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The Influence of Transjudicial Conversation in the Cross-fertilization of Philippine Human Rights Jurisprudence

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Article	Abstract
<p>Keywords: Freedom of Expression; Gap-Filling Mechanism; Human Rights Norms and Standards; Religious Freedom; Transjudicial Conversation.</p> <p>Article History Received: Jan 25, 2024; Reviewed: Jul 24, 2024; Accepted: Jul 30, 2024; Published: Jul 31, 2024.</p> <p>DOI: 10.28946/slrev.Vol8.Iss2.3574.pp393-416</p>	<p>Transjudicial conversation refers to the domestic court's judicial practice of cross-citing foreign decisions on common and shared human rights issues. Scholars have argued that this phenomenon facilitates the cross-fertilisation of rights norms and standards across territories. While this has been documented and studied in various jurisdictions, its incidence and effect in the Philippine context is yet to be fully understood. The paper thus seeks to explore the extent of such influence in the Philippine setting, specifically in the development of domestic human rights jurisprudence. In order to examine its impact, this research employs a qualitative research design. Select cases on free speech and religious exercise rights were analysed using doctrinal and content analysis approaches. These cases were purposively chosen, considering that Philippine provisions on these rights have shown close affinity with foreign constitutions. The analysis reveals that the participation of the Philippine Supreme Court in the transjudicial conversation phenomenon generally causes the cross-border fertilisation of human rights norms. Particularly, the impact of this engagement contributes to filling the gap in the domestic understanding of human rights concepts, expanding existing legal systems such as human rights and penal laws, and aligning national human rights systems with international laws. Such impacts enrich the domestic understanding of free speech and religious rights, specifically drawing bright lines between legitimate state intervention and individual enjoyment of the rights.</p>

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INTRODUCTION

Courts across territories and jurisdictions engage in a form of conversation.¹ Unlike a conventional dialogue, however, these judicial institutions communicate with each other

¹ Slaughter and Anne-Marie, “Judicial Globalization,” *Virginia Journal of International Law* 40 (1999): 1104.

through cross-referencing one's decision.² Scholars, for years, have been documenting this phenomenon and have derived different terminologies for this occurrence – judicial globalisation,³ transjudicial conversation,⁴ transjudicial monologue,⁵ and transnational judicial communication⁶ Despite such many names, a large body of literature agrees with its common characterisation, which refers to the judicial practice of a domestic court of cross-citing decisions of foreign counterparts. Various reasons, such as the similarities in the political arrangements and historical experiences between the interlocutor courts impel transjudicial conversation,⁷ lack of local solutions to a common problem,⁸ judge's pedagogical impulse,⁹ and even the nature of the Constitution and how it is interpreted¹⁰ as well as the Constitutional structure followed by the borrowing court.¹¹

Typologizing transjudicial conversation

The conversation may be categorised into two broad groups based on the form or level of reciprocity between courts. As to form, transjudicial conversation may be classified as horizontal, vertical, or mixed horizontal-vertical.¹² Horizontal communication pertains to cross-citation between tribunals of the same level: national-to-national or supranational-to-supranational.¹³ Vertical communication, on the other hand, involves two judicial bodies that are not on the same level.¹⁴ Mixed horizontal-vertical, meanwhile, occurs when a supranational court cites the judgment of a national court, and then that adopted judgment is further adopted by another national court.¹⁵

Furthermore, based on the level of reciprocity between courts, transjudicial borrowing may be characterised as direct dialogue, monologue, or intermediated dialogue. Direct dialogue refers to a situation where one court initiates the conversation, and the other responds to such initiated communication. For example, the national court of a European Union member state brings the case to the European Court of Justice under its treaty obligation. In return, the ECJ

² Kansra and Deepa, “Human Rights and the Practice of Cross-Referencing by Domestic Courts.,” *Kamkus Law Journal* 4 (2020): 118.

³ Slaughter and Anne-Marie, “Judicial Globalisation.”

⁴ Slaughter and Anne-Marie, “A Typology of Transjudicial Communication.,” *University of Richmond Law Review* 29 (1994): 99.

⁵ Law, David S, and Wen-Chen Chang, “The Limits of Global Judicial Dialogue,” *Washington Law Review* 86 (2011): 523.

⁶ Mak and Elaine, “General Principles of Law and Transnational Judicial Communication.,” in *In General Principles of Law-The Role of the Judiciary*, ed. Laura Pineschi (Switzerland: Springer, 2015), 47.

⁷ McCrudden and Christopher, “Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights.,” *Oxford Journal of Legal Studies* 20, no. 4 (2000): 501.

⁸ L’Heureux-Dube and Claire, “The Importance of Dialogue: Globalisation and the International Impact of the Rehnquist Court.,” *Tulsa Law Journal* 34 (1998): 15.

⁹ McCrudden, Jacobsohn, and Gary J, “Apple of Gold: Constitutionalism in Israel and the United States.,” in *Common Law of Human Rights* (Princeton University Press, 2017), 506.

¹⁰ McCrudden, Jacobsohn, and J.

¹¹ Jackson and Vicki C, “Constitutional Comparisons: Convergence, Resistance, Engagement,” *Harvard Law Review* 119 (2005): 109.

¹² Slaughter and Anne-Marie, “A Typology of Transjudicial Communication.”

¹³ Waters and Melissa A, “Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law.,” *Georgetown Law Journal* 93, no. 487 (2004).

¹⁴ Slaughter and Anne-Marie, “A Typology of Transjudicial Communication.”

¹⁵ Slaughter and Anne-Marie.

acts (or responds) to that elevated case. Monologue further occurs when a national court cites the decision of another cross-border national or supranational court without the source's awareness of such citation. This is illustrated when, for example, the Indian Supreme Court cites the case of the US Supreme Court. The latter needs to be made aware of such foreign citations. As such, the communication is one-way.¹⁶ Lastly, an intermediate dialogue happens when various courts participate, usually at different levels. A supranational court borrowing decisions from a national court initiates this type.¹⁷ Another national court then cites the supranational court's resulting decision. In essence, the supranational court is an intermediary in the conversation between two national courts.

Transjudicial conversation and the cross-fertilisation of human rights norms and standards

Since human rights are a shared issue across jurisdictions, they are one of the subject matters of transjudicial conversation.¹⁸ Since this phenomenon facilitates the movement of global rights norms and standards into domestic legal spheres, it is highly valued in the universalist ideals of human rights.

In broad terms, given that human rights norms and standards migrate from one legal system to another, transjudicial conversation results in the cross-fertilisation of legal ideas and principles. It effectively merges normative meanings among two or more legal orders".¹⁹ While this is arguably a complex process²⁰ as it is an implication of the cross-referencing judicial behavior, this nonetheless occurs since jurisprudence of different jurisdictions are "increasingly building on each other".²¹ This thus enriches judicial discourse on human rights issues and bolsters the rights of domestic protection and promotion regimes.²²

Although the cross-fertilisation impact is all-encompassing, it may be understood better by inquiring into the specific effect of transjudicial conversation in developing domestic human rights norms and standards. A study of cross-citing behaviours of select South American Courts found that in the process of borrowing foreign decisions, judicial bodies bridge the gaps in their respective domestic systems. For example, in a case where the Brazilian Supreme Court was asked to rule on a novel question of whether an anti-Semitic publication is covered by the right to freedom of expression clause under the Constitution, the court looked for solutions abroad. In holding that anti-Semite materials are not protected speeches and hence outside the bounds

¹⁶ David S. Law and Wen-Chen Chang, "The Limits of Global Judicial Dialogue," *Washington Law Review* 86, no. 3 (2011): 523.

¹⁷ Erik Voeten, "Borrowing and Nonborrowing among International Courts," *The Journal of Legal Studies* 39, no. 2 (2010): 547–76.

¹⁸ Vasiliev and Sergey, "Cross-Fertilisation Under the Looking Glass: Transjudicial Grammar and Reception of Strasbourg Jurisprudence by International Criminal Tribunals," *Judicial Dialogue on Human Rights*, 2017, 14.

¹⁹ Antje Wiener and Philip Liste, "Lost Without Translation? Cross-Referencing and a New Global Community of Courts," *Indiana Journal of Global Legal Studies* 21, no. 1 (2014): 263–96.

²⁰ FRANCIS G. J ACOBS, "Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice," *Texas International Law Journal* 38 (2003): 547.

²¹ L'Heureux-Dube and Claire, "The Importance of Dialogue: Globalisation and the International Impact of the Rehnquist Court."

²² Mohallem and Michael Freitas, "*Horizontal Judicial Dialogue on Human Rights: The Practice of Constitutional Courts in South America.*" (Cambridge University Press, 2017).

of the free expression guarantee, Justice Mendes, who penned the ruling, examined and cited the case laws of Spain, the UK, Germany, and the US.²³

Transjudicial conversation in the Philippines – the role of the Philippine Supreme Court.

The role of judicial tribunals in the cross-citation of foreign judgments cannot be further stressed. In the Philippines, the Supreme Court is the highest judicial tribunal in the country's judicial branch of government. Its institutional role in promoting and protecting human rights may be traced from the historical-political experience of the Philippines. It has undergone various institutional reforms back from the American occupation of the Philippine archipelago in 1901 until the present.²⁴ The contemporary Supreme Court is a creation of the 1987 Constitution duly ratified by the people at large following the ouster of then President Ferdinand Marcos. The drafters of the Constitution are dominated by anti-dictator and pro-democracy sentiments. The framers thus put the protection and promotion of human rights as the cornerstone of the new Republic and viewed the judiciary as the key institution in keeping authoritarian rule at bay and preserving the democratic values of the country. In light of these objectives, the writers of the fundamental law made sure that the Marcosian dictatorial regime from 1972 to 1986, tainted with gross human rights violations, will never again be repeated in the annals of our history.²⁵

As such, the Supreme Court was granted an expanded power of judicial review, rule-making power to protect and promote fundamental rights, and independence from other co-equal branches of government.²⁶ Under the previous Constitutions, the Supreme Court can only take cognisance of a case if there is an actual controversy or real competing interest of claims between parties. This was amended in the present Constitution, where the court can take cognisance of the case even without the required actual controversy and adjudicate the parties' rights. This Constitutional grant effectively made the people's fundamental rights subject to the Supreme Court's authority.²⁷

Similarly, the Supreme Court was previously restrained from performing the adjudicative role.²⁸ Thus, its authority is confined to hearing cases and determining the parties' rights. With the 1987 Constitution, however, the Supreme Court is now empowered to promulgate rules to protect and enforce people's rights. This is akin to a Congressional power to legislate laws.²⁹ By this Constitutional mandate, the Supreme Court has promulgated rules on Habeas Corpus, Habeas Data, Amparo, and Kalikasan that protect the peoples' rights against arbitrary detention, privacy, and the security of person and environment, respectively.

²³ Müller, Amrei, and Hege Elisabeth Kjos, *Judicial Dialogue and Human Rights* (Cambridge University Press, 2017).

²⁴ Pangalangan and Raul, ““Overview of the Philippine Judicial Systems.”” accessed November 13, 2023, <http://hdl.handle.net/2344/00015195>.

²⁵ Diane Alferez Desierto, ““A Universalist History of the 1987 Philippine Constitution (I),”” *Historia Constitucional/Electronic Journal of Constitucional History* 10 (2009): 383–444.

²⁶ Pangalangan and Raul, ““Overview of the Philippine Judicial Systems.””

²⁷ PACIFICO AGABIN, “The Supreme Court and Social Change, in UNCONSTITUTIONAL ESSAYS,” *The Politics of Judicial Review over Executive Action* 167 (1996): 193–94.

²⁸ Tiojanco, Bryan Dennis G, and Leandro Angelo Y. Aguirre, ““The Scope, Justifications and Limitations of Extradecisional Judicial Activism and Governance in the Philippines.”” *Phil. LJ84*, 2009, 73.

²⁹ Diane A. Desierto, ““A Universalist History of the 1987 Philippine Constitution (II),”” *Historia Constitucional: Revista Electrónica de Historia Constitucional* 11 (2010): 427–84.

The post-Marcos Supreme Court was also granted autonomy and independence from the other co-equal departments in the government. This is to ensure that the judiciary will no longer serve and fall victim to the president's whims and caprices and provide it with an unhampered venue in performing its Constitutional mandate as the bulwark of Philippine democracy.³⁰ The present constitutional provisions guarantee that the members of the Supreme Court can only be removed through impeachment and that its State budget shall not be reduced and shall be automatically released by the Philippine Congress.³¹

The Supreme Court thus performs a powerful role in promoting, respecting, and fulfilling human rights. It is entrusted with constitutional authority to adjudicate effectively and grant remedies whenever there are violations of the rights, to create a rule which will ensure that these rights are safeguarded, and to perform its function without fear or favour from the other political apparatuses of the government such as the Executive and the Legislative branches.

Given that the country's high tribunal has evolved into an emboldened judicial body, it has been observed to be an active agent in developing human rights norms within the Philippine domestic sphere.³² The Supreme Court's adjudicative function gives it a platform to resolve disputes involving human rights issues and, in the process, uphold or introduce a particular relevant norm. Such an adjudication involves the interpretation of the existing human rights laws and principles and applies them to the case.

In performing its interpretive role and fulfilling its adjudicative function, the court is sometimes confronted with conundrums where the human rights law text is equivocal or the nature of the facts of the controversy is novel.³³ In both cases, judicial reasoning is used. In finding the solution to a case involving a human rights concern, the Supreme Court frequently turn to foreign jurisdictions for solutions. The occurrence of this referring to foreign rulings is well recognised in literature, supported by an analysis of cases promulgated by the Philippine Supreme Court. The opinions delivered by the court are replete with indicators that engage in the cross-citation of foreign decisions in cases involving human rights issues.

How does transjudicial conversation fertilise domestic human rights norms in the Philippines?

Owing to its great importance, it is imperative to understand transjudicial conversation. While scholarship on the subject area focused on its normative conceptualisation, more must be dedicated to studying its impact as it relates to the universal idea of rights. More so, in the Philippines, local literature needs an understanding of the phenomenon of transjudicial conversation in the context of the Supreme Court.³⁴

³⁰ Alejandro N. Ciencia, "From Judicialization to Politicization of the Judiciary," in *The Judicialization of Politics in Asia*, 1st Editio, 2012, 22.

³¹ Nachura and Antonio, *Outline Reviewer in Political Law* (Quezon City: VJ Graphic Arts, 2014).

³² Tiojanco and Aguirre, "The Scope, Justification and Limitations of Extradecisional Judicial Activism and Governance in the Philippines," *Philippine Law Journal* 84, no. 1 (2009).

³³ Barak Aharon, "'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy,'" *Harvard Law Review* 116, no. 1 (2002): 19.

³⁴ Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014).

Considering that the decisions of the Philippine Supreme Court form part of the laws of the land,³⁵ Such judicial judgments are important in the formation and transformation of the country's legal system. There are indications that cases involving human rights issues are commonplace for transjudicial conversation. This makes the phenomenon even more consequential for the country's legal system, as human rights are often the subject of contestations—both by rights holders and duty bearers.

Given its legal implications, there are questions as to what extent the cross-referencing of foreign decisions affects the country's human rights norms and standards, specifically how the phenomenon of transjudicial conversation reframes domestic jurisprudence on human rights.

In particular, it is crucial to understand how the court's engagement in the cross-border judicial conversation affects the scope and limitations of relevant human rights issues such as the right to free speech and religion. Furthermore, it should be noted how this phenomenon expands, constricts, and creates legal norms and standards through jurisprudence.

Hence, this paper aims to examine the effects of transjudicial conversation in forming and developing domestic human rights norms and standards. Specifically, the article seeks to understand how such a phenomenon fertilises local human rights jurisprudence.

RESEARCH METHODS

The paper employs a qualitative research design, specifically doctrinal research. In order to understand the impact of transjudicial conversation on the development of domestic human rights norms, an in-depth content analysis³⁶ of selected Supreme Court cases was done. These cases were selected through a purposive sampling using the following criteria: (a) these should involve issues on rights to free speech and religious freedom; (b) these should have a doctrinal value where a legal principle is either introduced or abandoned; and (c) these should show cross-referencing of foreign cases. There is cross-referencing if the decision used foreign cases to answer legal issues or controversies presented for judicial determination. Due to its close affinity with foreign Constitutions, rights to free speech and religious exercise were deliberately chosen.³⁷³⁸ Such similarities normally impel Courts to cross-cite foreign judgments.³⁹ Moreover, cases were analysed based on their contents, specifically locating the judicial reasoning that justifies the cross-citation of foreign judgments. Their legal consequences are likewise examined.

ANALYSIS AND DISCUSSION

Transjudicial conversation closes the gaps in the domestic understanding of human rights norms. This impact may be observed in countries with developing case laws on constitutional and human rights laws.⁴⁰ The judicial practice of cross-citing foreign cases was most

³⁵ “New Civil Code of the Philippines” (n.d.).

³⁶ Mark Hall and Ronald Wright, “Systematic Content Analysis of Judicial Opinions,” *California Law Review* 96, no. 1 (2008): 63.

³⁷ Murray and John Courtney, “The Problem of Free Speech,” in *Philippine Studies* 1, 2, 1953, 108.

³⁸ Murray, John Courtney, “The Problem of Free Speech.” *Philippine Studies* 1, 2 (1953): 108.

³⁹ McCrudden, Jacobsohn, and J, “Apple of Gold: Constitutionalism in Israel and the United States.”

⁴⁰ L'Heureux-Dube and Claire, “The Importance of Dialogue: Globalisation and the International Impact of the Rehnquist Court.”

commonly used as a “springboard to begin the development of human rights jurisprudence”,⁴¹ and to fill in the void in a particular legal system. A void exists when the national tribunal is confronted by a case involving novel human rights issues. Due to such novelty, the court cannot readily use domestic solutions. In the Philippine context, this may be observed in judgments delivered by the Supreme Court in selected free speech and religious freedom cases.

Free speech rights – in pursuit of bright lines that divide state regulation from free expression

The limitation of free speech rights

One of the most fertile territories where the gap-filling impacts of transjudicial conversation are evident is the limitations and delimitations of the exercise of free speech. The contesting interests between the government and the people on the limitation and delimitation of the exercise of the freedom of speech have been the subject of cases decided by the Philippine Supreme Court. The contestation usually concentrates on the question of the allowable extent of government intervention regarding the individual exercise of this right.⁴²

The earliest documented case challenging the limits of the government’s authority in regulating the exercise of the freedom of speech is *People of the Philippine Islands v. Perez*.⁴³ Here, Mr. Perez, a municipal secretary, was charged with violation of sedition laws for his utterance against the Governor-General of the Philippines: "The Filipinos, like myself, must use bolos for cutting off Wood's head for having recommended a bad thing for the Filipinos, for he has killed our independence." In finding that Mr Perez indeed committed sedition, Justice Malcolm, speaking for the court, declared that the exercise of the right of free speech could be limited by the government in order to preserve the very existence of the State.

Perez's case laid down the basic foundation drawing the line between government interference and a person's enjoyment of free speech. Similar court pronouncements were made in the 1932 cases of *Evangelista v. Earnshaw*⁴⁴ and *People of the Philippine Islands v. Feleo*.⁴⁵ In *Evangelista*, a criminal suit for sedition was filed against Evangelista, the President of the Communist Party of the Philippine Islands. It was determined that Evangelista made a public speech urging all labourers to join the party "to bring the government into their hands and to run it by themselves and for themselves".⁴⁶ The Supreme Court, speaking through Justice Ostrand, found the President of the Communist Party guilty of sedition. In justifying this ruling, the court cited the US case of *Gitlow vs. New York*, which held that "Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution."⁴⁷

Meanwhile, in *Feleo*, the validity of sedition laws was put in issue. The accused, a communist leader, was charged with the violation of the U.S. anti-sedition law in relation to his public speech that allegedly incited anti-American sentiments. He comes to the court arguing

⁴¹ For example, Canada, Israel, South Africa, New Zealand and various South American countries.

⁴² Antonio Eduardo B. Nachura, “OUTLINE REVIEWER IN POLITICAL LAW,” *Academia.Edu*, 2014, https://www.academia.edu/40579872/OUTLINE_REVIEWER_IN_POLITICAL_LAW.

⁴³ “People of the Philippines Islands v. Perez, 45 Phil 599 (1923).” (n.d.).

⁴⁴ “Evangelista v. Earnshaw, 57 Phil 255 (1932).” (n.d.).

⁴⁵ “People of the Philippine Islands v. Feleo, 58 Phil 573 (1932).” (n.d.).

⁴⁶ “PEOPLE v. JUAN FELEO 58 Phil 573 (1932).” (n.d.).

⁴⁷ “Gitlow v. New York, 268 U.S. 652 (1925)” (n.d.).

that the criminal charge of sedition against him violated his right to freedom of speech as guaranteed under the Philippine Autonomy Act of 1916. In holding against the accused, the Supreme Court, through Justice Street, cited the same US case of *Gitlow v. New York* and set the rule that “a state in the exercise of its police power may punish those who abuse the freedom conferred by the constitutional provision, and whose language tends to disturb the public peace”.⁴⁸

It is clear then that *Perez, Evangelista* and *Feleo* all substantiated the rudimentary principle that the exercise of free speech guarantees is not absolute; the State, through its agents such as the government, can limit this right in order to preserve public peace, national security, and public order. While the rule may be clear-cut and straightforward, the Philippine Supreme Court continued to belabour on some particular issues that dispute the limitation of the State's power to regulate the enjoyment of free speech rights. However, the rule laid down in these cases has broadly drawn the dividing line between the allowable limitation on one side and the enjoyment of the right on the other. However, the broadness of such a rule left gaps in the domestic understanding of free speech rights. The succeeding cases delivered by the court illustrate how transjudicial conversation enriched the discourse on state limitation by closing the gap in the domestic human rights norms.

Cabansag v. Fernandez, et al.⁴⁹ In this case, Cabansag wrote a letter to the Presidential Complaint and Action Commission (PCAC) asking the executive department to intervene in the speedy resolution of his case pending before the trial court. In his communication, Cabansag complained that the trial judge failed to promulgate a judgment promptly because of the delay in transcribing the stenographic notes. Because of his letter, a case was filed against him asking the court to cite him in contempt, to which the trial judge acceded by stating that this “tended to put (the court) into disrepute or belittle or degrade or embarrass it in its administration of justice, and so it punished them for contempt to protect its judicial independence”.⁵⁰ Cabansag, for his part, appealed the judgment to the Supreme Court, arguing that the contempt citation violated his right to free speech. He adds that “in sending the letter in question to the PCAC, they did nothing but exercise their right to petition the government for redress of their grievance as guaranteed by our constitution.”⁵¹

When it reached the high tribunal, the court was asked to balance the “clash of two fundamental rights—the independence of the judiciary and the right to petition the government for redress of grievances.”⁵² This issue is unique,⁵³ never before that a similar controversy was brought before the court. Given its novelty, Justice Bautista turned to the decisions of the US Supreme Court for solutions. He resorted to a review of the mechanisms “devised” in the American jurisdiction used to “draw the proper boundary between freedom of expression and independence of the judiciary.”⁵⁴ Using the US case of *Schenck v. United States*, Justice Bautista examined the rules

⁴⁸ PEOPLE v. JUAN FELEO 58 Phil 573 (1932).

⁴⁹ “Cabansag v. Fernandez, 102 Phil. 152 (1957).” (n.d.).

⁵⁰ Cabansag v. Fernandez, 102 Phil. 152 (1957).

⁵¹ Cabansag v. Fernandez, 102 Phil. 152 (1957).

⁵² Cabansag v. Fernandez, 102 Phil. 152 (1957).

⁵³ Cabansag v. Fernandez, 102 Phil. 152 (1957).

⁵⁴ Cabansag v. Fernandez, 102 Phil. 152 (1957).

“Two theoretical formulas had been devised in the determination of conflicting rights of similar import (...) These are the “*clear and present danger*” rule and the “*dangerous tendency*” rule. The first, as interpreted in several cases, means that the evil consequence of the comment or utterance must be “extremely serious and the degree of imminence extremely high” before the utterance can be punished. The danger to be guarded against is the “substantive evil” sought to be prevented. And this evil is primarily the “disorderly and unfair administration of justice.” This test provides the criterion as to what words may be published. Under this, the advocacy of ideas cannot constitutionally be abridged unless there is a clear and present danger that such advocacy will harm the administration of justice.”⁵⁵

After reading the American-devised mechanism of clear and present danger, Justice Bautista came to the conclusion that the right to freedom of speech may be curtailed if the utterances “create a sufficiently imminent danger to a fair administration of justice.”⁵⁶ Based on this rule, the Philippine Supreme Court concluded that the letter did not endanger the administration of justice. Consequently, there is no imminent danger to the integrity of the court.

Manuel Lagunzad v. Maria Soto Vda. De Gonzales.⁵⁷ In *Cabansag*, an American-standard dangerous tendency test was introduced to fill the local understanding of the freedom of speech gap. The test's application was held to be proper if the issue is between a state interest and an individual enjoyment of rights. However, what if the clashing interests involved are both private rights? This issue confronted the Supreme Court in *Lagunzad v. Soto Vda. De Gonzales*.

Here, Lagunzad owns a movie production company, MML Productions. He decided to produce a film depicting the life of Mr. Padilla, a famous mayoral candidate who was assassinated. The movie covers not only Padilla's public life but also his private life. As such, a narration of the life of Padilla's mother, Soto Vda. De Gonzales was included, and she was portrayed as having a relationship with another woman. Because of this, Soto Vda. De Gonzales' demanded that some movie portions be deleted and edited. Thereafter, both parties, Lagunzad and Soto Vda. De Gonzales entered a licensing agreement where he promised to edit and delete some portions. However, despite their agreement, Lagunzad failed to fulfil his promises. A suit was then filed against him where Soto Vda. De Gonzales asserts that the movie violated her constitutionally guaranteed right to privacy. In response, Lagunzad counters that her demands violated his right to freedom of expression. The court was then tasked to resolve a novel issue involving two contending private interests.

As stated earlier, the prevailing rule laid down in *Cabansag* cannot be applied because the test enunciated therein is applicable only when a state interest is involved. Because of the issue's uniqueness and the lack of existing rule, Justice Melencio-Herrera turned to the judgments of the US Supreme Court for solutions. She then ruled that the freedom of expression Lagunzad had raised could not overstep another person's privacy rights. In this ruling, the court cross-cited the balancing-of-interest test as articulated in the US case of *American Communications Association v. Douds*:

“Another criterion for permissible limitation on freedom of speech and of the press, which includes such mass media vehicles as radio, television, and movies, is the balancing-of-interests test. The principle requires a court

⁵⁵ “*Schenck v. United States*, 249 U.S. 47 (1919).” (n.d.).

⁵⁶ *Cabansag v. Fernandez*, 102 Phil. 152 (1957).

⁵⁷ “*Lagunzad v. Soto Vda. De Gonzales*, 92 SCRA 476 (1979).” (n.d.).

to take conscious and detailed consideration of the interplay of interests observable in a given situation or type of situation."⁵⁸

Emilio Osmena and Pablo Garcia v. Commission on Elections.⁵⁹ An analysis of the aforementioned cases gives the impression that the tests used by the Supreme Court in deciding the extent to which the State may interfere in the exercise of free speech are all contents-based in the cases of *Perez, Evangelista*, and *Feleo*, the controversy that was raised revolved around the message of the public speeches. In *Cabansag*, the issue raised requires an examination of the letter's contents, the same as in *Lagunzad*, where the story depicted in the movie was assailed. The problem, however, arises when state regulations only pertain to the substance of the speech or expression rather than the manner in which such was delivered or manifested. In *Osmena and Garcia v. Commission on Elections*, the national election agency's regulation is content-neutral, not content-based. Because of this, the Supreme Court was in a dilemma as to whether using the existing tests articulated in the previous court judgments was proper.

Petitioners Osmena and Garcia are candidates for the Presidency and Governorship, respectively. They assail the constitutionality of the new election law that prohibits the "mass media from selling or giving free of charge print space or airtime for a campaign or other political purposes and mandates the COMELEC to procure and itself allocate to the candidate's space and time in the media." The law further states, "There is no suppression of political ads but only a regulation of the time and manner of advertising." Both petitioners argue that this regulation violates their freedom of speech as it curtails their right to express their message to the voters.⁶⁰

The complexity of the case springs from the possibility of using the existing test to determine whether this government policy is an invalid encroachment on the right to free speech. For the *clear-and-present-danger test* to apply, there should be a presence of a substantive evil that the government has the right to prevent. Considering that the election law being challenged merely regulates the platform to be used, no substantive evil is present. Thus, such regulation should be declared as violative of the right to freedom of expression.

Moreover, the *Osmena* case raises another concern. The assailed COMELEC ruling does not intend to regulate the substance of speech but only the platform where the message is to be delivered. The *clear-and-present-danger test* was consistently applied when the government regulation was content-based and not content-neutral. How should this controversy be decided, then?

Justice Mendoza turned his attention to the American case of *United States v. O'Brien*.⁶¹ Justice Mendoza inquired into this mechanism and resolved that the O'Brien test enunciated in the American case is the "appropriate test for content-neutral restrictions on speech."⁶² He argued that such a test is less restrictive than the "clear and present danger test" traditionally used by the Philippine Supreme Court.

It is apparent that content-neutral and content-based regulations on speech require varying treatments. Lesser justifications are called for when the government regulation limits the time,

⁵⁸ "American Communications Association v. Douds, 339 U.S. 382 (1950)." (n.d.).

⁵⁹ "Osmeña and Garcia v. COMELEC, 199 SCRA 750 (1998)." (n.d.).

⁶⁰ Osmeña and Garcia v. COMELEC, 199 SCRA 750 (1998).

⁶¹ "United States v. O'Brien, 391 U.S. 367 (1968)." (n.d.).

⁶² Osmeña and Garcia v. COMELEC, 199 SCRA 750 (1998).

place, and manner of expression compared to when the message itself is the subject of such limitation. Holding that the *O'Brien test*, and not the clear-and-present-danger test, is the proper lens to be used, the Supreme Court then declared that the State may validly prohibit mass media companies from selling their airtime and print space to election candidates except to the Commission on Elections.

The case of *Osmena*, alongside the opinions delivered by the court in *Perez*, *Feleo*, *Evangelista*, *Cabansag*, and *Lagunzad*, leads towards articulating the limitation of the exercise of free speech guarantees by defining the bounds of the State's authority. In all these cases, the Supreme Court has resorted to cross-referencing foreign decisions to fill this void – a clear indication of transjudicial conversation.

The delimitation of free speech rights

Delimiting the government's authority in regulating free speech may involve the expansion of the power of the court to inquire into the validity or legitimacy of this state regulation. Generally, the court may exercise judicial review of government regulations if there is an actual case or controversy (see Article VIII, Section 1, 1987 Constitution). This means that for the court to review the validity of the law legitimately, actual injury must first be incurred by the challenger to satisfy the actual controversy requirement.⁶³

While this is the standing principle, the Supreme Court made some exceptions to this requisite. In *Estrada v. Sandiganbayan*,⁶⁴ the high court acceded to the opinion of Justice Mendoza. Citing the US cases of *Conally v. General Construction Company*⁶⁵ and *NAACP v. Alabama*,⁶⁶ Justice Mendoza postulated that a law may be reviewed even without an actual injury if it is vague or overbroad. A statute is vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Meanwhile, a law is overbroad if a "governmental purpose may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms".⁶⁷

However, the vague and overbroad exceptions were rendered applicable only in laws that clearly infringe on free speech rights. A special reason for the admission of this exception is to avoid any possible chilling effect upon protected speeches brought by an overbroad or vague statute.

The principle in *Estrada* was further clarified in the subsequent cases of *Romualdez v. Sandiganbayan*⁶⁸ and *Spouses Romualdez v. Commission on Elections*^{69,70}. In the first case, the Anti-Graft and Corrupt Practices Act (AGCPA) provision, a penal statute that punishes graft and corruption in the government, was challenged on the grounds that such provision was vague and overbroad. However, the petitioner, Mr. Alfredo Romualdez, did not present any

⁶³ Marc E Isserles, "Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement.," *American University Law Review* 48 (1998): 359.

⁶⁴ "Estrada v. Sandiganbayan, 36 SCRA 394 (2001)." (n.d.).

⁶⁵ "Conally v. General Construction Company, 269 U.S. 385 (1926)." (n.d.).

⁶⁶ "NAACP v. Alabama, 360 U.S. 240 (1959)." (n.d.).

⁶⁷ *Estrada v. Sandiganbayan*, 36 SCRA 394 (2001).

⁶⁸ "Romualdez v. Sandiganbayan, 435 SCRA 371 (2004)." (n.d.).

⁶⁹ "Spouses Romualdez v. COMELEC, 576 Phil. 357 (2008)." (n.d.).

⁷⁰ *Spouses Romualdez v. COMELEC*, 576 Phil. 357 (2008).

injury in applying the law but merely relied on its texts. Simply, the petitioner asked the Supreme Court to inquire into the validity of the provision of the mentioned criminal statute, even in the absence of an actual injury. The court refused to make an inquiry, arguing that the vague and overbroad exceptions do not apply in penal statutes; hence, no facial challenge can be had. The court further reasoned that no chilling effect occurs in criminal laws, unlike in free speech laws. In fact, these types of laws generally have an "in terrorem effect resulting from their very existence, and, if the facial challenge is allowed for this reason alone, the State may well be prevented from enacting laws against socially harmful conduct."⁷¹ In conclusion, the court cautions that the consequence of allowing these exceptions in penal laws, other than speech laws, will result in "a mass acquittal of parties whose cases may not have even reached the courts".⁷²

A similar similar opinion was handed down in *Spouses Romualdez*, where a penal provision of the Voter's Registration Act was challenged using the same vague and overbroad exceptions. Nevertheless, despite reiterating the rule that such exceptions do not apply in penal laws, the court still analysed the said provision to determine whether it was, in fact, vague and overbroad. The finding was to the contrary.

The cases of *Estrada*, *Romualdez*, and *Spouses Romualdez* conclude that free speech laws may be the subject of judicial review even without an actual controversy, provided that their phraseologies are vague or overbroad. Moreover, these exceptions cannot be drawn in other types of laws, such as those that are penal in character. Generally, a court will not inquire into the validity of a law – especially one that is punitive – without the attendance of an actual injury suffered by the challenger.

Jose Jesus Disini, Jr., v. Secretary of Justice.⁷³ In *Disini, Jr., v. Secretary of Justice*, the legality of the Cybercrime Prevention Act of 2012 was challenged. The petitioners specifically launch attacks against the legitimacy of its provision without an actual controversy. They specifically question the provision of the law that punishes a person who aids or abets in the commission of internet crimes. For them, the provision is vague "since the crime of aiding or abetting ensnares all the actors in the cyberspace front in a fuzzy way."⁷⁴ In a more practical manner, the petitioners ask the court whether mere liking, sharing, or retweeting a post on Facebook or Twitter already amounts to aiding or abetting.

Ordinarily, a plain application of the rule in the previous cases of *Estrada*, *Romualdez*, and *Spouses Romualdez* would result in the dismissal of the petition since it is a clear challenge on a penal statute without actual injury on the part of the petitioners. However, the cybercrime provision being questioned possesses some intersectionality with free speech rights. It is clear that cyberspace is a fertile ground where the exercise of free speech is exercised.

Because of this entanglement, the Supreme Court took pains searching for an answer. Speaking for the Court, Justice Abad cross-cited the American case of *Reno v. American Civil Liberties Union*. Here, he drew a similarity between the domestic and US cases. In particular, Justice Abad observed that, like *Disini*, *Reno* involved an internet penal law that punishes

⁷¹ *Romualdez v. Sandiganbayan*, 435 SCRA 371 (2004).

⁷² *Romualdez v. Sandiganbayan*, 435 SCRA 371 (2004).

⁷³ "Disini, Jr. v. Secretary of Justice, 727 Phil. 28 (2014)." (n.d.).

⁷⁴ *Disini, Jr. v. Secretary of Justice*, 727 Phil. 28 (2014).

obscene speeches, among others. The petitioner in *Reno* assails its facial validity on the grounds of vagueness. The US Supreme Court did not hesitate to inquire into the legitimacy of the penal statute, arguing that its intersection with free speech exercise raises an "obvious chilling effect" that it "unquestionably silences some speakers whose messages would be entitled to protection".⁷⁵

As such, relying on the findings of the US Court in *Reno*, Justice Abad concluded that the vague and overbroad exceptions may be applied to criminal laws if their final effect infringes on the freedom of speech.

Noting the lessons of *Reno*, the Supreme Court resolved to expand the application of the exceptions articulated in *Estrada*, *Romualdez*, and *Spouses Romualdez*. As such, in *Disini, Jr.*, the court determined whether the aiding and abetting provision in the anti-cybercrime law is vague. The result of its analysis is in the affirmative. In this ruling, Justice Abad noted, "When a penal statute encroaches upon the freedom of speech, a facial challenge grounded on the void-for-vagueness doctrine is acceptable."⁷⁶

The Supreme Court resolved in finality that penal laws are subject to facial challenges if they involve infringement of the enjoyment of free speech rights. This pronouncement, a clear product of transjudicial conversation, expands the court's authority to review government regulations on freedom of speech and expression.

1-United Transport Koalisyon v. Commission on Elections.⁷⁷ The delimitation of the State's authority to regulate free speech is in the form of reviewing a restrictive regulation. In *1-United Transport Koalisyon (1-UTAK) v. Commission on Elections* (2015), the Commission on Elections (COMELEC) issued a rule prohibiting electoral candidates from posting their campaign materials in public utility vehicles such as buses, jeepneys, trains, taxis, and ferries. The election body justifies this order to ensure "equal campaign opportunity, time, and space for all candidates."⁷⁸ The COMELEC further argues that "the suppression of free expression" is impertinent to the regulation and that "any restriction on free speech is merely incidental".⁷⁹ The petitioner 1-UTAK disagrees with the justification. For them, the regulation being questioned violates their right to free speech because it "curtails their ideas of who should be voted by the public." They further assert that the government went beyond permissible interference in exercising their freedom since "the curtailment of (their) right to free speech is much greater than is necessary to achieve the desired governmental purpose".⁸⁰

In response to the points raised by the transport coalition and on its last attempt to rationalise the governmental prohibition, the COMELEC finally explains that "while owners of privately owned (public utility vehicles) and transport terminals have a right to express their views to those who wish to listen, they have no right to force their message upon an audience incapable of declining to receive it". They contend that the passengers of these vehicles are

⁷⁵ "Reno v. American Civil Liberties Union, 521 U.S. 844 (1997)." (n.d.).

⁷⁶ *Disini, Jr. v. Secretary of Justice*, 727 Phil. 28 (2014).

⁷⁷ "1-United Transport Koalisyon (1-Utak) v. Commission on Elections, 755 SCRA 441 (2015)" (n.d.).

⁷⁸ *1-United Transport Koalisyon (1-Utak) v. Commission on Elections*, 755 SCRA 441 (2015).

⁷⁹ *1-United Transport Koalisyon (1-Utak) v. Commission on Elections*, 755 SCRA 441 (2015).

⁸⁰ *1-United Transport Koalisyon (1-Utak) v. Commission on Elections*, 755 SCRA 441 (2015).

“captive audience” of these campaign materials in a sense that they “have no choice but be subjected to the blare of political propaganda”.⁸¹

The issue then is whether the government may impose limitations on the exercise of free speech for it to protect the people from intrusive speech. The Supreme Court, through Justice Reyes, disagrees with the contentions of COMELEC. In his analysis, Justice Reyes deduced that the arguments made by the COMELEC were borrowed from the US concept of "captive audience doctrine", which recognises the right of "a listener not to be exposed to an unwanted message in circumstances in which the communication cannot be avoided".⁸²

While the COMELEC argues that its reliance on the captive audience principle does not amount to a prior restraint on the exercise of the freedom of speech, the Supreme Court nevertheless does not agree. On Justice Reyes’ explicit review of the American cases of *Consolidated Edison Co. v. Public Service Commission*,⁸³ *Erznoznik v. City of Jacksonville*,⁸⁴ and *Lehman v. City of Shaker Heights*,⁸⁵ Justice Reyes concluded that “A regulation based on the captive-audience doctrine is in the guise of censorship, which undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others.”⁸⁶ Thus, the Philippine Supreme Court declared that while the COMELEC is arguing that the questioned election regulation is non-infringement of free speech, it is censorial in nature. Thus, the court struck the order as an invalid encroachment on free speech and expression.

The church-state separation thesis and the profession of religious beliefs – from neutrality to benevolence

The phraseology of the religious freedom provisions under Article III, Section 5 of the 1987 Philippine Constitution refers to two normative contexts.⁸⁷ First, the provision prohibits the State from establishing a national religion. In this context, the inviolability of the separation of Church and State is ensured⁸⁸, the appropriation of public funds in favour of religious sects is not allowed⁸⁹, and the participation of the church in any political activities is prohibited⁹⁰. Second, religious freedom also means the people's liberty to observe religious profession and worship.

Owing to this domestic normative contextualisation of the right to religion, the Supreme Court took pains to articulate its bounds and contents. The court is challenged by the voids in its understanding; often, these gaps are resolved by cross-referencing the judgments of foreign tribunals. This observation can be exemplified in the following disputes, which the court was tasked to resolve.

⁸¹ 1-United Transport Koalisyon (1-Utak) v. Commission on Elections, 755 SCRA 441 (2015).

⁸² 1-United Transport Koalisyon (1-Utak) v. Commission on Elections, 755 SCRA 441 (2015).

⁸³ “*Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980).” (n.d.).

⁸⁴ “*Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).” (n.d.).

⁸⁵ “*Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).” (n.d.).

⁸⁶ 1-United Transport Koalisyon (1-Utak) v. Commission on Elections, 755 SCRA 441 (2015).

⁸⁷ Joaquin Bernas, *Constitutional Structure and Powers of Government: Notes and Cases* (Manila: Rex Bookstore, 2005).

⁸⁸ “Philippine Constitution, Art. II, Sec. 6.” (n.d.).

⁸⁹ “Philippine Constitution, Art IX-C, Sec. 2.5” (n.d.).

⁹⁰ Philippine Constitution, art IX-C, sec. 2.5.

The Flag Salute Cases. The 1959 case of *Genaro Gerona et al., v. Secretary of Education*⁹¹ and the 1960 case of *Gil Balbuna et al., v. Secretary of Education*⁹² both dealt with the issue whether students may validly refuse to attend the State-mandated flag salute ceremonies in all schools. The reason for the refusal of the students is grounded on the fact that their religious beliefs as members of the church of Jehovah's Witnesses prevent them from saluting the flag of the Republic since they consider the flag as a graven image.

In both cases, the Supreme Court disagreed with the contentions proffered by the church members. The court's opinions stated that such religious belief does not exempt its believers from the flag salute ordered by the Ministry of Education. The flag salute ceremony is a secular act intended to teach students the virtues of patriotism. Exemption from this secular activity "will disrupt school discipline and demoralise the rest of the school population, which by far constitutes the great majority."⁹³ The ruling in *Gerona* and *Balbuna* forced the members of Jehovah's Witnesses to salute the Philippine flag despite it being contrary to their religious profession.

After almost 30 years, the Ministry of Education's order was challenged anew in the 1993 case of *Roel Ebralinag et al. v. Division Superintendent of Schools of Cebu*.⁹⁴ The petitioners reiterated that as members of the Jehovah's Witnesses, they cannot be compelled against their religious convictions to salute the flag of the Republic. Practically, the petitioners raised the same arguments. However, despite no new compelling arguments being raised, the Supreme Court revisited its past ruling, especially in *Gerona*. It must be noted that in *Gerona*, the court expressed its fear that "exempting the Jehovah's Witnesses from saluting the flag, singing the national anthem and reciting the patriotic pledge" unpatriotic citizens.⁹⁵ The court admitted that such fear "did not come to pass" despite the lapse of almost three decades.⁹⁶

While the factual and legal milieu of *Ebralinag* is not new, the court is tasked to formulate a different justification to rationalise the protection of students' right to religious freedom. Writing for the court, Justice Montemayor sought guidance from the U.S. cases for answers. After a careful study of *West Virginia v. Barnette*⁹⁷ and *Meyer v. Nebraska*⁹⁸ to which similar facts are present, he found that a violation of religious freedom of these students will not promote love and patriotism as originally justified in *Gerona* and *Balbuna*. Cross-citing the words of Justice Jackson of the US Supreme Court in *Barnette*, the Philippine Supreme Court declared that "let it be noted that coerced unity and loyalty even to the country, (...) — assuming that such unity and loyalty can be attained through coercion — is not a goal that is constitutionally obtainable at the expense of religious liberty".⁹⁹

For years, the separation of church and State haunted the Supreme Court like a recurring ghost. As early as 1913, in *The Municipality of Nueva Caceres v. The Director of Lands and*

⁹¹ "Gerona v. Secretary of Education, 106 Phil. 2 (1959)." (n.d.).

⁹² "Balbuna et Al., v. Secretary of Education, 110 Phil 150 (1960)." (n.d.).

⁹³ Gerona v. Secretary of Education, 106 Phil. 2 (1959).

⁹⁴ "Ebralinag et Al., v. Division Superintendent of Schools of Cebu, 219 SCRA 276 (1993)." (n.d.).

⁹⁵ Gerona v. Secretary of Education, 106 Phil. 2 (1959).

⁹⁶ Ebralinag et al., v. Division Superintendent of Schools of Cebu, 219 SCRA 276 (1993).

⁹⁷ "West Virginia v. Barnette, 319 U.S. 624 (1943)." (n.d.).

⁹⁸ "Meyer v. Nebraska, 262 U.S. 390 (1923)." (n.d.).

⁹⁹ West Virginia v. Barnette, 319 U.S. 624 (1943).

*the Roman Catholic Bishop of Nueva Caceres*¹⁰⁰ this issue was already brought for judicial determination. This was then succeeded by hundreds of other cases challenging the interference of the State in the affairs of the church. In all such instances, the court upheld the strict neutrality of the State in matters involving the affairs of the church. For example, in *Gregorio Aglipay v. Juan Ruiz*,¹⁰¹ a suit was filed challenging the Director of Posts's decision to issue a stamp commemorating the Roman Catholic Church's 33rd International Eucharistic Congress. For the petitioner, this issuance of a postage stamp amounts to favouring the State toward one religion, considering that public funds were appropriated for its printing.

In holding that the order is proper, the court, citing *Video Bradfield v. Roberts*, ruled that "the Government should not be embarrassed in its activities simply because of incidental results, more or less religious in character, if the purpose had in view is one which could legitimately be undertaken by appropriate legislation".¹⁰² Simply stated, the Supreme Court in *Aglipay* declared that a law with a secular purpose does not violate the non-establishment principle of religious freedom, even if this legislation has some entanglements with religious affairs.

Alejandro Estrada v. Soledad Escritor.¹⁰³ The strict neutrality stance was challenged in the case of *Alejandro Estrada v. Soledad Escritor*, in which an administrative complaint was filed against Mrs. Soledad Escritor. The complaint alleges that Mrs. Escritor is engaged in immoral conduct because even if she is a widow, she is having an affair with a married man. For her defence, Mrs. Escritor argues that she does not commit immoral conduct. She claims that under the rules of their religion, The Jehovah's Witnesses, they are both considered husband and wife. She further contends that she and her partner both executed the Declaration Pledging Faithfulness that sufficiently legitimises their union as far as the Jehovah's Witnesses are concerned.

At the outset, applying the strict neutrality principle laid down as early as 1913 in *The Municipality of Nueva Caceres* and further clarified in the 1937 case of *Aglipay*, the Supreme Court should have certainly ruled that under the State regulation, a union between a married man and an unmarried woman is not allowed. The State should not have entertained the internal rules of affairs of the Jehovah's Witnesses. However, the Supreme Court, speaking through Justice Panganiban, declared the issue in *Estrada* as a novel that requires a thorough analysis. In the court's opinion, the non-establishment principle of a state religion was revisited. In Justice Panganiban's analysis, he opines that a reading of American cases reveals another, but more proper, view regarding the subject matter. He analysed the cases of *Walz v. Tax Commission*¹⁰⁴ and *Zorach v. Clauson*¹⁰⁵. These two cases introduced the new principle of benevolent neutrality, a contradiction of strict neutrality.

In his analysis of both *Walz* and *Zorach*, Justice Panganiban deduced that unlike strict neutrality, which "holds that government should base public policy solely on secular considerations, without regard to the religious consequences of its actions", benevolent

¹⁰⁰ "Municipality of Nueva Caceres v. Roman Catholic Bishop of Nueva Caceres, 24 Phil. 485 (1913)." (n.d.).

¹⁰¹ "Aglipay vs. Ruiz, 64 Phil. 201 (1937)." (n.d.).

¹⁰² "Video Bradfield v. Roberts, 175 U.S. 291 (1899)." (n.d.).

¹⁰³ "Estrada v. Escritor, 455 Phil. 411." (n.d.).

¹⁰⁴ "Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970)." (n.d.).

¹⁰⁵ "Zorach v. Clauson, 343 U.S. 306 (1952)." (n.d.).

neutrality "recognises that religion plays an important role in the public" lives of the people and accommodates "religion under some circumstances".¹⁰⁶

The fundamental question that should be answered when resolving church-state separation is: "Is the freedom of religion best achieved when the government is conscious of the effects of its action on the various religious practices of its people and seeks to minimise interferences with those practices? Alternatively, is it best advanced through a policy of 'religious blindness' — keeping government aloof from religious practices and issues?" For this, the Philippine Supreme Court's response favoured the benevolent neutrality stance, thereby signalling the abandonment of the age-old strict neutrality position.¹⁰⁷

Because of this, the Supreme Court in *Estrada* arrived at a fairly unanticipated disposition. Although the court did not rule the case with certainty because it ordered the rehearing of the case, it did, however, pave the way for the utilisation of the benevolent neutrality lens in carving out the boundaries between state interference and religious freedom exercise. It is clear that the cross-citation of US cases made the introduction of such a principle possible, filling the void in a rather complex adjudication of religious freedom cases.

Re: Letter of Tony Q. Valenciano.¹⁰⁸ The separation of church and State was also the subject of contestations in *Re: Letter of Tony Q. Valenciano, Holding of Religious Rituals at the Hall of Justice Building in Quezon City*. Here, Mr. Tony Valenciano sent a letter to the Office of the Chief Justice reporting that the basement of the Hall of Justice of the City of Quezon was being used to celebrate the mass of Roman Catholics. He even reported that the basement was already transformed into a chapel with an offertory table, images of Catholic religious icons, a canopy, an electric organ, and a projector. In the same letter, he asserted that the conduct of a mass in a government building violated the separation of church and State and his right to religion as a non-Catholic.

In ruling that the facts do not violate the separation clause of the Constitution, much less result in the unison of church and State, the Supreme Court used the *Lemon test* first formulated in the US case of *Lemon v. Kurtzman*¹⁰⁹. Under this test, the court was tasked to determine whether the government's action involved an excessive entanglement with religion. Following *Lemon*, the degree of entanglement was measured using the criteria "character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority".¹¹⁰

Using the said criteria, the court found that, first, allowing the celebration of a Catholic mass within the government premises did not "benefit one particular religion."¹¹¹ Any employees belonging to any religion other than the catholic are not prohibited from observing their religious convictions during their free time. Second, the court found that no public fund was spent favouring the masses. The religious celebration was made at the expense of its members. Using the premises meant something other than the government's money being allocated to it. Further, the government did not compel all employees to attend the mass. Third

¹⁰⁶ *Estrada v. Escritor*, 455 Phil. 411.

¹⁰⁷ *Estrada v. Escritor*, 455 Phil. 411.

¹⁰⁸ "Re: Letter of Tony Q. Valenciano, 819 SCRA 313 (2018)." (n.d.).

¹⁰⁹ "*Lemon v. Kurtzman*, 403 U. S. 602 (1971)." (n.d.).

¹¹⁰ *Lemon v. Kurtzman*, 403 U. S. 602 (1971).

¹¹¹ Re: Letter of Tony Q. Valenciano, 819 SCRA 313 (2018).

and lastly, there is no excessive contact between the judiciary (that oversees the premises) and the Catholics. There is, at best, a minimal entanglement between the State and the church since the mass was performed only during free time.

In the final analysis of *Re: Valenciano*, it may be argued that the void in understanding the permissible entanglements between the State and the church was settled using the *Lemon test*, a product of transjudicial conversation where US jurisprudence was explicitly utilised to resolve a novel issue.

The enduring impact of transjudicial conversation on the Philippine criminal legal system

The impact of transjudicial conversation may extend to the domestic criminal legal system. The court may clarify complex or contested concepts in criminal law by cross-citing foreign cases. The Internet Free Speech case of *Disini, Jr. v. Secretary of Justice*¹¹² is a straightforward illustration. Here, a petition was filed challenging the newly enacted anti-cybercrime law. The contestation was specifically directed against the law's provision of "aiding or abetting" in the crime of cyber-libel. The petitioner claims the penal statute creates a chilling effect because it is unequivocal. The people will not know whether the simple sharing or retweeting of a libellous post on either Facebook or Twitter will amount to a crime of cyber-libel.

The Supreme Court was confronted with a conundrum. First, the court admits that the cybercrime law deals with a novel situation. Second, the prevailing rule in the Philippines prohibits attacks on penal statutes on the basis of mere vagueness. The existing principle requires that there should be an actual violation of criminal law before it can be assailed. The facial challenge, or the assailment based on the text of the law, is only allowed on purely free speech laws.

Speaking for the court, Associate Justice Florencio Abad departed from this rule. Because of the novel situation presented by exercising free speech rights in cyberspace, he ruled that the facial challenge may be successfully done even if the law is intrinsically penal in character. In so doing, he argued using the US case of *Reno v. American Civil Liberties Union*¹¹³ Here, Justice Abad introduced a rule allowing the review of penal statutes even without an actual case or controversy.

Transjudicial conversation may also affect criminal systems by redefining a crime. This can be best illustrated in the case of *People of the Philippines v. Edgar Jumawan*¹¹⁴ where the issue of marital rape as a form of gender-based violence was put in issue; at the time when the case was brought to the Supreme Court, marital rape was not a crime. The court, in interpreting rape laws, had previously declared that it follows the Hale Principle of irrevocable implied consent theory, which states that rape can never be committed by the husband to his wife because, by marriage, the woman surrendered her body to the man.

However, because of the development in the recognition of the rights of women in the ratification of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Philippine Supreme Court revisited its position against the recognition of marital rape. Then Justice Reyes, opening for the court, reviewed the trend in the

¹¹² *Disini, Jr. v. Secretary of Justice*, 727 Phil. 28 (2014).

¹¹³ *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

¹¹⁴ "People of the Philippines v. Edgar Jumawan, 740 Phil 742 (2014)." (n.d.).

United States concerning the unconsented sexual intercourse committed by the husband against his wife.

In his review of relevant foreign cases, Justice Reyes noted that throughout history, the US has assented to the principle of irrevocable implied consent. This may be gleaned from the case of *Commonwealth v. Fogerty*¹¹⁵ where "The Supreme Judicial Court of Massachusetts pronounced that it would always be a defence in rape to show marriage to the victim." Succeeding cases in the US upheld this principle, and it was later translated into a statute in the 1909 Penal Code. Because of the apparent abusive impact of Hale's principle against women, the civil rights movement organised a mass mobilisation for its abolition in the 1970s. It was only in 1983 when the Supreme Court of New York in *People v. Liberta*¹¹⁶ declared the unconstitutionality of the irrevocable implied consent theory, where they "find that there is no rational basis for distinguishing between marital rape and non-marital rape".

Succeeding the promulgation of *People v. Liberta*, all American states abolished Hale's principle, thereby recognising the right of women against marital rape abuse. Following this development in the US, the Philippine Supreme Court in *Jumawan* declared that "Rape is a crime that (...) because it is an abhorrence to a woman's value and dignity as a human being. It respects no time, place, age, physical condition or social status. It can happen anywhere, and it can happen to anyone."

Thus, the court, through transjudicial conversation, reversed its long-held belief concerning the right of a married woman against sexual abuse by a husband. Such reversion aligned the domestic understanding of women's rights with that of foreign evolutions and, in effect, expanded the country's rape statutes.

The synchronisation of national human rights jurisprudence with the evolving international and foreign rights norms through transjudicial conversation

Transjudicial conversation triggers the alignment of the national understanding of human rights norms with its evolving concept in the foreign and international system of rights. Some scholars view this as "synchronising rights evolution through judicial dialogue".¹¹⁷ Empirical evidence may be observed in the opinions of the Philippine Supreme Court.

The case of *Government of Hong Kong SAR v. Honorable Felixberto Olalia, Jr.*¹¹⁸ offers a concrete understanding of this impact. Here, a certain Juan Antonio Munoz, a Filipino and a resident of the Philippines, was charged with a criminal offence for bribery in Hong Kong. Because of this charge, the Hong Kong government filed a request for the provisional arrest of Mr. Munoz, to which the Philippine government promptly acceded. While Mr. Munoz is in detention, the government of Hong Kong has filed a petition for extradition against him. They are asking the Philippine government to surrender Mr. Munoz so that he can be tried under their domestic penal laws. While the petition for extradition is being tried, Mr. Munoz applied for bail. He is requesting the court to grant him provisional liberty in accordance with his right

¹¹⁵ "Commonwealth v. Fogerty, 74 Mass. 489 (1857)." (n.d.).

¹¹⁶ "People v. Liberta, 64 N.Y.2d 152 (1984)." (n.d.).

¹¹⁷ Mohallem and Freitas, "Horizontal Judicial Dialogue on Human Rights: The Practice of Constitutional Courts in South America."

¹¹⁸ "Government of Hong Kong SAR v. Honorable Felixberto Olalia, Jr., G.R. No. 153675 (2007)." (n.d.).

as an accused. Such bail application was approved after Mr Munoz prayed for reconsideration before the court.

Considering that Mr Munoz was under provisional liberty on the basis of his successful bail application, the Government of Hong Kong petitioned the Supreme Court to annul his provisional liberty. Their argument rested on the previous case of *Government of United States of America v. Hon. Guillermo G. Purganan*.¹¹⁹ In *Purganan*, the Supreme Court ruled that the right to bail does not apply to extradition proceedings because extradition courts do not render judgments of conviction or acquittal. Otherwise stated, an extradition proceeding is not criminal in nature which means that an extraditee like Mr. Munoz is not an accused for him to be entitled to the right to bail.

A plain reading of *Purganan* leads to the conclusion that Mr Munoz should be detained and his bail cancelled, considering that the facts of his case are similar to those of *Purganan*. However, the Supreme Court, through the opinion penned by Justice Angelina Sandoval Gutierrez, moved for the abandonment of the *Purganan* ruling. Citing the US case of *Beaulieu v. Hartigan*,¹²⁰ the court resolved that while extradition is not a criminal case, the fact remains that an extraditee is being placed under detention, and his liberty is being suppressed, similar to criminal prosecution.

In deciding to contravene the prevailing rule concerning the subject matter, the court finally noted, "The modern trend in public international law is the primacy placed on the worth of the individual person and the sanctity of human rights." Simply, the court, facilitated by its engagement in transjudicial conversation, decided to align its understanding of the right to liberty, specifically the right to bail, with the evolving concept in foreign and international systems.

CONCLUSION

The paper winnowed the impact of transjudicial conversation in the domestic understanding of human rights norms by examining selected cases on free expression and religious freedom rights. It was observed that transjudicial conversation closes the void in the domestic human rights law discourse. Considering that the Philippine local norms and standards of human rights law are relatively young compared to other countries that have dealt with it for centuries, there needs to be more domestic answers to human rights issues that confront the court. In order to resolve these controversies, the court would turn to foreign judgments for solutions. The cross-citation of foreign decisions, especially from those with a more developed concept of human rights, contributed to enriching the Philippine human rights concepts. A qualitative study of decisions handed down by our Supreme Court reveals that such engagement in the citation of cross-border judicial decisions facilitated filling the gap in the domestic human rights norms. A deeper look into these cases shows that the concomitant result leads towards either the expansion or the restriction of the right. For example, in free speech cases, the court utilised US decisions to resolve novel questions arising from the constitutional provision on freedom of speech, expression, and the press. This practice's immediate and straightforward impact is the

¹¹⁹ "Government of United States of America v. Hon. Guillermo G. Purganan, G.R. No. 148571 (2002)." (n.d.).

¹²⁰ "Beaulieu v. Hartigan, 430 F. Supp. 915 (1977)." (n.d.).

fertilisation of the local rights norms. The ancillary influence of this is either limitation of the exercise of freedom or the delimitation of the authority of the State to regulate this right. Along this line, the phenomenon also influenced the country's criminal law system. It was made apparent that by borrowing foreign cases, the Philippine Supreme Court has either defined a new crime or clarified complex issues on penal statutes. Furthermore, transjudicial conversation causes the alignment of domestic human rights norms with the evolving concepts in the international and foreign spheres. This results in the synchronisation of the national rights regime with the international rights system. Sometimes, the Supreme Court would abandon its long-held principles to follow the development in foreign jurisdictions. In broad terms, it is obvious that transjudicial conversation caused the cross-fertilisation of the Philippine human rights norms. The factor that enriched the local understanding of rights was the cross-cited foreign opinions facilitated by the phenomenon. The examination of the human rights cases serves us with empirical evidence of this impact. The paper gives an overview of such an impact.

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