the services performed, (c) information relating to any discretionary benefit of a financial nature such as the granting of a license or permit given by the government to an individual, (d) information necessary in order to carry out the functions of public authority which includes the processing of personal data for the performance by the independent, central monetary authority and law enforcement and regulatory agencies of their constitutionally and statutorily mandated functions, (e) information necessary for banks and other financial institutions under the jurisdiction of the independent, central monetary authority, and (f) personal information originally collected from residents of foreign jurisdictions in accordance with the

66 Data Privacy Act, Sec. 25-33.

67 Data Privacy Act, Sec. 4(d).

68 Data Privacy Act, Sec. 5.

laws of those foreign jurisdictions, including any applicable data privacy laws, which is being processed in the Philippines.⁶⁹

Of the exclusions above, the processing of information necessary for a public authority to carry out its constitutionally and statutorily mandated functions may leave the implementation of public surveillance mechanisms unchecked,⁷⁰ and also promote a chilling effect or a culture of self-censorship. Communications surveillance is statutorily-sanctioned as a legitimate enforcement activity, such as in the case of the Anti-Trafficking in Persons Act, mandating the NBI and PNP to undertake surveillance, investigation, and arrest of individuals suspected to be engaged in trafficking.⁷¹ The Human Security Act allows the surveillance of terrorism suspects and interception and reading of communications upon a written order of the Court of Appeals.⁷² Even an Anti-Wiretapping Act provides an exception for law enforcement to perform wiretapping in certain cases upon written order of the court, and upon compliance

with stringent requirements, for cases involving “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.”⁷³

The cybercrime law’s implementing rule on collection of computer data also multiplies exponentially the crimes that may now be subject to government surveillance. The Anti-Wiretapping Law and the Human Security Act, for example, provide exceptions to the prohibition against communications surveillance, in cases of crimes against national security. But the rules now make government surveillance applicable virtually to all crimes in the Revised Penal Code and in the cybercrime law,⁷⁴ by virtue of the cybercrime law’s catch-all provision.

The recently-passed Anti-

69 Data Privacy Act, Sec. 4(d).

70 Foundation for Media Alternatives. (2015, September). Tiktik: An Overview of the Philippine Surveillance Landscape. Foundation for Media Alternatives. <https://www.fma.ph/wp-content/uploads/2017/10/Briefing-Paper-1-DRAFT-1.pdf>

71 Anti-Trafficking in Persons Act, Sec. 16(g), https://www.lawphil.net/statutes/repacts/ra2003/ra_9208_2003.html

72 Human Security Act, Sec. 7, <https://www.officialgazette.gov.ph/2007/03/06/republic-act-no-9372/>

73 Anti-Wiretapping Act, Sec. 3, https://lawphil.net/statutes/repacts/ra1965/ra_4200_1965.html

74 Jacob, J. (2016, 16 June). Commentary: The IRR of RA 10175. <https://www.fma.ph/2016/06/16/commentary-the-irr-of-ra-10175/>

Terrorism Act of 2020 also seeks to reinforce the surveillance capacities of law enforcement, as will be seen later in this report.

Public Telecommunications Policy Act of 1995 and related laws

Telecommunications is defined in case law as “communication over a distance for the purpose of effecting the reception and transmission of messages.”⁷⁵ Pursuant to Sec. 13(b) of the Commonwealth Act 146, all forms of telecommunications services are considered public services and therefore subject to regulation as such. The telephone and communications industry is affected by a high degree of public interest,⁷⁶ more so in the context of freedom of expression online, as these industries enable access to the internet.

In general, every telecommunications service requires a primary franchise from Congress to operate, subject to some exceptions. Under Sec. 1 of Act No. 3846 (An Act

Providing for the Regulation of Radio Stations and Radio Communications in the Philippine Islands and for Other Purposes), “No person, firm, association or corporation shall construct, install, establish, or operate a radio transmitting station, or a radio receiving station used for commercial purposes, or a radio broadcasting station, without first having obtained a franchise therefore from the Congress of the Philippines.”⁷⁷ Moreover, under Sec. 16 of the Public Telecommunications Policy Act, “No person shall commence or conduct the business of being a public telecommunications entity without first obtaining a franchise.”⁷⁸ The operation of a telecommunications service also requires a secondary franchise or license, granted by the National Telecommunications Commission, for the operation of a specific service.⁷⁹ Moreover, importation of radio equipment requires permits from the NTC, except for military and law enforcement.⁸⁰ Broadcasting is also similarly regulated by a similar system of

75 PLDT v. NTC, 241 SCRA 486 (1995). https://lawphil.net/judjuris/juri1995/feb1995/gr_94374_1995.html

76 Boiser v. Court of Appeals, 122 SCRA 945 (1983). https://lawphil.net/judjuris/juri1983/jun1983/gr_1_61438_1983.html

77 An Act Providing for the Regulation of Radio Stations and Radio Communications in the Philippine Islands and for Other Purposes. https://www.lawphil.net/statutes/repacts/ra1963/ra_3846_1963.html

78 Public Telecommunications Policy Act. https://lawphil.net/statutes/repacts/ra1995/ra_7925_1995.html

79 Public Service Act, Sec. 15. https://lawphil.net/statutes/comacts/ca_146_1936.html

80 NTC Memorandum Circular 5-10-88 (Government Transmission Networks and Telecommunication Services). <https://ntc.gov.ph/wp-content/uploads/2015/10/LawsRulesRegulations/MemoCirculars/MC1988/MC-05-10-88-government-transmission-networks&telecomm.-services.pdf>

franchises, licenses, and permits.⁸¹ Broadcast is defined in Sec. 3(a) of the Public Telecommunications Policy Act as “an undertaking the object of which is to transmit over-the-air commercial radio or television messages for reception of a broad audience in a geographic area.” The broadcast service is generally understood to cover radio and free-to-air television stations; many of these stations now provide full access to their broadcast services via websites and social/online media platforms.

The NTC has adjudicatory and regulatory control and supervision over the frequencies and facilities of radio and television stations. It also regulates the operations of cable antenna (CATV) systems.⁸² However, the broadcast industry is considered self-regulating as to content, through private professional ethics organizations such as the Kapisanan ng mga Brodkaster ng Pilipinas and the Advertising Board of the Philippines. Nonetheless, the NTC monitors compliance with program standards it sets in various memorandum circulars.⁸³

For example, NTC MC No. 22-89 specifically provides that: “All radio broadcasting and television stations...shall not use its stations for the broadcasting and/or telecasting of obscene or indecent language, speech and/or scene, or for the dissemination of false information or willful misrepresentation, or to the detriment of the public health or to incite, encourage or assist in subversive or treasonable acts.” Further, its guidelines add that (a) “the airing of rebellious/terrorist propaganda, comments, interviews, information and other similar and/or related materials shall be prohibited,” and (b) “the airing of government strategic information, including but not limited to government military locations, troop movements, troop numbers, description of government weapons, military units, vehicles and such other government tactical operations shall likewise be prohibited.” Finally, it directed all television and radio broadcast media entities to, during any broadcast or telecast, “cut off from the air the speech, play, act or scene or other

81 See, among others, the Radio Control Law (Republic Act No. 3846) https://www.lawphil.net/statutes/repacts/ra1963/ra_3846_1963.html; Presidential Decree No. 36, https://lawphil.net/statutes/presdecs/pd1972/pd_36_1972.html; and Presidential Decree No. 576-A, https://ntc.gov.ph/wp-content/uploads/2015/10/LawsRulesRegulations/RAs_PDs_EOs/PD_576.pdf.

82 See Executive Order No. 205. <https://www.officialgazette.gov.ph/1987/06/30/executive-order-no-205-s-1987/>

83 See NTC Memorandum Circular No. 11-12-85 (Revision re: Program Standards), <https://ntc.gov.ph/wp-content/uploads/2015/10/LawsRulesRegulations/MemoCirculars/MC1985/MC-11-12-85.pdf>; Memorandum Circular No. 22-89 (Revision re: Program Standards) <https://ntc.gov.ph/wp-content/uploads/2015/10/LawsRulesRegulations/MemoCirculars/MC1989/MC-22-89.pdf>; and Memorandum Circular No. 01-01-01 (Reiteration re: Program Standards) <https://ntc.gov.ph/wp-content/uploads/2015/10/LawsRulesRegulations/MemoCirculars/MC2001/MC-01-01-2001.pdf>

matter being broadcast and/or telecast, of the tendency thereof is to proposed and/or incite treason, rebellion or sedition, or the language used therein or the theme thereof is incident or immoral.”⁸⁴

The NTC can initiate legal action—including ordering closure—for violation of its programming standards, failure to air mandatory content, and for airing of absolutely prohibited content, among others.⁸⁵ Notably, amid the coronavirus pandemic, the NTC issued a cease-and-desist order (the first in its history) against ABS-CBN, one of the biggest broadcasting networks in the Philippines, citing the expiration of its franchise and after the Office of the Solicitor General (a known ally of the president) sent it a letter warning against the consequences of issuing a provisional authority to operate in favor of the network, which has been critical against the government.⁸⁶

Rules and resolutions of the Commission on Elections (Comelec)

In *Sanidad v. Comelec*, the Supreme Court clarified that Constitutional power of the Comelec to regulate franchises and permits during election periods⁸⁷ does not include regulating the exercise by media practitioners themselves of their right to expression during plebiscite periods. In that case, the Comelec sought to enforce a prohibition against journalists using their columns or radio/television time to campaign for or against plebiscite issues during the campaign period, including the day before and the actual plebiscite day itself.⁸⁸ Yet clearly, what the Constitution provided, said the court, was only the power to supervise the franchises, permits, or other grants issued for the operation of media, among others⁸⁹ and not the power to regulate speech. However, in *National Press Club v. Comelec*, the court subsequently qualified that no presumption of invalidity arises on the supervisory or regulatory

84 Memorandum Circular No. 22-89 (Revision re: Program Standards). Op. cit.

85 See NTC's 2006 Rules. <http://ntc.gov.ph/wp-content/uploads/2020/02/The-2006-Rules-of-Practice-and-Procedure-before-NTC.pdf>

86 Mercado, N. (2020, 5 May). BREAKING: NTC orders ABS-CBN to stop broadcast operations. Inquirer.net. <https://newsinfo.inquirer.net/1270074/ntc-issues-cess-and-desist-order-vs-abs-cbn>; also see Radio Control Law, Sec. 3.

87 Philippine Constitution, Art. IX (C), Sec. 4.

88 *Sanidad v. Comelec*, G.R. No. L-44640 (1976). https://www.lawphil.net/judjuris/juri1976/oct1976/gr_44640_1976.html

89 Ibid.

authority of Comelec to secure equal opportunity for political candidates, even though such supervision or regulation may result in some limitations to free speech.⁹⁰

Curtailment of Freedom of Expression

Constitutional limitations

Insofar as the tests of ‘clear and present danger,’ ‘dangerous tendency,’ ‘balancing of interests,’ and the *O’Brien* test have been utilized and developed to determine the constitutionality of free speech restrictions, a law that passes the muster of such tests will be determined as a valid limitation of free speech by the court. Libel and obscenity have also been stated to be limited classes of speech, “the

prevention and punishment of which has never been thought to raise constitutional problems.”⁹¹ It has been posed that such utterances are “no essential part of any exposition of ideas” and are of slight social value that any benefit that may derived from them is outweighed by the social interests in order and morality.⁹²

In the context of online media, it is also worth noting the guidelines enumerated in *Eastern Broadcasting v. Dans, Jr.*⁹³ when describing the nature of the internet. While the issue therein was rendered moot and academic by the court (the broadcasting station asked to be reopened after it was closed due to ‘inciting to sedition’ charges, but was sold to another owner later on), the court took the opportunity to state that “the freedom of television and radio broadcasting is somewhat lesser in scope than the freedom accorded to newspaper or print media,”⁹⁴ on account of broadcast media’s pervasive nature and its unique accessibility to children—which factors are, arguably, applicable in the case of the internet.

90 National Press Club v. Comelec, G.R. No. 102653 (1992). https://lawphil.net/judjuris/juri1992/mar1992/gr_102653_1992.html

91 Chaplinsky v. New Hampshire, 315 U.S. 568, 571-2 (1942). <https://supreme.justia.com/cases/federal/us/315/568/>

92 Ibid.

93 Eastern Broadcasting v. Dans, G.R. No. L-59329 (1985). https://www.lawphil.net/judjuris/juri1985/jul1985/gr_159329_1985.html

94 Ibid.

In *Pharmaceutical v. Secretary of Health*, the Supreme Court also stated that commercial speech—or speech that contemplates an economic transaction (such as advertisements)—is not accorded the same level of protection given to other constitutionally-guaranteed forms of expression, but is nonetheless entitled to protection.⁹⁵

Restrictions on content

The Revised Penal Code of 1930, which is lined up for repeal by Congress in view of a new draft criminal code,⁹⁶ punishes several actions and activities that may interfere with freedom of expression, speech, and of the press and may be used for harassment of citizens online. These include sedition, inciting to sedition, unlawful publications and utterances, offending religious feelings, and libel.

Through a catch-all clause in the cybercrime law, any violation of the Revised Penal Code, if done through information and communications technologies, is also criminalized and merits a higher penalty.⁹⁷

Libel

Online libel in the cybercrime law⁹⁸ adopts the definition in the archaic Revised Penal Code: “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.”⁹⁹ Libelous imputations are automatically assumed malicious, unless (a) they qualify as private communications made out of duty, or (b) a fair and true report made out of good faith. However, truth is not a defense against libel, but rather only a rebuttal against the presumption of malice.¹⁰⁰

Closely related to online libel, other acts have also been made punishable if committed online by virtue of the cybercrime law. Art. 355 provides that libel may be committed by means of writing or other similar means; Art. 357 punishes reporters, editors or managers of a newspaper,

⁹⁵ *Pharmaceutical v. Secretary of Health*, G.R. No. 173034 (2007). https://lawphil.net/judjuris/juri2007/oct2007/gr_173034_2007.html

⁹⁶ The proposed New Criminal Code of the Philippines of the 17th Congress, filed Oct. 27, 2016, may be accessed at https://www.senate.gov.ph/lis/bill_res.aspx?congress=17&q=SBN-1227

⁹⁷ Cybercrime Prevention Act, Sec. 6.

⁹⁸ Cybercrime Prevention Act, Sec. 4(c)[4].

⁹⁹ Revised Penal Code, Art. 353.

¹⁰⁰ Revised Penal Code, Art. 354.

daily or magazine, “who shall publish facts connected with the private life of another and offensive to the honor, virtue and reputation of said person, even though said publication be made in connection with or under the pretext that it is necessary in the narration of any judicial or administrative proceedings wherein such facts have been mentioned”; Art. 358 punishes oral defamation or slander; and Art. 359 punishes slander by deed, another catch-all provision encompassing any act not included above and which shall “cast dishonor, discredit or contempt upon another person.”

While there is a whole assortment of acts related to libel in the Revised Penal Code, only libel is explicitly enumerated as a crime in the cybercrime law. And even though online libel takes from the definition of libel from the penal code, online libel has a harsher penalty and stricter restrictions:

- » The penalty for online libel offenders is imprisonment for 4-8 years, while for non-online libel offenders, it is for 4 years only.
- » Probation may not be available for online libel offenders (as it is only available for those whose prison terms do not exceed 6 years), while for

non-online libel offenders, it is available without qualification.

» Online libel offenders may be face prosecution several years after an offending piece is published, since the concept of “continuing publication” (discussed later on) may render the crime without a prescriptive period. For non-online libel offenders, the prescriptive period is fixed at one year from publication.

» The venue for filing online libel cases can be any place where elements of the crime occurred (the vagueness of which makes it possible to file the crime in inconvenient venues), expanding the venue of filing of libel cases in the penal code, which is the place of publication or where publication is made available.

Following a petition to declare the unconstitutionality of online libel and other provisions of the cybercrime law, the Supreme Court upheld the provision of online libel in a landmark case in 2014. In *Disini v. Secretary of Justice*, the court disavowed the view that online libel in the cybercrime law is a violation of Philippine obligations in the ICCPR, and stated that the United Nations Human Rights Committee (UNHRC) did not actually enjoin the Philippines to decriminalize libel, but only that laws should be crafted

with care to ensure they do not stifle freedom of expression.¹⁰¹ In fact, in 2012, the UNHRC did comment on the imposition of imprisonment as penalty for online libel based on a complaint filed by a radio broadcaster who served his sentence for the crime, and stated that “...the sanction of imprisonment imposed on the author was incompatible with article 19, paragraph 3, of the Covenant,” and the facts “...disclose a violation” of Art. 19 of the ICCPR, among others.¹⁰² In General Comment No. 34, the UNHRC stated: “States parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.”¹⁰³

In any case, when it comes the crime of “aiding and abetting” the commission of crimes in the cybercrime law, the court arrived at a different conclusion, and ruled the provision was unconstitutional insofar as it related to online libel. Liability for online libel is limited to the original author of the post, and does

not include those who merely “like,” comment, or share an article.¹⁰⁴

Recent events point to the need to revisit the *Disini* decision and reassess the implications of criminalizing online libel. In the arrest of Maria Ressa (one of the founders of news platform Rappler), who faces an online libel charge filed by a businessman, the National Bureau of Investigation (NBI) floated the idea of “continuing publication” in the internet as basis to prosecute individuals who may have written stories even before the passage of the cybercrime law,¹⁰⁵ violating the principle of non-retroactivity of criminal laws.¹⁰⁶ Rappler published the story in 2012, before the passage of the cybercrime law. It was updated in the website in 2014, which became the basis of the businessman’s complaint.

A few days after Ressa filed bail for her online libel charge, an online news website, PhilStar.com, deleted its own article dated 2002 (republished from The Star, its print version) involving the same businessman for fear of legal action. Its statement said: “Although laws

101 *Disini v. Secretary v. Justice*, Op. cit.

102 Alexander Adonis v. The Philippines, Communication No. 1815/2008, U.N. Doc. CCPR/C/103/D/1815/2008/Rev.1 (2012). <http://hrlibrary.umn.edu/undocs/1815-2008.html>

103 UN Human Rights Committee. (2011). General Comment No. 34 to Art. 19 of the ICCPR. <https://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>

104 *Disini v. Secretary v. Justice*, Op. cit.

105 Rappler.com. (2019, 19 February). FAQs: What you need to know about Rappler’s cyber libel case. Rappler. <https://www.rappler.com/about-rappler/about-us/223545-frequently-asked-questions-cyber-libel-case>

106 Revised Penal Code, Art. 22.

are not supposed to be applied retroactively, the scope and bounds of the Cybercrime Prevention Act of 2012 are still unexplored and the takedown was seen as a prudent course of action. At this time, it is not clear if any live digital element on the article page outside the 17-year-old article could be used against us.”¹⁰⁷

The National Union of Journalists of the Philippines declared this as a “chilling effect of the government’s perversion of the law.”¹⁰⁸

The most recent high-profile online libel case involved 8chan founder Fredrick Brennan, who was issued a warrant of arrest for tweeting that the current 8chan owner Jim Atkins was “senile” and “incompetent.”¹⁰⁹ The prosecutor found there was a “malicious imputation of senility on the part of Watkins” and that Brennan failed to prove Watkins was “actually senile.”¹¹⁰ Brennan justified that his comments were fair commentary within the ambit of public interest.¹¹¹

Journalists have lobbied for decades for the decriminalization of libel itself, but they have been generally ignored by Congress.¹¹² Mere amendment of the cybercrime law is not the priority for legislators, and decriminalizing libel has never been mentioned in the president’s State of the Nation Address. For its part, the Supreme Court (perhaps observing the harshness of imprisonment in libel cases and the volume of cases thereof) published its own “Guidelines in the Observance of a Rule of Preference in the Imposition of Penalties in Libel Cases,”¹¹³ issued in 2008. The administrative circular, while recognizing the penalty of imprisonment for libel, cites several cases where courts opted to impose only a fine for persons convicted of the crime:

» In *Sazon v. CA and People*, the court imposed only a fine of P3,000 (instead of imprisonment and a P200,000 fine) for libel

107 The Philippine Star. (2019, 16 February). Philstar.com’s statement on the 2002 article on Wilfredo Keng. Philstar.com. <https://www.philstar.com/metro/2002/08/12/171715/influential-businessman-eyed-ex-councilor146s-slay>

108 National Union of Journalists of the Philippines. (2019, 17 February). Philstar takedown: The chilling effect of government’s perversion of the law. National Union of Journalists of the Philippines. <https://nujp.org/statement/philstar-takedown-the-chilling-effect-of-governments-perversion-of-the-law/>

109 Gregorio, X. (2020, 27 February). Founder of site linked to mass shootings faces arrest over cyberlibel charge. CNN Philippines. <https://cnnphilippines.com/news/2020/2/27/8Chan-founder-Fredrick-Brennan-arrest-order.html>

110 Ibid.

111 Ibid.

112 National Union of Journalists in the Philippines. (2019, 18 February). Persecution of Rappler underscores need to decriminalize libel NOW. National Union of Journalists in the Philippines. <https://nujp.org/statement/persecution-of-rappler-underscores-need-to-decriminalize-libel-now/>

113 Administrative Circular No. 08-2008 (Guidelines in the Observance of a Rule of Preference in the Imposition of Penalties in Libel Cases). https://www.lawphil.net/courts/supreme/ac/ac_8_2008.html

because the offender “wrote the libelous article merely to defend his honor against the malicious messages that earlier circulated”;¹¹⁴

» In *Mari v. CA and People*, the court imposed only a fine of P1,000 and in case of insolvency, subsidiary imprisonment (instead of imprisonment) for slander by deed because the offender “committed the offense in the heat of anger and in reaction to a perceived provocation”;¹¹⁵

» In *Brillante v. CA and People*, the court deleted the penalty of imprisonment and instead meted out a P4,000 fine and subsidiary imprisonment in case of insolvency against the offender, a local politician, on the ground that “the intensely feverish passions evoked during the election period in 1988 must have agitated petitioner into writing his open letter,” and also considered the wide latitude given to defamatory imputations against public officials;¹¹⁶

» In *Buatis v. People and Atty. Pieraz*, the court imposed only a fine because it was the offender’s first offense, and “he was motivated purely by his belief that he was merely exercising a civic or moral duty to his client when wrote the defamatory letter to private complainant.”¹¹⁷

Through the circular, the Supreme Court explicitly recognized that “the foregoing cases indicate an emergent rule of preference for the imposition of fine only rather than imprisonment in libel cases under the circumstances therein specified.”¹¹⁸

In the *Disini* case, a dissenting Supreme Court justice has also stated that a review of the “history and actual use of criminal libel”—perhaps implying its role in the harassment of individuals— should result in a declaration of its unconstitutionality, both in the Revised Penal Code and the cybercrime law, adding that: “We have to acknowledge the real uses of criminal libel if we are to be consistent to protect speech made to make public officers and government accountable. Criminal libel has an *in*

114 325 Phil. 1053, 1068 (1996). https://lawphil.net/judjuris/juri1996/mar1996/gr_120715_1996.html

115 388 Phil. 269, 279 (2000). https://lawphil.net/judjuris/juri2000/may2000/gr_127694_2000.html

116 G.R. Nos. 118757 & 121571 (2005). https://lawphil.net/judjuris/juri2004/oct2004/gr_118757_2004.html

117 G.R. No. 142509 (2006). https://lawphil.net/judjuris/juri2006/mar2006/gr_142509_2006.html

118 Administrative Circular No. 08-2008. Op. cit.

terrorem effect that is inconsistent with the contemporary protection of the primordial and necessary right of expression enshrined in our Constitution.”¹¹⁹

False information

The Philippines’ Bayanihan to Heal as One Act—a bill that granted the president special powers in light of the coronavirus pandemic—included as a last-minute amendment¹²⁰ a provision punishing “individuals or groups creating, perpetrating, or spreading false information regarding the COVID-19 crisis on social media and other platforms, such information having no valid or beneficial effect to the population, and are clearly geared to promote chaos, panic, anarchy, fear, or confusion; and those participating in cyber incidents that make use or take advantage of the current situation to prey on the public through scams, phishing, fraudulent emails, or other similar acts.”¹²¹

While the *Disini* case has previously stated that mere “abetting or aiding” in cybercrime is not punishable—which includes liking,

commenting, or sharing posts online—the false information provision above punishes “perpetration” or “spreading” of false information, which may include likes, shares, or comments.

“False information” has yet to be defined in Philippine law. Yet the Revised Penal Code has long penalized in its Art. 154 the unlawful use of means of publication and unlawful utterances, imposing penalties on any person who (a) by means of printing, lithography, or any other means of publication shall publish or cause to be published as news any false news which may endanger the public order, or cause damage to the interest or credit of the State, or who (b) by the same means, or by words, utterances or speeches shall encourage disobedience to the law or to the constituted authorities or praise, justify, or extol any act punished by law, or who (c) shall maliciously publish or cause to be published any official resolution or document without proper authority, or before they have been published officially, or who, (d) who shall print, publish, or distribute or cause to be printed, published, or distributed books, pamphlets, periodicals, or

119 *Disini v. Secretary of Justice*, G.R. No. 203335 (2014). Dissenting and Concurring Opinion (Leonen, J.). <http://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/56650>

120 Buan, L. (2020, 29 March). Bayanihan Act’s sanction vs ‘false’ info the ‘most dangerous’. *Rappler*. <https://www.rappler.com/nation/256256-sanctions-fake-news-bayanihan-act-most-dangerous>

121 Bayanihan to Heal As One Act, Sec. 6(f). <https://www.senate.gov.ph/Bayanihan-to-Heal-as-One-Act-RA-11469.pdf>

leaflets which do not bear the real printer's name, or which are classified as anonymous.¹²²

Law enforcement personnel have utilized the provisions of the cybercrime law, the Bayanihan to Heal as One Act, and the penal code provisions above to arrest and detain persons accused of spreading false reports and misinformation in social media during the coronavirus pandemic,¹²³ justifying the arrests for reasons of public order.

Previously, a senator, Senator Vicente Sotto III, has also tagged as 'fake news' an online article linking him to the rape case of a deceased actress, and asked to have the article taken down from Inquirer.net, the website that published the story.¹²⁴ Inquirer.net complied and the story is now inaccessible. In a statement, Inquirer.net explained that the author of the story has not replied to requests for substantiation, and clarified that "we believe this is not a question of press freedom but the veracity of a story."¹²⁵

Cybersex

Cybersex is a content-related offense under the cybercrime law, defined as "[t]he 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."¹²⁶ The government justifies the provision as a way to address cyber prostitution, white slave trade, and pornography for consideration.¹²⁷

Advocates challenged the law on the basis of vagueness and overbreadth. It fails to define "lascivious exhibition," "sexual organ," or "sexual activity," and fails to clarify whether works of art may fall under the category of cybersex.¹²⁸ The wording, according to a dissenting Supreme Court justice, may "empower law enforcers to pass off their very personal standards of their own morality."¹²⁹ The word 'willful' in the

122 Revised Penal Code, Art. 154.

123 Philippine National Police – Public Information Office. (2020, 27 March). PNP un.masks 4 fake news purveyors on Covid-19. Philippine National Police. <http://www.pnp.gov.ph/index.php/news-and-information/3658-pnp-un.masks-4-fake-news-purveyors-on-covid-19>

124 Salaverria, L.B. (2018, 18 June). Sotto asks Inquirer.net to remove Pepsi Paloma stories. Inquirer.net. <https://newsinfo.inquirer.net/1001463/sotto-asks-inquirer-net-to-remove-pepsi-paloma-stories>

125 Inquirer.net. (2018, 5 July). INQUIRER.net statement on the Pepsi Paloma stories. Inquirer.net. <https://newsinfo.inquirer.net/1007453/inquirer-net-statement-on-the-pepsi-paloma-stories>

126 Cybercrime Prevention Act, Sec. 4(c)[1].

127 *Disini v. Secretary of Justice* (2014). Op. cit.

128 Foundation for Media Alternatives. (2016, September). Human Rights and the Philippine Digital Environment: Joint Submission to the Universal Periodic Review of the Philippines. Association for Progressive Communications. https://www.apc.org/sites/default/files/UPR_FMA.pdf

129 *Disini v. Secretary of Justice* (2014). Dissenting and Concurring Opinion. Op. cit.

definition may not also consider that persons involved in cybersex are most often unwilling victims of exploitation.¹³⁰

Relying heavily on bicameral committee deliberations (as opposed to the provision's plain meaning) to clarify what cybersex covers, the Supreme Court upheld the cybersex provision "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." The decision also invoked the State's power to regulate pornographic materials, and that "engaging in sexual acts privately through an 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," and in any case, "... consenting adults are protected by the wealth of jurisprudence delineating the bounds of obscenity."¹³¹ A dissenting justice, on the other hand, stated that "... criminalizing cybersex is tantamount

to legislating sexual behavior, one that throws us back as a society into the dark ages."¹³²

Outside of the cybercrime law, the criminalization of cybersex affects existing legislation regarding online sexual trafficking, prostitution, and anti-voyeurism, and may pose adverse effects on women. Cybersex as a crime overlaps with that of online trafficking and prostitution, and in this respect may even be redundant. With regard to anti-voyeurism, women who file a case against voyeurism may unwittingly admit to committing cybersex. The provision also affects issues of anonymity, affirmation, and the fluidity of online identity in the modern world—how technology allows people to move beyond usual social markers of class, ethnicity, gender, and age, among others, and how technology fulfils a need to express oneself online, as an alternative to oppressive offline spaces. This is true especially for marginalized peoples such as members of the LGBTQIA+ sector, or persons with disabilities.

130 Clark, L. (2012, 20 September). Philippines passes law that criminalises cybersex. Wired. <https://www.wired.co.uk/article/philippines-cyber-crimes-act>

131 Disini v. Secretary of Justice (2014). Dissenting and Concurring Opinion. Op. cit.

132 Ibid.

Obscenity and indecency

Courts have provided for basic guidelines to test for obscenity in speech: “(a) whether the average person, applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or social value,”¹³³ with stricter rules followed for television on account of its pervasive nature and accessibility to children.¹³⁴

While obscenity itself may be banned upon failure with the standards set above, pornography in itself is another matter. It has been observed that attempts to regulate sex on the internet “which does not come under the definition of obscenity for the purposes of protecting minors, have failed on the argument that the regulations deprive adult of shows, which do not come under the definition of obscenity and are therefore legitimate for adults.”¹³⁵

Inciting to rebellion and sedition

The Revised Penal Code punishes inciting to rebellion or insurrection in its Art. 138, and inciting to sedition in Art. 142. Both are mere preparatory acts considered as consummated crimes already punishable by law.

In inciting to rebellion, the offender does not have to take arms or be in open hostility against the government, but, by means of speeches, proclamations, writings, emblems, banners or other representations tending to the same end, incite others to (a) remove from the allegiance to the government or its laws, the Philippine territory and any body of land, or army, naval, or other forces, and (b) deprive the chief executive chiefly or partially of powers and prerogatives. It is not required that the offender has decided to commit rebellion.¹³⁶

In inciting to sedition, the offender is punished for committing any of three acts: (a) inciting others to sedition by means of speeches, proclamations, writings, emblems, etc., (b) uttering seditious words which disturb the public speech, and

¹³³ Miller v. California, 37 L. Ed. 2md 419, 431 (1973). <https://supreme.justia.com/cases/federal/us/413/15/>; reiterated in Gonzales v. Kalaw Katigbak, 137 SCRA 717 (1985). https://www.lawphil.net/judjuris/juri1985/jul1985/gr_l69500_1985.html

¹³⁴ FCC v. Pacifica Foundation, 438 U.S. 726 (1978). <https://supreme.justia.com/cases/federal/us/438/726/>

¹³⁵ Bernas, The 1987 Philippine Constitution: A Comprehensive Reviewer (2011), p.78-79.

¹³⁶ Revised Penal Code, Art. 138.

(c) writing, publishing, or circulating scurrilous libels against the government which tend to disturb public peace. Sedition, distinguished from rebellion, penalizes offenders who rise publicly and tumultuously, by force, intimidation, and other illegal method, to (a) prevent the promulgation of or execution of law or the holding of a popular election, (b) prevent the government or any officer thereof from freely exercising functions, (c) inflict hate or revenge upon a public officer or his property; (d) commit for political and social end, any act of revenge on any person or social class, and (e) despoil for any political and social end, any person, the government, or any division thereof or all or some of their property.¹³⁷

While courts should still observe the standards set in the 'clear and present danger' and 'dangerous tendency' tests to determine what justifies a restriction to free speech in the context of inciting to sedition and inciting to rebellion, law enforcement officers are quick to prosecute individuals on these grounds even when there may be no probable cause to do so. For example, police

have arrested without a warrant a teacher for posting online that "people were going hungry because of the coronavirus and should raid the local gym where goods are stocked."¹³⁸ She was charged with inciting to sedition in relation to cybercrime. Another teacher who posted a tweet, offering a bounty of 50 million pesos for anyone to kill the president, was also arrested without a warrant and charged with inciting to sedition in relation to cybercrime by the Department of Justice.¹³⁹

Inciting to sedition has also been previously utilized to charge a webmaster who created a domain where videos damaging to the president were uploaded. While the webmaster did not create the videos, law enforcement and the Department of Justice justified the charge because creating the domain—and having the videos uploaded therein—supposedly aroused among viewers a sense of dissatisfaction against authorities, citing these as acts that disturbed public peace.¹⁴⁰ A senator has likewise been charged with inciting to sedition (though not in relation to cybercrime) for making statements against the

¹³⁷ Revised Penal Code, Art. 142.

¹³⁸ Buan, L. (2020, 31 March). Teacher arrested over Facebook post in GenSan rushed to hospital. Rappler. <https://www.rappler.com/nation/256529-teacher-arrested-inciting-sedition-rushed-to-hospital-son-still-in-jail-march-31-2020>

¹³⁹ Patag, K. (2020, 15 May). DOJ OKs inciting to sedition charge vs teacher who offered bounty for Duterte's slay. Philstar.com. <https://www.philstar.com/headlines/2020/05/15/2014198/doj-oks-inciting-sedition-charge-vs-teacher-who-offered-bounty-dutertes-slay>

¹⁴⁰ Buan, L. (2019, 7 May). Looking at 'inciting to sedition' at the time of Duterte. Rappler. <https://www.rappler.com/newsbreak/iq/229889-looking-at-inciting-sedition-time-of-duterte>

president's unexplained wealth and statements in relation to his amnesty.¹⁴¹

Inciting to commit terrorism

On May 2020, amid the coronavirus pandemic, lawmakers in the House of Representatives found time to fast track the passage of the draft Anti-Terrorism Act,¹⁴² essentially an enhanced version of the Human Security Act. The bill has been recently signed by the president into law.¹⁴³

On top of other provisions that potentially violate human rights, Sec. 9 criminalizes "inciting to commit terrorism," where a person, by means of speeches, proclamations, writings, emblems, banners, or other representations to the same end, incites others to the execution of the following acts considered as terrorism in the bill: (a) acts that tend to cause death or serious bodily injuries to any persons, or endangers a person's life, (b) acts that tend to cause extensive damage or destruction to a government or public facility, public place, or private property, (c) acts that tend to cause extensive interference with, damage, or destruction to

critical infrastructure, (d) developing, manufacturing, possessing, acquiring, transporting, supplying, or using weapons, explosives, or biological, nuclear, radiological, or chemical weapons, (e) releasing dangerous substances or cause fire, floods, and explosions.

All such acts enumerated qualify as terrorism when their purpose is to intimidate the public or spread a message of fear, to provoke or influence by intimidation the government or any of its international organization, or seriously destabilize or destroy the fundamental political, economic, or social structures of the country, or create a public emergency or seriously undermine public safety. The definition itself is rife with terms ("intimidate," "spread fear," "destabilize," "undermine public safety") which law enforcement may subject to broad interpretation, justifying multiple arrests similar to arrests based on inciting sedition or rebellion.

The widened definition of terrorism and what constitutes a terrorist is alarming in the context of the Philippines, which is already one of the most dangerous places for journalists in Asia. The government,

¹⁴¹ Ibid.

¹⁴² Senate Bill No. 1083, <http://www.senate.gov.ph/lisdata/31632292421.pdf>

¹⁴³ The Anti-Terrorism Act of 2020. <https://officialgazette.gov.ph/downloads/2020/06jun/20200703-RA-11479-RRD.pdf>

including the president, has been aggressive in its campaign to stamp out rebels and communists, resulting to haphazard red-tagging of groups including a women's rights party list group with Congressional representation.¹⁴⁴ Journalists and media groups have not been spared from red-tagging, including the National Union of Journalists of the Philippines, Vera Files, Rappler, and other news outlets.¹⁴⁵ The anti-terrorism law may only facilitate and institutionalize the government's attacks against the media, including online media, which already has the highest number of reported cases of intimidation, online harassment, threats via text messages, libel cases, website attacks, slay attempts, and journalists barred from coverage.¹⁴⁶

It bears stressing that the government itself releases material supposed to implicate journalists, lawyers, and media organizations in ouster plots and other efforts to "destabilize" the government, such

as when the owner of the Manila Times¹⁴⁷ (a newspaper sympathetic to the government) and a former presidential spokesperson released a 'matrix' of individuals who were allegedly plotting to oust the president.¹⁴⁸ The Manila Times' editor resigned over the incident.¹⁴⁹ Previously, the president and military personnel also implicated other opposition groups in a 'Red October' ouster plot, which never happened.¹⁵⁰

In the context of an anti-terrorism law, law enforcement may deem itself the arbiter of what acts constitute terrorism or inciting to commit terrorism—which it may readily conclude without issue based on prior government conduct, affecting the safety and security of many journalists and the online publications where they write.

A month into the law's passage, the chief of the Armed Forces of the Philippines has already proposed to include social media regulation in the implementing rules and regulations

144 Cepeda, M. (2019, 5 November). In House briefing, AFP, DND accuse Gabriela of being 'communist front'. Rappler. <https://www.rappler.com/nation/244219-house-briefing-afp-dnd-accuse-gabriela-communist-front>

145 Freedom for Media, Freedom for All Network. (2019, 10 December). STATE OF MEDIA FREEDOM IN PH. Media Freedom in PH: Red-tagging, intimidation vs. press: Du30, state agents behind 69 cases. MindaNews. <https://www.mindanews.com/statements/2019/12/state-of-media-freedom-in-ph-media-freedom-in-ph-red-tagging-intimidation-vs-pressdu30-state-agents-behind-69-cases/>

146 Ibid.

147 Ang, D. (2019, 22 April). Oust-Duterte plot bared. The Manila Times. <https://www.manilatimes.net/2019/04/22/news/headlines/oust-duterte-plot-bared/543609/>

148 Colcol, E. (2019, 22 April). Colmenares, Zarate deny involvement in 'ridiculous' alleged ouster plot. GMA News Online. <https://www.gmanetwork.com/news/news/nation/691978/colmenares-zarate-deny-involvement-in-ridiculous-alleged-ouster-plot/story/>

149 Coloma, A. (2019, 25 April). Manila Times editor resigns over 'oust Duterte' matrix. ABS-CBN News. <https://news.abs-cbn.com/news/04/25/19/manila-times-editor-resigns-over-oust-duterte-matrix>

150 Talabong, R. (2018, 19 December). 2018 blockbuster: Red October plot vs Duterte. Rappler. <https://www.rappler.com/news/218901-red-october-ouster-plot-vs-duterte-year-end-2018>

of the law, backtracking only after drawing criticism.¹⁵¹ As of writing, 28 petitions have been filed questioning the constitutionality of the law.¹⁵²

Offending religious feelings

Art. 133 of the Revised Penal Code punishes anyone who “in a place devoted to religious worship or during the celebration of any religious ceremony shall perform acts notoriously offensive to the feelings of the faithful.”¹⁵³ Lawmakers have tagged this provision obsolete and archaic and have called for its repeal in light of its vagueness,¹⁵⁴ even as the Supreme Court has affirmed simultaneously the decision to convict an activist of this crime, for holding a placard with the name Damaso (a fictional priest who raped a woman and sired a child) and shouting “Bishops, stop involving yourselves in politics!” during a religious worship ceremony. The court stated that the activist’s acts were “meant to mock, insult, and ridicule those clergy whose beliefs and principles were

diametrically opposed to his own.”¹⁵⁵

Because of the catch-all provision of cybercrime law, ‘offending religious feelings’ may also be a crime committed online with a higher penalty, and may face subjective interpretations in light of the element that such act should be ‘notoriously offensive to the feelings of the faithful.’

Restrictions on the media entity level

The Philippine government has clamped down on online freedom of expression not merely by weaponizing laws at its disposal, but also by targeting media entities themselves through novel approaches that skirt around the right to free speech.

Revocation of registration

In 2017, the president in his State of the Nation Address had accused Rappler of being American-owned.¹⁵⁶ A year later, the Securities

151 Cabrera, R. (2020, 11 August). AFP Chief Backpedals On Social Media Regulation; 27th Petition Versus Anti-Terror Law Filed. One News. <https://www.onenews.ph/afp-chief-backpedals-on-social-media-regulation-27th-petition-versus-anti-terror-law-filed>

152 Panaligan, R. (2020, 18 August). Human rights advocates file 28th case with SC vs. Anti-Terrorism Act. Manila Bulletin. <https://mb.com.ph/2020/08/18/human-rights-advocates-file-28th-case-with-sc-vs-anti-terrorism-act/>

153 Revised Penal Code, Art. 133.

154 Gregorio, X. (2019, 21 October). Lawmakers seek repeal of ‘archaic’ ban on offending religious feelings. CNN Philippines. <https://www.cnn.ph/news/2019/10/21/offending-religious-feelings-repeal.html>

155 Celdran v. People, G.R. No 220127 (2018). https://lawphil.net/sc_res/2018/pdf/gr_220127_2018.pdf

156 Buan, L. (2018, 27 July). DOCUMENT: Court of Appeals’ full decision on Rappler’s SEC case. Rappler. <https://www.rappler.com/nation/208297-full-decision-court-of-appeals-rappler-sec-case>

and Exchange Commission (SEC), charged with issuing certificates of incorporation and regulating corporate entities, revoked the registration of Rappler, an online and social news website, for allegedly violating the Constitution and the Anti-Dummy Law.¹⁵⁷

As mentioned above, the Constitution limits ownership of media entities wholly to Filipinos and restricts foreign equity. Rappler, at that time, received funds from Omidyar Network via a Philippine Depositary Receipt (PDR). SEC ruled that the PDR violated the foreign equity restriction; Rappler stressed that the PDR “does not give the owner voting rights in the board or a say in the management or day-to-day operations of the company.”¹⁵⁸ As of the date, the case has reached the Court of Appeals which directed the SEC to review its decision.¹⁵⁹ For the meantime, while the shutdown order is not yet final and executory, Rappler continues to maintain operations.¹⁶⁰

Rappler has been a constant

target of pro-administration bloggers, often attacked based on issues of ownership and bias. A day after the SEC issued its order on the Rappler shutdown, the president himself called Rappler “a fake news outlet” for reporting about how his aide, Christopher Go (who is also a senator) may have meddled in the selection of a government supplier.¹⁶¹ Thereafter, the president banned Rappler reporters from covering him, extending the ban to events where he is a guest.¹⁶² Rappler CEO Maria Ressa has also been the subject of constant online harassment.¹⁶³

Refusal to tackle franchise bills

ABS-CBN is also a constant subject of the Philippine president’s tirades against the media. Among others, the president has ranted against the network’s failure to run his political ads during the 2016 elections, cursed the network’s chairman, called him a thief, and declared he will reject the renewal of

157 Fonbuena, C. (2018, 15 January). SEC revokes Rappler’s registration. Rappler. <https://www.rappler.com/nation/193687-rappler-registration-revoked>

158 Ibid.

159 Rappler.com. (2019, 11 March). Rappler on Court of Appeal’s ruling: SEC must review order. Rappler. <https://www.rappler.com/about-rappler/about-us/225460-statement-court-appeals-february-21-2019-ruling-sec-case>

160 Dela Paz, C. (2018, 15 January). Rappler still free to continue operations – SEC. Rappler. <https://www.rappler.com/business/193730-sec-rappler-revoke-license-appeal>

161 Ranada, P. (2018, 16 January). Duterte calls Rappler ‘fake news outlet’. Rappler. <https://www.rappler.com/nation/193806-duterte-fake-news-outlet>

162 Rappler.com. (2019, 11 April). STATEMENT: With Rappler ban, Duterte also violates public right to know. Rappler. <https://www.rappler.com/about-rappler/about-us/227910-statement-malacanang-ban-reporters-covering-duterte>

163 Posetti, J. (2017). Fighting back against prolific online harassment: Maria Ressa. In L. Kilman (Ed.), *An Attack on One is an Attack on All*. Paris, France: UNESCO. <https://unesdoc.unesco.org/ark:/48223/pf0000259399>

ABS-CBN's franchise which was set to expire on May 4, 2020.¹⁶⁴ He would reiterate these threats later on, while the Office of the Solicitor General (OSG) filed a petition alleging ABS-CBN violated the foreign equity restriction by selling PDRs to foreigners (in a callback to the Rappler allegations) as well as a gag order asking the Supreme Court to restrain ABS-CBN from discussing the earlier petition he filed against the network. All the while, the bill renewing ABS-CBN's franchise languished in Congress¹⁶⁵ until its expiry, even as a bill on the matter has been filed since 2016.

ABS-CBN voluntarily went off-air on May 5, 2020 after the National Telecommunications Commission (NTC) issued a cease and desist order for it to stop operations. NTC issued the order in the wake of a letter sent to it by the OSG, which outlined the reasons why ABS-CBN cannot be issued a provisional authority to operate—even though the advice of the justice secretary was ABS-CBN may be granted a provisional authority based on equity.¹⁶⁶ As of date, ABS-CBN broadcasts its content via its online websites and through its other channels not covered by the expired franchise.

Website attacks

Alternative news websites, such as those of Bulatlat, Kodao Productions, Altermidya, Pinoy Weekly, Manila Today, and the National Union of Journalists of the Philippines (NUJP)—all of them critical of the government and its policies—also suffered distributed denial-of-service (DDoS) attacks in December 2018 and January 2019, thus denying access to reportage only available via their websites.

The NUJP stated that these DDoS attacks are meant to stifle criticism and dissent. The NUJP added that the “alternative media’s brand of coverage, which puts more focus on the basic, mainly marginalized, sectors of society and on issues such as human rights and social justice, has also found them openly accused by government and its security forces, of harboring sympathies or even being ‘legal fronts’ of the rebel movement.” The websites of Pinoy Weekly, Kodao, and Bulatlat in particular, were taken down after publishing reports on the 50th anniversary of the Communist Party of the Philippines.¹⁶⁷

164 Lopez, M. & Jalea, G. (2020, 13 February). TIMELINE: ABS-CBN franchise. CNN Philippines. <https://www.cnnphilippines.com/news/2020/2/13/ABS-CBN-franchise-timeline.html>

165 Ibid.

166 Ibid.

167 National Union of Journalists of the Philippines. (2019, 6 February). DDoS attacks on alternative news sites meant to stifle criticism, dissent. National Union of Journalists of the Philippines. <https://nujp.org/statement/bulatlat-kodao/>

Restrictions by other government bodies

Speech online may also be subject to the *sub judice* rule, which limits comments and disclosures pertaining to judicial proceedings. In a supplemental opinion to *Lejano v. People*, a Supreme Court justice stated that “the restriction applies not only to participants in the pending case, i.e. to members of the bar and bench, and to litigants and witnesses, but also to the public in general, which necessarily includes the media.”¹⁶⁸ *Lejano* involved a highly publicized murder case, the merits of which a Court justice found may have been tainted by the “inordinate media campaign” that transpired. Thus he found it necessary to explain the rule: “Any publication pending a suit, reflecting upon the court, the parties, the officers of the court, the counsel, etc., with reference to the suit, or tending to influence the decision of the controversy, is contempt of court and is punishable. The resulting (but temporary) curtailment of speech because of the *sub judice* rule is necessary and justified by the more

compelling interests to uphold the rights of the accused and promote the fair and orderly administration of justice.”¹⁶⁹

The Supreme Court also previously issued guidelines for the radio-TV coverage of the plunder trial against former president Joseph Estrada, and stated that the massive intrusion of media representatives of new media into the trial can alter or destroy the constitutionally necessary judicial atmosphere and decorum and may deny Estrada due process.¹⁷⁰ It thus prohibited the live radio and television coverage of the trial and declared that the “freedom of the press and the right of the people to information may be served and satisfied by less distracting, degrading, and prejudicial means.”¹⁷¹

168 G.R. No. 176389 (2010). https://www.lawphil.net/judjuris/juri2010/dec2010/gr_176389_2010.html

169 Ibid.

170 Supreme Court A.M. No. 01-4-03-SC (2001). https://lawphil.net/judjuris/juri2001/jun2001/am_01-4-03-sc_2001.html

171 Ibid.

Future Violations

Through

Draft Laws

Proposed Constitutional amendment

In 2018, a group of lawmakers in the House of Representatives proposed the amendment of the free speech clause (Art. III, Sec. 4 of the Constitution) to add the terms “responsible exercise [of freedom of speech],” thus changing the clause to “no law shall be passed abridging the *responsible exercise of* freedom of speech, of expression, or of the press, or of the right of people peaceably to assemble and petition the government for the redress of grievances.”¹⁷² A lawmaker justified support for the proposal by saying “there is so much abuse of this freedom,” in the wake of the Security and Exchange Commission’s revocation of the corporate registration of Rappler, a news website.¹⁷³ The proposal is seen to unduly restrain speech for it may give law enforcement and government agencies “unfettered discretion to

restrict freedom of expression and assembly.”¹⁷⁴

Anti-False Content Act

A ‘fake news’ bill, formally titled the “Anti-False Content Act,” is pending in Congress as of 2019. It punishes the following acts: (a) creating and/or publishing one’s online account or website content, (b) use of a fictitious online account or website in creating and/or publishing content, (c) offering or providing service to create and/or publish content online, whether it is done for profit or not, and (d) financing an activity which has for its purpose the creation and/or publication of content—all based on “knowing or having a reasonable belief that it contains information that is false or that would tend to mislead the public.”¹⁷⁵

The fake news bill also punishes non-compliance (whether deliberate or through negligence) of ‘counteractive measures’ issued by the Department of Justice (DOJ) Office of Cybercrime. These counteractive measures are rectification orders, takedown orders, and block

172 Santos, E.P. (2018, 18 January). House body wants amendment to free speech. CNN Philippines. <https://cnnphilippines.com/news/2018/01/16/House-body-wants-amendment-to-free-speech.html>

173 Ibid.

174 International Commission of Jurists. (2018, 1 February). Philippines: proposed constitutional amendment a threat to freedoms of expression and assembly. International Commission of Jurists. <https://www.icj.org/philippines-proposed-constitutional-amendment-a-threat-to-freedoms-of-expression-and-assembly/>

175 Senate Bill No. 9, Sec. 4. https://senate.gov.ph/lis/bill_res.aspx?congress=18&q=SBN-9

access orders directed to website owners/administrators or online intermediaries, either based on a valid complaint, or on the DOJ's own instance for matters affecting public interest.¹⁷⁶ Such administrator/ owner or online intermediary may appeal to the DOJ to cancel the order,¹⁷⁷ but the bill is silent as to whether filing such appeal would stay the implementation of the orders, or on what grounds may appeal and immediate relief be had. While rules of court provide for the procedure for challenging orders by quasi-judicial agencies, like the DOJ, the law is also silent as to the process for judicial review.

On its face, the counteractive measures may face strict scrutiny as they are forms of subsequent punishment violative of the freedom of speech, expression, and of the press. If passed, the bill may also face challenge based on the void for vagueness doctrine and the prohibition against overbreadth, as terms like "reasonable belief," "false information," and "would tend to mislead the public" are not clearly defined or are otherwise subject

to interpretation.¹⁷⁸

The author of the bill is the same senator who succeeded in ordering the takedown of an online article discussing his involvement in the rape case of a deceased actress,¹⁷⁹ which sheds light on how lawmakers and law enforcement personnel may be expected to oversee the bill's implementation. While there is now no question that the proliferation of 'trolls,' fake accounts, and 'fake news' online have widely affected the integrity of online news platforms and may have perverted the public's understanding of free speech and expression online, implementing a 'fake news' bill may not resolve the issues underlying its proliferation, i.e. the need to for better self-regulation for advertising and public relations industries (which direct the work of disinformation), the need for financial stability of the labor force involved in such work, and the need for transparency mechanisms for 'influencers' or 'thought leaders' who are involved in such work.¹⁸⁰ In this context, criminalization may not be appropriate.

176 Senate Bill No. 9, Sec. 5.

177 Senate Bill No. 9, Sec. 6.

178 Human Rights Watch. (2019, 25 July). Philippines: Reject Sweeping 'Fake News' Bill. Human Rights Watch. <https://www.hrw.org/news/2019/07/26/philippines-reject-sweeping-fake-news-bill>

179 Buan, L. (2019, 26 July). Human Rights Watch slams Sotto's fake news bill. Rappler. <https://www.rappler.com/nation/236357-human-rights-watch-calls-for-opposition-sotto-fake-news-bill>

180 Ong, J. & Cabañes, J. (2018). Architects of Networked Disinformation. Newton Tech4Dev Network. <https://newtontechfordev.com/wp-content/uploads/2018/02/ARCHITECTS-OF-NETWORKED-DISINFORMATION-FULL-REPORT.pdf>

Summary and Conclusion

The strategy of the government in restricting not only free expression, but its very enabling environment, is felt at multiple levels by journalists, advocates, writers, activists, and media entities. To be clear, the government's clampdown is systematic—using the wide gamut of laws at its disposal—yet often indirect, which makes it more challenging to address violations.

It may be observed that, *first*, at the level of public perception, government actions to restrict free speech are often preceded by statements criticizing the media and foreshadowing a penalty or sanction, which are actually directed to the *public* and not the media, as if to prime the latter on the acceptability of the planned restrictions. The president and his personnel routinely come up with fresh allegations, repeated over time, to discredit journalists and the media, which, in a social media environment crowded with 'trolls' and which is at the mercy of algorithms, may be deeply reinforced by echo chambers and confirmation bias.

Second, to justify the implementation of legal restrictions, law personnel take a very liberal interpretation of laws, which just straggles the line between what is allowable and what is not (the idea of "continuing publication"; vagueness in the terms "public interest," "spreading panic or fear," etc.) thereby allowing the interpretation a degree of legitimacy, since it not entirely wrong and is subjective.

Third, freedom of expression is not the only battlefield, so to speak, as evinced by government's reexaminations of corporate registrations, licenses, permits, and franchises of media entities. At their core, media entities are corporations and journalists are mostly employees (if not contributors) and in that context, there is space for government agencies to nitpick on documents submitted to their offices as part of regulatory compliance, and prepare in advance legal arguments based on records under their custody.

The enumerated three steps above may be utilized out of order,

or all at the same time, or may even involve only one constantly repeated step. It may be noted that so far, utilizing the steps above, the government has successfully laid legal foundations for shutting down or compelling the closure of two major entities, both with significant online presence, although they remain operational online as of date. It has failed to prioritize the amendment of vague provisions on the cybercrime law which are most prone to abuse, and has allowed overeager law enforcement personnel to get away with arrests over harmless social media posts.

Beyond the press, the same strategy works for individuals. Working on a platform of discipline and order—the battlecry that won him the elections and justified his bloody drug war—the president has successfully ingrained in the public that the same discipline and order justifies restrictions to freedom of expression, and has publicly denounced opposition groups and journalists as ‘leftists’ or ‘communists’ who disturb the public peace. Even in the coronavirus pandemic, discipline and order is repeatedly cited as the only way to survive the crisis, and not urgent mass testing and other medical interventions. As a result, quarantine violators are arrested and detained in

crowded penal facilities, with military and police personnel taking pride in arresting individuals who have posted rants and frustrations against the president on social media.

Beyond efforts to decriminalize and clarify free speech restrictions, civil society is laden with the burden to execute a similar multi-level strategy to advocate for meaningful internet access and the full realization of free expression, especially as lives move online in a pandemic. To do so will be a challenge in light of the president’s unique and unbelievably strong hold on majority of all other branches and levels of government. As the Philippines’ vibrant social media presence continues to grow, it is hoped that such growth is taken as an opportunity to speak up—despite the chilling effect of state restrictions—and to widen the space for free expression so citizens may continue to loudly demand for better governance and state accountability both offline and online