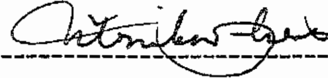
EN BANC

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



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DISSENTING OPINION

PERLAS-BERNABE, *J.*:

I write to reiterate my **dissent** against the majority's ruling on the main. I maintain my view that the present petition assailing the constitutionality of Manila Ordinance No. 7780 or the "Anti-Obscenity and Pornography [O]rdinance of the City of Manila"[1] (Ordinance No. 7780) should not have been dismissed on the ground of mootness, and instead, should have been resolved by the Court on the merits, and consequently decreed unconstitutional based on the overbreadth doctrine.

To recount, petitioners Allan Madrilejos, Allan Hernandez, Glenda Gil, and Lisa Gokongwei-Cheng (petitioners) were the respective editor-in-chief, managing editor, circulation manager, and president of Summit Publishing Company, Inc., which published the FHM Magazine.[2] In 2008, they were charged before the City Prosecutor's Office of Manila under Ordinance No. 7780 which proscribes the "printing, distribution, circulation, sale, and exhibition[,]" as well as the "production, public showing[,] and viewing" of **obscene and pornographic acts of materials.**[3] Subsequently, petitioners filed this **petition for prohibition** assailing the constitutionality of Ordinance No. 7780 for being patently offensive to [the] **constitutional right to free speech and expression**, and for violating "privacy rights," among others. They claim that the definitions of obscenity and pornography in Ordinance

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[1] Entitled "AN ORDINANCE PROHIBITING AND PENALIZING THE PRINTING, PUBLICATION, SALE, DISTRIBUTION AND EXHIBITION OF OBSCENE AND PORNOGRAPHIC ACTS AND MATERIALS AND THE PRODUCTION, RENTAL, PUBLIC SHOWING AND VIEWING OF INDECENT AND IMMORAL MOVIES, TELEVISION SHOWS, MUSIC RECORDS, VIDEO AND VHS TAPES, LASER DISCS, THEATRICAL OR STAGE AND OTHER LIVE PERFORMANCES, EXCEPT THOSE REVIEWED BY THE MOVIE, TELEVISION REVIEW AND CLASSIFICATION BOARD (MTRCB)," enacted by the City Council of Manila on January 28, 1993 and approved by the City Mayor on February 19, 1993.

[2] See *rollo*, pp. 4-5.

[3] See Section 3 of Ordinance No. 7780.

No. 7780 are **unduly expansive** in that they disregard the guidelines prescribed in *Miller v. California* (*Miller*),[4] to wit:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, x x x (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Respondents Lourdes Gatdula, Agnes Lopez, and Hilarion Buban of the City Prosecutor's Office of Manila (respondents) countered that since our statutes do not define what is "obscene," the Ordinance's definition of obscenity could very well be the contemporary community standard under the *Miller* test.[5]

Pending resolution of the said petition, the criminal charge against petitioners was dismissed. This notwithstanding, petitioners did not move to withdraw the present action, arguing that the case has not become moot by the fact of the criminal case's dismissal since the distinct issue anent the constitutionality/validity of the Ordinance subsists. However, taking cognizance of the supervening dismissal of the criminal case, the Court likewise dismissed the present petition on the grounds that: (*a*) the dismissal of the criminal charge against petitioners rendered the case moot; and (*b*) Ordinance No. 7780, an anti-obscenity law, cannot be facially attacked on overbreadth grounds because obscenity is unprotected speech.[6] According to the *ponencia* on the main, petitioners' purpose in filing the petition was to stop the conduct of the preliminary investigation on their alleged violation of an unconstitutional ordinance. In any case, petitioners still failed to establish a cause of action to warrant a ruling in their favor, holding that they cannot mount a facial challenge against the Ordinance on the ground of overbreadth because the present petition does not involve a free speech case as it stemmed, rather, from an obscenity prosecution. Aggrieved, petitioners moved for reconsideration.[7]

The present *ponencia* denies petitioners' motion, reiterating that the dismissal of the criminal charges against petitioners has rendered moot this prohibition case. It then proceeds to counter the dissenting views by: (1) insisting on the constitutional policy of avoidance and judicial restraint when no full-blown hearing is conducted with all indispensable parties, such as the Manila City Council; (2) limiting the application of the "capable of repetition, yet evading review" exception to the mootness rule; (3) rejecting an overbreadth analysis on the ground that such doctrine is not used to test the

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[4] 413 U.S. 15 (1973).
[5] See *rollo*, p. 364.
[6] See Main Decision dated September 24, 2019.
[7] *Rollo*, pp. 541-557.

validity of penal laws; and (4) noting that obscenity is unprotected speech that has no transcendent value to society.[8]

I maintain my dissent.

Verily, it is my view that the present prohibition case is not mooted by the dismissal of the criminal charge at the prosecutor level because **the issue regarding the constitutionality of Ordinance No. 7780 is separate and distinct from the matter of petitioners' criminal prosecution**. From the records, it is clear that petitioners not only questioned the legality of the criminal prosecution against them but also the validity of Ordinance No. 7780 itself, **invoking their constitutional right to free speech and expression.** Indeed, despite the dismissal of the criminal case, petitioners' proffered curtailment of their free speech rights — as well as other persons similarly situated as them — still looms in the horizon because Ordinance No. 7780 remains valid and subsisting.

To be sure, case law states that a case is moot "when it ceases to present a justiciable controversy by virtue of supervening events, **so that an adjudication of the case or a declaration on the issue would be of no practical value or use**." "[T]he judgment will **not serve any useful purpose or have any practical legal effect** because, in the nature of things, it **cannot be enforced**."[9]

To my mind, there remains to be practical legal value in resolving the constitutionality issue as regards Ordinance No. 7780, considering its chilling effect on protected speech. In view of its expansive scope, its subsistence in the legislative books of the City of Manila has the **effect of chilling** otherwise protected forms of speech because of the impending threat of further prosecution based on the same. This concern is particularly relevant for petitioners who *regularly* publish a magazine (*i.e.*, monthly) in a particular genre. As asserted in their motion for reconsideration, petitioners' roles as editors and publishers of the monthly FHM Magazines render them continuously vulnerable to criminal charges under the assailed ordinance for every publication. Hence, the dismissal of the criminal charge against them alone does not remove their interest in pursuing this case on their own behalf and of other similarly situated publishers. Besides, the relief prayed for by petitioners in filing the present petition was not only to obtain the dismissal of the criminal charges against them but, moreover, to directly assail the validity of Ordinance No. 7780. Therefore, **the constitutionality issue persists as a live controversy** which the Court is duty-bound to resolve. Accordingly, since the constitutionality issue is not moot, the exception of capable of repetition yet evading review discussed in the *ponencia* is not even necessary to be applied in this case.

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8 See Resolution, pp. 3-5.

9 *Peñafrancia Sugar Mill, Inc. v. Sugar Regulatory Administration*, 728 Phil. 535 (2014); emphases supplied.

Furthermore, contrary to the *ponencia*, a **facial challenge** against Ordinance No. 7780 on **overbreadth** grounds is **proper** in this case. The overbreadth doctrine decrees that "a governmental purpose may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms";[10] hence, **a statute or ordinance may be declared as unconstitutional if it transgresses free speech**. In this relation, jurisprudence illumines that "[b]y 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**."[11]

The *ponencia* states that the "overbreadth doctrine finds special application in free speech cases" and "is not used to test the validity of penal laws." [12] I disagree. In the more recent case of *Nicolas-Lewis v. Commission on Elections*,[13] the Court *En Banc* invalidated a penal[14] provision for being overbroad[15] in view of its chilling effect. It explained that while facial invalidation of laws is generally disfavored, its use is justified "to **avert the 'chilling effect'** on protected speech,"[16] as in this case. Notably, even indecent speech not amounting to obscenity, may be considered as constitutionally protected depending on the context or the medium of communication.[17]

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[10] See Concurring in the Judgment Opinion of Mr. Justice Vicente V. Mendoza in *Estrada v. Sandiganbayan*, 421 Phil. 290, 430 (2001); citing *NAACP v. Alabama*, 377 U.S. 288, 307, 12 L. Ed. 2d 325, 338 [1958]; and *Shelton v. Tucker*, 364 U.S. 479, 5 L. Ed. 2d 231 (1960)

[11] See *Samahan ng mga Progresibong Kabataan v. Quezon City*, 815 Phil 1067 (2017); emphasis and underscoring supplied.

[12] Resolution, p. 4.

[13] See G.R. No. 223705, August 14, 2019.

[14] See id. "Petitioner assails the constitutionality of Section 36.8 of R.A. No. 9189, as amended by R.A. No. 10590, which prohibits 'any person to engage in partisan political activity abroad during the 30-day overseas voting period.' A violation of this provision entails penal and administrative sanctions." (underscoring supplied)

[15] See id. The Court held that the assailed penal provision is "an impermissible content-neutral regulation for being **overbroad,** violating, thus, the free speech clause under Section 4, Article III of the 1987 Constitution." It stated further than "a facial invalidation of the questioned statute is warranted to **counter the 'chilling effect'** on protected speech that comes its **overbreadth**[.]" (emphases supplied)

[16] See id. "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 at all times be abridged." (emphases supplied)

[17] In *Soriano v. Laguardia* (605 Phil. 43 [2009]), the Court acknowledged that "indecent speech without [the] prurient appeal component" may fall "under the **category of protected speech** depending on the context within which it was made." In that case, the Court found the indecent speech unprotected because it was uttered using in a G-rated broadcast show. In contrast, the present case involves the print media, which is accorded broader protection. See also *Chavez v. Gonzales* (569 Phil. 155 [2008]) wherein the Court held that "[w]hile all forms of communication are entitled to the broad protection of freedom of expression clause, the freedom of film, television and radio broadcasting is somewhat lesser in scope than the freedom accorded to newspapers and other print media x x x." (emphases and underscoring supplied)

Moreover, in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court held that the "Filthy Words" monologue was indecent using the broadcast mode of communication. It stressed that "the First Amendment has a special meaning in the broadcasting context," considering that it is a pervasive medium (*e.g.*, radio) and "broadcasting is uniquely accessible to children." In his opinion, Justice Steven acknowledged that "[s]ome of the words used [in the monologue] have been held protected by the First Amendment in other cases and contexts." The monologue can be validly delivered to a live audience

As in the main Decision, the *ponencia* refuses to examine Ordinance No. 7780's constitutionality under the lens of the overbreadth doctrine, stating that the subject regulation punishes "obscenity" which is not protected speech.[18] However, with all due respect, I submit that this is misplaced reasoning. It should be borne in mind that in this case, the Court is not asked to examine a material whether it is obscene and therefore unprotected, but rather, to evaluate whether or not **the very parameters used by the Ordinance to determine obscenity itself is constitutionally valid**. Indeed, there is a clear difference between the parameters to determine obscenity from a finding that the material itself is obscene. The former is the very issue in this case and not the latter. As I have explained in my opinion on the main, **if a statute or ordinance foists unreasonable parameters for obscenity, then it will have the effect of sweeping unnecessarily and broadly against protected areas of free speech which would have otherwise been deemed as protected under our Constitution.**[19] Thus, since this Court is asked to examine the validity of the obscenity parameters in Ordinance No. 7780, a facial challenge based on the overbreadth doctrine is proper in this case.

On this score, I join the opinion of Associate Justice Marvic M.V.F. Leonen that Ordinance No. 7780 is unconstitutional. However, I find it opportune to clarify that Ordinance No. 7780 is regarded as constitutionally infirm **not because it transgresses the *Miller* test *per se***, but because it **violates substantive due process** under an **"overbreadth" analysis.** As will be briefly explained below, the *Miller* test is conceptually different from the overbreadth doctrine.

The *Miller* test is a test to determine if a certain material is obscene; in contrast to the overbreadth doctrine, the *Miller* test is not a test to determine an ordinance or law's constitutionality. To be sure, *Miller* traces its roots to a rich history of jurisprudence that demonstrates the constant struggle to capture, at its truest form, a reasonable definition of obscenity so as not to impinge on free speech and expression. The ultimate goal is to ensure that protected expression will not be lumped together with unprotected expression and be unduly restrained. Hence, an obscenity regulation that prohibits a wider range of expression than *Miller* runs the risk of being overbroad.

In *Fernando v. Court of Appeals*,[20] the Court observed that:

> There is no perfect definition of "obscenity" but the 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,

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composed of adults who knows what to expect and chose to attend the performance. Adults may also validly purchase a recording or transcript of that monologue. (emphases and underscoring supplied)

[18] See Resolution, p. 2.

[19] See my Dissenting Opinion in the Main Decision dated September 24, 2019.

[20] 539 Phil. 407 (2006).

taken as a whole, lacks serious literary, artistic, political, or scientific value.[21]

The *Miller* test consists of three (3) parameters to determine whether or not a particular material is considered "obscene"; in consequence, if a material is considered obscene, then it can be the subject of government regulation without infringing on the author's freedom of speech and expression. Through these three (3) parameters, the *Miller* test aims to define into demonstrable criteria what material may be properly considered as "obscene" under judicial standards, and in so doing, seeks to delimit the conceptual malleability of "obscenity." Practically speaking, a person's appreciation of obscenity may be based on his or her disposition, mores, or values. As such, *Miller* is a jurisprudential attempt to set a uniform benchmark for such a highly-subjective term as "obscenity."

Since *Miller* is a test to determine what is obscene or not, its proper application is to "zero-in" on the actual material. In this regard, *Miller* is not — strictly speaking — the test to determine the constitutionality of a particular ordinance or statute. **However, this does not mean that the *Miller* parameters are completely taken out of the equation in constitutional entreaties related to free speech issues**. Since *Miller* provides the **prevailing proper standard to determine what is obscene**, an obscenity regulation that **fails to take into account *Miller*'s three (3) parameters effectively foists an overbroad definition of obscenity** and therefore, **dangerously suppresses what should have been protected speech or expressions.**

In this case, petitioners argue that the Ordinance's definitions of obscenity and pornography are **unduly expansive** as to disregard the guidelines prescribed in *Miller*. The relevant portions of the Ordinance read:

> Section 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 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

[21] Id. at 417.

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 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.**

C. Materials shall refer to magazines, newspapers, tabloids, comics, writings, photographs, drawings, paintings, billboards, decals, movies, music records, video and VHS tapes, laser discs, and similar matters.

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:

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 scientific and for educational purposes.** (emphases supplied)

To highlight the relevant points, the subject Ordinance criminally punishes the mere "showing, depicting, or describing" "*sexual acts*," "*completely nude human bodies*", and "*human sexual organs or the female breasts*" for being obscene or pornographic. A *proviso* exempts these expressions when used for science, scientific research, medical or medically-related art, profession, and for educational purposes.

A perusal of Ordinance No. 7780 reveals that it utterly failed to take the *Miller*'s guidelines into account in defining and penalizing obscenity under the parameters set therein.

In particular, *Miller*'s first guideline ("whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest") was exceeded, considering that Ordinance No. 7780 defines the mere depiction of "sexual acts" as obscene without looking at whether the **dominant theme** of the work has a tendency to excite lustful thoughts. While the phrase "act calculated to excite impure imagination or arouse prurient interest" appears in the Ordinance's definition of what is obscene, it is not the sole and definitive factor on what is obscene. Notably, such phrase is qualified by the conjunction "or," which means that it is an alternative to the other four (4) phrases contained in the passage (*i.e.*, any material or act that is (1) indecent, erotic, lewd, or offensive; (2) contrary to morals, good customs, or religious beliefs, principles or doctrines; (3) unfit to be seen or heard; or (4) violative of the proprieties of language or behavior, regardless of the motive of the printer, publisher, seller, distributor, performer, or author of such act or material). As such, Ordinance No. 7780 is unduly expansive.

Hypothetically therefore, under the Ordinance's definition, a short section in a publication describing a sexual act would be sufficient to penalize the producer even though the effect of the work, taken as a whole, is not to excite the prurient interest. This depiction is a protected expression under *Miller*. It has long been understood that "sex and obscenity are not synonymous," such that the portrayal of sex, by itself, is not sufficient to deny a material of constitutional protection. However, Ordinance No. 7780 attempts to criminalize such portrayal without any regard as to whether the dominant theme of the material "appeals to the prurient interest" as required by *Miller*.

Miller's second guideline — that is, "whether the work depicts or describes, in a patently offensive way, sexual conduct," was likewise ignored, since the Ordinance disallows even the mere showing of completely nude human bodies, as well as of sexual organs. As unanimously held in *Jenkins v. Georgia*,[22] the showing of nudity alone does not render a material patently offensive or obscene based on *Miller*'s standards. However, as petitioners point out, a resident of Manila who invites a guest into his home where a nude painting or sculpture is casually displayed, can be held liable under the assailed ordinance.[23]

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[22] 418 U.S. 153 (1974).

[23] See Motion for Reconsideration, p. 12.

Finally, *Miller*'s third guideline (*i.e.*, whether the work, taken as a whole, lacks serious *literary, artistic, political*, or *scientific* value) was disregarded. While the Ordinance contains a *proviso* that it shall not apply to materials made or used for "science and scientific research and medical or medically related art, profession, and x x x educational purposes," this *proviso* does not include the full range of considerations in *Miller* such that those with **serious literary, artistic, and political value are still considered obscene**. It bears noting that the *proviso* exempts art only when it is medically related even though Miller does not contemplate such restrictive appreciation of a material's artistic value.

Accordingly, by failing to take into account the *Miller* guidelines, whether implicitly or explicitly, in its characterization of what is "obscene," **the assailed Ordinance unduly sweeps towards protected forms of speech and expression in violation of Section 4,[24] Article III of the Constitution.** Thus, it violates the overbreadth doctrine.

In *Adiong v. Commission on Elections*,[25] the Court has held that "[a] statute is considered void for overbreadth when 'it offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulations may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'"[26] Notably, the "[o]verbreadth doctrine is a principle of judicial review that a law is invalid if it punishes constitutionally protected speech or conduct along with speech or conduct that the government may limit to further a compelling government interest. A statute that is **broadly written which deters free expression can be struck down on its face** because of its **chilling effect** even if it also prohibits acts that may legitimately be forbidden."[27] Truly, a facial evaluation of Ordinance No. 7780 reveals its undeniably expansive scope as it prohibits even protected expression.[28]

ACCORDINGLY, I vote to **GRANT** the motion for reconsideration, and to declare Ordinance No. 7780 **VOID** and **UNCONSTITUTIONAL**.

ESTELA M. PERLAS-BERNABE
Senior Associate Justice

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[24] 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.

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

[26] Id. at 719-720.

[27] <https://definitions.uslegal.com/o/overbreadth-doctrine/> (last visited October 5, 2021); emphasis supplied.

[28] Portrayal of sex, by itself, is not sufficient to deny a material of constitutional protection. (See *Roth v. United States*, 354 US 476 [1957]; see also *Sable Communications v. FCC*, 492 US 115 [1989]).