EN BANC

G.R. No. 184389 – ALLAN MADRILEJOS, ALLAN HERNANDEZ, GLENDA GIL, and LISA GOKONGWEI-CHENG, *Petitioners*, **v. LOURDES GATDULA, AGNES LOPEZ, HILARION BUBAN, and THE OFFICE OF THE CITY PROSECUTOR OF MANILA,** *Respondents*.

Promulgated:
September 24, 2019

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DISSENTING OPINION

LEONEN, *J.*:

> *No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.*[1]
>
> *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.*[2]

An ordinance with terms so broad and vague that it easily allows repeated prosecution, chilling both creative and political expression, is unconstitutional. It violates the fundamental tenets of both free expression and due process of law. Good intentions are never sufficient. Laws pertaining to restrictions of expression must be clearly articulated so that they could not provide any possibility for abuse.

"I know it when I see it[.]"[3]

This seemingly innocuous statement by Justice Potter Stewart, which is not even part of the majority opinion, has, for one reason or another, become the defining moment in determining whether an obscene or pornographic material can be considered a constitutionally-protected expression. This simple sentence, however harmless, has also placed a heavy burden on courts to determine with certainty what can be deemed immoral and offensive. Our jurisprudence, for one, has been inconsistent at best and hazy at worst.

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1 CONST., art. III, sec. 4.
2 CONST., art. III, sec. 1.
3 Concurring Opinion of J. Stewart in *Jacobellis v. Ohio*, 378 U.S. 184 (1964).
4 222 Phil. 225 (1985) [Per J. Fernando, En Banc].

In this jurisdiction, this Court has consistently struck down—from *Gonzalez v. Katigbak*[4] (1985), to *Pita v. Court of Appeals*[5] (1989), to *Fernando v. Court of Appeals*[6] (2006), then to *Soriano v. Laguardia*[7] (2009)—any attempt based on broad formulations in law to stifle creative speech in the form of text or image. Only a few weeks ago, in *Nicolas-Lewis v. Commission on Elections*,[8] despite the case being clearly moot, this Court struck down, on the basis of a facial challenge of overbreadth, Section 36.8[9] of Republic Act No. 9189, as amended.[10]

The adoption of the guidelines in these cases provides demarcations of what is obscene and what is constitutionally-protected expression. Unlike in previous cases, however, this Court is not tasked with reviewing whether a certain material is considered obscene, but rather, whether a local ordinance goes beyond the guidelines mandated in previous jurisprudence. Any ordinance that goes beyond these guidelines will be considered censorship and will be struck down as unconstitutional.

In this case, an ordinance, not even a statute, clearly fails to follow the current canonical framework for determining whether there is obscenity beyond the pale of protected speech. As adopted in *Soriano*:

> [T]he latest word is that of *Miller v. California* which established "basic guidelines," to wit: (a) whether to the average person, applying contemporary 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 scientific value.[11]

An overbroad provision goes beyond punishing obscenity. It provides an uncontrolled, unbridled, and unregulated warrant to attack and prohibit protected creative speech. It chills the fundamental right of expression under

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4 222 Phil. 225 (1985) [Per J. Fernando, En Banc].

5 258-A Phil. 134 (1989) [Per J. Sarmiento, En Banc].

6 539 Phil. 407 (2006) [Per J. Quisumbing, Third Division].

7 605 Phil. 43 (2009) [Per J. Velasco, Jr., En Banc].

8 G.R. No. 223705, August 13, 2019, <http://sc.judiciary.gov.ph/8730/> [Per J. Reyes, Jr., En Banc].

9 Republic Act No 9189 (2003), sec. 24, as amended by Republic Act No. 10590 (2013), sec 37 provides:

SECTION 37. Section 24 of the same Act is hereby renumbered as Section 36 and is amended to read as follows:

SEC. 36. Prohibited Acts. — In addition to the prohibited acts provided by law, it shall be unlawful:

. . . .

36.8. For any person to engage in partisan political activity abroad during the thirty (30)-day overseas voting period[.]

10 The Overseas Voting Act of 2013.

11 *Soriano v. Laguardia*, 605 Phil. 43, 97 (2009) [Per J. Velasco, Jr., En Banc] *citing Fernando v. Court of Appeals*, 539 Phil. 407 (2006) [Per J. Quisumbing, Third Division] and *Miller v. California*, 413 U.S. 15 (1973).

Article III, Section 4 of the Constitution. This Court, being the sentinel of the Bill of Rights, should strike down such an ordinance without hesitation.

This case involves a Petition for Prohibition[12] questioning the constitutionality of Manila Ordinance No. 7780, or the "Anti-Obscenity and Pornography Ordinance of the City of Manila."

On February 19, 1993, the City of Manila enacted Ordinance No. 7780,[13] which prescribes criminal penalties for the printing, publishing, distribution, circulation, sale production, exhibition, showing, or viewing of obscene and pornographic materials. Its pertinent portions provide:

> SEC. 2. Definition of Terms: As used in this ordinance, the terms:
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> A. Obscene shall refer to any material or act that is indecent, erotic, lewd or offensive, or contrary to morals, good customs or religious beliefs, principles or doctrines, or to any material or act that tends to corrupt or depr[a]ve the human mind, or is calculated to excite impure imagination or arouse prurient interest, or is unfit to be seen or heard, or which violates the proprieties of language or behavior, regardless of the motive of the printer, publisher, seller, distributor, performer or author of such act or material, such as but not limited to:
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> 1. Printing, showing, depicting or describing sexual acts;
> 2. Printing, showing, depicting or describing children in sexual acts;
> 3. Printing, showing, depicting or describing completely nude human bodies; and
> 4. Printing, showing, depicting or describing the human sexual organs or the female breasts.
>
> B. Pornographic or pornography shall refer to such objects or subjects of photography, movies, music records, video and VHS tapes, laser discs, billboards, television, magazines, newspapers, tabloids, comics and live shows calculated to excite or stimulate sexual drive or impure imagination, regardless of the motive of the author thereof, such as, but not limited to the following:
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> 1. Performing live sexual acts in whatever form;
> 2. Those other than live performances showing, depicting or describing sexual acts;
> 3. Those showing, depicting or describing children in sex acts;
> 4. Those showing, depicting, or describing completely nude human body, or showing, depicting or describing the human sexual organs or the female breasts.
>
> Materials shall refer to magazines, newspapers, tabloids, comics, writings, photographs, drawings, paintings,

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12 *Rollo*, pp. 3–38.
13 Id. at 39–41.

billboards, decals, movies, music records, video and VHS tapes, laser discs, and similar matters.

SEC. 3. Prohibited Acts[:] The printing, publishing, distribution, circulation, sale and exhibition of obscene and pornographic acts and materials and the production, public showing and viewing of video and VHS tapes, laser discs, theatrical or stage and other live performances and private showing for public consumption, whether for free or for a fee, of pornographic pictures as herein defined are hereby prohibited within the City of Manila and accordingly penalized as provided herein.

SEC 4. Penalty Clause: Any person violating this ordinance shall be punished as follows:

1. For the printing, publishing, distribution or circulation of obscene or pornographic materials; the production or showing of obscene movies, television shows, stage and other live performances; for producing or renting obscene video and VHS tapes, laser discs, for viewing obscene movies, television shows, video and VHS tapes, laser discs or stage and other live performances; and for performing obscene act on stage and other live performances – imprisonment of one (1) year or fine of five thousand (₱5,000.00) pesos, or both, at the discretion of the court.

2. For the selling of obscene or pornographic materials – imprisonment of not less than six (6) months nor more than one (1) year or a fine of not less than one thousand (₱1,000.00) pesos, nor more than three thousand (₱3,000.00) pesos.

Provided, that in case the offender is a juridical person, the President and the members of the board of directors, shall be held criminally liable; Provided, further, that in case of conviction, all pertinent permits and licenses issued by the City Government to the offender shall automatically be revoked and the obscene or pornographic materials shall be confiscated in favor of the City Government for destruction; Provided, furthermore, that in case the offender is a minor and unemancipated and unable to pay the fine, his parents or guardian shall be liable to pay such fine; Provided finally, that this ordinance shall not apply to materials printed, distributed, exhibited, sold, filmed, rented, viewed or produced by reason of or in connection with or in furtherance of science and scientific research and medical or medically related art, profession, and for educational purposes.[14]

On July 7, 2008, 12 pastors and preachers led by Pastor Bienvenido M. Abante, Jr. (Abante), then Manila's Sixth District Representative and the principal author of Ordinance No. 7780,[15] filed a Joint Complaint-Affidavit[16] before the Office of the City Prosecutor of Manila against officers and publishers of various magazines and tabloids. They claimed that these

[14] Id. at 39–40.
[15] Id. at 6.
[16] Id. at 44–49.

materials were in violation of Articles 200[17] and 201(2)(a)[18] of the Revised Penal Code, and Ordinance No. 7780.[19]

Among the periodicals questioned was FHM Magazine, published by Summit Publishing Company, Inc. (Summit Media). Allan Madrilejos (Madrilejos), Allen Hernandez (Hernandez), and Glenda Gil (Gil) were the magazine's editor-in-chief, managing editor, and circulation manager, respectively, while Lisa Gokongwei-Cheng (Gokongwei-Cheng) is Summit Media's president.[20]

The criminal case was docketed as I.S. No. 08G-12234 and was set for preliminary investigation.[21] The Office of the City Prosecutor of Manila created a special panel of prosecutors composed of Lourdes Gatdula, Agnes Lopez, and Hilario Buban (Prosecutor Gatdula, et al.).[22]

On July 24, 2008, Prosecutor Gatdula, et al. subpoenaed[23] Madrilejos, Hernandez, Gil, and Gokongwei-Cheng (Madrilejos, et al.) to appear and submit their counter-affidavits. Madrilejos, et al. moved that the preliminary investigation be reset to August 28, 2008 to give time to study the complaint. Later, they filed an Urgent Motion for Bill of Particulars, requesting for clarification on the extent of their alleged culpability for all the publications complained against since all the publications being complained of were charged in conspiracy with each other.[24]

On September 24, 2008, Madrilejos, et al. filed this Petition for Prohibition[25] against Prosecutor Gatdula, et al. They seek to prevent the implementation of Ordinance No. 7780, claiming that it is invalid on its face for being patently offensive to the constitutional right to free speech and expression, repugnant to due process and privacy rights, and violative of the principle of separation of Church and State.

The Petition comes with a prayer for a temporary restraining order

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17 REV. PEN. CODE, art. 200 provides:

ARTICLE 200. *Grave scandal.* – The penalties of *arresto mayor* and public censure shall be imposed upon any person who shall offend against decency or good customs by any highly scandalous conduct not expressly falling within any other article of this Code.

18 REV. PEN. CODE, art. 201 provides:

ARTICLE 201. *Immoral doctrines, obscene publications and exhibitions and indecent shows.* – The penalty of *prision mayor* or a fine ranging from six thousand to twelve thousand pesos, or both such imprisonment and fine, shall be imposed upon:

. . . .

(2) (a) the authors of obscene literature, published with their knowledge in any form; the editors publishing such literature; and the owners/operators of the establishment selling the same[.]

19 *Rollo*, p. 44.

20 Id. at 4–5.

21 Id. at 352.

22 Id. at 7

23 Id. at 50.

24 Id. at 7.

25 Id. at 3–38. The Comment was filed on November 18, 2008 (*rollo*, pp. 352–368) while the Reply was filed on December 19, 2008 (*rollo*, pp. 337–351).

and/or writ of preliminary injunction. In applying for injunctive relief, petitioners submit that they "now face the spectacle of having to undergo the continuing ignominy of criminal prosecution for the legitimate exercise of their freedom of expression."[26] They point out that "[e]ven presuming that certain protected speech may be regulated, there is already adequate legislation for the purpose in the form of Article 201 of the Revised Penal Code."[27]

Petitioners concede that writs of prohibition do not restrain the conduct of criminal prosecution. They submit, however, that this case falls under the exceptions enumerated in *Venus v. Desierto*,[28] namely, "[w]here the prosecution is under an invalid law, ordinance[,] or regulation[.]"[29]

Petitioners argue that, as with *Yu Cong Eng v. Trinidad*,[30] Ordinance No. 7780, which was enacted in 1993, has not yet been interpreted by the courts. In the interest of public welfare and the advancement of public policy, they contend that it is proper to have the validity of a given law determined at the start of a prosecution.[31]

Petitioners likewise claim that Ordinance No. 7780 provides a definition of "obscene" and "pornography" that disregards the doctrine in *Miller v. California*.[32] They assert that the standards in the Ordinance are vague as it uses expansive language, which made it possible for the complaining pastors and preachers "to impose upon the public what, in their religious estimation, is 'unfit to be seen or heard' by the residents of Manila or what is violative of the 'proprieties of language or behavior.'"[33] They argue that these pastors or preachers cannot be the "average person" referred to in *Miller*, who may be called upon to apply contemporary community standards to determine what is obscene.[34]

Petitioners also allege that FHM Magazine has a readership of about 1 million, 40% of whom are female. They argue that these readers, along with cultural groups or anti-religious sects, will protest that religious pastors and preachers will determine what are considered contemporary community standards. They claim that "it is not for ultra-conservatives or extreme liberalists to dictate upon society what they can or should not see or hear. Neither is it the place for militants, fanatics, radicals[,] or traditionalists to determine the same."[35]

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26 Id. at 34.
27 Id.
28 358 Phil. 675 (1998) [Per J. Davide, Jr., First Division].
29 *Rollo*, p. 9 *citing Venus v. Desierto*, 358 Phil. 675, 694 (1998) [Per J. Davide, Jr., First Division].
30 47 Phil. 385 (1925) [Per J. Malcolm, Second Division].
31 *Rollo*, pp. 10–12.
32 Id. at 15 *citing* 413 U.S. 15 (1973).
33 Id. at 18.
34 Id.
35 Id. at 19.

Petitioners assert that according to the *Miller* test, "only sexual conduct, described in a 'patently offensive' manner is considered as obscene."[36] They point out that Ordinance No. 7780 is unduly expansive in that it considers the mere printing, showing, depicting, or describing of sexual acts as obscene and pornographic.[37] They allege that by this standard, the following works would be obscene and pornographic: (1) this Court's Decision in *People v. Baligod*;[38] (2) the exhibit, "100 Nudes, 100 Years," featuring national artists' works; (3) Chapter 7, Verses 3 and 7 of the Song of Songs in the Bible, which describes female breasts; (4) and certain scenes in the movie, "Schindler's List."[39]

Petitioners argue that the allegedly obscene excerpts of FHM Magazine "cannot seriously be accused of lacking serious artistic value by any but the most prudish eyes."[40] As an example, they point out that the cover page of FHM Erotica "carries the picture of a nude woman whose private parts are artistically covered by shadows."[41] They allege that the pastors and preachers "did not bother to peruse the contents of the said publication, which featured literature from award-winning writers such as Marguerite de Leon, Anna Felicia Sanchez[,] and Norman Wilwayco."[42] They point out that there must be evidence of pandering to prurient interests to determine if a material is obscene, instead of the Ordinance's "wholesale branding of materials . . . as being obscene, without regard to the manner of their commercial exploitation[.]"[43]

Moreover, petitioners contend that their manner of distribution shows that their magazine is not being commercially exploited "for the sake of its prurient appeal."[44] They point out that "a clear 18+ mark appears prominently on all the covers of FHM magazines together with the words 'CONTENTS MAY NOT BE SUITABLE FOR MINORS.'"[45] The magazines are also sealed in plastic covers, sold in legitimate stands, "and only to adults."[46]

Petitioners submit that allowing obscenity to be defined based on religious morals and customs violates the principle of the separation of Church and State.[47] They argue that allowing so would open "the floodgates for religious organizations to impose their beliefs on non-members."[48]

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36 Id. at 20.
37 Id. at 21.
38 583 Phil. 299 (2008) [Per J. Quisumbing, Second Division].
39 *Rollo*, pp. 22–23.
40 Id. at 23.
41 Id. at 24.
42 Id.
43 Id.
44 Id. at 25.
45 Id. at 24.
46 Id.
47 Id. at 26.
48 Id. at 27.

Moreover, petitioners submit that the Ordinance violates their right to due process, as the means employed were "not reasonably necessary to accomplish its purpose."[49] They allege that the Ordinance imposes criminal liability based on one's membership in a publication's board, regardless of whether that member was involved in the actual publication of the questioned material. Considering that Summit Media publishes several magazines other than FHM Magazine, they argue that the Ordinance effectively discourages persons from pursuing other legitimate businesses.[50]

Petitioners further assert that the Ordinance violates their readers' privacy rights as it "intrude[s] into the privacy of one's home with no other purpose than to control individual thought."[51] They point out that the words, "private showing for public consumption, whether free or for a fee, of pornographic pictures as herein defined," in the acts prohibited by the Ordinance "unlawfully oversteps the traditionally recognized state interest to control commercial exhibition of prohibited material."[52] They argue that the Ordinance is "tantamount to a blanket prohibition of the private possession of objectionable materials" and thus, is "in the nature of a constitutionally impermissible state control over private thoughts."[53]

Respondents, on the other hand, counter that an action for prohibition is not proper, since petitioners failed to allege any act by the Office of the City Prosecutor of Manila that shows grave abuse of discretion in the conduct of its preliminary investigation.[54]

Respondents, citing *Guingona v. City Fiscal of Manila*,[55] maintain that criminal prosecutions cannot be enjoined and that this case does not fall under the exceptions to the general rule. They point out that petitioners incorrectly cited *Venus* since nowhere in that case was it contended that a law, ordinance, or regulation was invalid. They also aver that this Court in *Yu Cong Eng* did not enjoin the criminal prosecution since the law being assailed was found to be constitutional.[56]

Moreover, respondents argue that the adoption of the *Miller* test "takes away the civil law aspect of our criminal law."[57] They submit that with obscenity not defined in statute, Ordinance No. 7780's definition of it "could very well be the contemporary community standard."[58] They allege that the Petition "seeks a mere exercise of academic discussion" [59] since petitioners

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49 Id. at 29.
50 Id. at 29–30.
51 Id. at 30–31.
52 Id.
53 Id. at 32.
54 Id. at 353–355.
55 213 Phil. 516 (1984) [Per J. Makasiar, Second Division].
56 *Rollo*, pp. 359–361.
57 Id. at 364.
58 Id.
59 Id.

failed to prove that the Ordinance will actually violate their civil rights.[60]

Respondents further submit that the Ordinance's "legislative intent to eradicate greed, which preys on and appeals on the baser instincts of unwary consumers, is far superior to the 'property rights' of the petitioners in the hierarchy of values within the due process clause[.]"[61] Moreover, they point out that the Ordinance did not violate the due process clause since it had undergone the basic requirements of notice and hearing.[62]

As to legal standing, respondents assert that petitioners were not the proper party to question Ordinance No. 7780. Since petitioners did not allege that they were the authors of articles, photographs, and graphics published in the magazine, they supposedly failed to prove that their constitutional rights of freedom of speech and expression was or will be violated because of the Ordinance.[63]

Even assuming that they were the authors, respondents submit that petitioner's freedoms were not absolute since "petitioners cannot pretend to be 'Little Lord Fauntleroys', when they published articles depicting incestuous sex or a woman having sex with father and son . . . or the suggestive pictures of lesbians fondling each other[.]"[64]

Moreover, respondents claim that since petitioners have neither alleged that they are believers or non-believers, they would have no standing to question the Ordinance on the basis that it violates the non-establishment clause. They likewise argue that since petitioners have not alleged to be Manila residents, they would have no standing to question the alleged violations to privacy.[65] They insist that Ordinance No. 7780 enjoys the presumption of constitutionality absent any factual evidence showing that it will impair their personal civil rights.[66]

In rebuttal, petitioners claim that they have sufficiently established a personal and substantial interest, since they are precisely the respondents in the criminal case who will personally suffer from some actual or threatened injury as a result of its enforcement.[67]

Later, on November 11, 2013, petitioners manifested[68] receiving a copy of the Office of the City Prosecutor of Manila's June 25, 2013 Resolution.[69]

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60 Id.
61 Id. at 364–365.
62 Id. at 365.
63 Id. at 362.
64 Id.
65 Id. at 362–363.
66 Id. at 365–367.
67 Id. at 340.
68 Id. at 422–424.
69 Id. at 425–439.

In it, the filing of Information against them for violation of Section 201(2)(a) of the Revised Penal Code was recommended. However, the charge against petitioner Gokongwei-Cheng for violation of Article 201 of the Revised Penal Code was dismissed. The charge against petitioners for violation of Article 200 of the Revised Penal Code and Ordinance No. 7780 was likewise dismissed.[70]

In their Manifestation, however, petitioners point out that what they question in their Petitions is the constitutionality of the Ordinance itself; hence, the issue has not become moot.[71]

From the arguments of the parties, this Court is now asked to resolve the following procedural issues:

First, whether or not a petition for prohibition is the proper remedy;

Second, whether or not petitioners Allan Madrilejos, Allan Hernandez, Glenda Gil, and Lisa Gokongwei-Cheng have legal standing to question the constitutionality of Ordinance No. 7780; and

Third, whether or not petitioners are entitled to the issuance of an injunctive writ.

The parties likewise raise the main substantive issue of whether or not Manila Ordinance No. 7780 is unconstitutional. To resolve this, however, this Court must first pass upon the following questions:

First, whether or not Ordinance No. 7780 contravenes the definition set by *Miller v. California*;[72]

Second, whether or not Ordinance No. 7780 violates the non-establishment clause;

Third, whether or not Ordinance No. 7780 violates the right to due process; and

Finally, whether or not Ordinance No. 7780 offends privacy rights.

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70 Id. at 438–439.
71 Id. at 423.
72 413 U.S. 15 (1973).

I

"The writ of prohibition is an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to an inferior court, for the purpose of preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested."[73] A petition for prohibition seeks the issuance of a judgment ordering the respondent to stop conducting further proceedings in the specified action or matter.[74]

Here, petitioners filed a Petition for Prohibition seeking to prevent respondents from proceeding with the prosecution of I.S. No. 08G-12234 for violation of Articles 200 and 201 of the Revised Penal Code and Ordinance No. 7780.

As a general rule, a petition that seeks to enjoin the prosecution of criminal proceedings will not prosper. This is because "public interest requires that criminal acts be immediately investigated and prosecuted for the protection of society."[75] There are of course, recognized exceptions to the rule, as laid out in *Brocka v. Enrile*:[76]

> a. To afford adequate protection to the constitutional rights of the accused;
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> b. When necessary for the orderly administration of justice or to avoid oppression or multiplicity of actions;
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> c. When there is a pre-judicial question which is *sub judice*;
>
> d. When the acts of the officer are without or in excess of authority;
>
> e. Where the prosecution is under an invalid law, ordinance or regulation;
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> f. When double jeopardy is clearly apparent;
>
> g. Where the court has no jurisdiction over the offense;
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> h. Where it is a case of persecution rather than prosecution;
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> i. Where the charges are manifestly false and motivated by the lust for vengeance; and
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> j. When there is clearly no prima facie case against the accused and a motion to quash on that ground has been denied.
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> 7. Preliminary injunction has been issued by the Supreme Court to prevent the threatened unlawful arrest of petitioners.[77]

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73 *People v. Vera*, 65 Phil. 56, 84 (1937) [Per J. Laurel, En Banc] *citing* High, Extraordinary Legal Remedies, p. 705.

74 RULES OF COURT, Rule 65, sec. 2.

75 *Asutilla v. Philippine National Bank*, 225 Phil. 40, 43 (1986) [Per J. Melencio-Herrera, First Division].

76 270 Phil. 271 (1990) [Per J. Medialdea, En Banc].

77 Id. at 276–277 *citing Hernandez v. Albano*, 125 Phil. 513 (1967) [Per J. Sanchez, En Banc]; *Dimayuga v. Fernandez*, 43 Phil. 304 (1922) [Per J. Johns, First Division]; *Fortun v. Labang*, 192 Phil. 125 (1981)

An action for prohibition is the proper remedy to enjoin a criminal prosecution if the tribunal hearing the case derives its jurisdiction exclusively from an unconstitutional statute. In *People v. Vera*:[78]

> The general rule, although there is a conflict in the cases, is that the writ of prohibition will not lie .... *But where the inferior court or tribunal derives its jurisdiction exclusively from an unconstitutional statute, it may be prevented by the writ of prohibition from enforcing that statute.*[79] (Emphasis supplied)

Respondents reason that *Yu Cong Eng*,[80] which petitioners cite as basis, upheld the constitutionality of the questioned statute, and thus, would not be adequate to support their position.

Yu Cong Eng, however, was eventually appealed to the United States Supreme Court, which overturned this Court's finding of constitutionality on the basis that the questioned statute violated the right to equal protection.[81] In any case, *Yu Cong Eng* remains good law on the exception that a criminal prosecution may be enjoined if a prosecution is alleged to be under an invalid law, ordinance, or regulation.

Respondents likewise cite *Guingona*[82] as basis to prove that this case does not fall under any of the exceptions. However, contrary to their claim, *Guingona* provides that criminal offenses may be the subject of prohibition and injunction "to afford adequate protection to constitutional rights" and "in proper cases, because the statute relied upon is unconstitutional or was held invalid."[83]

Here, petitioners did not err in seeking a writ of prohibition to enjoin the criminal proceedings against them, since they claim that the penal statute

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[Per J. Fernando, Second Division]; *De Leon v. Mabanag*, 70 Phil. 202 (1940) [Per J. Imperial, First Division]; *Planas v. Gil*, 67 Phil. 62 (1939) [Per J. Laurel, En Banc]; *Young v. Rafferty*, 33 Phil. 556 (1916) [Per J. Trent, First Division]; *Yu Cong Eng v. Trinidad*, 47 Phil. 385, 389 (1925) [Per J. Malcolm, Second Division]; *Sangalang v. People and Avendia*, 109 Phil. 1140 (1960) [Per J. Gutierrez-David, First Division]; *Lopez v. City Judge*, 124 Phil. 1211 (1966) [Per J. Dizon, En Banc]; *Rustia v. Ocampo*, CA-G.R. No. 4760, March 25, 1960; *Recto v. Castelo*, 18 L.J. (1953); *Rañoa v. Alvendia*, CA-G.R. No. 30720-R, October 8, 1962; *Guingona v. City Fiscal*, 213 Phil. 516 (1984) [Per J. Makasiar, Second Division]; *Salonga v. Paño*, 219 Phil. 402 (1985) [Per J. Gutierrez, Jr., En Banc]; *Rodriguez v. Castelo*, L-6374, August 1, 1958.

78 65 Phil. 56 (1937) [Per J. Laurel, En Banc].

79 Id. at 84–85 *citing* 50 C. J., 670; *Ex parte* Round tree [1874, 51 Ala., 42; *In re Macfarland*, 30 App. [D. C.], 365; *Curtis v. Cornish* (1912), 109 Me., 384; 84 A., 799; *Pennington v. Woolfolk* (1880), 79 Ky., 13; *State v. Godfrey* (1903), 54 W. Va., 54; 46 S. E., 185; *Arnold v. Shields* (1837), 5 Dana, 19; 30 Am. Dec., 669.

80 47 Phil. 385 (1925) [Per J. Malcolm, Second Division].

81 *See Yu Cong Eng v. Trinidad*, 271 U.S. 500 (46 S.Ct. 619, 70 L.Ed. 1059).

82 213 Phil. 516 (1984) [Per Acting CJ. Makasiar, Second Division].

83 Id. at 528 *citing Primicias v. Municipality of Urdaneta, Pangasinan*, 182 Phil. 42 (1979) [Per J. De Castro, First Division]; *Ramos v. Torres*, 134 Phil. 544 (1968) [Per J. Concepcion, En Banc]; and *Hernandez v. Albano*, 125 Phil. 153 (1967) [Per J. Sanchez, En Banc].

used against them, Ordinance No. 7780, is unconstitutional.

II

Legal standing or *locus standi* is the "right of appearance in a court of justice on a given question."[84] It has likewise been defined as "the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case."[85]

In private suits, standing is afforded only to the real party-in-interest,[86] one "who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit."[87]

In public suits, however, "the doctrine of standing is built on the principle of separation of powers, sparing as it does unnecessary interference or invalidation by the judicial branch of the actions rendered by its co-equal branches of government."[88] Parties must show "a personal and substantial interest" in the case such that they "sustained or will sustain direct injury as a result of the governmental act that is being challenged."[89] They must allege "such personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court depends for illumination of difficult constitutional questions."[90]

The general rule, therefore, is that before parties can raise a constitutional question, they must first show that direct injury was sustained or will be sustained because of the challenged government act. Nonetheless, as discussed in *David v. Macapagal-Arroyo*,[91] there are exceptions:

> Taxpayers, voters, concerned citizens, and legislators may be accorded standing to sue, provided that the following requirements are met:
>
> (1) the cases involve constitutional issues;
>
> (2) for taxpayers, there must be a claim of illegal disbursement of public funds or that the tax measure is unconstitutional;
>
> (3) for voters, there must be a showing of obvious interest in the validity of the election law in question;

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84 *David v. Macapagal-Arroyo*, 522 Phil. 705, 755 (2006) [Per J. Sandoval-Gutierrez, En Banc] citing Black's Law Dictionary, 6th Ed. 1991, p. 941.

85 *White Light Corporation v. City of Manila*, 596 Phil. 444, 455 (2009) [Per J. Tinga, En Banc].

86 RULES OF COURT, Rule 3, sec. 2.

87 RULES OF COURT, Rule 3, sec. 2.

88 *White Light Corporation v. City of Manila,* 596 Phil. 444, 455 (2009) [Per J. Tinga, En Banc] *citing Allen v. Wright*, 468 U.S. 737 (1984).

89 *Galicto v. Aquino III,* 683 Phil. 141, 170 (2012) [Per J. Brion, En Banc].

90 Id. *citing Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council,* 646 Phil. 452 (2010) [Per J. Carpio Morales, En Banc].

91 522 Phil. 705 (2006) [Per J. Sandoval-Gutierrez, En Banc].

> (4) for concerned citizens, there must be a showing that the issues raised are of transcendental importance which must be settled early; and
>
> (5) for legislators, there must be a claim that the official action complained of infringes upon their prerogatives as legislators.[92]

Another permissible exception is the concept of third-party standing. Actions may be brought on behalf of third parties if the following requisites are satisfied:

> . . . the litigant must have suffered an 'injury-in-fact,' thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.[93]

In *White Light Corporation v. City of Manila*,[94] hotel and motel operators filed a complaint to prevent the implementation of Manila Ordinance No. 7774, which prohibited "short time admission in hotels, motels, lodging houses, pension houses and similar establishments"[95] in Manila. These operators alleged that the questioned ordinance unlawfully interfered with the conduct of their business. Interestingly, they likewise filed the complaint on behalf of their clients, alleging that the questioned ordinance violated their clients' right to privacy and the freedom of movement, as well as their right to equal protection of the laws.

This Court granted standing to these hotel and motel operators since there would be a clear injury to their business interests. It reasoned that these kinds of businesses rely on the continued patronage of their clientele, and Ordinance No. 7774 deters their clients from patronizing their businesses. This Court likewise noted that "[t]he relative silence in constitutional litigation of such special interest groups in our nation such as the American Civil Liberties Union in the United States may also be construed as a hindrance for customers to bring suit."[96]

In this case, respondents allege that petitioners were not the proper parties to the suit since they were not the authors of articles, photographs, and graphics published in the magazine. Ordinance No. 7780, however, penalizes the printing, publishing, distribution, or circulation of materials alleged to be obscene or pornographic. Petitioners are the editor-in-chief, managing editor, circulation manager of FHM Magazine and the president of Summit Media,

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92 Id. at 760.

93 *White Light Corporation v. City of Manila*, 596 Phil. 444, 456 (2009) [Per J. Tinga, En Banc] *citing Powers v. Ohio*, 499 U.S. 400 (1991).

94 596 Phil. 444 (2009) [Per J. Tinga, En Banc].

95 Id. at 450.

96 Id. at 456–457 *citing* Kelsey McCowan Heilman, *The Rights of Others: Protection and Advocacy Organizations Associational Standing to Sue*, 157 U. Pa. L. Rev. 237.

the corporation that publishes the magazine alleged to contain obscene or pornographic material. They stood to be penalized under the law. The direct injury to them, therefore, is clear.

Respondents likewise assail petitioners' standing to argue that Ordinance No. 7780 violates the non-establishment clause, since petitioners did not allege that they were "believers or non-believers" of a particular religion or sect. But, as explained in *David*, concerned citizens may be granted standing if the case involves constitutional issues. Regardless of petitioners' religious denomination, they may question the validity of an ordinance on the ground that it violates provisions of the Constitution.

Petitioners also bring this suit on behalf of their readers in Manila, whose privacy rights are supposedly violated by Ordinance No. 7780. They assert that it is "tantamount to a blanket prohibition of the private possession of objectionable materials[,]"[97] and thus, "is in the nature of a constitutionally impermissible state control over private thoughts."[98] Respondents counter that petitioners have no standing to raise this issue since they are not residents of Manila.

Petitioners have shown sufficient third-party standing to question Ordinance No. 7780 on the basis that it violates their readers' privacy rights. As with *White Light Corporation*, readers would be deterred from buying petitioners' magazines, believing that they possess prohibited materials. This, in turn, would endanger petitioners' business interests, since their publications rely on the strength of their readership.

It is likewise unlikely that a Manila resident who regularly reads these kinds of publications would bring an action to question the Ordinance. This kind of action would be costly and protracted, bringing no substantial benefit to that Manila resident other than giving him or her continued freedom to read these magazines. As noted in *White Light Corporation*, corporations will more likely question such ordinances to protect their business interests, since there are not enough special interest groups that can regularly engage in constitutional litigation.

III

The issuance of an injunctive writ has already become unnecessary in light of the dismissal of I.S. No. 08G-12234. The Petition, however, has not yet become moot since petitioners questioned not only the validity of the criminal prosecution against them, but the validity of Ordinance No. 7780 itself.

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97 *Rollo*, p. 32.
98 Id.

An injunctive writ may be "granted at any stage of an action or proceeding prior to the judgment or final order, requiring a party or a court, agency or a person to refrain from a particular act or acts. It may also require the performance of a particular act or acts[.]"[99] For it to be granted, the applicant must establish:

> (a) That the applicant is entitled to the relief demanded, and the whole or part of such relief consists in restraining the commission or continuance of the act or acts complained of, or in requiring performance of an act or acts, either for a limited period or perpetually;
>
> (b) That the commission, continuance or non-performance of the act or acts complained of during the litigation would probably work injustice to the applicant; or
>
> (c) That a party, court, agency or a person is doing, threatening, or is attempting to do, or is procuring or suffering to be done, some act or acts probably in violation of the rights of the applicant respecting the subject of the action or proceeding, and tending to render the judgment ineffectual.[100]

Since I.S. No. 08G-12234 has already been dismissed,[101] there is no need or urgency requiring the issuance of an injunctive writ. However, the majority opined that the dismissal of the criminal prosecution has rendered this Petition moot. I disagree.

In *David*:

> A moot and academic case is one that ceases to present a justiciable controversy by virtue of supervening events, so that a declaration thereon would be of no practical use or value. Generally, courts decline jurisdiction over such case or dismiss it on ground of mootness.[102]

Generally, this Court cannot review cases where the controversy has become moot. However, it will decide cases that have otherwise been moot "if: *first*, there is a grave violation of the Constitution; *second*, the exceptional character of the situation and the paramount public interest is involved; *third*, when the constitutional issue raised requires formulation of controlling

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99 RULES OF COURT, Rule 58, sec. 1.

100 RULES OF COURT, Rule 58, sec. 3.

101 *Rollo*, pp. 438–439.

102 *David v. Macapagal-Arroyo*, 522 Phil. 705, 753–754 (2006) [Per J. Sandoval-Gutierrez, En Banc] *citing Province of Batangas v. Romulo*, 473 Phil. 806 (2004) [Per J. Callejo, Sr., En Banc]; *Banco Filipino Savings and Mortgage Bank v. Tuazon, Jr.*, 469 Phil. 79 (2004) [Per J. Austria-Martinez, Second Division]; *Vda. De Dabao v. Court of Appeals*, 469 Phil. 938 (2004) [Per J. Austria-Marinez, Second Division]; and *Paloma v. Court of Appeals*, 461 Phil. 270 (2003) [Per J. Quisumbing, Second]; *Royal Cargo Corporation v. Civil Aeronautics Board*, 465 Phil. 719 (2004) [Per J. Callejo, Sr., Second Division]; and *Lacson v. Perez*, 410 Phil. 78 (2001) [Per J. Melo, En Banc].

principles to guide the bench, the bar, and the public; and *fourth*, the case is capable of repetition yet evading review."[103]

Ordinance No. 7780 is still valid within the City of Manila. No other case has been filed to question its constitutionality. The dismissal of the criminal cases against petitioners does not mean that no other person will be penalized under the Ordinance. Its constitutionality, therefore, is an issue that is precisely "capable of repetition, yet evading review."

As this Court stated in *Fernando v. Court of Appeals*,[104] "obscenity is an issue proper for judicial determination and should be treated on a case to case basis and on the judge's sound discretion."[105]

The majority, however, points out that this dissenting opinion disregards the two-requirement rule in footnote 11 of *Pormento v. Estrada*,[106] which reads:

> [T]he "capable of repetition yet evading review" exception . . . applies only where the following two circumstances concur: (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again.[107]

The majority submits that, *first*, petitioners' indictment "is not of such inherently short duration that it will lapse before petitioners are able to see it challenged before a higher prosecutorial authority (*i.e.*, the Department of Justice) or the courts";[108] and *second*, that petitioners "also failed to demonstrate a reasonable likelihood that they will once again be hailed before the [Office of the City Prosecutor of] Manila for the same or another violation of Ordinance No. 7780."[109]

As the facts show, at the time of the filing of the Petition, petitioners were criminally charged before the Office of the City Prosecutor of Manila for violating the questioned Ordinance, but the charges were later dismissed after a preliminary investigation. The short duration of the criminal prosecution is the very reason for this Court to pass upon the issue of mootness. Had the criminal prosecution prospered, there would have been no issue on mootness since the threatened injury would still be existing.

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103 *Belgica v. Ochoa*, 721 Phil. 416, 522 (2013) [Per J. Perlas-Bernabe, En Banc] *citing Mattel, Inc. v. Francisco*, 582 Phil. 492 (2008) [Per J. Austria-Martinez, Third Division]; and *Constantino v. Sandiganbayan*, 559 Phil. 622 (2007) [Per J. Tinga, Second Division].

104 539 Phil. 407 (2006) [Per J. Quisumbing, Third Division].

105 Id. at 417.

106 643 Phil. 735 (2010) [Per CJ. Corona, En Banc].

107 Id. at 738–739, *see* Footnote 11 *citing Lewis v. Continental Bank Corporation,* 494 U.S. 472 (1990).

108 Ponencia, p. 14.

109 Id.

Likewise, as previously stated, Ordinance No. 7780 is still *valid and existing* in the City of Manila as of the writing of the Decision. Petitioners publish their magazines monthly, which means that they could be subjected to similar criminal charges for every monthly publication. There is, thus, a reasonable likelihood that petitioners could again be charged before the Ordinance's validity is addressed by *any* court.

In the recent case of *Nicolas-Lewis*, this Court entertained a Petition questioning the prohibition against partisan political activities abroad during the 2019 national and local elections. Though the Petition had already become moot, this Court exercised its power of judicial review on the ground that the questioned provision might have a chilling effect on a citizen's fundamental right to speech, expression, and suffrage.[110]

Even more recent, *Marquez v. Commission on Elections*[111] involved the petitioner questioning the Commission on Elections' cancellation of his Certificate of Candidacy for the 2019 national and local elections for being a nuisance candidate. This Court, through Justice Francis H. Jardeleza, conceded that the case should have been dismissed for mootness since elections had already been conducted, with the winning candidates proclaimed. Nonetheless, it proceeded to rule on the case:

> The Court is well aware that the May 13, 2019 national and local elections have concluded, with the proclamation of the top 12 candidates receiving the highest number of votes as senators-elect. This development would ordinarily result in the dismissal of the case on the ground of mootness. Since a judgment in one party's (*i.e.*, Marquez) favor will not serve any useful purpose nor have any practical legal effect because, in the nature of things, it cannot be enforced, the Court would normally decline jurisdiction over it.
>
> The Court's power to adjudicate is limited to actual, ongoing controversies. Paragraph 2, Section 1, Article VIII of the 1987 Constitution provides that "judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable . . ." Thus, and as a general rule, this Court will not decide moot questions, or abstract propositions, or declare principles or rules of law which cannot affect the result as to the thing in issue in the case before it.
>
> Such rule, however, admits of exceptions. A court will decide a case which is otherwise moot and academic if it finds that: (a) there was a grave violation of the Constitution; (2) the case involved a situation of exceptional character and was of paramount public interest; (3) the issues raised required the formulation of controlling principles to guide the Bench, the Bar and the public; and (4) the case was capable of repetition yet evading review.
>
> We find that the fourth exception obtains in this case.

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[110] G.R. No. 223705, August 13, 2019, <http://sc.judiciary.gov.ph/8730/> [Per J. Reyes, Jr., En Banc].

[111] G.R. No. 244274, September 10, 2019, <http://sc.judiciary.gov.ph/8153/> [Per J. Jardeleza, En Banc].

At this point, tracing the history of the capable of repetition yet evading review exception to the doctrine on mootness is in order.

The United States (U.S.) Supreme Court first laid down the exception in 1911, in *Southern Pacific Terminal Company v. Interstate Commerce Commission*. In that case, the Interstate Commerce Commission ordered appellants to cease and desist from granting a shipper undue preference over wharfage charges. The questioned Order, which was effective for about two years expired while the case inched its way up the appellate process, and before a decision could be rendered by the U.S. Supreme Court. The Court refused to dismiss the appeal as moot, holding:

> . . . The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress.

The exception would find application in the 1969 election case of *Moore v. Ogilvie*. Petitioners were independent candidates from Illinois for the offices of electors for President and Vice President of the U.S., for the 1968 election. They questioned an Illinois statute which required candidates for the post of such electors to be nominated by means of signatures of at least 25,000 qualified voters, provided the 25,000 signatures include the signatures of 200 qualified voters spread from each of at least 50 counties. While petitioners filed petitions containing 26,500 signatures of qualified voters, they failed to satisfy the proviso.

Although the 1968 election was over by the time the case reached the U.S. Supreme Court for decision, the Court did not dismiss the case as moot, ruling that "the burden which . . . allowed to be placed on the nomination of candidates for statewide offices remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935. The problem is therefore "capable of repetition, yet evading review.""

Similarly, the U.S. Supreme Court in 1973 applied the exception in *Roe v. Wade*. There, a pregnant woman in 1970 filed a petition challenging the anti-abortion statutes of Texas and Georgia. The case was not decided until 1973 when petitioner was no longer pregnant. Despite being mooted, the U.S. Supreme Court ruled on the merits of the petition, explaining:

> The usual rule in federal cases is that an actual controversy must exist at stages of appellate or *certiorari* review, and not simply at the date the action is initiated.
>
> But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be

> effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review." . . .

By 1975, the U.S. Supreme Court would lay down two elements required to be present in a case before the exception applies. In *Weinstein v. Bradford*, the Court, explaining its ruling in *Sosna v. Iowa*, clarified that in the absence of a class action, the "capable of repetition yet evading review" doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

In Our jurisdiction, the Court would first apply the exception in *Alunan III v. Mirasol*, an election case. There, petitioners assailed a Department of the Interior and Local Government (DILG) Resolution exempting the City of Manila from holding elections for the Sangguniang Kabataan (SK) on December 4, 1992. Petitioners argued that the elections previously held on May 26, 1990 were to be considered the first under the Local Government Code. The Court was then confronted with the issue of whether the COMELEC can validly vest in the DILG control and supervision of the SK Elections. While the second elections were already held on May 13, 1996, during the pendency of the petition, the Court ruled that the controversy raised is capable of repetition yet evading review because the same issue is "likely to arise in connection with every SK election and yet, the question may not be decided before the date of such elections."

The Court would then apply the exception in the subsequent cases of *Sanlakas v. Executive Secretary*, *David v. Macapagal-Arroyo*, *Belgica v. Ochoa* and in the more recent case of *Philippine Association of Detective and Protective Agency Operators (PADPAO) v. COMELEC.*

Here, it was only on January 23, 2019 that the COMELEC En Banc rendered its assailed ruling and ultimately decided that Marquez is a nuisance candidate. After receiving a copy of the Resolution on January 28, 2019, he filed this petition on February 14, 2019. Meanwhile, the COMELEC finalized the list of senatorial candidates on January 31, 2019 started printing ballots for national candidates on February 9, 2019 and completing the printing of the same on April 26, 2019. Given this chronology of events, this Court was little wont to issue a TRO, as the same would only delay the conduct of the May 13, 2019 elections.

Moreover, given that the COMELEC appears to be applying the same rule with respect to other aspiring candidates, there is reason to believe that the same issue would likely arise in future elections. Thus, the Court deems it proper to exercise its power of judicial review to rule with finality on whether lack of proof of financial capacity is a valid ground to declare an aspirant a nuisance candidate.[112] (Citations omitted)

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[112] Id. at 4–9.

In *Marquez*, the parties did not need to prove that other aspiring candidates would file the same cases in subsequent national elections. The Commission on Elections' continuing application of its rules on nuisance candidates was enough for this Court to consider the case as capable of repetition, yet evading review.

Here, the continuing existence of Ordinance No. 7780 and the continuing sale of petitioners' publications heighten the likelihood that they, or other similar publishers, will once again be charged by the Office of the City Prosecutor of Manila with the same offense. Since the issues raised here concern local legislation and its effect on constitutional freedoms, it would be far more prudent for this Court to exercise its power of judicial review to settle the controversy. As this Court aptly stated in *David*, and as quoted[113] by the majority:

> There is no question that the issues being raised affect the public's interest, involving as they do the people's basic rights to freedom of expression, of assembly and of the press. Moreover, the Court has the duty to formulate guiding and controlling constitutional precepts, doctrines or rules. It has the symbolic function of educating the bench and the bar, and in the present petitions, the military and the police, on the extent of the protection given by constitutional guarantees. And lastly, respondents' contested actions are capable of repetition. Certainly, the petitions are subject to judicial review.[114] (Citation omitted)

IV

Before the enactment of the Revised Penal Code, questions as to what speech or publication may be considered "obscene" were analyzed within the context of Act No. 277,[115] otherwise referred to as the Philippine Libel Law.[116] Its Section 12 provided:

> SECTION 12. Any person who writes, composes, stereotypes, prints, publishes, sells, or keeps for sale, distributes, or exhibits any obscene or indecent writing, paper, book, or other matter, or who designs, copies, draws, engraves, paints or otherwise prepares any obscene picture or print, or who moulds, cuts, casts, or otherwise makes any obscene or indecent figure, or who writes, composes, or prints any notice or advertisement of any such writing, paper, book, print, or figure shall be guilty of a misdemeanor and punished by a fine of not exceeding one thousand dollars or by imprisonment not exceeding one year, or both.

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113 Ponencia, p. 13.

114 *David v. Macapagal-Arroyo*, 522 Phil. 705, 755 (2006) [Per J. Sandoval-Gutierrez, En Banc].

115 An Act Defining the Law of Libel and Threats to Publish a Libel, Making Libel and Threats to Publish a Libel Misdemeanors, Giving a Right of Civil Action Therefor, and Making Obscene or Indecent Publications Misdemeanors (1901).

116 *See People v. Kottinger*, 45 Phil. 352 (1923) [Per J. Malcolm, Second Division].

This Court was first confronted with the question of obscene publications in the 1923 case of *People v. Kottinger*.[117] In that case, an Information was filed against J.J. Kottinger, the owner of Camera Supply Company, for selling photos alleged to be obscene and indecent:

> The pictures which it is argued offend against the law on account of being obscene and indecent, disclose six different postures of non-Christian inhabitants of the Philippines. Exhibit A carries the legend "Philippines, Bontoc Woman." Exhibit A-1 is a picture of five young boys and carries the legend "Greetings from the Philippines." Exhibit A-2 has the legend "Ifugao Belle, Philippines. Greetings from the Philippines." Exhibit A-3 has the legend "Igorrot (*sic*) Girl, Rice Field Costume." Exhibit A-4 has the legend "Kalinga Girls, Philippines." Exhibit A-5 has the legend "Moros, Philippines."[118]

To determine if the pictures violated Act No. 227, this Court in *Kottinger* first had to determine what was meant by "obscene." It held:

> The word "obscene" and the term "obscenity" may be defined as meaning something offensive to chastity, decency, or delicacy. "Indecency" is an act against good behavior and a just delicacy. The test ordinarily followed by the courts in determining whether a particular publication or other thing is obscene within the meaning of the statutes, is whether the tendency of the matter charged as obscene, is to deprave or corrupt those who minds are open to such immoral influences and into whose hands a publication or other article charged as being obscene may fall. Another test of obscenity is that which shocks the ordinary and common sense of men as an indecency.
>
> The Philippine statute does not attempt to define obscenity or indecent pictures, writings, papers, or books. But the words "obscene or indecent" are themselves descriptive. They are words in common use and every person of average intelligence understands their meaning. Indeed, beyond the evidence furnished by the pictures themselves, there is but little scope for bearing on the issue of obscenity or indecency. Whether a picture is obscene or indecent must depend upon the circumstances of the case.[119]

This Court likewise noted that there were "copies of reputable magazines which circulate freely thru-out the United States and other countries, and which are admitted into the Philippines without question, containing illustrations into the Philippines without question, containing illustrations identical in nature to those forming the basis of the prosecution at bar."[120] Tested against these standards, this Court concluded that the pictures could not be considered "obscene" within the context of the law since they do not tend to offend the viewer's sensibilities:

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[117] Id.

[118] Id. at 356.

[119] Id. at 356–357 *citing* 29 Cyc., 1315; 8 R. C. L., 312; *People v. Muller*, 96 N. Y., 408 (1884); and 48 Am. Rep., 635.

[120] Id. at 360.

> The pictures in question merely depict persons as they actually live, without attempted presentation of persons in unusual postures or dress. The aggregate judgment of the Philippine community, the moral sense of all the people in the Philippines, would not be shocked by photographs of this type. We are convinced that the post-card pictures in this case cannot be characterized as offensive to chastity, or foul, or filthy.
>
> We readily understand the laudable motives which moved the Government to initiate this prosecution. We fully appreciate the sentiments of colleagues who take a different view of the case. We would be the last to offend the sensibilities of the Filipino people and to sanction anything which would hold them up to ridicule in the eyes of mankind. But we emphasize that we are not deciding a question in political theory or in social ethics. We are dealing with a legal question predicated on a legal fact, and on this question and fact, we reach the conclusion that there has not been proved a violation of section 12 of the Libel Law. When other cases predicated on other states of facts are brought to our attention, we will decide them as they arise.[121]

Interestingly, Justice George A. Malcolm, an American justice, wrote this Court's opinion. To do so, he used the same standards that would be used in an American federal court and concluded that based on these standards, an American federal court would find that the pictures were not offensive. In contrast, a Filipino justice, Justice Norberto Romualdez, dissented and opined that the same standards would not hold in Manila:

> I do not agree with the view taken by the majority as to the nature of the photographic pictures in question. While said pictures cannot, strictly, be termed obscene, they must, however, be regarded as indecent, for they are so.
>
> Such pictures offend modesty and refinement, and for this reason, they are indecent. This is shown by common sense. No woman claiming to be decent would dare to stand before the public in Manila, where said pictures were exhibited, in the same fashion as these pictures are.
>
> It is alleged that these pictures were taken from nature in non-Christian regions. We agree that in said regions they are not, perhaps, regarded as offensive to modesty, and, therefore, are accidentally not indecent there. But in the City of Manila where they were exhibited, no doubt they are.[122]

This Court would not be confronted with the same issue until the 1955 case of *People v. Go Pin*.[123] By then, however, any question before this Court as to what may be considered "obscene" was seen through the lens of Article 201 of the Revised Penal Code, which provides:

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121 Id. at 360–361.

122 J. Romualdez, Dissenting Opinion in *People v. Kottinger*, 45 Phil. 352, 361–362 (1923) [Per J. Malcolm, Second Division].

123 97 Phil. 418 (1955) [Per J. Montemayor, First Division].

> ARTICLE 201. *Immoral doctrines, obscene publications and exhibitions, and indecent shows.* — The penalty of *prision mayor* or a fine ranging from six thousand to twelve thousand pesos, or both such imprisonment and fine, shall be imposed upon:
>
> 1. Those who shall publicly expound or proclaim doctrines openly contrary to public morals;
> 2. The authors of obscene literature, published with their knowledge in any form, the editors publishing such literature, and the owners/operators of the book store or other establishments selling the same;
> 3. Those who in theaters, fairs cinematographs or any other place, shall exhibit indecent or immoral plays, scenes, acts or shows, including the following:
>
> (a) Films which tend to incite subversion, insurrection or rebellion against the State;
> (b) Films which tend to undermine the faith and confidence of the people in their Government and/or duly constituted authorities;
> (c) Films which glorify criminals or condone crimes;
> (d) Films which serve no other purpose but to satisfy the market for violence, lust or pornography;
> (e) Films which offend any race or religion;
> (f) Films which tend to abet traffic in the use of prohibited drugs;
> (g) Films contrary to law, public order, morals, good customs, established policies, lawful orders, decrees, edicts, and any or all films which in the judgment of the Board of Censors for Motion Pictures or other agency established by the Government to oversee such motion pictures are objectionable on some other legal or moral grounds.
>
> 4. Those who shall sell, give away of exhibit prints, engravings, sculptures or literature which are offensive to morals.[124]

In *Go Pin*, a Chinese citizen was charged with violation of Article 201 for exhibiting within the City of Manila "a large number of one-real 16-millimeter films about 100 feet in length each, which are allegedly indecent and/or immoral."[125] The case, however, did not specify what the films actually contained.

This Court in *Go Pin* neither defined "obscenity" nor even cited *Kottinger*. Instead, it created a standard where publications done for the sake

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[124] REV. PEN. CODE, art. 201, as amended by Presidential Decree No. 960 (1976).
[125] *People v. Go Pin*, 97 Phil. 418 (1955) [Per J. Montemayor, First Division].

of art would not be treated with the same protection as those distributed for commercial purposes:

> If such pictures, sculptures and paintings are shown in art exhibits and art galleries for the cause of art, to be viewed and appreciated by people interested in art, there would be no offense committed. However, the pictures here in question were used not exactly for art's sake but rather for commercial purposes. In other words, the supposed artistic qualities of said pictures were being commercialized so that the cause of art was of secondary or minor importance. Gain and profit would appear to have been the main, if not the exclusive consideration in their exhibition; and it would not be surprising if the persons who went to see those pictures and paid entrance fees for the privilege of doing so, were not exactly artists and persons interested in art and who generally go to art exhibitions and galleries to satisfy and improve their artistic tastes, but rather people desirous of satisfying their morbid curiosity and taste, and lust, and for love for excitement, including the youth who because of their immaturity are not in a position to resist and shield themselves from the ill and perverting effects of these pictures.[126]

Not more than two (2) years later, this Court would again apply the same standard in *People v. Padan*.[127] In *Padan*, a manager, a ticket collector, and two (2) performers were convicted of violating Article 201 for allegedly performing sexual intercourse in front of paying spectators.

This Court's shock at the offense was palpable. It was quick to denounce the crime:

> We believe that the penalty imposed fits the crime, considering its seriousness. As far as we know, this is the first time that the courts in this jurisdiction, at least this Tribunal, have been called upon to take cognizance of an offense against morals and decency of this kind. We have had occasion to consider offenses like the exhibition of still or moving pictures of women in the nude, which we have condemned for obscenity and as offensive to morals. In those cases, one might yet claim that there was involved the element of art; that connoisseurs of the same, and painters and sculptors might find inspiration in the showing of pictures in the nude, or the human body exhibited in sheer nakedness, as models in *tableaux vivants*. But an actual exhibition of the sexual act, preceded by acts of lasciviousness, can have no redeeming feature. In it, there is no room for art. One can see nothing in it but clear and unmitigated obscenity, indecency, and an offense to public morals, inspiring and causing as it does, nothing but lust and lewdness, and exerting a corrupting influence specially on the youth of the land.[128]

Art, thus, was not considered obscene if it contained a "redeeming feature." The irony, however, was that despite the apparently shocking nature

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126 Id. at 419.
127 101 Phil. 749 (1957) [Per J. Montemayor, En Banc].
128 Id. at 752.

of the offense, this Court proceeded to describe in detail the "exhibition of human 'fighting fish' [in the] actual act of coitus or copulation":[129]

> [The manager Fajardo] ordered that an army steel bed be placed at the center of the floor, covered with an army blanket and provided with a pillow. Once the spectators, about 106 in number, were crowded inside that small building, the show started. Fajardo evidently to arouse more interest among the customers, asked them to select among two girls present who was to be one of the principal actors. By pointing to or holding his hand over the head of each of the two women one after the other, and judging by the shouts of approval emitted by the spectators, he decided that defendant Marina Padan was the subject of popular approval, and he selected her. After her selection, the other woman named Concha, left. Without much ado, Fajardo selected Cosme Espinosa to be Marina's partner. Thereafter, Cosme and Marina proceeded to disrobe while standing around the bed. When completely naked, they turned around to exhibit their bodies to the spectators. Then they indulged in lascivious acts, consisting of petting, kissing, and touching the private parts of each other. When sufficiently aroused, they lay on the bed and proceeded to consummate the act of coitus in three different positions which we deem unnecessary to describe. The four or five witnesses who testified for the Government when asked about their reaction to what they saw, frankly admitted that they were excited beyond description. Then the police who were among the spectators and who were previously provided with a search warrant made the raid, arrested the four defendants herein, and took pictures of Marina and Cosme still naked and of the army bed, which pictures were presented as exhibits during the trial.[130]

None of these prior cases, however, involved constitutional questions. They merely required the interpretation of "obscenity" under the law. It was only in 1985 when, for the first time, an obscenity case invoking the constitutional right to freedom of expression was brought to this Court.

In *Gonzalez v. Katigbak*,[131] the Board of Review for Motion Pictures and Television (Board), created by Executive Order No. 876, classified the film, "Kapit sa Patalim," as "For Adults Only," and permitted its showing subject to certain changes and deletions enumerated by the Board. This prompted Jose U. Gonzalez, the president of Malaya Films, and the filmmakers, Lino Brocka, Jose F. Lacaba, and Dulce Q. Saguisag, to file a Petition for Certiorari against the Board on the basis that the classification was "without legal and factual basis and [was] exercised as impermissible restraint of artistic expression."[132]

In balancing the prohibition against obscenity and the protection of constitutionally-protected rights, this Court applied the *Hicklin* test in *Regina v. Hicklin*:[133]

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129 Id. at 753.
130 Id. at 754–755.
131 222 Phil. 225 (1985) [Per J. Fernando, En Banc].
132 Id. at 228.
133 L.R. 2 Q.B. 360 (1868).

> . . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.[134]

Thus, this Court mandated in *Gonzalez* that a work must be evaluated as a whole, rather than in its isolated passages, "applying contemporary Filipino cultural values as standard," to determine if the work is obscene and beyond the protection of freedom of expression:

> In the applicable law, Executive Order No. 876, reference was made to respondent Board "applying contemporary Filipino cultural values as standard," words which can be construed in an analogous manner. Moreover, as far as the question of sex and obscenity are concerned, it cannot be stressed strongly that the arts and letters "shall be under the patronage of the State." That is a constitutional mandate. It will be less than true to its function if any government office or agency would invade the sphere of autonomy that an artist enjoys. There is no orthodoxy in what passes for beauty or for reality. It is for the artist to determine what for him is a true representation. It is not to be forgotten that art and belles-lettres deal primarily with imagination, not so much with ideas in a strict sense. What is seen or perceived by an artist is entitled to respect, unless there is a showing that the product of his talent rightfully may be considered obscene. As so well put by Justice Frankfurter in a concurring opinion, "the widest scope of freedom is to be given to the adventurous and imaginative exercise of the human spirit" in this sensitive area of a man's personality. On the question of obscenity, therefore, and in the light of the facts of this case, such standard set forth in Executive Order No. 878 is to be construed in such a fashion to avoid any taint of unconstitutionality. To repeat, what was stated in a recent decision citing the language of Justice Malcolm in *Yu Cong Eng v. Trinidad*, it is "an elementary, a fundamental, and a universal role of construction, applied when considering constitutional questions, that when a law is susceptible of two constructions one of which will maintain and the other destroy it, the courts will always adopt the former[.]" As thus construed, there can be no valid objection to the sufficiency of the controlling standard and its conformity to what the Constitution ordains.[135]

Guided by the following standards, this Court ruled that the Board abused its discretion, finding "its perception of what constitutes obscenity appears to be unduly restrictive."[136] The abuse, however, could not be categorized as grave since:

> The adult classification given the film serves as a warning to theater operators and viewers that some contents of *Kapit* are not fit for the young. Some of the scenes in the picture were taken in a theater-club and a good

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134 *Gonzalez v. Katigbak*, 222 Phil. 225, 232 (1985) [Per J. Fernando, En Banc] *citing Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868).

135 Id. at 233–234 *citing* Executive Order No. 876 (1963), sec. 3(c); CONST. (1973), art. XV, sec. 9(2); *Kingsley v. Regents*, 360 U.S. 684, 695 (1959); *Lopez, Jr. v. Commission on Elections*, 221 Phil. 321 (1985) [Per J. Fernando, En Banc]; and *Yu Cong Eng v. Trinidad*, 47 Phil. 385 (1925) [Per J. Malcolm, Second Division].

136 Id. at 234.

> portion of the film shots concentrated on some women erotically dancing naked, or at least nearly naked, on the theater stage. Another scene on that stage depicted the women kissing and caressing as lesbians. And toward the end of the picture, there exists scenes of excessive violence attending the battle between a group of robbers and the police. The vulnerable and imitative in the young audience will misunderstand these scenes.[137]

This Court likewise suggested a "less liberal approach" when reviewing television shows:

> [U]nlike motion pictures where the patrons have to pay their way, television reaches every home where there is a set. Children then will likely will be among the avid viewers of the programs therein shown. As was observed by Circuit Court of Appeals Judge Jerome Frank, it is hardly the concern of the law to deal with the sexual fantasies of the adult population. It cannot be denied though that the State as *parens patriae* is called upon to manifest an attitude of caring for the welfare of the young.[138]

The absence of a set standard in prior cases would continue to confound this Court in the 1989 case of *Pita v. Court of Appeals*,[139] remarking that "the issue is a complicated one, in which the fine lines have neither been drawn nor divided."[140] In that case, the publisher of Pinoy Playboy, a "men's magazine,"[141] questioned the police's seizure of his magazines from peddlers along Manila sidewalks for supposedly being obscene, pornographic, and indecent.

In *Pita*, this Court first addressed the prior cases but subsequently concluded that jurisprudence tended to obfuscate, rather than illuminate, the issues:

> *Kottinger*, in its effort to arrive at a "conclusive" definition, succeeded merely in generalizing a problem that has grown increasingly complex over the years. Precisely, the question is: When does a publication have a corrupting tendency, or when can it be said to be offensive to human sensibilities? And obviously, it is to beg the question to say that a piece of literature has a corrupting influence because it is obscene, and vice-versa.
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> Apparently, *Kottinger* was aware of its own uncertainty because in the same breath, it would leave the final say to a hypothetical "community standard" — whatever that is — and that the question must supposedly be judged from case to case.
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> About three decades later, this Court promulgated *People v. Go Pin*, a prosecution under Article 201 of the Revised Penal Code. *Go Pin* was also even hazier[.]

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137 Id. at 234–235 *citing* respondents' Answer to the Amended Petition.
138 Id. at 235 *citing United States v. Roth*, 237 F 2d 796 (1956).
139 258-A Phil. 134 (1989) [Per J. Sarmiento, En Banc].
140 Id. at 143.
141 Id. at 138.

. . . .

It was *People v. Padan y Alova*, however, that introduced to Philippine jurisprudence the "redeeming" element that should accompany the work, to save it from a valid prosecution. . . .

. . . .

Padan y Alova, like *Go Pin*, however, raised more questions than answers. For one thing, if the exhibition was attended by "artists and persons interested in art and who generally go to art exhibitions and galleries to satisfy and improve their artistic tastes," could the same legitimately lay claim to "art"? For another, suppose that the exhibition was so presented that "connoisseurs of [art], and painters and sculptors might find inspiration," in it, would it cease to be a case of obscenity?

Padan y Alova, like *Go Pin* also leaves too much latitude for judicial arbitrament, which has permitted an ad lib of ideas and "two-cents worths" among judges as to what is obscene and what is art.

In a much later decision, *Gonzalez v. Kalaw Katigbak*, the Court, following trends in the United States, adopted the test: "Whether to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Kalaw-Katigbak* represented a marked departure from *Kottinger* in the sense that it measured obscenity in terms of the "dominant theme" of the work rather than isolated passages, which were central to *Kottinger* (although both cases are agreed that "contemporary community standards" are the final arbiters of what is "obscene"). *Kalaw-Katigbak* undertook moreover to make the determination of obscenity essentially a judicial question and as a consequence, to temper the wide discretion *Kottinger* had given unto law enforcers.[142]

This Court showed in *Pita* a rather progressive view of the constitutional questions involved, concluding that a society's tastes and sensibilities develop and evolve over time. What may be regarded as obscene before may not be as shocking decades later:

In the case at bar, there is no challenge on the right of the State, in the legitimate exercise of police power, to suppress smut — provided it is smut. For obvious reasons, smut is not smut simply because one insists it is smut. So is it equally evident that individual tastes develop, adapt to wide-ranging influences, and keep in step with the rapid advance of civilization. What shocked our forebears, say, five decades ago, is not necessarily repulsive to the present generation. James Joyce and D.H. Lawrence were censored in the Thirties yet their works are considered important literature today. Goya's *La Maja Desnuda* was once banned from public exhibition but now adorns the world's most prestigious museums.

But neither should we say that "obscenity" is a bare (no pun intended) matter of opinion. As we said earlier, it is the divergent

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[142] Id. at 142–144 *citing People v. Kottinger*, 45 Phil. 352 (1923) [Per J. Malcolm, En Banc]; *People v. Go Pin*, 97 Phil. 418 (1955) [Per J. Montemayor, First Division]; *People v. Padan*, 101 Phil. 749 (1957) [Per J. Montemayor, En Banc]; and *Gonzalez v. Katigbak*, 222 Phil. 225 (1985) [Per J. Fernando, En Banc].

> perceptions of men and women that have probably compounded the problem rather than resolved it.
>
> What the Court is impressing, plainly and simply, is that the question is not, and has not been, an easy one to answer, as it is far from being a settled matter. We share Tribe's disappointment over the discouraging trend in American decisional law on obscenity as well as his pessimism on whether or not an "acceptable" solution is in sight.[143] (Citation omitted)

It was also in *Pita* where the standards imposed in *Miller v. California*[144] were introduced into this jurisdiction. *Miller* refined and clarified the *Hicklin* test by expanding its guidelines:

> The latest word, however, is *Miller v. California*, which . . . established "basic guidelines," to wit: "(a) whether 'the average person, applying contemporary 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 scientific value."[145]

However, despite introducing the *Miller* test, this Court declined to apply it in *Pita*. Instead, this Court focused the issue on whether the distribution and sale of Pinoy Playboy presented a clear and present danger that would warrant State interference:

> In the final analysis perhaps, the task that confronts us is less heroic than rushing to a "perfect" definition of "obscenity," if that is possible, as evolving standards for proper police conduct faced with the problem, which, after all, is the plaint specifically raised in the petition.
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> . . . .
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> Undoubtedly, "immoral" lore or literature comes within the ambit of free expression, although not its protection. In free expression cases, this Court has consistently been on the side of the exercise of the right, barring a "clear and present danger" that would warrant State interference and action. But, so we asserted in *Reyes v. Bagatsing*, "the burden to show the existence of grave and imminent danger that would justify adverse action . . . lies on the . . . authorit[ies]."
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> "There must be objective and convincing, not subjective or conjectural, proof of the existence of such clear and present danger." "It is essential for the validity of . . . previous restraint or censorship that the . . . authority does not rely solely on his own appraisal of what the public welfare, peace or safety may require."
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> "To justify such a limitation, there must be proof of such weight and sufficiency to satisfy the clear and present danger test."

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143 Id. at 146.

144 413 U.S. 15 (1973).

145 *Pita v. Court of Appeals*, 258-A Phil. 134, 145 (1989) [Per J. Sarmiento, En Banc] *citing Miller v. California*, 413 U.S. 15 (1973).

> The above disposition must not, however, be taken as a neat effort to arrive at a solution — so only we may arrive at one — but rather as a serious attempt to put the question in its proper perspective, that is, as a genuine constitutional issue.[146] (Citations omitted)

This Court's reluctance to apply the *Miller* test in *Pita* was not a hindrance in *Fernando v. Court of Appeals*.[147] In *Fernando*, the petitioners were charged with violation of Article 201 for the sale and exhibition of allegedly obscene magazines and VHS tapes. This Court, after a review of the relevant jurisprudence, conceded that "[i]t seems futile at this point to formulate a perfect definition of obscenity that shall apply in all cases."[148]

This Court encouraged the application of the *Miller* test in determining obscenity, but was quick to point out that "it would be a serious misreading of *Miller* to conclude that the trier of facts has the unbridled discretion in determining what is 'patently offensive.'"[149] Instead, it mandated:

> No one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct. Examples included (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[150]

Using these examples as basis, this Court concluded that the confiscated materials, being obscene, violated Article 201 of the Revised Penal Code. It affirmed the lower courts' finding that the pictures and the VHS tapes, which showed nude men and women having sex, "exhibited indecent and immoral scenes and acts."[151]

The latest pronouncement upholding the *Miller* test was in the 2009 case of *Soriano v. Laguardia*,[152] where this Court stated that "a patently offensive utterance would come within the pale of the term obscenity should it appeal to the prurient interest of an average listener applying contemporary standards."[153]

The *Miller* test provides the current guidelines to distinguish between protected speech and obscenity. Any legislation, whether local or national, that goes beyond these guidelines run the risk of violating constitutionally-

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146 Id. at 147.
147 539 Phil. 407 (2006) [Per J. Quisumbing, Third Division].
148 Id. at 417.
149 Id. *citing Jenkins v. Georgia*, 418 U.S. 153 (1974).
150 Id. *citing Jenkins v. Georgia*, 418 U.S. 153 (1974) and *Miller v. California*, 413 U.S. 15 (1973).
151 Id. at 418.
152 605 Phil. 43 (2009) [Per J. Velasco, Jr., En Banc].
153 Id. at 98.

protected freedoms. Thus, they must be struck down as unconstitutional.

V

Before proceeding, this Court must recognize certain views to be considered when faced with the issue of offensive and obscene language and imagery as protected speech and expression.

Legal scholar Catharine MacKinnon (MacKinnon) submits that whenever courts discuss obscenity or pornography, there is an inherent conflict between the doctrines on free speech and gender equality.[154] The standard to measure whether obscene speech is unprotected speech is if it is "puerile," or when it can give a penis an erection.[155] To Mackinnon, framing issues based on men's reactions to obscene expression perpetuates the social reality that women are subordinate to men, since it is *men's* speech that is protected when an obscene expression is held as constitutional.[156]

MacKinnon elaborates that in treating pornography as protected expression, the State only protects men's freedom of speech. A woman's freedom of speech is trampled.[157] When an obscene material is held constitutional, it is concluded that the material did not offend *men's* sensibilities. No actual discussion is held on whether the material tends to exploit *women*.[158] This is the continuing flaw of anti-obscenity regulations. Each time pornography is held as protected expression, this inequality is perpetuated. It becomes more integrated into the social consciousness, effectively silencing women, and rendering any argument on inequality as inconsequential.[159]

This perceived inequality has never been addressed in this jurisdiction. This Court's application of the *Miller* test, as with the earlier guidelines, is premised on the idea of equality: that men and women are equal and are to be viewed equally. All prior cases, however, were written by *male* Justices, and necessarily pertained to the male's point of view of equality that women are inferior to men.

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154 *See* CATHARINE MACKINNON, ONLY WORDS (1993). *See also* CATHARINE MACKINNON, FROM PORNOGRAPHY, CIVIL RIGHTS, AND SPEECH, IN DOING ETHICS (2009) and J. Leonen, Dissenting Opinion in *Disini, Jr. v. Secretary of Justice*, 727 Phil. 28, 301–430 (2014) [Per J. Abad, En Banc].

155 *See* CATHARINE MACKINNON, FROM PORNOGRAPHY, CIVIL RIGHTS, AND SPEECH, IN DOING ETHICS (2009). *See also* 2 CATHARINE MACKINNON, *Not a Moral Issue*, YALE LAW & POL'Y REV. (Spring, 1984).

156 *See* CATHARINE MACKINNON, ONLY WORDS (1993). *See also* CATHARINE MACKINNON, FROM PORNOGRAPHY, CIVIL RIGHTS, AND SPEECH, IN DOING ETHICS (2009) and J. Leonen, Dissenting Opinion in *Disini, Jr. v. Secretary of Justice*, 727 Phil. 28, 301–430 (2014) [Per J. Abad, En Banc].

157 Id.

158 *See* CATHARINE MACKINNON, FROM PORNOGRAPHY, CIVIL RIGHTS, AND SPEECH, IN DOING ETHICS (2009) and 2 CATHARINE MACKINNON, NOT A MORAL ISSUE, YALE LAW & POL'Y REV. (Spring, 1984).

159 *See* CATHARINE MACKINNON, ONLY WORDS (1993); *See also* CATHARINE MACKINNON, FROM PORNOGRAPHY, CIVIL RIGHTS, AND SPEECH, IN DOING ETHICS (2009); and J. Leonen, Dissenting Opinion in *Disini, Jr. v. Secretary of Justice*, 727 Phil. 28, 301–430 (2014) [Per J. Abad, En Banc].

MacKinnon's views, however, are not without criticisms. Scholar Edwin Baker (Baker) submits that her theory fails to recognize the primary justification for protecting expression in relation to individual liberty.[160] It fails to recognize that people can induce change and transform their social and political environments through expressive behavior.[161] Their participation in this process is within their protected freedoms:

> Even expression that is received less as argument than "masturbation material", becomes part of a cultural or behavioral "debate" about sexuality, about the nature of human relations, and about pleasure and morality, as well as about the roles of men and women. Historically, puritanical attempts to suppress sexually explicit materials appear largely designed to shut down this cultural contestation in favor of a traditional practice of keeping women in the private sphere. Opening up this cultural debate has in the past, and can in the future, contribute to progressive change.[162] (Citations omitted)

Baker likewise suggests that MacKinnon disregards the view that the audience of the obscene expression is presumed to be composed of autonomous agents who are responsible for their actions and are capable of making their own moral choices.[163]

For Baker, the expression should be treated as independent of the offense. The speaker's obscene expression does not by itself give rise to the offense. Any possible harm that could be caused by the expression is through how the receiver, who has the autonomy to think and act for himself or herself, responds to the expression:

> Part of the reason to protect speech, or, more broadly, to protect liberty, is a commitment to the view that people should be able to participate in constructing their world, or to the belief that this popular participation provides the best way to move toward a better world. The guarantee of liberty represents a deep faith in people and in democracy.[164] (Citation omitted)

Regardless of these seemingly conflicting views, discussions on obscene expression as protected speech still largely remain a debate on the *male* reaction to the expression. Perhaps, in future cases, this inequality would be raised by the parties and addressed by this Court. For now, the *Miller* test

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160 *See* EDWIN BAKER, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181, 1197 (1994) and J. Leonen, Dissenting Opinion in *Disini, Jr. v. Secretary of Justice*, 727 Phil. 28, 301–430 (2014) [Per J. Abad, En Banc].

161 Id. and J. Leonen, Dissenting Opinion in *Disini, Jr. v. Secretary of Justice*, 727 Phil. 28, 301–430 (2014) [Per J. Abad, En Banc].

162 Id. at 1198.

163 See EDWIN BAKER, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181 (1994) and J. Leonen, Dissenting Opinion in *Disini, Jr. v. Secretary of Justice*, 727 Phil. 28, 301–430 (2014) [Per J. Abad, En Banc].

164 Id. at 1204.

would have to suffice in determining whether an obscenity regulation transgresses on protected freedoms.

VI

This Court's task here is not to determine whether a certain work or publication is obscene, but rather, whether a certain local legislation follows the set guidelines to protect speech and expression.

When confronted with the constitutionality of a statute, this Court determines whether a statute is valid "on its face" or "as applied."[165] In his opinion in *Estrada v. Sandiganbayan*,[166] Justice Vicente Mendoza explains:

> A facial challenge is allowed to be made to a vague statute and to one which is overbroad because of possible "chilling effect" upon protected speech. The theory is that "[w]hen statutes regulate or proscribe speech and no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution, the transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with narrow specificity." The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that the protected speech of others may be deterred and perceived grievances left to fester because of possible inhibitory effects of overly broad statutes.
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> This rationale does not apply to penal statutes. Criminal statutes have general *in terrorem* effect resulting from their very existence, and, if facial challenge is allowed for this reason alone, the State may well be prevented from enacting laws against socially harmful conduct. In the area of criminal law, the law cannot take chances as in the area of free speech.
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> The overbreadth and vagueness doctrines then have special application only to free speech cases. They are inapt for testing the validity of penal statutes. As the U.S. Supreme Court put it, in an opinion by Chief Justice Rehnquist, "we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." In *Broadrick v. Oklahoma*, the Court ruled that "claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate only spoken words" and, again, that "overbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct." For this reason, it has been held that "a facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." As for the vagueness doctrine, it is said that a litigant may challenge a statute on its face only if it is vague in all its possible applications. "A plaintiff who

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[165] *See* J. Mendoza, Separate Opinion in *Cruz v. Secretary of Environment and Natural Resources*, 400 Phil. 904, 1092 (2000) [Per Curiam, En Banc].

[166] 421 Phil. 290, 430–432 (2001) [Per J. Bellosillo, En Banc].

> engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."
>
> In sum, the doctrines of strict scrutiny, overbreadth, and vagueness are analytical tools developed for testing "on their faces" statutes in free speech cases or, as they are called in American law, First Amendment cases. They cannot be made to do service when what is involved is a criminal statute. With respect to such statute, the established rule is that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." As has been pointed out, "vagueness challenges in the First Amendment context, like overbreadth challenges typically produce facial invalidation, while statutes found vague as a matter of due process typically are invalidated [only] 'as applied' to a particular defendant." Consequently, there is no basis for petitioner's claim that this Court review the Anti-Plunder Law on its face and in its entirety.[167]

A statute may be declared invalid if it is vague—when its provisions fail to "inform those who are subject to it what conduct on their part will render them liable to its penalties."[168] Specifically:

> A statute or act suffers from the defect of vagueness when it lacks comprehensible standards that men of common intelligence must necessarily guess at its meaning and differ as to its application. It is repugnant to the Constitution in two respects: (1) it violates due process for failure to accord persons, especially the parties targeted by it, fair notice of the conduct to avoid; and (2) it leaves law enforcers unbridled discretion in carrying out its provisions and becomes an arbitrary flexing of the Government muscle.[169] (Citation omitted)

In *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*,[170] this Court clarified that a vagueness challenge may only be invoked in "as applied" cases. In *Disini, Jr. v. Secretary of Justice*,[171] however, this Court expanded its application to facial challenges, on the ground that "[w]hen a penal statute encroaches upon the freedom of speech, a facial challenge grounded on the void-for-vagueness doctrine is acceptable."[172]

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

168 *See* J. Leonen, Dissenting Opinion in *Lagman v. Medialdea*, 812 Phil. 179, 749–750 (2017 [Per J. Del Castillo, En Banc] *citing People v. Dela Piedra*, 403 Phil. 31 (2001) [Per J. Kapunan, First Division].

169 *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, 646 Phil. 452, 488 (2010) [Per J. Carpio Morales, En Banc].

170 646 Phil. 452 (2010) [Per J. Carpio Morales, En Banc].

171 727 Phil. 28 (2014) [Per J. Abad, En Banc].

172 Id. at 121.

The overbreadth doctrine, on the other hand, invalidates a statute when it "offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulations may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[173]

Southern Hemisphere limits the application of the overbreadth doctrine only to freedom of expression cases:

> By its nature, the overbreadth doctrine has to necessarily apply a facial type of invalidation in order to plot areas of protected speech, inevitably almost always under situations not before the court, that are impermissibly swept by the substantially overbroad regulation. Otherwise stated, a statute cannot be properly analyzed for being substantially overbroad if the court confines itself only to facts as applied to the litigants.[174]

The same case, however, clarifies that "the primary criterion in the application of the doctrine is not whether the case is a freedom of speech case, but rather, whether the case involves an as-applied or a facial challenge."[175] In particular:

> In restricting the overbreadth doctrine to free speech claims, the Court, in at least two cases, observed that the US Supreme Court has not recognized an overbreadth doctrine outside the limited context of the First Amendment, and that claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate only spoken words. In *Virginia v. Hicks*, it was held that rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or speech-related conduct. Attacks on overly broad statutes are justified by the "transcendent value to all society of constitutionally protected expression."[176] (Citations omitted)

Thus, in determining whether the void-for-vagueness doctrine and the overbreadth doctrine should apply, the primary consideration is not whether the case is a freedom of expression case. Instead, for the void-for-vagueness doctrine, the primary consideration is whether there is a violation of the fundamental right to due process. As for the overbreadth doctrine, the question must be whether the case involves a facial challenge or an "as applied" challenge.[177]

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[173] *Adiong v. Commission on Elections*, G.R. No. 103956, March 31, 1992, 207 SCRA 712, 719 [Per Gutierrez, Jr., En Banc].

[174] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, 646 Phil. 452, 490 (2010) [Per J. Carpio Morales, En Banc]

[175] *See* J. Leonen, Dissenting Opinion in *Lagman v. Medialdea*, 812 Phil. 179, 754–755 (2017) [Per J. Del Castillo, En Banc].

[176] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, 646 Phil. 452, 490–491 (2010) [Per J. Carpio Morales, En Banc].

[177] *See* J. Leonen, Dissenting Opinion in *Lagman v. Medialdea*, 812 Phil. 179 (2017) [Per J. Del Castillo, En Banc].

The only exception to this analysis is when the assailed ordinance prohibits child pornography. This type of medium is explicitly prohibited by Republic Act No. 9775.[178] It is, thus, beyond the pale of constitutionally-protected speech.

Petitioners in this case assail the constitutionality of Ordinance No. 7780 on the ground that its provisions were unduly expansive and encroaches upon protected expression. They appear to be arguing that the statute, on its face, was overbroad. Thus, an overbreadth analysis must be applied to determine the validity of Ordinance No. 7780.

In *Nicolas-Lewis*, this Court subjected Section 36.8[179] of Republic Act No. 9189, as amended,[180] to a facial challenge on the ground of overbreadth, as it was alleged that this provision, on its face, violated the right to free speech, expression, and assembly, as well as the right of suffrage.[181] This Court stated:

> Foremost, a facial review of a law or statute encroaching upon the freedom of speech on the ground of overbreadth or vagueness is acceptable in our jurisdiction. Under the overbreadth doctrine, a proper governmental purpose, constitutionally subject to state regulation, may not be achieved by means that unnecessarily sweep its subject broadly, thereby invading the area of protected freedoms. Put differently, an overbroad law or statute needlessly restricts even constitutionally-protected rights. On the other hand, a law or statute suffers from vagueness when it lacks comprehensible standards that men of common intelligence must necessarily guess at its meaning and differ as to its application.
>
> It is noteworthy, however, that facial invalidation of laws is generally disfavored as its results to entirely striking down the challenged law or statute on the ground that they may be applied to parties not before the Court whose activities are constitutionally protected. It disregards the case and controversy requirement of the Constitution in judicial review, and permits decisions to be made without concrete factual settings and in sterile abstract contexts, deviating thus from the traditional rules governing constitutional adjudication. Hence, an on-its-face invalidation of the law has consistently been considered as a "manifestly strong medicine to be used "sparingly and only as a last resort."
>
> The allowance of a review of a law or statute on its face in free speech cases is justified, however, by the aim to avert the "chilling effect"

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[178] Anti-Child Pornography Act of 2009.

[179] Republic Act No 9189 (2003), sec. 24, as amended by Republic Act No. 10590 (2013), sec 37 provides:

SECTION 37. Section 24 of the same Act is hereby renumbered as Section 36 and is amended to read as follows:

SEC. 36. Prohibited Acts. - In addition to the prohibited acts provided by law, it shall be unlawful:

. . . .

36.8. For any person to engage in partisan political activity abroad during the thirty (30)-day overseas voting period[.]

[180] The Overseas Voting Act of 2013.

[181] *Nicolas-Lewis v. Commission on Elections*, G.R. No. 223705, August 13, 2019, <http://sc.judiciary.gov.ph/8730/> [Per J. Reyes, Jr., En Banc].

on protected speech, the exercise of which should not at all times be abridged. The Court elucidated:

> The theory is that "[w]hen statutes regulate or proscribe speech and no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution, the transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with narrow specificity.[182] (Citations omitted)

The questioned legislation here, Ordinance No. 7780, considers the following acts or materials as "obscene," and therefore, illegal:

> A. Obscene shall refer to any material ***or*** act that is indecent, erotic, lewd or offensive, ***or*** contrary to morals, good customs ***or*** religious beliefs, principles or doctrines, ***or*** to any material or act that tends to corrupt or depr[a]ve the human mind, ***or*** is calculated to excite impure imagination or arouse prurient interest, ***or*** is unfit to be seen or heard, ***or*** which violates the proprieties of language or behavior, regardless of the motive of the printer, publisher, seller, distributor, performer or author of such act or material, such as but not limited to:
>
> 1. Printing, showing, depicting or describing sexual acts;
> 2. Printing, showing, depicting or describing children in sexual acts;
> 3. Printing, showing, depicting or describing completely nude human bodies; and
> 4. Printing, showing, depicting or describing the human sexual organs or the female breasts.

The question before this Court is whether the enumeration in the Ordinance is so overbroad that it invades the areas of protected freedoms. We are asked to resolve whether it contains, on its face, provisions that result in a "chilling effect" on constitutionally-protected speech and expression.

The majority submits that "a facial overbreadth challenge is improper as against an anti-obscenity statute"[183] since obscenity has always been considered unprotected speech.

However, before speech may be considered obscene—and therefore, unprotected speech—prior legislation must first declare it to be so. Jurisprudence has yet to accept the idea of any speech or expression that is obscene per se. Thus, anti-obscenity statutes may still be subjected to a constitutional challenge to determine if they violate certain constitutional freedoms. Only when the statute overcomes questions of overbreadth can any

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[182] Id. at 9–10.
[183] Ponencia, p. 15.

speech or expression proscribed by it be considered obscene or unprotected speech.

The problem in this case is *how* to determine if the provisions of Ordinance No. 7780 are overbroad. This Court must, thus, resort to more specific tests, and in this particular instance, the *Miller* test suffices.

As Justice Estela Perlas-Bernabe (Justice Perlas-Bernabe) notes, "*Miller* is not – strictly speaking – the test to determine the constitutionality of a particular ordinance or statute."[184] It "provides the prevailing proper standard to determine what is obscene[.]"[185] Thus, a questioned anti-obscenity ordinance may be rendered unconstitutional, not because it violates the *Miller* test, but because it violates substantive due process under the overbreadth analysis.[186]

To be sure, the *Miller* test is not the only test that has provided guidelines on obscenity. The MacKinnon-Dworkin test, after MacKinnon and Andrea Dworkin (Dworkin), provides a different definition of pornography:

> Pornography is the graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things, or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures or positions of sexual submission, servility, or display; or (vi) women's body parts—including but not limited to vaginas, breasts, or buttocks—are exhibited such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.
>
> The use of men, children, or transsexuals in the place of women in [the paragraph] above is also pornography.[187]

Unlike the *Miller* test, the MacKinnon-Dworkin test examines particular depictions of obscenity, and not the work when viewed as a whole. It concerns itself with the prohibition of obscene works, not merely because they appeal to prurient interest, but because they tend to subordinate women.

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184 J. Perlas-Bernabe, Dissent, p. 5.
185 Id.
186 Id. at 4.
187 ANDREA DWORKIN AND CATHARINE MACKINNON, CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY, 36 (2nd ed., 1988).

For MacKinnon and Dworkin, pornography is "a practice of civil inequality on the basis of gender,"[188] and law is the specific vehicle for which this inequality may be corrected. The MacKinnon-Dworkin test espouses an absolute prohibition on pornography, as it conditions the viewers' minds to believe that the actors, usually the female actors, are subordinate and cannot be treated as equal.[189]

However, the MacKinnon-Dworkin test has since been struck down in *American Booksellers Association v. Hudnut*,[190] a case heard in the United States Court of Appeals Seventh Circuit and summarily affirmed by the United States Supreme Court.[191]

In that case,[192] an Indianapolis anti-obscenity ordinance, which was primarily drafted by MacKinnon and Dworkin, was questioned before the courts. The district court declared it unconstitutional as it tended to regulate speech rather than the conduct involved. The circuit court agreed, since the premise of MacKinnon and Dworkin's theory proposes that depictions of subordinate women perpetuates men's continued subordination of women. According to the circuit court:

> Sexual responses often are unthinking responses, and the association of sexual arousal with the subordination of women therefore may have a substantial effect. But almost all cultural stimuli provoke unconscious responses. Religious ceremonies condition their participants. Teachers convey messages by selecting what not to cover; the implicit message about what is off limits or unthinkable may be more powerful than the messages for which they present rational argument. Television scripts contain unarticulated assumptions. People may be conditioned in subtle ways. If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.
>
> It is possible to interpret the claim that the pornography is the harm in a different way. Indianapolis emphasizes the injury that models in pornographic films and pictures may suffer. The record contains materials depicting sexual torture, penetration of women by red-hot irons and the like. These concerns have nothing to do with written materials subject to the statute, and physical injury can occur with or without the "subordination" of women.[193]

The questioned ordinance in *American Booksellers Association* was seen as overbroad since it tended to encroach on protected speech. Thus, the entire ordinance was struck down as unconstitutional based on the very definition of what may be considered pornography:

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188 Id. at 31.
189 Id. at 38–39.
190 771 F.2d 323 (7th Cir. 1985).
191 475 U.S. 1001 (1986).
192 771 F.2d 323 (7th Cir. 1985).
193 Id.

> The definition of "pornography" is unconstitutional. No construction or excision of particular terms could save it. The offense of trafficking in pornography necessarily falls with the definition. We express no view on the district court's conclusions that the ordinance is vague and that it establishes a prior restraint. Neither is necessary to our judgment. We also express no view on the argument presented by several amici that the ordinance is itself a form of discrimination on account of sex.
>
> Section 8 of the ordinance is a strong severability clause, and Indianapolis asks that we parse the ordinance to save what we can. If a court could do this by surgical excision, this might be possible. But a federal court may not completely reconstruct a local ordinance, and we conclude that nothing short of rewriting could save anything.[194] (Citation omitted)

Since the MacKinnon-Dworkin test is in itself overbroad, this Court is constrained to apply the *Miller* test.

This Court acknowledges that Ordinance No. 7780 was enacted before the promulgation of *Miller*.[195] But as discussed earlier, *Miller* merely refined *Hicklin*,[196] which provided:

> . . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.[197]

Gonzalez,[198] where the *Hicklin* test was applied, had already been in existence when Ordinance No. 7780 was enacted. *Miller* merely consolidates and refines the standards in *Hicklin* and the other cases that came before it.

Justice Antonio Carpio, in his opinion in *Soriano*, succinctly provides an illuminating history of these cases and its subsequent application in this jurisdiction:

> One of the established exceptions in freedom of expression is speech characterized as obscene. I will briefly discuss obscenity as the majority opinion characterized the subject speech in this case as obscene, thereby taking the speech out of the scope of constitutional protection.
>
> The leading test for determining what material could be considered obscene was the famous *Regina v. Hicklin* case wherein Lord Cockburn enunciated thus:

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194 Id.
195 413 U.S. 15 [1973].
196 LR 3 QB 360 (1868).
197 *Gonzalez v. Katigbak*, 222 Phil. 225, 232 (1985) [Per J. Fernando, En Banc] *citing Regina v. Hicklin*, LR 3 QB 360 (1868).
198 222 Phil. 225 (1985) [Per J. Fernando, En Banc].

> I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

Judge Learned Hand, in *United States v. Kennerly*, opposed the strictness of the Hicklin test even as he was obliged to follow the rule. He wrote:

> I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time.

Roth v. United States laid down the more reasonable and thus, more acceptable test for obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Such material is defined as that which has "a tendency to excite lustful thoughts," and "prurient interest" as "a shameful or morbid interest in nudity, sex, or excretion."

Miller v. California merely expanded the *Roth* test to include two additional criteria: "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and the work, taken as whole, lacks serious literary, artistic, political, or scientific value." The basic test, as applied in our jurisprudence, extracts the essence of both *Roth* and *Miller* – that is, whether the material appeals to prurient interest.[199]

The majority in this case, however, takes exception to this Court's application of the *Miller* test and suggests that the proper recourse should have been to proceed with trial so that the trial court could rule on the factual issues, adopt the *Miller* test, and receive evidence. It suggests that the case should have first undergone the appellate process before review by this Court, as that "is the process observed by the US Supreme Court in all of the obscenity cases cited . . . which led to the adoption of the *Miller* standards in the US."[200]

In this case, petitioners were criminally charged by the Office of the City Prosecutor of Manila before filing this Petition. While this case was pending, however, that criminal case was dismissed. Had it continued, there would be no doubt that it would have undergone the appellate process suggested by the majority and would have eventually been reviewed by this Court. The same discussion would, undoubtedly, be undertaken by this Court.

In any case, there is no need to make a factual determination of the issues when the mode of analysis to be applied is a facial overbreadth

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[199] J. Carpio, Dissenting Opinion in *Soriano v. Laguardia*, 629 Phil. 262, 286–287 (2010) [Per J. Velasco, Jr., En Banc]. citing *Regina v. Hicklin*, L.R. 3 Q.B. 360, 371 (1868); *United States v. Kennerly*, 209 F. 119, 120 (S.D.N.Y. 1913); *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973); and *Gonzalez v. Katigbak*, 222 Phil. 225 (1985) [Per J. Fernando, En Banc].

[200] Ponencia, p. 21.

challenge. The constitutionality of the statute is determined "on its face," rather than "as applied," which requires factual antecedence. As recent cases present, resolving questions of fact when subsequent events have already rendered the facts moot is unnecessary.

In *Marquez*, this Court did not delve into the factual issue of whether the petitioner had the financial capacity to launch a nationwide senatorial campaign, since the conduct of the elections already rendered this issue moot.[201]

In *Nicolas-Lewis*, no questions of fact were to be resolved since the petitioner, a private citizen with dual citizenship, was not alleged to have been campaigning for certain candidates abroad. She merely argued that the questioned provision prevented her from doing so.[202]

Even certain obscenity cases did not require the conduct of an appellate process before this Court exercised its power of judicial review.

In *Gonzalez*,[203] the Petition was filed directly before this Court questioning the Board's resolution classifying "Kapit sa Patalim" as "For Adults Only." There was no question raised as to whether the issue should first be resolved by the trial court or whether the trial court should first receive evidence that moviegoers and critics found the movie too obscene for commercial distribution. On the contrary, this Court assumed jurisdiction over the certiorari petition.

In *Soriano*,[204] this Court did not hesitate to entertain a Petition directly filed before it assailing decision of the Movie and Television Review and Classification Board to suspend the petitioner from his television program for allegedly uttering obscene words. It was unnecessary that the case be first reviewed by the Court of Appeals before this Court could fully resolve the issues raised by the parties.

While the majority is correct in stating that cases in the United States that led to the development of the *Miller* test underwent an appellate process, that is not the case in this jurisdiction. Thus, while this Court may consider the *Miller* test as a guideline, prior cases in our jurisdiction should still take precedence to that resolved by foreign courts.

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[201] *Marquez v. Commission on Elections*, G.R. No. 244274, September 10, 2019, <http://sc.judiciary.gov.ph/8153/> [Per J. Jardeleza, En Banc].

[202] *Nicolas-Lewis v. Commission on Elections*, G.R. No. 223705, August 13, 2019, <http://sc.judiciary.gov.ph/8730/> [Per J. Reyes, Jr., En Banc].

[203] 222 Phil. 225 (1985) [Per J. Fernando, En Banc].

[204] 605 Phil. 43 (2009) [Per J. Velasco, Jr, En Banc].

The *Miller* test may have vague application to this case, since what is questioned is the validity of an ordinance, not the prurience of a certain published work. This case, however, is not the proper occasion for this Court to carve out a test that specifically applies to anti-obscenity regulation. We are called to determine the validity of an ordinance as it applies to an *entire* publication and not merely to a specific utterance or expression. For now, this Court should have applied the *Miller* test, which, as discussed, is currently the dominant test to determine whether the statute is overbroad, and thus, violative of substantive due process.

VII

Petitioners argue that Ordinance No. 7780 violates the guidelines in the *Miller* test for the following reasons: (1) its expansive language fails to consider contemporary community standards in its application; (2) it considers certain acts as obscene without determining whether it was made in a patently offensive manner; and (3) it fails to take into account whether a certain expression, when taken as a whole, lacks serious literary, artistic, political, or scientific value.

Under Ordinance No. 7780, "obscene" is defined as:

> [A]ny material or act that is indecent, erotic, lewd or offensive, or contrary to morals, good customs or religious beliefs, principles or doctrines, or to any material or act that tends to corrupt or depr[a]ve the human mind, or is calculated to excite impure imagination or arouse prurient interest, or is unfit to be seen or heard, or which violates the proprieties of language or behavior, regardless of the motive of the printer, publisher, seller, distributor, performer or author of such act or material, such as but not limited to:
>
> 1. Printing, showing, depicting or describing sexual acts;
> 2. Printing, showing, depicting or describing children in sexual acts;
> 3. Printing, showing, depicting or describing completely nude human bodies; and
> 4. Printing, showing, depicting or describing the human sexual organs or the female breasts[.][205]

Pornography, on the other hand, is defined as:

> [S]uch objects or subjects of photography, movies, music records, video and VHS tapes, laser discs, billboards, television, magazines, newspapers, tabloids, comics and live shows calculated to excite or stimulate sexual drive or impure imagination, regardless of the motive of the author thereof, such as, but not limited to the following:
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> 1. Performing live sexual acts in whatever form;

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[205] *Rollo*, p. 39.

> 2. Those other than live performances showing, depicting or describing sexual acts;
> 3. Those showing, depicting or describing children in sex acts;
> 4. Those showing, depicting, or describing completely nude human body, or showing, depicting or describing the human sexual organs or the female breasts. [206]

The Ordinance does not take into account contemporary community standards in determining what is considered obscene.

The Ordinance fails to specify what material or act may be considered "indecent, erotic, lewd or offensive, or contrary to morals, good customs or religious beliefs, principles or doctrines, or to any material or act that tends to corrupt or depr[a]ve the human mind, or is calculated to excite impure imagination or arouse prurient interest, or is unfit to be seen or heard, or which violates the proprieties of language or behavior[.]" Instead, it casts a wide net that could encompass all kinds of behavior without acknowledging what the present standards of the community are.

Petitioners submit that 40% of their readership is female.[207] This is an indication that the "community" by which contemporary standards are to be held do not necessarily believe that petitioners' magazines appeal purely to male prurient interests. Even in *Pita*, this Court acknowledged that what may be offensive years ago could be inoffensive now.[208] The Ordinance's failure to indicate what it considers offensive within contemporary community standards is fatal.

Worse, the prohibitions used in the Ordinance include material that is contrary to religious beliefs.

Ordinance No. 7780 does not mention which religion's beliefs it seeks to protect, but considering that its sponsor is Abante, a Baptist pastor,[209] and that it was he who filed the criminal case against petitioners, it can be presumed that the Ordinance seeks to penalize those that offend the sensibilities of Baptists or similar religions.

Article II, Section 6 of the Constitution provides that there shall be an inviolable separation of Church and State. Article III, Section 5 is even more explicit:

> SECTION 5. No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or

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206 Id.
207 Id. at 19.
208 *Pita v. Court of Appeals*, 258-A Phil. 134 (1989) [Per J. Sarmiento, En Banc].
209 *Rollo*, p. 45.

> preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.

A local legislation that bases its standards of morality on a particular religion only tends to establish a dominant religion, to the exclusion of all other faiths. A religion may not consider a certain material as offensive, and another may even view human sexuality as part of the religious experience. To arbitrarily create legislation based on the puritanical views of a specific religion is not merely insensitive; it is unconstitutional.

The language used by the Ordinance is likewise unduly expansive. It tends to punish every single print, show, depiction, or description of nudity and sex seemingly without distinction. For example, it unnecessarily lumps together eroticism with lewdness, "regardless of the motive of the printer, publisher, seller, distributor, performer[,] or author[.]"[210] It even singles out the female breast as lewder and more offensive than other sexual organs.

Under the *Miller* test, a material is seen as obscene if it is "patently offensive." Yet, of the examples listed, only that of child pornography is, on its face, offensive. Even without this Ordinance, child pornography would still be illegal under Republic Act No. 9775, or the Anti-Child Pornography Act of 2009.

Moreover, under the Ordinance's expansive language, the motive of the author, performer, or publisher is disregarded. Any work is immediately categorized as obscene if it is deemed "indecent, erotic, lewd or offensive, or contrary to morals, good customs or religious beliefs, principles or doctrines, or to any material or act that tends to corrupt or depr[a]ve the human mind, or is calculated to excite impure imagination or arouse prurient interest, or is unfit to be seen or heard, or which violates the proprieties of language or behavior[.]"[211]

Such disregard of the author, performer, or publisher's motives contradicts the Ordinance's very own proviso, as indicated in Section 4:

> [T]his ordinance shall not apply to materials printed, distributed, exhibited, sold, filmed, rented, viewed or produced by reason of or in connection with or in furtherance of science and scientific research and medical or medically related art, profession, and for educational purposes.[212]

An artist may, for instance, intend for his or her painting to be erotic, and the painting will still be considered as art. Certainly, the artist does not mean for the painting to be patently offensive. But by penalizing the artist

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[210] Id. at 39.
[211] Id.
[212] Id. at 40.

regardless of the motive, the Ordinance imposes an arbitrary restraint on that artist's freedom of expression.

The Ordinance also fails to take into account whether the materials, when taken as a whole, lack serious literary, artistic, political, or scientific value.

In disregarding the motives of the printer, publisher, distributor, or seller, the Ordinance broadly presumes that an entire publication can only contain obscene material and nothing more. Petitioners point out that the allegedly offensive magazines featured "literature from award-winning writers such as Marguerite de Leon, Anna Felicia Sanchez[,] and Norman Wilwayco."[213] Parts of the magazine may appeal to prurient interests, but some parts are heralded for having serious literary value.

During the martial law period, journalists looked to small publications to skirt censorship. Called the "mosquito press," these journalists published searing articles on the dictatorship that continued to reach the people.[214] The mosquito press would not have survived this Ordinance since it prohibits the entire publication, regardless of whatever important articles may have been published in it.

The Ordinance likewise imposes criminal liability on the president and board members of a publication, regardless of whether they were personally involved in actually publishing the allegedly obscene material. In this case, Summit Media also publishes several other magazines outside the realm of the Ordinance. However, because of its provisions, the president and the board members may be held criminally liable for offenses they may have no personal knowledge of, and may consequently be prevented from doing their jobs. This is an arbitrary restraint on their legitimate pursuit of business.

VIII

Article III, Section 1 of the Constitution provides:

> SECTION 1. 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 under this provision encompasses two (2) concepts: (1) procedural due process; and (2) substantive due process. In *Ermita-Malate*

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213 Id. at 24.

214 *See* Ria de Fiesta, *How women journalists pushed limits during Martial Law*, ABS-CBN NEWS ONLINE, February 24, 2014, <https://news.abs-cbn.com/focus/02/24/14/how-women-journalists-pushed-limits-during-martial-law> (last accessed on September 23, 2019).

Hotel and Motel Operators Association, Inc. v. The Honorable City Mayor of Manila:[215]

> There is no controlling and precise definition of due process. It furnishes though a standard to which governmental action should conform in order that deprivation of life, liberty or property, in each appropriate case, be valid. What then is the standard of due process which must exist both as a procedural and as substantive requisite to free the challenged ordinance, or any government action for that matter, from the imputation of legal infirmity; sufficient to spell its doom? It is responsiveness to the supremacy of reason, obedience to the dictates of justice. Negatively put, arbitrariness is ruled out and unfairness avoided. To satisfy the due process requirement, official action, to paraphrase Cardozo, must not outrun the bounds of reasons and result in sheer oppression. Due process is thus hostile to any official action marred by lack of reasonableness. Correctly has it been identified as freedom from arbitrariness. It is the embodiment of the sporting idea of fair play. It exacts fealty "to those strivings for justice" and judges the act of officialdom of whatever branch" in the light of reason drawn from considerations of fairness that reflect [democratic] traditions of legal and political thought." It is not a narrow or "technical conception with fixed content unrelated to time, place and circumstances," decisions based on such a clause requiring a "close and perceptive inquiry into fundamental principles of our society." Questions of due process are not to be treated narrowly or pedantically in slavery to form or phrases.[216]

"Procedural due process refers to the procedures that the government must follow before it deprives a person of life, liberty, or property. Procedural due process concerns itself with government action adhering to the established process when it makes an intrusion into the private sphere."[217] Here, since Ordinance No. 7780 underwent notice and hearing when it was enacted, it suffers no defect in its compliance with the requirements of procedural due process.[218]

When measured against the requirements of substantive due process, however, the Ordinance is found wanting.

Substantive due process "inquires whether the government has sufficient justification for depriving a person of life, liberty, or property."[219] It requires an examination as to whether the State's exercise of its police power transgresses on certain protected freedoms. In *White Light Corporation*:

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215 127 Phil. 306 (1967) [Per J. Fernando, En Banc].

216 Id. at 318–319 *citing* Frankfurter, Mr. Justice Holmes and the Supreme Court, 32–33 (1938); Frankfurter, *Hannah v. Larche*, 363 U.S. 420, 487 (1960); *Cafeteria Workers v. McElroy*, 367 U.S. 1230 (1961); and *Bartkus v. Illinois* (1959) 359 U.S. 121.

217 *White Light Corporation v. City of Manila*, 596 Phil. 444, 461 (2009) [Per J. Tinga, En Banc] *citing Lopez v. Director of Lands*, 47 Phil. 23, 32 (1924) [Per J. Johnson, Second Division].

218 *Rollo*, p. 365.

219 *White Light Corporation v. City of Manila*, 596 Phil. 444, 461 (2009) [Per J. Tinga, En Banc] *citing City of Manila v. Hon. Laguio, Jr.*, 495 Phil. 289, 330 (2005) [Per J. Tinga, En Banc].

> In terms of judicial review of statutes or ordinances, strict scrutiny refers to the standard for determining the quality and the amount of governmental interest brought to justify the regulation of fundamental freedoms. Strict scrutiny is used today to test the validity of laws dealing with the regulation of speech, gender, or race as well as other fundamental rights as expansion from its earlier applications to equal protection. The United States Supreme Court has expanded the scope of strict scrutiny to protect fundamental rights such as suffrage, judicial access and interstate travel.[220]

Similarly, in *Kabataan Party-List v. Commission on Elections*:[221]

> Applying strict scrutiny, the focus is on the presence of compelling, rather than substantial, governmental interest and on the absence of less restrictive means for achieving that interest, and the burden befalls upon the State to prove the same.[222]

Thus, in determining whether an ordinance was validly enacted, the State must prove that: (1) the governmental interest involved is compelling enough to require a restraint on constitutional freedoms; and (2) there were no less restrictive means for achieving that interest. In *White Light Corporation*:

> It must appear that the interests of the public generally, as distinguished from those of a particular class, require an interference with private rights and the means must be reasonably necessary for the accomplishment of the purpose and not unduly oppressive of private rights. It must also be evident that no other alternative for the accomplishment of the purpose less intrusive of private rights can work. More importantly, a reasonable relation must exist between the purposes of the measure and the means employed for its accomplishment, for even under the guise of protecting the public interest, personal rights and those pertaining to private property will not be permitted to be arbitrarily invaded.[223]

Respondents submit that the Ordinance's legislative intent is to eradicate greed, "which preys on and appeals on the baser instincts of unwary consumers, [and] is far superior to the 'property rights' of the petitioners in the hierarchy of values within the due process clause[.]"[224]

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220 Id. at 463 *citing* J. Mendoza, Concurring Opinion in *Estrada v. Sandiganbayan*, 421 Phil. 290 (2001) [Per J. Bellosillo, En Banc]; *Bush v. Gore*, 531 U.S. 98 (2000); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Shapiro v. Thompson*, 394 U.S. 618 (1969); and ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES (2nd ed., 2002).

221 775 Phil. 523 (2015) [Per J. Perlas-Bernabe, En Banc].

222 Id. at 552 *citing White Light Corporation v. City of Manila*, 596 Phil. 444 (2009) [Per J. Tinga, En Banc]; J. Leonardo-De Castro, Concurring Opinion in *Garcia v. Drilon*, 712 Phil. 44 (2013) [Per J. Perlas-Bernabe, En Banc]; and J. Puno, Separate Concurring Opinion in *Ang Ladlad LGBT Party v. COMELEC*, 632 Phil. 32, 106 (2010) [Per J. Del Castillo, En Banc].

223 *White Light Corporation v. City of Manila*, 596 Phil. 444, 467 (2009) [Per J. Tinga, En Banc] *citing Metro Manila Development Authority v. Viron Transportation Company*, 557 Phil. 121 (2007) [Per J. Carpio Morales, En Banc] and *U.S. v. Toribio*, 15 Phil. 85 (1910) [Per J. Carson, First Division].

224 *Rollo*, pp. 364–365.

Whatever baser instincts an adult consumer may have is not for the local government to legislate. As previously discussed, consumers may buy the publications not merely to satisfy their prurient curiosity, but because the publication itself contains serious literary, artistic, political, or scientific value.

Ordinance No. 7780 does not give due regard to measures that may have been undertaken by the publishing corporation to ensure that only adults, who have full autonomy over all their moral choices, are in possession of the materials. As petitioners point out, "a clear 18+ mark appears prominently on all the covers of FHM magazines together with the words 'CONTENTS MAY NOT BE SUITABLE FOR MINORS.' Further, these magazines are released to distributors sealed in plastic covers, for sale only in legitimate magazine stands and only to adults."[225]

These measures taken to protect the "unwary consumers" are less restrictive than the penal provisions provided in the Ordinance.

As this Court aptly observed in *White Light Corporation*:

> The promotion of public welfare and a sense of morality among citizens deserves the full endorsement of the judiciary provided that such measures do not trample rights this Court is sworn to protect. The notion that the promotion of public morality is a function of the State is as old as Aristotle. The advancement of moral relativism as a school of philosophy does not de-legitimize the role of morality in law, even if it may foster wider debate on which particular behavior to penalize. It is conceivable that a society with relatively little shared morality among its citizens could be functional so long as the pursuit of sharply variant moral perspectives yields an adequate accommodation of different interests.
>
> To be candid about it, the oft-quoted American maxim that "you cannot legislate morality" is ultimately illegitimate as a matter of law, since as explained by Calabresi, that phrase is more accurately interpreted as meaning that efforts to legislate morality will fail if they are widely at variance with public attitudes about right and wrong. Our penal laws, for one, are founded on age-old moral traditions, and as long as there are widely accepted distinctions between right and wrong, they will remain so oriented.
>
> Yet the continuing progression of the human story has seen not only the acceptance of the right-wrong distinction, but also the advent of fundamental liberties as the key to the enjoyment of life to the fullest. Our democracy is distinguished from non-free societies not with any more extensive elaboration on our part of what is moral and immoral, but from our recognition that the individual liberty to make the choices in our lives is innate, and protected by the State. Independent and fair-minded judges themselves are under a moral duty to uphold the Constitution as the embodiment of the rule of law, by reason of their expression of consent to do so when they take the oath of office, and because they are entrusted by the people to uphold the law.

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[225] Id. at 24.

> Even as the implementation of moral norms remains an indispensable complement to governance, that prerogative is hardly absolute, especially in the face of the norms of due process of liberty. And while the tension may often be left to the courts to relieve, it is possible for the government to avoid the constitutional conflict by employing more judicious, less drastic means to promote morality.[226]

IX

The value of art in a person's life and in society at large is immeasurable. However, no authoritative standard exists by which all members of Philippine society will agree on what constitutes art, much less "good" art. Indeed, different sectors have on occasion been vocal in their disagreements on art, even beyond matters of personal preference. Despite the absence of any standard, and perhaps naturally so, art maintains a special status in the Constitution and in law.

Artistic creations are, of course, protected under the Bill of Rights as a mode of an artist's expression. Beyond this preferred status as a form of expression, the role of art in society is further recognized in our Constitution, which devotes a subsection to its promotion and protection.[227]

Art is so seamlessly integrated into our lives that we tend to forget its power, where it derives this power, and why it deserves this special status. Forgetting these reasons may lead the State to intrude into matters of the art. This intrusion may be in the form of regulation that unduly stifles art, and consequently, society. Thus, the important role of art in society demands reiteration—a reminder of why the State should not unduly police what can be interpreted as artistic endeavors.

During the constitutional deliberations, Commissioner Ponciano Bennagen (Commissioner Bennagen) provided some context within which to appreciate the special status of art:

> Arts is one of the things that have always been with us but are usually taken for granted until they impinge on or shock our jaded consciousness. We hang a painting to impress people, to add color to a wall or to fill up a space. We sing or listen to music while we do our morning ablutions and laundry and while we are in the midst of some conversation. We dance, recite poems, go to the theater and do other things that may be

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226 *White Light Corporation v. City of Manila*, 596 Phil. 444, 469–471 (2009) [Per J. Tinga, En Banc] *citing City of Manila v. Hon. Laguio, Jr.*, 495 Phil. 289 (2005) [Per J. Tinga, En Banc]; *De La Cruz v. Hon. Paras*, 208 Phil. 490 (1983) [Per J. Fernando, En Banc]; *Ermita-Malate Hotel and Motel Operations Association, Inc. v. City Mayor of Manila*, 127 Phil. 306 (1967) [Per J. Fernando, En Banc]; MAX HAMBURGER, MORALS AND LAW: THE GROWTH OF ARISTOTLE'S LEGAL THEORY, 178 (1951 ed.); KENT GREENWALT, CONFLICTS OF LAW AND MORALITY, 38 (1989 ed.); STEVEN CALABRESI, *Render Unto Caesar that which is Caesars, and unto God that which is God's*, 31 Harv. J.L. & Pub. Pol'y 495; RICHARD POSNER, *The Problematics of Moral And Legal Theory*, THE BELKNAP PRESS OF HARVARD UNIVERSITY PRESS (2002); and STEVEN BURTON, JUDGING IN GOOD FAITH, 218 (1992 ed.).

227 CONST., art. XIV, secs. 13, 14, 15, 16, and 18.

artistic, all in the process of growing up and, sadly, also of growing old. But most of the time, we go through these things rather thoughtlessly, unaware of the subtle ways of how arts affects our very life, both as individuals and as a society.

. . . .

Arts is a way of surviving beyond the historical circumstances which have generated them. It survives *in situ*, in private and public museums, in scholars' books and shelves and, more vibrant still, in people's lives. And as it survives, its functions often change. For example, we continue to be awed and fascinated by the cave paintings of Altamira in Spain and those of Lascaux in France. We are entertained by the ancient dances, songs, and epics of our ancestors through the Bayanihan, Filipinescas and other dance troupes. We decorate our rooms with ethnic and folk arts and we are cheek by jowl with imports from other lands and other times.

Art, therefore, acquires a certain autonomy and it affects our lives in very subtle ways. Art, beyond its magico-religious and economic functions, also functions to distort, criticize and shape our feeling, thinking and behavior. Today, conventional wisdom has it that art entertains, decorates or educates. But in its own way, it also mystifies and in the process dehumanizes.

Let me illustrate, Madam President. An average citizen, looking at an abstract painting by Joya with a five-figure price, could be dehumanized in at least two ways: The painting, understandable only to the specialist, tells him: "You do not understand me; you are a Philistine, therefore, you are an idiot." Or it could say: "You cannot afford me, therefore, you are poor." The same could also apply to other arts that have been accessible only to the rich and the powerful. It is this kind of cultural terrorism that has agitated some artists to wage protest actions against the Cultural Center of the Philippines during the Marcos years when it became the watering hole of culture vultures oblivious to the widespread poverty and misery even as they speak sanctimoniously of "the true, the good and the beautiful."

In a class-divided society, it is the dominant elite who dictate what is true, what is good and what is beautiful. Consequently, art contributes to the preservation of social and cultural stratification. Fortunately, however, because of the relative autonomy of art, it provides an arena for criticism of society and of the struggle to restructure this society. Those who are excluded from the privileged circle, whether by choice or by force, continue to explore other forms of artistic expression, particularly those that are rooted in the realities of Filipino life. In their inchoate form, these efforts complement those directed at liberating us from an alienating Western culture, as well as the corollary search for a Filipino aesthetics nourished by the rich diversity of Philippine society and culture as it expresses our own vision of humanity.

It is in this search for Filipino aesthetics that the provisions in the section on arts and culture are situated. The provisions, we believe, are supportive of already approved provisions which altogether aim to help build a vigorously democratic Filipino nation.[228]

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[228] R.C.C. No. 080, September 11, 1986.

In *Almario v. Executive Secretary*,[229] this Court stressed that the law recognizes the significance of art in society:

> Art has traditionally been viewed as the expression of everything that is true, good and beautiful. As such, it is perceived to evoke and produce a spirit of harmony. Art is also considered as a civilizing force, a catalyst of nation-building. The notion of art and artists as privileged expressions of national culture helped shape the grand narratives of the nation and shared symbols of the people. The artist does not simply express his/her own individual inspiration but articulates the deeper aspirations of history and the soul of the people. The law recognizes this role and views art as something that "reflects and shapes values, beliefs, aspirations, thereby defining a people's national identity."[230] (Citations omitted)

As explained by Commissioner Bennagen and noted in *Almario*, art does not merely repeat what has been said; it has a formative power and can shape and define a people's national identity. Still, art does more than shape our consciousness—it also reacts to this consciousness, and becomes part of our consciousness.

However, it can also be a tool to stifle a people and rigidly preserve the aesthetics and values of a dominant class.

When Article III, Section 4 of the Constitution speaks of freedom of speech and expression, this freedom pertains not only to matters of political discourse for the sake of policy development, but also to life, liberty, and the authenticity of life of an enlightened citizenry.

Ideally, art opens minds, lifting individuals from their immediate present, deepening their experience of the world. It facilitates contemplation on matters such as the meaning of life, of good and evil, existence, truth, or even the meaning of meaning itself.

However, the art to which society is regularly exposed consists of that found in advertising and social media. These works are designed to convince their audiences to spend, and their messages overwhelmingly pertain to conformity, appeal to consumerism, and act as distractions from questions more significant to the development of society.

Art and cultural forms are unique in their capacity to open the mind to experiences and possibilities beyond the self. While verbal communications may be written or uttered with the similar goal of presenting the author's point of view to the audience, their presentation does not have the same effect. Such verbal communications may be expressed to shock or provoke their audiences,

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229 714 Phil. 127 (2013) [Per J. Leonardo-De Castro, En Banc].
230 Id. at 133.

or to persuade them of the author's perspective. However, when presented as an argument to a reader whose beliefs are not already aligned with the author's position, the typical response is not one of openness. Rather, the reader tends to be defensive, to critically search for flaws in the author's logic or holes in the author's presentation.

Works of art and culture, on the other hand, are less direct in their messaging, and more subject to interpretation. An artist's choices, as manifested in a piece, pertain to all the human senses, and are not clearly defined the way that words are. Viewers may not even be equipped to fully understand even a fraction of the artist's intention. Despite this, they may find something compelling in the work to cause them to dwell on it further, and linger a moment longer. Works of art and culture appeal to any or all human senses and sensibilities; what may initially captivate a viewer may vary from person to person. They rely less on logic and argumentation, and are less susceptible to the knee-jerk defensive response that straightforward verbal communication tends to produce. They can, therefore, be more effective than persuasion and argumentation as a means of questioning the norms.

I am not suggesting that FHM Magazine is opening people's minds or moving society toward some lofty ideal, nor am I attempting to reify the male gaze perpetuated by it as a form of elevated art. I am not convinced that the magazine is attempting to achieve anything beyond selling magazines and advertising space.

However, the demarcations as to what constitutes art are not always clear. Art is subjective: a particular portrayal may have one meaning to a viewer and an entirely different meaning to the other. Moreover, there is always the possibility that FHM Magazine may be more creative or lofty in its endeavors, the way that Playboy, for instance, decided to stop publishing nude photos of women for a time.[231]

Moreover, intentions aside, the unclothed body—and whether it is obscene, and whether it is art—is in itself subject to interpretation.

To conclude that something sexual was obscene, this Court reasoned that it could not be art, because it would not be viewed by "artists and persons interested in art and who generally go to art exhibitions and galleries to satisfy and improve their artistic tastes[.]"[232] This Court has taken it upon itself to declare what cannot possibly be art or has no redeeming quality.[233] It has lamely attempted to discern the "aggregate judgment of the Philippine

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[231] *See* Ravi Somaiya, *Nudes Are Old News at Playboy*, THE NEW YORK TIMES, October 12, 2015, <https://www.nytimes.com/2015/10/13/business/media/nudes-are-old-news-at-playboy.html> (last accessed on September 23, 2019).

[232] *People v. Go Pin*, 97 Phil. 418, 419 (1955) [Per J. Montemayor, First Division].

[233] *See People v. Padan*, 101 Phil. 749 (1957) [Per J. Montemayor, En Banc].

community,"[234] enforcing the contemporary community's standards of what may offend it.

Just as important, it may be time to ask why the contemporary community—as such, the government and this Court—polices the display of women's bodies with so much more zeal than it polices men's bodies. It may be time to consider why the contemporary community appears to judge the nipple as obscene, but only when it belongs to a woman.

Nonetheless, as it stands, Ordinance No. 7780 is a feeble attempt to legislate morality. It prevents adults, who have complete autonomy over their morals and choices, from pursuing what may be their own personal interests. While it does not penalize mere possession of obscene materials, it relies heavily on inserting perceived values into each individual's thoughts.

The artist or author should not have to live under the threat of censorship without legitimate basis. While this Court is granted the discretion to decide what is and what is not obscene, the standards for determination must vary per case and must evolve over time. Any legislation that seeks to restrain the exercise of free speech and expression—be it local or national law—must be struck down. As Article III, Section 4 of the Constitution succinctly states:

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

ACCORDINGLY, I vote to **GRANT** the Petition. City of Manila Ordinance No. 7780 should be declared **VOID** for being **UNCONSTITUTIONAL**.

MARVIC M.V.F. LEONEN
Associate Justice

[234] *People v. Kottinger*, 45 Phil. 352, 360 (1923) [Per J. Malcolm, Second Division].