

JOSE JESUS M. DISINI, JR., ROWENA S. DISINI, LIANNE IVY P. MEDINA, JANETTE TORAL AND ERNESTO SONIDO, JR., PETITIONERS, VS. THE SECRETARY OF JUSTICE, THE SECRETARY OF THE DEPARTM...

G.R. No. 203335. April 22, 2014

Ponente: ABAD, J.

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ABAD, J.:

A number of petitioners seek reconsideration of the Court’s February 18, 2014 Decision that declared invalid and unconstitutional certain provisions of Republic Act 10125 or the Cybercrime Prevention Act of 2012 and upheld the validity of the others. The respondents, represented by the Office of the Solicitor General, also seek reconsideration of portions of that decision. After going over their motions, however, the Court sees no substantial arguments from either side to warrant the reversal of its February 18, 2014 Decision.

The point about the legislative bicameral committee’s insertions of certain provisions that were neither in the House bill nor in the Senate bill is something that the Court is not inclined to investigate since insertions are within the power of those committees to make so long as the passage of the law complies with the constitutional requirements.[1] The Cybercrime Prevention Act went through both houses and they approved it. Any issue concerning alleged non-compliance with the governing rules of both houses regarding committee insertions have to be internally resolved by each house.

In any event, the Court will briefly address certain aspects of the decision that drew the most objections.

Section 6 of the cybercrime law imposes penalties that are one degree higher when the crimes defined in the Revised Penal Code and certain special laws are committed with the use of information and communication technologies (ICT). Some of the petitioners insist that Section 6 is invalid since it produces an unusual chilling effect on users of cyberspace that would hinder free expression.

Petitioner Bloggers and Netizens for Democracy insist that Section 6 cannot stand in the absence of a definition of the term “information and communication technology”.[2] But petitioner seems to forget the basic tenet that statutes should not be read in isolation from one another. The parameters of that ICT exist in many other laws. Indeed those parameters have been used as basis for establishing government systems and classifying evidence.[3] These along with common usage provide the needed boundary within which the law may be applied.

The Court had ample opportunity to consider the proposition that Section 6 violates the equal protection clause via the parties’ pleadings, oral arguments, and memoranda. But, as the Decision stressed, the power to fix the penalties for violations of penal laws, like the cybercrime law, exclusively belongs to Congress.

In any event, Section 6 of the cybercrime law merely makes the commission of existing crimes through the internet a qualifying circumstance that raises by one degree the penalties corresponding to such crimes. This is not at all arbitrary since a substantial distinction exists between crimes committed through the use of ICT and similar

crimes committed using conventional means.

The United Nations Special Rapporteur,[4] Frank La Rue, acknowledged the material distinction. He pointed out that “[t]he vast potential and benefits of the Internet are rooted in its unique characteristics, such as its speed, worldwide reach and relative anonymity.” For this reason, while many governments advocate freedom online, they recognize the necessity to regulate certain aspects of the use of this media to protect the most vulnerable.[5]

Not infrequently, certain users of the technology have found means to evade being identified and for this reason have been emboldened to reach far more victims or cause greater harm or both. It is, therefore, logical for Congress to consider as aggravating the deliberate use of available ICT by those who ply their wicked trades.

Compared to traditional crimes, cybercrimes are more perverse. In traditional estafa for example, the offender could reach his victim only at a particular place and a particular time. It is rare that he could consummate his crime without exposing himself to detection and prosecution. Fraud online, however, crosses national boundaries, generally depriving its victim of the means to obtain reparation of the wrong done and seek prosecution and punishment of the absent criminal. Cybercriminals enjoy the advantage of anonymity, like wearing a mask during a heist.

Petitioners share the Chief Justice’s concern for the overall impact of those penalties, being one degree higher than those imposed on ordinary crimes, including the fact that the prescriptive periods for the equivalent cybercrimes have become longer.[6]

Prescription is not a matter of procedure over which the Court has something to say. Rather, it is substantive law since it assumes the existence of an authority to punish a wrong, which authority the Constitution vests in Congress alone. Thus, there is no question that Congress may provide a variety of periods for the prescription of offenses as it sees fit. What it cannot do is pass a law that extends the periods of prescription to impact crimes committed before its passage.[7]

It is pointed out that the legislative discretion to fix the penalty for crimes is not absolute especially when this discretion is exercised in violation of the freedom of expression. The increase in the penalty for online libel creates, according to this view, greater and unusual chilling effect that violates the protection afforded to such freedom.

But what the stiffer penalty for online libel truly targets are those who choose to use this most pervasive of media without qualms, tearing down the reputation of private individuals who value their names and community standing. The law does not remotely and could not have any chilling effect on the right of the people to disagree, a most protected right, the exercise of which does not constitute libel.

The majority of the movants believe that the Court’s decision upholding the constitutionality of Section 4(c)(4), which penalizes online libel, effectively tramples upon the right to free expression. But libel is not a protected speech. There is no freedom to unjustly destroy the reputation of a decent woman by publicly claiming that she is a paid prostitute.

As early as 1912, the Court held that libel is a form of expression not protected by the Constitution.[8] Libel, like obscenity, belongs to those forms of speeches that have never attained Constitutional protection and are considered outside the realm of protected freedom. As explained by the US Supreme Court in *Champlinsky v. New Hampshire*: [9]

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been

thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words – those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. “Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.” (Emphasis supplied)

The constitutional guarantee against prior restraint and subsequent punishment, the jurisprudential requirement of “actual malice,” and the legal protection afforded by “privilege communications” all ensure that protected speech remains to be protected and guarded. As long as the expression or speech falls within the protected sphere, it is the solemn duty of courts to ensure that the rights of the people are protected.

At bottom, the deepest concerns of the movants seem to be the fact that the government seeks to regulate activities in the internet at all. For them, the Internet is a place where everyone should be free to do and say whatever he or she wants. But that is anarchical. Any good thing can be converted to evil use if there are no laws to prohibit such use. Indeed, both the United States and the Philippines have promulgated laws that regulate the use of and access to the Internet.[10]

The movants argue that Section 4(c)(4) is both vague and overbroad. But, again, online libel is not a new crime. It is essentially the old crime of libel found in the 1930 Revised Penal Code and transposed to operate in the cyberspace. Consequently, the mass of jurisprudence that secures the freedom of expression from its reach applies to online libel. Any apprehended vagueness in its provisions has long been settled by precedents.

The parties’ other arguments in their respective motions for reconsideration are mere reiterations that the Court already considered and ruled upon when it promulgated its earlier Decision.

WHEREFORE, the Court DENIES with finality the various motions for reconsideration that both the petitioners and the respondents, represented by the Office of the Solicitor General, filed for lack of merit.

SO ORDERED.

Leonardo-De Castro, Peralta, Bersamin, Del Castillo, Villarama, Jr., Perez, and Reyes, JJ., concur.

Sereno, C.J., see concurring & dissenting opinion.

Carpio, J., I vote to declare section 6 constitutional. I reiterate my separate dissenting & concurring opinion.

Velasco, Jr., J., no part, with prior inhibition

Brion, J., see my dissent.

Mendoza, J., I join the position of C.J. on sec. 6 and other positions taken by J. brion.

Perlas-Bernabe, J., no part.

Leonen, J., see dissent.

[1] *Tatad v. The Secretary of the Department of Energy*, 346 Phil. 321 (1997), citing *Tolentino v. Secretary of Finance*, G.R. Nos. 115455, 115525, 115543, 115544, 115754, 115781, 115852, 115873 & 115931, August 25, 1994, 235 SCRA 630.

[2] *Motion for Reconsideration*, p. 2357.

[3] *An Act Providing And Use Of Electronic Commercial And Non-Commercial Transactions, Penalties For Unlawful Use Thereof, And Other Purposes*, Republic Act 8792, June 14, 2000.

[4] Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

[5] La Rue accepts that “legitimate types of information ... may be restricted [such as] child pornography (to protect the rights of children), hate speech (to protect the rights of affected communities), defamation (to protect the rights and reputation of others against unwarranted attacks), direct and public incitement to commit genocide (to protect the rights of others), and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (to protect the rights of others, such as the right to life).” (Citations omitted) (A/HRC/17/27, p.8); see Maria Luisa Isabel L. Rosales, *Today the Internet, Tomorrow Cable TV?: Situating the Internet as a Human Right*, 57 *Ateneo L.J.* 463, 484-85 (2012).

[6] Philippine Bar Association, Motion for Reconsideration, p. 2397; Bloggers and Netizens for Democracy, Motion for Reconsideration, p. 2362.

[7] *People of the Philippine Islands v. Parel*, G.R. No. L-18260, January 27, 1923, citing *Fiore*, *Irretroactividad e Interpretacion de las Leyes*, pp. 426-428.

[8] *Worcester v. Ocampo*, 22 Phil. 41 (1912), cited in Bernas, S.J. *The 1987 Constitution of the Republic of the Philippines: A Commentary*, 3rd ed., Rex Book Store, Manila, 2003.

[9] 315 U.S. 568 (1942), cited in Gorospe, R. *Constitutional Law: Notes and Readings on the Bill of Rights, Citizenship and Suffrage*, Vol. I, Rex Book Store, Manila, 2006, p. 672.

[10] In the Philippines, the following laws were enacted to regulate the access and use of the Internet: Electronic Commerce Act of 2000 (Republic Act 8792), Access Devices Regulation Act (Republic Act 8484) and the Anti-Bullying Act of 2013 (Republic Act 10627). The United States, on the other hand, enacted the following laws: (1) to combat Internet fraud: (a) 15 U.S.C. §§ 45, 52 (Unfair or deceptive acts or practices; false advertisements; (b) 18 U.S.C. §§ 1028, 1029, 1030 (fraud in connection with identification documents and information; fraud in connection with access devices; and fraud in connection with computers); and (c) 15 U.S.C. § 1644 (credit card fraud). (2) For Child Pornography, Child Luring and other Related Activities: (a) 18 U.S.C. § 2251 (sexual exploitation and other abuse of children), and (b) 18 U.S.C. § 2421 (transportation for illegal sexual activity). See US Federal Cybercrime Laws, retrieved at http://digitalenterprise.org/governance/us_code.html (last accessed April 3, 2014).

DISSENTING AND CONCURRING OPINION

SERENO, C.J.:

Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.

Justice Potter Stewart[1]

Nothing can be more plain and unambiguous than the Constitutional command that “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.” The Constitution’s mantle of protection is not limited to direct interference[2] with the right to free speech; it prohibits anything that as much as subtly chills its exercise.

I maintain my dissent insofar as the application of Section 6 to libel is concerned because the one degree higher penalty it imposes creates a chilling effect on the exercise of free speech. Hence, while a solitary sentence to that effect would have sufficed, I respectfully but vigorously reassert my dissent, considering the far-reaching effects

of Section 6 on the lives and liberty of the Filipino people. Freedom of speech is the nucleus of other rights. That is why it is the first right that is curtailed when a free society falls under a repressive regime.[3] That is also why this Court has acknowledged freedom of speech as occupying a preferred position in the hierarchy of rights.[4]

Unfortunately, the questioned provision was discussed only cursorily in the Court's Decision, – through a single paragraph, – and again in the resolution of the motions for reconsideration, despite the gravity of its consequences. The Decision dismissively disposes of the issue by 1) stating that Section 6 operates only to make commissions of crimes through the Internet a qualifying circumstance and 2) substantial distinctions justify a higher penalty for crimes through information communication technology (ICT). I believe that it is the Court's constitutional duty to explain to the people its decision exhaustively, especially when the issue has broad implications on the national life. Indeed, if the majority had only thoroughly examined the implications of Section 6, at least as far as its application to libel is concerned, they might have seen how the provision subtly but surely endangers the preferred right to free speech.

It is also the Court's duty to address the confusion that may have resulted from its Decision when the matter of such confusion is raised in a motion for reconsideration. Especially so when several parties raise the issue, since it would show how widespread the misconception is. Failure to do so may create and propagate unfounded fears with inevitable adverse effects. If the Court takes the time to resolve moot and academic cases when doing so will be instructive to the bar and bench and the public, and when the issues raised are of paramount public interest,[5] all the more should it endeavour to allay the concrete fears of the population, no matter how absurd, by clarifying and untangling the confusion that caused them. This I will do in relation to the wild conclusions some parties hold about the nature of ICT in Section 6.

I had fervently hoped that this conscientious reiteration of my reasons for asserting the unconstitutionality of Section 6 insofar as its application to libel is concerned would have the effect of convincing those who take a contrary position – within and outside of the Court – to reconsider their strongly-held position on Section 6. It would be a glimmer of hope should this reassertion even as much as nudge them slightly to be open to this different view being offered in the marketplace of ideas. Incidentally, the marketplace has moved into cyberspace which we must now protect, not for its own sake, but for the vast possibilities for robust exchange of ideas it has opened, especially those pertaining to politics and governance. ICT has proven to be an ally of democracy. Hence, nowhere is the protection of free speech more imperative than in this ubiquitous medium.

I also explain my position on the validity of regulating the transmission of unsolicited commercial communications under Section 4(c)(3). I believe that the regulation prevents harmful conduct that may interfere with an e-mail user's enjoyment of his e-mail. Consequently, the interference may possibly affect his online exercise of his right to free speech, free expression and free association, that e-mail services facilitate.

Urgent need to remove the chilling effect of Section 6 insofar as its application to cyberlibel is concerned.

The Court had struck down unconstitutional provisions of the Cybercrime Prevention Act, in the exercise of its duty as the ultimate guardian of the Constitution. However, it has left Section 6 completely unscathed. In doing so, the Court would appear not to have completely slain the beast still poised to attack the right to freedom of speech. Perhaps it is the deceptively simple and innocuous wording of the provision that has successfully masked its invidious repercussions. Or perhaps, it is because of the provision's indirect, rather than frontal attack on free speech that has left the majority unconcerned. Indeed, it is often the quiet and creeping interference upon fundamental rights that succeeds in absolutely undermining liberty. It is the Court's duty to examine and expose

to light this hidden peril and rouse the complacent from her complacency.

I believe that the Court should now closely scrutinize Section 6 anew if it had failed to do so the first time around.

As a general rule, penal statutes cannot be facially invalidated on the ground that they produce a “chilling effect,” since they are intended to have an in terrorem effect^[6] to deter criminality.^[7] However, when a law provides for a penalty that goes beyond the in terrorem effect needed to deter crimes and impedes the exercise of freedom of speech, it should be quashed at once without hesitation. As I previously demonstrated, the increase in penalty under this seemingly innocuous provision of Section 6, insofar as it is applied to libel, indirectly but absolutely results in chilling the right of the people to free speech and expression. Therefore, it is unconstitutional.

Section 6 creates an additional in terrorem effect on top of that already created by Article 355 of the Revised Penal Code.

Our Revised Penal Code is based on the premise that humans are rational beings who refrain from criminal acts if threatened with punishment sufficient to outweigh any expected gain in committing the crime.^[8] This consequence is the intended in terrorem effect of penal statutes.^[9] Hence, in their exercise of freedom of speech, people circumspectly weigh the severity of the punishment if the speech turns out to be libelous against the possible benefit to be derived from it.

However, additional in terrorem effect may be validly created by law to discourage resort to greater perversity in the commission of a felony. Hence, under the Revised Penal Code the imposable penalty is increased when there are aggravating circumstances showing a greater perversity in the commission of a felony.^[10]

Section 6 of the Cybercrime Prevention Act introduces the use of ICT as a qualifying aggravating circumstance, thusly:

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

Article 355 of the Revised Penal Code, provides for libel the penalty of prisión correccional in its minimum (from 6 months and 1 day to 2 years and 4 months) and medium (from 2 years, 4 months, and 1 day to 4 years and 2 months) periods. However, with the increase in penalty by one degree under the Cybercrime Prevention Act, libel qualified by the use of ICT is now punishable by prisión correccional in its maximum period (from 4 years, 2 months and 1 day to 6 years) to prisión mayor in its minimum period (from 6 years and 1 day to 8 years).^[11] Therefore, Section 6 doubles the maximum penalty for online libel.

Thus, Section 6 effectively creates an additional in terrorem effect by introducing ICT as a qualifying aggravating circumstance. This burden is imposed on top of the intended in terrorem effect of the original penalties imposed by the Revised Penal Code. Thus, the public will now have to take this additional burden into account in their calculation of penalties. As if the need to weigh the costs and benefits of whether to exercise freedom of speech is not burdened enough by the possibility of a libel suit, the public will now have to additionally mull over their use of ICT in the exercise of this freedom through ICT.

Every individual, including those of us in the judiciary, who rely heavily on the use of ICT can easily see how burdensome this state of affairs is. Significantly, the statistical facts show that the Philippines depends greatly on

ICT as a means of communication and of expression. As pointed out by Justice Leonen in his Separate Dissenting and Concurring Opinion to the main Decision, a global study of internet users showed that 78% of Filipino respondents said that they access the Internet several times a day, while 79% used e-mail at least once a day.[12] Additionally, 72% used social media at least once a day. This shows the inextricability of ICT from our national life. Indeed, we do not need statistics to convince us of this fact. What office or establishment or individual can function without the Internet nowadays? Given this reality, it is inevitable that the increase in penalty per se will effectively chill the exercise of the preferred constitutional right to free speech.

Worse, as will be shown below, this increase in penalty has domino effects which combine to create a behemoth that treacherously tramples over freedom of speech – the imposition of harsher accessory penalties, the neutralization of the full benefits of the law on probation, the increase in the prescription periods for the crime of cyberlibel and its penalty, and the fact that the aggravating circumstance cannot be offset by any mitigating circumstance. Additionally, all these extra burden can be easily imposed since the use of ICT per se, without need to prove criminal intent, automatically calls for the application of a penalty one degree higher.

The increase in penalty also
results in the imposition of
harsher accessory penalties

As explained earlier, before the Cybercrime Prevention Act, the imposable penalty for libel under Art. 355 of the Revised Penal Code, even if committed by means of ICT, was prisión correccional in its minimum and medium periods. Now, under Section 6 of the Cybercrime Prevention Act, the imposable penalty for libel qualified by ICT has been increased to prisión correccional in its maximum period to prisión mayor in its minimum period.[13] Consequently, it is now possible for the harsher accessory penalties for prisión mayor to attach. These are: the deprivation of public offices and employments even if conferred by popular election, the deprivation of the right to vote, disqualification from offices or public employments and the forfeiture of retirement pay. Undeniably, public office and employment as well as the right to vote, and retirement pay are not trifling privileges that one can easily risk losing. Hence, the public will now have to factor in these severe consequences into their calculations. The exercise of freedom of speech through ICT is thereby further burdened.

I also note that these accessory penalties hit public officers hardest. This can be troubling because it is often public servants who know about and may expose corruption within their ranks. Such harsher penalties will certainly discourage public servants from exercising their freedom of speech to denounce wrongdoing. We are therefore depriving ourselves of a potent check against official abuse.

The increase in penalty
neutralizes the full benefits of the
law on probation, consequently
threatening the public with the
guaranteed imposition of imprisonment
and the accessory penalties thereof.

Under Presidential Decree No. (P.D.) 968 or the Probation Law,[14] qualified offenders who immediately admit to their liability and thus renounce the right to appeal are given the chance to avoid the stigma of incarceration by making them undergo rehabilitation outside prison instead. However, Section 9 of the law excludes those sentenced to serve a maximum term of imprisonment of more than six years from its coverage. Since the maximum penalty for libel committed through the use of ICT has been increased two-fold to 8 years, a convicted offender may now be disqualified from availing of the benefits of probation.

Given the basic postulate animating our penal laws that humans are calculating beings who weigh the perils of their actions, it is possible that people may risk a conviction for libel, since they may avail themselves of the privilege of probation. They may find that the exercise of their freedom to speak and to express themselves is worth the threat. But when this very beneficial^[15] technology is made a qualifying aggravating circumstance that guarantees imprisonment, the in terrorem effect of libel is further magnified and becomes unduly oppressive to the exercise of free speech. Furthermore, it should be noted that offenders will now lose the additional benefit of probation – the suspension of accessory penalties.

Section 6 increases the prescription periods for the crime of cyberlibel and its penalty to 15 years.

Before the passage of the Cybercrime Prevention Act, the State waives its right to prosecute libel after only one year. With the increase in penalty by one degree pursuant to Section 6 of the Cybercrime Prevention Act, however, the penalty for libel through ICT becomes afflictive under Article 25 of the Revised Penal Code. Accordingly, while a charge for ordinary libel may be filed within the limited period of only one year from its commission, the charge for online libel can be instituted within 15 years since under Article 90 that is the prescription period for crimes punishable by afflictive penalties, other than reclusion perpetua and reclusion temporal.^[16] This is not a trivial matter since, in effect, the threat of prosecution for online libel lingers for 14 years more. Similarly, the prescription period for the penalty of libel through ICT is increased from 10 to 15 years.

These increases in the prescription periods are additional factors in the rational calculation of whether or not to exercise freedom of speech through ICT. Obviously, this adverse change further tilts the scales against the exercise of freedom of speech.

ICT as a qualifying aggravating circumstance cannot be offset by any mitigating circumstance.

A qualifying aggravating circumstance like the use of ICT increases the penalty by degrees, not by period as a generic aggravating circumstance does.^[17] Moreover, while a generic aggravating circumstance may be offset by a generic mitigating circumstance such as voluntary surrender, a qualifying aggravating circumstance is more onerous in that it cannot be similarly offset.^[18] Hence, since Section 6 now punishes the offender with a higher range of penalty — prisión correccional in its maximum period (from 4 years, 2 months and 1 day to 6 years) to prisión mayor in its minimum period (from 6 years and 1 day to 8 years) — the period of imprisonment will remain within this higher and harsher range.

It is not difficult to see how Section 6 subjugates freedom of speech through its combined effects – longer prison terms, harsher accessory penalties, loss of benefits under the Probation Law, extended prescription periods, and ineligibility of these penalties to be offset by mitigating circumstances. We cannot turn a blind eye to this and turn our backs on the Filipino people. I am convinced more than ever of the unconstitutionality of Section 6, as far as libel is concerned.

For providing that the use per se of ICT, even without malicious intent, aggravates the crime of libel, Section 6 is seriously flawed and burdens free speech.

I now discuss an additional factor by which free speech is burdened.

Petitioners Cruz et al.[19] observe in their motion for reconsideration that Section 6 increases by one degree the penalty for a crime committed through ICT without regard to how ICT contributed to the gravity of the crime.[20] Hence, even if the use of ICT is “completely arbitrary” and unintended, it merits a higher penalty that is double that imposed for ordinary libel.[21]

They also note that provisions of the Cybercrime Prevention Act appear to be *malum prohibitum*. Hence, they penalize acts by their mere commission regardless of the intent of the actor.[22] Petitioners then proceed to explain that this is inconsistent with the idea of criminalizing the act of aiding and abetting the commission of a crime as well as the attempt to commit a crime that operate within the concept of *malum in se*, where intent or *mens rea* is essential to justify culpability and penalty. Hence, the mere fact of having aided the commission of a crime already becomes criminal even without criminal intent under Section 5.

While petitioners Cruz et al. raise the criticism of inconsistency with regard to Section 5, I believe that it is more appropriately raised against Section 6. Their observation is true in the way ICT as a qualifying circumstance is applied: the use of ICT per se, even without criminal intent, merits an automatic one degree increase in penalty. This application, I believe, is inconsistent with the philosophy animating the Revised Penal Code. It also burdens free speech since the provision makes it extremely easy to prove the existence of this qualifying circumstance against an offender. How can a simple click of the mouse, without more, earn a person a penalty one degree higher than the original penalty for libel, with all its consequent oppressive effects discussed above?

Under the Revised Penal Code the basic consideration for criminal liability to arise is the *mens rea* of the accused.[23] He must be shown to have possessed a guilty mind or criminal intent on top of committing the physical act prohibited by law.[24] Hence, as a general rule, it is necessary for criminal liability that the act be committed by means of *dolo* or “malice”;^[25] otherwise, there can be no crime. That is why crimes under the Revised Penal Code, including libel, are generally characterized as crimes *mala in se*, for which there must be malicious intent.

It follows that to incur greater criminal liability and consequently higher penalty, such as that provided under Section 6, there must also be a greater perversity of the mind, a greater *mens rea*, or a greater criminal intent. Hence, for the existence of a circumstance to be considered in increasing criminal liability, it is essential that such circumstance clearly reveal the guiltier mind and greater criminal intent of the accused. Thus, there must be a clear intent and purposeful taking advantage of an aggravating circumstance. This is the fundamental principle behind the application of an aggravating circumstance.

The heavier punishment resulting from the attendance of so-called aggravating circumstances under Article 14 of the Revised Penal Code is attributed to various factors, which may be categorized as (1) the motivating power itself (e.g. “in consideration of a price, reward, or promise”^[26]); (2) the place of commission (e.g. “dwelling of the offended party”^[27]); (3) the means and ways employed (e.g. use of vehicle), (4) the time (e.g. nighttime^[28]); or (5) the personal circumstances of the offender or of the offended party (e.g. “insult or disregard of respect due to a party on account of rank, age, sex”^[29]).

Most aggravating circumstances are in the nature of means and ways employed to commit a crime.^[30] The use of ICT logically falls under this category as a means for the commission of libel and other crimes under the Revised Penal Code. Hence, we proceed to further analyze this category. A closer look below at the circumstances falling under this category^[31] reveals a shared principle behind their appreciation and application: that they must be abused deliberately with criminal intent. The same principle should then properly apply to the use of ICT, since it belongs to the same category. Hence, the need for criminal intent in the use of ICT before it can be deemed

aggravating.

Taking advantage of a public position.

The circumstance of (the offender's) public position is not aggravating by itself. It only becomes so if it was taken advantage of and there is proof that it was.[32] It means that the offenders must have used the influence, prestige or ascendancy that their office gives them as the means by which they realize their purpose.[33] The offenders must have abused their office in order to commit the offense.[34] In that way, the malicious intent of the mind is revealed. If the accused did not avail themselves of their authority, their public position would not be aggravating;[35] not even if they were sergeants in the Philippine Army and were in fatigue uniform and had army rifles at the time they committed a crime.[36] Hence, the intent to use a public position for the purpose of committing a crime appears to be essential.

By a band or with the aid of armed men

Similarly, the circumstance of commission of a crime by a band should have been especially sought and taken advantage of.[37] Jurisprudence is consistent that the aid of armed men is not aggravating unless the accused availed themselves of that aid or relied upon it.[38] The accused must have knowingly counted upon the assistance of the armed men in the commission of the crime.[39]

Abuse of Superior strength

The same is required of superior strength – it must have been abused purposely.[40] It is present when the offenders assess a superiority of strength that they select and take advantage of in the commission of the crime.[41] The mere fact of superiority in the number of assailants does not suffice; they must have taken advantage of their combined strength.[42] They must have cooperated in such a way as to secure advantage from their superiority in strength.[43]

Abuse of confidence

For the aggravating circumstance of abuse of confidence, it is necessary that there exists a relationship of trust and confidence between the accused and the victim, and that the culprits took advantage of the trust reposed in them by the offended party.[44] Indeed, it is essential that the confidence between the parties was immediate and personal, such that it gave the accused some advantage or made it easier for them to commit the criminal act.[45] Again, intent is essential for this circumstance to aggravate the crime.

Use of vehicle

Among the aggravating circumstances, the one closest to the use of ICT would be the use of vehicles, since both are tangible tools and are by themselves neutral, if not beneficial. But again, like the other aggravating circumstances, the mere use of a vehicle will not qualify it as an aggravating circumstance. The use of vehicle has to be purposely sought to facilitate the commission of the offense or to render the escape of the offender easier and his apprehension more difficult. Otherwise, the circumstance is not aggravating.[46]

Like other means of committing a crime which are made aggravating circumstances, the use of ICT has to be purposely sought to show criminal intent justifying a higher penalty.

It is clear from this sampling that for aggravating circumstances that refer to the means employed to commit the crime, it is essential that deliberately employing or taking advantage of them either to facilitate the crime or to insure impunity must be proven. This is as it should be, since it is the knowing and purposive resort to the aggravating circumstances - the added criminal intent - that aggravates the crime. In other words, the aggravation arises because of a more perverse mind, not from the mere presence or use of the means. It is this malicious intent in the adoption of the circumstance that reveals an added perversity that justifies a greater penalty.

The same principle should be applied to ICT. The mere use of ICT by itself should not automatically make it aggravating. It has to be purposely sought to facilitate the crime, maximize damage or ensure impunity. It must be established that the otherwise beneficial nature of ICT was selected and intentionally sought, deliberately and consciously adopted to advance the perpetration of the crime. That is the only way to attribute greater perversity on the part of the offender in using ICT and to justify the imposition of a penalty one degree higher. If there is no such intent, there can be no aggravation. If the mind is innocent as to the adoption of a particular means, there can be no aggravating circumstance. This malicious intent, like the elements of the crimes itself, must be proven beyond reasonable doubt. If not so proven, the ICT cannot qualify the crime, and the criminal cannot be penalized one degree higher.

Hence, there is a need to spell out the condition that ICT be specifically taken advantage of and abused to facilitate the commission of a crime, ensure impunity, or maximize damage. In other words, its use has to be abused to be aggravating.

That the law failed to specify that ICT must be taken advantage of and abused with intent – in order to facilitate the crime, ensure impunity or maximize the damage - is lamentable. Again, considering how ICT has become so ubiquitously indispensable and how it has penetrated almost every facet of life, the need to specifically show intent in the use of ICT for the commission of a crime like libel becomes all the more crucial, logical and just.

Because of this unclear requirement of criminal intent in the application of the qualifying circumstance of use of ICT, Section 6 of the Cybercrime Prevention Act effectively scares the public from using ICT and exacerbates the chilling effect on free speech.

Considering all these, it is not difficult to see how the increase of the penalty under Section 6 mutes freedom of speech. It creates a domino effect that effectively subjugates the exercise of the freedom – longer prison terms, harsher accessory penalties, loss of benefits under the Probation Law, extended prescription periods, and ineligibility of these penalties to be offset by mitigating circumstances. Worse, the qualifying circumstance can be applied easily by simply proving the use of ICT, sans proof of criminal intent to purposely use ICT for libel, thereby further chilling freedom of speech.

The Court must clarify that ICT should not refer to “stand alone” devices but should be connected to the Internet.

The Court must also take the time to clarify that ICT as used in Section 6 should refer only to devices connected to the Internet and does not include stand alone devices. This should necessarily follow from the avowed reasons of the government for imposing one degree higher penalty on crimes committed with the use of ICT.

As the Court had said, the use of ICT enables the offender to evade identification and to reach far more victims or cause greater harm. Indeed, respondents in their Memorandum prepared by the Office of the Solicitor General (OSG) enumerate three factors which justify the higher penalty for crimes committed with the use of ICT.[47]

First, the OSG explains that cybercrimes are limitless as to their scope because they are not bound by time and geography. On the other hand, non-cybercrimes are limited by distance, border security, various regulations and time. Secondly, respondents explain that cybercrimes are easily committed due to the accessibility of ICT.[48] There are approximately 30 million internet users in the country and a billion more worldwide. Hence, any person can create widespread chaos with anonymity. Thirdly, criminal purpose is accomplished with greater impact with the use of ICT.[49]

“Stand alone” devices do not have these consequences. Hence, they could not have been contemplated under Section 6.

While this may seem obvious to most, many people are confused as seen from the number of motions for reconsideration that raised this issue.[50] Many think that the mere use of a “stand alone” computer device will automatically trigger the application of Section 6. If this is not clarified, it will sow unnecessary fear of using computer technology with adverse effects on individual and organizational efficiency and productivity. In fact some petitioners[51] have made the absurd conclusion that even the use of hardware in the commission of the crime, such as physically injuring a person by hitting him with a mobile phone, will now be penalized under the questioned provision, with all its concomitant penalties.

Validity of regulating unsolicited
commercial communications under
Section 4(c)(3).

I have previously found the petitions questioning Section 4(c)(3) dismissible because of a failure to establish that a pre-enforcement judicial review thereof was warranted. Hence, without delving into the merits of petitioners’ arguments, I disagreed with the majority when they declared the questioned provision unconstitutional; first, because the said petitions are dismissible per se. However, since the majority had proceeded to review Section 4(c)(3), let me now explain my position on the matter.

I fully agree with the opinion of Justice Roberto Abad that commercial speech should be protected even if it does not enjoy the same level of protection as other categories of free speech and expression. However, may I emphasize that the questioned provision is not burdensome to commercial speech at all since the law does not prohibit the sending of unsolicited e-mail per se. Section 4(c)(3)(iii) allows the sending of unsolicited e-mails, provided that the following conditions are present: (a) the commercial electronic communication contains a simple, valid, and reliable way for the recipient to reject receipt of further commercial electronic messages (opt-out) from the same source; (b) the commercial electronic communication does not purposely disguise the source of the electronic message; and (c) the commercial electronic communication does not purposely include misleading information in any part of the message in order to induce the recipients to read the message.

Additionally, Petitioners Cruz et al., make a valid observation when they point out in their motions for reconsideration that contrary to the holding of the majority, online transmission of unsolicited commercial communications is not of the same level as unsolicited advertisements by mail.[52]

Firstly, ordinary mail advertisements are not as voluminous while e-mail ads can be so voluminous that they interfere with an e-mail user’s enjoyment of his e-mail account. Indeed, the assailed provision seeks to prevent malicious attacks done through the sending of e-mails, which the victim cannot opt out from. One of those forms of attack includes what is called “mail bombing.”[53] Here, an attacker intentionally sends large volumes of e-mail to a single address in an effort to overwhelm the mail server and degrade the communication system by making it unserviceable.[54] This is a form of Denial of Service (DoS) attack, as it prevents other users who are using the same server from accessing their e-mails.[55] We can thus imagine a situation in which an e-mail

account reaches its storage capacity, thereby preventing the account holder from receiving legitimate mails, as these e-mails are “bounced” back to the senders.[56] This situation would impede the robust exchange of ideas as well as the speedy flow of information and communication. It is precisely so that recipients of unsolicited commercial communications can prevent the congestion of their e-mail accounts that the provision requires that recipients of unsolicited commercial communications be allowed to opt out under Section 4(c)(3)(iii).

Secondly, as petitioners pointed out, unsolicited e-mail commercial communications, unlike ordinary mail commercial communications can be used for another form of attack called “phishing.”[57] It is an internet scam done by offering enticing deals or false statements (such as winning a cash prize), aimed at tricking users into disclosing their personal, financial, and other confidential information.[58] The message used for phishing may appear to be coming from a department store, a known company, a bank, the government, or even from a contact whose e-mail account has been “hacked.”[59] Phishing can attack millions of e-mail addresses around the world, and has emerged as an effective method of stealing personal and confidential data of users.[60] It is said that phishing is typically executed as follows:[61]

A successful phishing attack deceives and convinces users with fake technical content and social engineering practices. Most phishing attacks are initiated through e-mails, where the user gets an e-mail that prompts him or her to follow a link given in the e-mail. This link leads to a phishing Web site, though the e-mail says otherwise. The e-mail may contain a message stating that a particular transaction has taken place on the user’s account, and a link is provided to check his or her balance. Or the e-mail may contain a link to perform a security check on the user’s account.

Hence, Section 4(c)(3) is valid because it seeks to regulate a potentially harmful conduct. Such harmful conduct may interfere with a user’s enjoyment of his e-mail and consequently of his legitimate exercise of his fundamental rights that e-mail facilitates. Thus, I respectfully disagree with the facial invalidation of Section 4(c)(3) and hold that it is not unconstitutional.

Call to vigilance

The Court has struck down provisions of the Cybercrime Prevention Act that clearly violate constitutional rights such as Section 12 and Section 19. It also partially struck down as unconstitutional Section 7 insofar as it applies to cyberlibel and online child pornography and Section 4(c)(4) insofar as it creates criminal liability on the part of persons who receive a libelous post and merely react to it. However, we left Section 6 completely untouched while wrongly invalidating Section 4(c)(3). The motions for reconsideration of the two provisions had given the Court another opportunity to complete the job it has started by also striking down as unconstitutional Section 6 insofar as its application to libel clearly chills freedom of speech and by upholding the constitutionality of Section 4(c)(3). It is an opportunity we should not have squandered.

We cannot be complacent. The very fabric of our democratic society is in danger of being slowly torn apart. The Court staunchly defended the right to commercial speech of advertisers by declaring unconstitutional Section 4(c)(3) which simply regulates the sending of unsolicited commercial communications even as it admits that commercial speech is not accorded the same level of protection as that given to other constitutionally guaranteed forms of expression. On the other hand, it does not give the same steadfast protection for freedom of speech which Section 6 clearly chills. Hence, it is puzzling that the Court is willing to uphold commercial speech than the preferred right to free speech of citizens.

True, the State has a legitimate interest in the preservation of order. For that purpose, it also has the power, exercised through the legislature, to criminalize acts and provide penalties therefor. Hence, it can validly regulate harmful conduct under Section 4(c)(3). Section 6, however, is a different matter. The State cannot override a clear

Constitutional command that no law shall be passed abridging the freedom of speech. I believe that the interest in encouraging free speech in a democratic society outweighs any theoretical but unproven benefit of an unduly harsher penalty for cyberlibel.[62]

The history of our nation has shown that we do not lack for brave people who dutifully speak against the excesses of government and at great cost to themselves. In recent times, ICT has been used to generate mass protests against perceived corruption and excesses in government. But the guaranteed imposition of imprisonment of as much as eight years and harsher accessory penalties that Section 6 mandates, together with the fact that they may be imposed so easily since no criminal intent is necessary to make the use of ICT a qualifying circumstance, may force even the bravest and most conscientious dissenters among us to forego their prized constitutional right to free speech and expression. That would be the start of the slow, quiet, but sure demise of our democracy. We can be complacent only at our own peril.

I had earlier voted with the majority to uphold Section 4(c)(4) on cyberlibel – save for its application to those who merely react to a libelous post – on the presumption that Section 6, which imposes a one degree higher penalty on crimes committed using ICT, would be declared unconstitutional insofar as it is applied to cyberlibel. However, in view of the ultimate ruling of the majority affirming the constitutionality of Section 6, I consequently conclude that Section 4(c)(4) is wholly unconstitutional. The invalidation of Section 6 would have removed the heavy burden on free speech exercised online. Indeed, Section 6 is completely incompatible with free speech. To reiterate, the majority's insistence that Section 4(c)(4) cannot be implemented without at the same time imposing the higher penalty provided by Section 6 – with its invidious chilling effects discussed above – constrains me to hold that Section 4(c)(4) is wholly unconstitutional as well. If free speech is to be truly defended as a right with a preferred position in the hierarchy of rights, its online exercise should also be vigorously protected.

WHEREFORE, I vote to DECLARE:

- Section 6 UNCONSTITUTIONAL, insofar as it applies to libel, for unduly curtailing freedom of speech;
- Section 4(c)(4) UNCONSTITUTIONAL; and
- Section 4(c)(3) NOT UNCONSTITUTIONAL for being a valid regulation of a harmful conduct.

Nevertheless, I CONCUR with the majority in its other dispositions.

[1] *Bates v. City of Little Rock*, 361 US 516 (1960), as cited in *Healy v. James*, 408 U.S. 169, 280-281 (1972).

[2] *Healy v. James*, 408 US 169, 280 (1972).

[3] ISAGANI A. CRUZ, CONSTITUTIONAL LAW, 198-199 (2000).

[4] *Ayer Productions Ptd. Ltd. v. Capulong*, G.R. Nos. 82380 and 82398, 29 April 1988, 160 SCRA 861.

[5] *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)*, G.R. Nos. 183591, 183752, 183893, 183951 & 183962, 14 October 2008, 568 SCRA 402.

[6] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, G.R. No. 178552, 5 October 2010, 632 SCRA 146.

[7] *The Philippine Railway Co. v. Geronimo Paredes*, 64 Phil. 129 (1936).

[8] RAMON C. AQUINO, *THE REVISED PENAL CODE* – Vol. 1, 3 (1961).

[9] See *id.* at 8-11.

[10] *Id.* at 277; LUIS B. REYES, *THE REVISED PENAL CODE – CRIMINAL LAW, BOOK ONE*, 328 (2008).

[11] See *REVISED PENAL CODE*, Art. 61 (on rules for graduating penalties); Reyes, *supra* note 10 at 705-706; Cf.: *People v. Medroso*, G.R. No. L-37633, 31 January 1975, 62 SCRA 245.

[12] *Dissenting and Concurring Opinion of Justice Leonen*, p. 12.

[13] *Supra* note 11.

[14] *Probation Law*; *Francisco v. Court of Appeals*, 313 Phil. 241 (1995); and *Baclayon v. Mutia*, 241 Phil. 126 (1984). See: *Del Rosario v. Rosero*, 211 Phil. 406 (1983).

[15] According to the 2012 Global Internet Survey, 91% of Filipino respondents agree that the Internet does more help to society than it does to hurt it while 93% have indicated that their lives have improved due to using the Internet. Additionally, 96% agree that the Internet is essential to their knowledge and education. See *Dissenting and Concurring Opinion of Justice Leonen* p. 13.

[16] See also TSN dated 15 January 2013, pp. 80-81.

[17] LEONOR D. BOADO, *NOTES AND CASES ON THE REVISED PENAL CODE*, 146 (2008 ed).

[18] *Supra* note 8 at 277.

[19] G.R. No. 203469.

[20] *Id.* at 30.

[21] *Id.*

[22] *Id.*

[23] *People v. Sandiganbayan*, 341 Phil. 503 (1997).

[24] VICENTE J. FRANCISCO, *THE REVISED PENAL CODE: ANNOTATED AND COMMENTED — BOOK ONE* 33 (3rd ed. 1958).

[25] *Id.* at 33-34.

[26] LUIS B. REYES, *THE REVISED PENAL CODE – CRIMINAL LAW, BOOK ONE*, 385 (2008).

[27] *Id.* at 349.

[28] *Id.* at 363.

[29] *Id.* at 343.

[30] By taking advantage of public position; by a band; with the aid of armed men or persons who insure or afford impunity; through abuse of confidence; by means of inundation, fire, poison, explosion, stranding of a vessel or intentional damage thereto, derailment of locomotive, or by the use of any other artifice involving great waste and ruin; by craft, fraud, or disguise; with evident premeditation; by taking advantage of superior strength, or by employing means to weaken the defense; with treachery; by employing means or bringing about circumstances which add ignominy; through unlawful entry; by breaking a wall, roof, floor, door, or window; with the aid of persons under fifteen years of age or by means of motor vehicles, motorized watercraft, airships, or other similar means and by deliberately augmenting the wrong done by causing other wrong not necessary for its commission.

[31] Id.

[32] Reyes, supra note 26 at 338 citing People v. Ordiales, G.R. No. L-30956, 23 November 1971, 42 SCRA 238, 245-246.

[33] Aquino, supra note 8 at 279; Reyes, supra note 26 at 336, citing U.S. v. Rodriguez, 19 Phil. 150, 156-157 (1911).

[34] Aquino, Id.

[35] Id. at 284 citing Jacinto Martinez, 2 Phil. 199 (1903).

[36] Id. at 285 citing Pantoja, 25 SCRA 468.

[37] Reyes, supra note 26 at 373.

[38] Reyes, supra note 26 at 376.

[39] Francisco, supra note 24 at 501, citing U.S. v. Abaigar, 2 Phil. 417.

[40] Reyes, supra note 26 at 409.

[41] Reyes, supra note 26 at 419.

[42] Aquino, supra note 8 at 350.

[43] Aquino, supra note 8 at 351, citing Elizaga, 86 Phil. 365.

[44] Francisco, supra note 24 at 495, citing People v. Luchico, 49 Phil. 689; Reyes, 357.

[45] Aquino, supra note 8 at 299.

[46] Reyes, supra note 26 at 463, citing People v. Garcia, G.R. No. L-32071, 9 July 1981. See also People v. Espejo (G.R. No. L-27708, 19 December 1970, 36 SCRA 400, 418) which found aggravating the use of a vehicle in going to the place of the crime, in carrying away the effect thereof and in facilitating escape of the offenders.

[47] Respondents' Memorandum dated 19 February 2013, p. 82.

[48] Id.

[49] Id.

[50] Phil. Bar Association (G.R. No. 203501); Cruz et al. (G.R. No. 203378) ; Adonis (G.R. No. 203378); Palatino (G.R. No. 203391).

[51] Palatino (G.R. No. 203391).

[52] Supra note 19 at 8.

[53] Also called "jamming" or "flooding." See VICENTE AMADOR, WWW.CYBERLAW.COM, 421-422 (2010).

[54] JONATHAN CLOUGH, PRINCIPLES OF CYBERCRIME, 37 (2010); EC COUNCIL, COMPUTER FORENSICS: INVESTIGATING NETWORK INTRUSIONS & CYBER CRIME, 7-6 to 7-7 (2010).

[55] Id.

[56] See EC COUNCIL, COMPUTER FORENSICS: INVESTIGATING NETWORK INTRUSIONS & CYBER

CRIME, 7-6 to 7-7 (2010).

[57] Supra note 19 at 9.

[58] Clough, supra note 54 at 192-194; EC Council, supra note 54 at 7-8.

[59] See Clough, supra note 54 at 192-194.

[60] Clough, supra note 54 at 192-194; EC Council, supra note 54 at 7-8.

[61] Id.

[62] Paraphrasing US Supreme Court Justice John Paul Stevens who said in *Reno v. ACLU*, 521 U.S. 844, 885 (1997), “The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”

Dissenting Opinion

BRION, J.:

I write this dissenting opinion to the Court’s resolution denying the motions for reconsideration regarding the constitutionality of the Cybercrime Prevention Act (Cybercrime Law) to reiterate my stance regarding cyberlibel, and urge my colleagues to reconsider its earlier ruling upholding the constitutionality of the application of Section 6[1] of the Cybercrime Law to cyberlibel.[2]

The ponencia denied the motions for reconsideration, and upheld the constitutionality of the application of Section 6 of the Cybercrime Law to cyberlibel. According to the ponencia, Section 6, which qualifies the crime of libel when committed through Information Communications Technology (ICT) and increases its penalty, is not unconstitutional because it is a valid exercise of Congress’ power to define and penalize crimes. The ponencia also alleged substantial distinctions between cyberlibel and libel that warrant an increase in the penalty of the former.

At the outset, allow me to clarify that I do not think that libel per se is unconstitutional; neither is its application in communications made through ICT violative of the Constitution. Jurisprudence has long settled that libel is not protected speech, and that Congress, in the exercise of its power to define and penalize crimes, may validly prohibit its utterance.

Increasing the penalty of libel when committed through ICT, however, is another matter. I submit that Section 6 of the Cybercrime Law, insofar as it qualifies the crime of libel, violates freedom of speech because it unduly increases the prohibitive effect of libel law on online speech.

My reasons are twofold: first, I do not believe that there is sufficient distinction between libelous speech committed online and speech uttered in the real, physical world to warrant increasing the prohibitive impact of penal law in cyberlibel.

Second, the increase in the penalty of libel when committed through computer systems can have the effect of imposing self-censorship in the Internet and of curtailing an otherwise robust avenue for debate and discussion on public issues. In other words, over-penalizing online speech could overreach into matters other than libelous and can thus prevent protected speech from being uttered.

Cyberlibel as libelous speech committed through the Internet

The ponencia pointed out as justifications for increasing the penalty of cyberlibel the following characteristics of communications in the Internet: its speed, worldwide reach and relative anonymity. The ponencia notes that cybercrimes, including cyberlibel, are more perverse than traditional crimes because of the anonymity of its perpetrator and the difficulty of prosecuting cybercrimes.

Viewed at its most extreme, cyberlibel's impact on a person's reputation would indeed be more perverse than ordinary libel – the speed, worldwide reach and the sender's relative anonymity in Internet communications all contribute to increasing a libelous statement's harmful effect on a person's reputation. Thus, a libelous article, once published and shared in the Internet, could reach millions in a short period of time, and injure reputation more than if it had been published in the traditional sense.

But allow me to point out the other side of the impact of qualifying cyberlibel: a person, who sent an e-mail containing a libelous statement against another person, with the intent of sending that e-mail only to the latter and has in fact been viewed only by that person, would be penalized with cyberlibel and its corresponding higher penalty. A person, who through the course of chatting online with another person privately uttered a libelous statement about a third person may also be penalized with cyberlibel. The definition of publication, after all, has not been changed when the elements of libel in the Revised Penal Code had been adopted into the definition of cyberlibel. For libel prosecution purposes, a defamatory statement is considered published when a third person, other than the speaker or the person defamed, is informed of it.[3]

In the examples I have cited, the reach of the libelous statement committed through the Internet is more or less the same as its reach had it been published in the real, physical world. Thus, following the ponencia's reasoning, we will have a situation where a libelous statement that has reached one person would be punished with a higher penalty because it was committed through the Internet, just because others could reach millions when communicating through the same medium.

The same reasoning applies to anonymity in Internet communications: an anonymous libeler would be penalized in the same manner as an identified person, because both of them used the Internet as a medium of communicating their libelous utterance.

The apparent misfit between the ponencia's reasons behind the increase in the penalty of cyberlibel and its actual application lies in the varying characteristics of online speech: depending on the platform of communications used, online speech may reach varying numbers of people: it could reach a single person (or more) through e-mail and chat; it could be seen by anyone who wants to view it (amounting to millions or more, depending on the website's traffic) through a public website.

Worthy of note too, is that the publicity element of libel in the Revised Penal Code does not take into consideration the amount of audience reached by the defamatory statement. Libelous speech may be penalized when, for instance, it reaches a third person by mail,[4] or through a television program,[5] or through a newspaper article published nationwide.[6] All these defamatory imputations are punishable with the same penalty of prision correccional in its minimum and medium periods or a fine ranging from 200 to 6,000 pesos or both.[7] I do not see any reason why libel committed through ICT should be treated in a harsher manner.

I submit that we cannot rule on the basis of extreme, outlying situations, especially since, as I would explain in my succeeding discussion, increasing the penalty of cyberlibel could curtail speech in the Internet. If we must err in this decision, we must err on the side of protecting freedom of speech, a fundamental right ranking high in the value of constitutional freedoms, so cherished because it is crucial to the functioning of a working democracy.

As a final point in the matter, I note that despite the Cybercrime Law's passage, bills punishing cyber-bullying

and electronic violence have been filed in Congress. As filed, the bills penalize cyber-bullying, or the act of using social media to “harm or harass other people in a deliberate, repeated and hostile manner.”[8] Electronic Violence, on the other hand, has been defined as any act involving the exploitation of data that “can cause or is likely to cause mental, emotional and psychological distress or suffering to the victim.”[9]

To my mind, these bills represent Congress’ intent to penalize the extreme situation that the ponencia contemplates; at most, these bills are a recognition that cyberlibel has not been intended to cover such extreme situation, but only to recognize and clarify that the crime of libel may be committed through computer systems.

The increase in penalty under Section 6 of the Cybercrime Law overreaches and curtails protected speech

I further agree with the Chief Justice’s arguments regarding the application of Section 6 to libel.

As Chief Justice Sereno points out, Section 6 not only considers ICT use to be a qualifying aggravating circumstance, but also has the following effects: first, it increases the accessory penalties of libel; second, it disqualifies the offender from availing of the privilege of probation; third, it increases the prescriptive period for the crime of libel from one year to fifteen years, and the prescriptive period for its penalty from ten years to fifteen years; and fourth, its impact cannot be offset by mitigating circumstances.

These effects, taken together, unduly burden the freedom of speech because the inhibiting effect of the crime of libel is magnified beyond what is necessary to prevent its commission. Thus, it can foster self-censorship in the Internet and curtail otherwise protected online speech.

[1] Section 6 of the Cybercrime Law provides:

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

[2] Section 4(c)(4) of the Cybercrime Law provides:

(4) Libel. — The unlawful or prohibited acts of libel as defined in Article 355 of the Revised Penal Code, as amended, committed through a computer system or any other similar means which may be devised in the future.

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

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

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

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

[7] Article 355 of the Revised Penal Code

[8] Section 2 of House Bill No. 3749, or the Social Media Regulation Act of 2014.

[9] Electronic Violence Against Women (E-VAW) Law of 2013.

DISSENTING OPINION

LEONEN, J.:

I reiterate my dissent in this case.

I am also of the view that the seven (7) Motions for Partial Reconsideration[1] and the Motion for Reconsideration[2] have raised very serious constitutional issues that should merit a second full deliberation by this court. At the very least, we should have required the opposing parties to file their comments on these motions. Thereafter, a full analytical evaluation of each and every argument should have been done. The members of this court should have been given enough time to be open and reflect further on the points raised by the parties.

The matters raised by the parties revolve around the cherished right to free expression in the internet age. The brief resolution issued on behalf of the majority of this court fails to do justice to the far-reaching consequences of our decision in this case.

It is not enough that we proclaim, as the majority does, that libel is unprotected speech. The ponencia's example, i.e. "[t]here is no freedom to unjustly destroy the reputation of a decent woman by publicly claiming that she is a paid prostitute,"[3] fails to capture the nuances of criminalizing libel in our jurisprudence and in reality. It is a precarious simplification of the issue inferred from one imagined case. This obfuscation practically neuters the ability of this court to do incisive analysis in order to provide the necessary protection to speech as it applies to the internet.

The ponencia cites the 1912 case of *Worcester v Ocampo*[4] to support its argument. There was no internet in 1912. The jurisprudential analysis of problems relating to speech criticizing public officers and public figures took many turns since then.[5]

The analysis of libel is compounded by the unfortunate confusion by the ponencia of "libelous speech" and "hate speech" by citing a case decided beyond our jurisdiction, that of *Chaplinsky v. New Hampshire*. [6] *Chaplinsky* was a case decided in 1942 and the words uttered there were "fighting words" within the context of another language and another culture. This case should have been taken in the context of subsequent declarations from the Supreme Court of that jurisdiction which asserted that debates on public issues will occasionally be caustic but needs to be "uninhibited, robust and wide open." [7] This was the 1964 case of *New York Times Co. v. Sullivan*. [8]

Until the promulgation of the main opinion in this case, *Ayer Productions Pty. Ltd. v. Capulong* [9] was the controlling case in this jurisdiction, not *Chaplinsky v. New Hampshire*. *Ayer Productions* clarified jurisprudence that emerged since *US v. Bustos* [10] and expanded the protection of free speech as against prosecutions for libel for both public officers and public figures. These precedents were unbroken until our decision in this case.

The majority now condones the same 1930s text definition of libel effectively discarding the carefully crafted exception painstakingly built from the assertion of fundamental rights in this court. This condonation reveals the legislative blinders to the radically different context of the internet. The text of Section 4(c)(4) of the Cybercrime Prevention Act of 2012 is a swing towards lesser protection of the primordial right to speech. The position taken by the majority deserves a second hard look, if only to ensure the constitutional guarantee that our people truly have freedom of expression as a means to assert their sovereignty and governmental authority in cyberspace.

Further reflection and deliberation is necessary, aided by comments from all the parties to this case, to determine the effect of such simplified referral to the 1930s provision on libel in a law that seeks to regulate networked and layered communities in the internet. The lines that distinguish what is private and what is public in cyberspace are not as clear as in the physical world. Social media creates various interlocking communities of friends and

followers. The ponencia's concept of author and its simplified distinction of those that post and those that "like" posted comments are not entirely accurate as used in the internet.[11] A Twitter community of twenty followers should not be likened to a Twitter community of thousands. Conversations limited to a small group should not be considered public for purposes of libel.

"Public defamation" as a category might not make sense in cyberspace. Unlike various types of media for which our courts may now be familiar with, entry into various cyberspace communities may require several conscious acts by the user which may negate the evils that criminal libel is supposed to prevent. For instance, the user agrees to end-user license agreements (EULA).

The chilling effect on various types of speech with just the possibility of criminal libel prosecution compared with the consequences of civil liabilities for defamation presents another dimension that have been glossed over by the main opinion and the resolution on the various motions for reconsideration.[12] We have to acknowledge the real uses of criminal libel if we are to be consistent to protect speech made to make public officers and government accountable. Criminal libel has an in terrorem effect that is inconsistent with the contemporary protection of the primordial and necessary right of expression enshrined in our Constitution. The history and actual use of criminal libel[13] should be enough for us to take a second look at the main opinion in this case. The review should include a consideration of the nature of cyberspace as layered communities used to evolve ideas. Such review should result in a declaration of unconstitutionality of criminal libel in the Revised Penal Code and in the Cybercrime Prevention Act of 2012.

The resolution of these motions for reconsideration does not even consider the arguments raised against the overbroad concept of "lascivious" in Section 4 (c)(1) or the prohibition of cybersex. This standard is an unacceptable retreat from our current jurisprudential concepts of obscenity[14] that produced a refined balance between expression and public rights. This court should seriously take the allegations of vagueness and overbroadness[15] and the possibility that the leeway given to law enforcers[16] can actually limit the fundamental rights of privacy and autonomy as well as the freedoms to express sexual intimacies.

Also neglected are the issues raised in relation to section 4 (c)(3) which the Solicitor General characterized as sufficient and narrowly tailored to meet the public objective of preventing spam while at the same time solicitous of speech in the form of advertisements.[17] I view the current provisions as sufficiently narrow and tailored to meet legitimate and compelling state interests. It protects the ordinary internet user against unwarranted intrusions. Certainly, freedom of expression should not evolve into a fundamental and protected right to badger. The Cybercrime Prevention Act of 2012 does not prohibit advertising. It simply requires that whoever advertises must be accountable to the user, not use false identities and allow for opt out mechanisms so that the user will not continue to receive unwelcome advertising ad nauseum.[18]

I agree with the Chief Justice that Section 6 attenuates the penalties unjustifiably. I add that this amounts to a greater chilling effect when speech in any of its forms (political, commercial or with sexual content) transfers from physical spaces to the internet. There can be no reason for such additional deterrence: none that would justify the increase in the penalties. This issue, too, requires better comment from all the parties and a fuller and more deliberate deliberation from this court

Further comment from the parties will allow us to fully appreciate the nuances, layers, and dimensions occasioned by the various platforms in the internet that color the seemingly simple issues involved in this case. We have to be open to understanding the context of these issues from parties that may have used the internet in a more pervasive manner and are more familiar with the terrain than the members of this court. Comment from the other parties could have enlightened us further. We lose nothing with better clarification of context from the parties.

ACCORDINGLY, I vote against the issuance, at this juncture, of a resolution denying, all seven (7) Motions for Partial Reconsideration and the Motion for Reconsideration for lack of merit. I also vote to REQUIRE all the parties to comment on the seven (7) Motions for Partial Reconsideration and the Motion for Reconsideration within a non-extendible period of thirty (30) days from notice.

I maintain the vote I manifested in my Dissenting and Concurring Opinion to the February 18, 2014 decision. Thus, I vote to declare as unconstitutional for being overbroad and violative of Article III, Section 4 of the Constitution the following provisions of Republic Act No. 10175 or the Cybercrime Prevention Act of 2012:

(a)

The entire Section 19 or the "take down" provision;

(b)

The entire Section 4(c)(4) on cyber libel as well as Articles 353, 354, and 355 on libel of the Revised Penal Code;

(c)

The entire Section 4(c)(1) on cybersex; .

(d)

Section 5 as it relates to Sections 4(c)(1) and 4(c)(4);

(e)

Section 6 as it increases the penalties to Sections 4(c)(1) and 4(c)(4);

(f)

Section 7 as it allows impermissibly countless prosecution of Sections 4(c)(1) and 4(c)(4); and

(g)

Section 12 on warrantless real-time traffic data surveillance.

Likewise, I maintain my dissent with the majority's finding that Section 4(c)(3) on Unsolicited Commercial Advertising is unconstitutional.

Moreover, I maintain my vote to dismiss the rest of the constitutional challenges against the other provisions in Republic Act No. 10175 as raised in the consolidated petitions for not being justiciable in the absence of an actual case or controversy.

[1] The parties that filed Motions for Partial Reconsideration are: petitioner Senator Teofisto Guingona III in G.R. No. 203359; petitioners Alexander Adonis et al. in G.R. No. 203378; petitioners Bayan Muna et al. and Bayan Muna Representative Neri Colmenares et al. (filed a joint motion) in G.R. Nos. 203407 and 203509; petitioners Bloggers and Netizens for Democracy (BAND) including Anthony Ian M. Cruz et al. in G.R. No. 203469; petitioners National Union of Journalists of the Philippines et al. in G.R. No. 203543; petitioners Philippine Bar Association in G.R. No. 203501; respondents and the Office of the Solicitor General.

[2] Petitioners Hon. Raymond Palatino et al. in G.R. No. 203391 filed a Motion for Reconsideration.

[3] Ponencia, p. 4.

[4] Id. The ponencia cites the secondary source Bernas, S.J. The 1987 Constitution of the Republic of the Philippines, which cites 22 Phil. 41 (1912).

[5] See *United States v. Bustos*, 13 Phil. 690 (1918) [Per J. Johnson]; *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Ayer Productions Pty. Ltd. v. Capulong*, 243 Phil. 1007 (1988) [Per J. Feliciano, En Banc]; *Borjal v. Court of Appeals*, 361 Phil. 1 (1999) [Per J. Bellosillo, Second Division]; *Vasquez v. Court of Appeals*, 373 Phil. 238 (1999) [Per J. Mendoza, En Banc]; *Guingguing v. Court of Appeals*, 508 Phil. 193 (2005) [Per J. Tinga, Second Division]; and *Villanueva v. Philippine Daily Inquirer, Inc.*, G.R. No. 164437, May 15, 2009, 588 SCRA 1 [Per J. Quisumbing, Second Division]. See also *Lopez v. Court of Appeals*, 145 Phil. 219 (1970) [Per J. Fernando, En Banc]; *Mercado v. Court of First Instance*, 201 Phil. 565 (1982) [Per J. Fernando, Second Division]; and *Adiong vs. Commission on Elections*, G.R. No. 103956, March 31, 1992, 207 SCRA 712 [Per J. Gutierrez, En Banc].

[6] Ponencia, p. 4. The ponencia cites the secondary source Gorospe R., *Constitutional Law: Notes and Readings on the Bill of Rights, Citizenship and Suffrage*, Vol. 1, p. 672, which actually cites 315 U.S. 568 (1942).

[7] 376 U.S. 254, 270 (1964).

[8] 376 U.S. 254 (1964).

[9] 243 Phil. 1007 (1988) [Per J. Feliciano, En Banc].

[10] 13 Phil. 690 (1918) [Per J. Johnson].

[11] See *Disini v. Secretary of Justice*, G.R. No. 203335, February 18, 2014, p. 26.

[12] See discussion on the state's interest vis-à-vis decriminalization of libel in J. Leonen's Dissenting and Concurring Opinion, *Disini v. Secretary of Justice*, G.R. No. 203335, February 18, 2014, pp. 63-70.

[13] Id. at 63-70.

[14] See *Pita v. Court of Appeals*, G.R. No. 80806, 178 SCRA 362, October 5, 1989. [En Banc, Sarmiento, J.].

[15] Petitioners Adonis et al in G.R. No. 203378, in their Motion for Partial Reconsideration, pp. 32-33; petitioners Bayan et al. and Bayan Muna Representative Neri Colmenares in G.R. Nos. 203407 and 203508, in their Joint Motion for Partial Reconsideration, pp. 26-28.

[16] Petitioners Adonis et al. in G.R. No. 203378, in their Motion for Partial Reconsideration, p. 33

[17] Respondents, represented by the Office of the Solicitor General, in their Motion for Partial Reconsideration, pp. 5-12.

[18] See discussion in J. Leonen's Dissenting and Concurring Opinion, *Disini v. Secretary of Justice*, G.R. No. 203335, February 18, 2014, pp. 88-99.

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