**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:

November 16, 2021

x----------x

**DISSENTING OPINION**

**LEONEN, *J.*:**

I dissent.

An ordinance previously held valid but whose terms are clearly so broad and vague as to easily allow repeated prosecution that will chill both creative and political expression, may still be reviewed by this Court.

This case arose from a Petition for Prohibition[1] 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[2] which penalizes the printing, publishing, distribution, circulation, sale, production, exhibition, showing, and viewing of obscene and pornographic materials. Ordinance No. 7780 provides:

> SECTION 2. *Definition of Terms.* – As used in this ordinance, the terms:
>
> A. Obscene shall refer to any material or act that is indecent, or offensive or 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 deprive 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;

---

1 *Rollo*, pp. 3–38.

2 Id. at 373–375.

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:

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 sexual acts;
4. Those showing, depicting or describing completely nude human body, or showing, depicting or describing the human sexual organs or the female breasts.

SECTION 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.

SECTION 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 videos and VHS tapes, laser discs, for viewing obscene movies, television shows, videos 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 pesos (P5,000.00), 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 (P1,000.00), nor more than three thousand (P3,000.00) 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 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.[3]

On July 7, 2008, 12 pastors and preachers filed a Joint Complaint-Affidavit[4] before the City Prosecutor's Office of Manila against the officers and publishers of various magazines and tabloids for violation of Articles 200[5] and 201, paragraph 2(a)[6] of the Revised Penal Code, and violation of Ordinance No. 7780. They were led by Pastor Bienvenido M. Abante, Jr., then Representative of the Sixth District of Manila and principal author of Ordinance No. 7780.[7]

Among those charged were petitioners Allan Madrilejos, Allen Hernandez, Glenda Gil, and Lisa Gokongwei-Cheng who were respectively the editor-in-chief, managing editor, circulation manager, and president of Summit Publications, which publishes FHM Magazine.[8] The criminal case, docketed as I.S. No. 08G-12234, was set for preliminary investigation.[9] The Office of the City Prosecutor created a special panel of prosecutors composed of Lourdes Gatdula, Agnes Lopez, and Hilarion Buban (Gatdula et al.).[10]

On September 12, 2008, petitioners filed a Petition for Prohibition with a Prayer for the Issuance of a Temporary Restraining Order and/or Writ of Preliminary Injunction[11] with this Court against respondents Gatdula et al. seeking to prevent the implementation of the Ordinance on the ground 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.

---

3 Ordinance No. 7780 (1993), secs. 2–4.

4 *Rollo*, pp. 44–46.

5 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.

6 REV. PEN. CODE, art. 201, par. 2(a) 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[.]

7 *Rollo*, p. 6, Petition.

8 Id. at 4–5

9 Id. at 352.

10 Id. at 7.

11 Id. at 3–38. On November 11, 2013, petitioners received a copy of a Resolution dated June 25, 2013 of the Office of the City Prosecutor of Manila which recommended the filing of Information against the petitioners for violation of Section 201, paragraph 2(a) of the Revised Penal Code. The charge against petitioner Lisa Gokongwei-Cheng for violation of Article 201 of the Revised Penal Code was dismissed. The Resolution also dismissed the complaint against them for violation of Article 200 of the Revised Penal Code and Ordinance No. 7780. Petitioners point out that although the charge for violation of Ordinance No. 7780 was dismissed, it is the constitutionality of the Ordinance itself that is being brought into question with this Petition; hence, the issue has not become moot.

Petitioners later manifested to this Court that I.S. No. 08G-12234 was dismissed with prejudice.[12] However, they argued that the Petition has not yet become moot as they questioned not only the validity of the criminal prosecution against them, but the validity of Ordinance No. 7780 itself.

In a September 24, 2019 Decision,[13] this Court dismissed the Petition on the ground of mootness, holding that the issue on the validity of the Ordinance cannot be addressed since it did not undergo a regular appeals process before it was filed with this Court. In particular, petitioners have not satisfied the two requirements in footnote 11 of *Pormento v. Estrada*[14] to warrant a review. The charge against them was "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."[15] They "have also failed to demonstrate a reasonable likelihood that they will once again be hailed before the OCP Manila for the same or another violation of Ordinance No. 7780."[16]

In their Motion for Reconsideration, petitioners assert that the case has not yet become moot since the issue of the constitutionality of a valid and existing Ordinance subsists. They maintain that both requirements of *Pormento* were present in this case, in that the period between the filing and dismissal of I.S. No. 08G-12234 was too short for it to be fully litigated and that the monthly publication of the magazine makes them vulnerable to criminal charges for every month.[17]

Petitioners insist that Ordinance No. 7780 was patently unconstitutional and susceptible to a facial challenge since its provisions are overbroad and violate the right to free speech and expression. They state that the Ordinance provides for a definition of "obscene" and "pornography" which disregards the doctrine in *Miller vs. California.*[18] They assert that the standards set forth in the Ordinance are vague as it uses expansive language for "Pastors and Preachers of different churches in Metro Manila, [who] are not within the class of the 'average person' referred to in [*Miller*], who may be called upon to apply 'contemporary community standards' in order to gauge whether or not a given work can be considered obscene."[19] They maintain that "it is not for ultra-conservatives or extreme liberalists to dictate

---

12 Id. at 438–439.

13 *Madrilejos v. Gatdula*, G.R. No. 184389, September 24, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65776> [Per J. Jardeleza, En Banc].

14 643 Phil. 735, 738 (2010) [Per C.J. Corona, En Banc]. Footnote 11 states:
[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.

15 *Madrilejos v. Gatdula*, G.R. No. 184389, September 24, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65776> [Per J. Jardeleza, En Banc].

16 Id.

17 Motion for Reconsideration, pp. 2–3.

18 413 U.S. 15 (1973); *rollo*, p. 15.

19 Motion for Reconsideration, p. 6.

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."[20]

Petitioners assert that Ordinance No. 7780 is unduly expansive since that it considers as obscene and pornographic the mere printing, showing, depicting, or describing of sexual acts regardless of whether these are "patently offensive" according to the *Miller* test.[21] They maintain that the Ordinance "discounts any appreciation of 'whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value' in direct contravention to the *Miller* Test."[22]

They likewise contend that the ordinance violates their right to due process as the means employed were not reasonably necessary to accomplish its purpose. They allege that the Ordinance imposes criminal liability based on mere membership in a publication's board, regardless of actual involvement in the publication of the contentious material. Considering that their mother corporation Summit Media publishes several magazines other than FHM, they argue that the Ordinance effectively discourages persons from pursuing other legitimate businesses.[23] Petitioners also assert that the Ordinance offends privacy rights as it "intrude[s] into the privacy of one's home with no other purpose than to control individual thought."[24]

The majority is now dismissing this Motion for Reconsideration, invoking this Court's constitutional policy of avoidance.[25] It held that petitioners have not "demonstrated any reasonable likelihood that they would be subjected to criminal prosecution under the same Ordinance again."[26] Further, it held that facial challenges cannot be mounted against penal statutes,[27] that obscenity and pornography have always been unprotected speech, and that there should have been a full blown hearing before striking down a legislative enactment, so "all pertinent issues are sufficiently and exhaustively briefed by all indispensable parties."[28]

Respectfully, I maintain my dissent. An overbroad provision goes beyond punishing obscenity. It provides an uncontrolled, unbridled, and unregulated warrant to attack and prohibit protected creative speech. It clearly has a chilling effect on the fundamental right to expression contained in Article III, Section 4 of the Constitution:

---

20 Id.
21 Id. at 6–7.
22 Id. at 8.
23 Id. at 10–11.
24 Id. at 12.
25 *Ponencia*, p. 3.
26 Id.
27 Id. at 3–4.
28 Id. at 4.

> 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.

Ordinance No. 7780's broad and expansive language goes beyond punishing obscenity. It should be struck down as unconstitutional.

## I

The dismissal of the criminal prosecution has not yet rendered the Petition moot.

As a general rule, cases which have become moot will no longer be reviewed by this Court. However, this Court "will decide cases, otherwise 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 principles to guide the bench, the bar, and the public; and fourth, the case is capable of repetition yet evading review."[29]

Petitioners did not merely assail their criminal prosecution before this Court. They squarely addressed the apparent unconstitutionality of the criminal statute they were being charged under. As petitioners point out, Ordinance No. 7780 is still valid within the City of Manila. The dismissal of the criminal cases against them 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."

The two requirements in footnote 11 of *Pormento v. Estrada*[30] are likewise present. Due to the short duration of the criminal prosecution, this Court had to pass upon the issue of mootness. Likewise, petitioners publish their magazines monthly. The continuing validity of Ordinance No. 7780 means that petitioners could be subjected to similar criminal charges for every monthly publication. Thus, there is a reasonable likelihood that petitioners could again be criminally charged under the Ordinance.

In any case, this Court has not hesitated in passing upon the merits of a case despite it already being rendered moot by subsequent events.

---

29 *Belgica v. Ochoa*, 721 Phil. 416, 522 [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].

30 643 Phil. 735, 738 (2010) [Per C.J. Corona, En Banc]. The Decision states:
[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[.]

In *Nicolas-Lewis v. Commission on Elections*,[31] this Court entertained a petition questioning the prohibition against partisan political activities abroad during the 2019 National and Local Elections even if 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.

In *Marquez v. Commission on Elections*,[32] petitioner questioned the Commission on Elections' cancellation of his Certificate of for being a nuisance candidate. This Court, while conceding that the case should have been dismissed for mootness since winning candidates have already been proclaimed, still proceeded to rule on the case since the continuing application of the Commission on Elections of its rules on nuisance candidates is capable of repetition, yet evading review.

Considering that this case is a rare instance to examine a local legislation's effect on constitutional freedoms, it is more prudent for this Court to exercise its power of judicial review to settle the controversy:

> 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.[33] (Citation omitted)

## II

An opinion in *Soriano v. Laguardia*[34] succinctly provides for a brief history of the test for determining whether a certain material is obscene and how the test was eventually applied 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:

---

31 G.R. No. 223705, August 13, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65669> [Per J. Reyes, Jr., En Banc].

32 G.R. No. 244274, September 10, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65668> [Per J. Jardeleza, En Banc].

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

34 629 Phil. 262 (2010) [Per J. Velasco, Jr., 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.[35] (Citations omitted)

In this case, we are not tasked to determine whether a certain work or publication is obscene. Rather, we are asked to resolve whether a certain local legislation follows the guidelines set by this Court to protect speech and expression.

While obscenity is considered unprotected speech which may be validly regulated, there must be a prior declaration stating that a certain speech is obscene before it can be regulated. Jurisprudence has yet to accept the idea of any speech or expression that is obscene *per se*.

With this, anti-obscenity statutes may still be subjected to a constitutional challenge to determine if they violate certain constitutional freedoms. In this case, petitioners assail the Ordinance for overbreadth, as its language and provisions are unduly expansive and transgress against constitutionally-protected freedoms.

---

[35] 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*, G.R. No. L-69500, July 22, 1985 [Per J. Fernando, En Banc].

While penal statutes are generally not subject to facial challenges, petitioners' argument that the provisions of the Ordinance have a chilling effect on protected speech and expression supports a facial challenge against it. As explained by Justice Mendoza in his opinion in *Estrada v. Sandiganbayan*:[36]

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

[36] 421 Phil. 290, 430 (2001) [Per J. Bellosillo, En Banc].

> 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. [37] (Emphasis supplied)

The void-for-vagueness doctrine holds that a statute may be declared unconstitutional if its provisions are vague such that it fails to "inform those who are subject to it what conduct on their part will render them liable to its penalties."[38]

> 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.[39] (Citation omitted)

In *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*,[40] this Court clarified that a vagueness challenge may only be invoked in "as applied" cases.[41] However, *Disini v. Secretary of Justice*,[42] broadened the scope of facial challenges based on vagueness to include cases where "a penal statute encroaches upon the freedom of speech."[43]

The overbreadth doctrine, on the other hand, invalidates statutes which aim to control or prevent activities constitutionally subject to state regulations "by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[44]

---

37 Id. at 430–432 citing *People v. De la Piedra*, 403 Phil. 31 (2001) [Per J. Kapunan, First Division]; *United States v. Salerno*, 481 U.S. 739, 745, 95 L.Ed.2d 697, 707 (1987); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–95, 71 L.Ed.2d 362, 369 (1982); *Gooding v. Wilson*, 405 U.S. 518, 521, 31 L.Ed.2d 408, 413 (1972); *Broadrick v. Oklahoma*, 413 U.S. 601, 612-613, 37 L.Ed. 2d 830, 840–841 (1973); *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).

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

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

40 646 Phil. 452 (2010) [Per J. Carpio Morales, En Banc].

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

42 727 Phil. 28 (2014) [Per J. Abad, En Banc].

43 Id. at 121.

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

In applying the overbreadth doctrine the primary criterion "is not whether the case is a freedom of speech case, but rather, whether the case involves an as-applied or a facial challenge."[45]

> 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.
>
> . . . .
>
> 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."[46] (Citations omitted)

While both void-for-vagueness and overbreadth doctrines tackle freedom of expression cases, the primary consideration in applying them is still whether the assailed statute violates the fundamental right to due process. Further, the application of the overbreadth doctrine also considers whether the case involves a facial challenge or an "as applied" challenge.[47]

Here, petitioners assailed the constitutionality of Ordinance No. 7780 on the ground that its provisions were unduly expansive and encroaches upon protected expression. Thus, the overbreadth doctrine must be applied to determine the validity of Ordinance No. 7780.

In *Nicolas-Lewis v. Commission on Elections*,[48] this Court subjected Section 36.8[49] of Republic Act No. 9189,[50] as amended to a facial challenge for being overbroad, as it was alleged that the provision, on its face, violated

---

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

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

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

48 G.R. No. 223705, August 13, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65669> [Per J. Reyes, Jr., En Banc].

49 SECTION 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[.]

50 The Overseas Voting Act of 2013.

the right to free speech, expression, and assembly, as well as the right to suffrage. 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 as 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" on protected speech, the exercise of which should not be at all times abridged. The Court elucidated:
>
> > The theory that "[w]hen statutes regulate and 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.[51] (Citations omitted)

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

The problem in this case lies on *how* to determine if the provisions of the Ordinance are overbroad. To resolve this, resort should be made to more

---

[51] *Lewis-Nicolas v. Commission on Elections*, G.R. No. 223705, August 13, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65669> [Per J. Reyes, Jr., En Banc].

specific tests. For this reason, this Court must apply the *Miller* Test, as this is the current and prevailing test within this jurisdiction.

In its September 24, 2019 Decision, this Court suggested that the case should have first undergone the appellate process before review by this Court, so that the trial court could rule on the factual issues, adopt the *Miller* Test, and receive evidence.[52]

However, it must be emphasized that there is no need to make a factual determination of the issues when the mode of analysis to be applied is a facial overbreadth challenge as the constitutionality of the statute is determined "on its face," rather than "as applied," which requires factual antecedence.

In recent cases of this Court, it was unnecessary to resolve questions of fact when subsequent events have already rendered the facts moot.

In *Marquez v. Commission on Elections*,[53] this Court did not delve into the factual issue of whether petitioner Marquez had the financial capacity to launch a nationwide senatorial campaign since the conduct of the elections already rendered this issue moot.

In *Nicolas-Lewis v. Commission on Elections*,[54] there were no questions of fact to be resolved since there was no allegation that petitioner in that case, a private citizen with dual citizenship, had been campaigning for certain candidates abroad. She merely argued that the questioned provision prevented her from doing so.

There are even certain obscenity cases which did not require the conduct of an appellate process before this Court exercised its power of judicial review.[55]

In *Gonzalez v. Katigbak*,[56] a petition was filed directly with this Court questioning the resolution of the Board of Review for Motion Pictures and Television, which classified the movie *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

---

52 *Madrilejos v. Gatdula*, G.R. No. 184389, September 24, 2009, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65776> [Per J. Jardeleza, En Banc].

53 G.R. No. 244274, September 10, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65668> [Per J. Jardeleza, En Banc].

54 G.R. No. 223705, August 13, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65669> [Per J. Reyes, Jr., En Banc].

55 *See Gonzalez v. Katigbak*, 222 Phil. 225 (1985) [Per J. Fernando, En Banc]; and *Soriano v. Laguardia*, 629 Phil. 262 (2010) [Per J. Velasco, Jr., En Banc].

56 222 Phil. 225 (1985) [Per J. Fernando, En Banc].

commercial distribution. On the contrary, this Court assumed jurisdiction over the certiorari petition.

In *Soriano v. Laguardia*,[57] this Court did not hesitate to entertain a petition directly filed with this Court assailing decision of the Movie and Television Review and Classification Board suspending 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.

Considering that this case presents a novel issue that is susceptible to a facial challenge on the basis of overbreadth, it is unnecessary to require the parties to complete the criminal prosecution and come to this Court on appeal before we can exercise our power of judicial review.

## III

Petitioners argue that Ordinance No. 7780 violates the guidelines in the *Miller* Test in that first, its expansive language fails to consider contemporary community standards in its application; second, it considers as obscene certain acts without determining whether it was made in a patently offensive manner; and third, it fails to take into account whether a certain speech, when taken as a whole, lacks serious literary, artistic, political, or scientific value.

The Ordinance considers as "obscene" and therefore, illegal, the following acts or materials:

> A. Obscene shall refer to any material ***or*** act that is indecent, ***or*** offensive ***or*** 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 deprive 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[.][58] (Emphasis supplied)

---

[57] 605 Phil. 43 (2009) [Per J. Velasco, Jr., En Banc].

[58] Ordinance No. 7780 (1993), sec. 2.

As it is worded, the Ordinance does not take into account contemporary community standards in determining whether a print, show, depiction, or description is considered obscene. It does not define what may be considered "indecent, or offensive or 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 deprive 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." It encompasses all kinds of behavior without acknowledging what the present standards of the community are.

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." It even singles out the female breast as lewder and more offensive than other sexual organs.

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

Under the Ordinance's expansive language, the motive of the author, performer, or publisher is disregarded. Any work that is "indecent, or offensive or 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 deprive 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" is immediately categorized as obscene.

Disregard of the author, performer, or publisher's motives contradicts the last proviso of Section 4 of the Ordinance:

> [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.

An artist may intend for his or her painting to be erotic and still be considered as art. There are instances where artists do not intend for their paintings to be patently offensive. The Ordinance penalizes the artist regardless of the motive. This is an arbitrary restraint on that artist's freedom of expression.

The Ordinance also fails to consider whether the materials, when taken as a whole, lacks serious literary, artistic, political, or scientific value.

In disregarding the motives of the printer, publisher, distributor, or seller, the Ordinance makes broad presumptions that an entire publication can only contain obscene material and nothing more. There are certainly instances where parts of the magazine may appeal to prurient interests, but some parts may have serious literary value. Petitioners point out that the alleged offensive magazines featured "literature from award-winning writers such as Marguerite de Leon, Anna Felicia Sanchez and Norman Wilwayco."[59]

The prohibition in the Ordinance likewise includes materials that are contrary to religious beliefs but does not mention which religion's beliefs it seeks to protect.

Article II of the Constitution provides that there shall be an inviolable separation of Church and State.[60] 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 preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.

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. It may be that certain material is not considered by one particular religion as offensive. One religion may even view human sexuality as part of the religious experience. To arbitrarily create legislation based on the puritanical views of one religion is not merely insensitive; it is unconstitutional.

The Ordinance likewise imposes criminal liability on the president and board members of a publication, regardless of whether they were personally involved in the actual publication of the alleged obscene publication. Petitioners' publishing corporation also publishes several other magazines that are not, under the Ordinance's provision, considered obscene. However, because of the Ordinance, the president and the board may be held criminally liable for offenses they may have no personal knowledge of which may prevent them from doing their jobs. This is an arbitrary restraint on their legitimate pursuit of business.

---

[59] Motion for Reconsideration, p. 8.

[60] CONST, art. II, sec. 6.

The Ordinance 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 the covers of all FHM magazines, together with the words 'CONTENTS MAY NOT BE SUITABLE FOR MINORS'. . . [they] are released to distributors sealed in plastic covers, for sale only in legitimate magazine stands and only to adults."[61]

Measures have already been taken to protect the "unwary consumers," which is less restrictive than the penal provisions provided in the Ordinance. As this Court aptly observed:

> 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.
>
> 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.[62]

---

[61] *Rollo*, p. 24.

[62] *White Light Corporation, et al. v. City of Manila*, 596 Phil. 444, 469–471 (2009) [Per J. Tinga, En

The alleged legislative intent of the Ordinance was to eradicate greed, "which preys on and appeals [to] the baser instincts of unwary consumers."[63] This purpose being "far superior to the 'property rights' of the petitioners in the hierarchy of values within the due process clause."[64]

However, in achieving this, the local government of Manila made an unnecessary intrusion into the private rights of its citizens based on its own pre-determined standard of morality. Whatever baser instinct an adult consumer may have is not for local government to legislate. Consumers may buy the publications not merely to satisfy their prurient curiosity but because the publication actually contains serious literary, artistic, political, or scientific value. The State cannot likewise interfere if they, who have complete autonomy over their morals and choices, choose to buy these publications for prurient reasons.

Neither the State nor this Court can attempt to legislate morality. Ordinance No. 7780 does not penalize mere possession of obscene material; it relies heavily on inserting perceived values into each individual's thoughts.

While this Court is granted the discretion to decide what is and what is not obscene, standards for determination must be done on a case-to-case basis and must evolve over time. Any legislation passed, whether local or national, that seeks to restrain the free exercise of speech and expression must be stricken down.

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

**MARVIC M.V.F. LEONEN**
Associate Justice

---

Banc] citing *City of Manila v. Hon. Laguio, Jr.*, 495 Phil. 289 (2005) [Per J. Tinga, En Banc]; *De La Cruz, et al. v. Hon. Paras, et al.*, 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.).

63 *Rollo*, pp. 364–365, Comment.

64 Id.