BEYOND THE RECORD: THE ADMISSIBILITY OF DYING DECLARATIONS AND THE FIRST KIND OF *RES GESTAE* MADE THROUGH ELECTRONIC MEANS*

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ABSTRACT

Authentication and hearsay analysis are separate hurdles in admitting evidence. However, these converge in the context of dying declarations and the first kind of *res gestae* made through electronic means. This conflict touches on the relationship of constitutional law and evidence law: despite the necessity and reliability of the dying declaration and *res gestae* exceptions, electronic evidentiary rules present reliability concerns and objections grounded on the rights to confront and cross-examine the witness. To reconcile the two, this Article argues that there can be a meaningful interpretation of constitutional rights alongside the non-exclusion of the two hearsay exceptions made through electronic means. In particular, the reliability concerns grounded on the constitutional rights to confront and cross-examine are addressed by the principles on authenticating electronic evidence. This Article recommends a two-pronged test, emphasizing hearsay analysis and authentication of electronic evidence as distinct steps, and ultimately pushing for the creation of specific guidelines and methods in authenticating electronic evidence.

I. INTRODUCTION

Philippine procedural rules which govern the admissibility of evidence have vastly evolved over time to address developments in multiple aspects of human life. Particularly, procedural rules have been bolstered to

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respond to the sign of the times amid the birth of electronic means of communication and production of documents. As such, the Rules on Electronic Evidence or A.M. No. 01-7-01-SC ("Rules on Electronic Evidence") has been issued by the Supreme Court in pursuance of providing clearer parameters in the admission of electronic documents or electronic data message into evidence.[1] Furthermore, the Supreme Court amended the existing Rules of Evidence through A.M. No. 19-08-15-SC or the 2019 Revised Rules of Evidence ("Revised Rules of Evidence"), which contains material modifications with respect to matters affecting the admissibility of evidence, such as the inclusion and recognition of electronic forms of evidence.

In relation to the changes in procedural rules recognizing electronic evidence and considering the undeniable prevalence of the use of electronic devices, we are faced with a multitude of possible situations wherein evidence may be stored or made through said electronic devices. Even more complex, there may be instances wherein declarations are made through electronic devices—which, if ordinarily made through verbal means, may be readily admitted as testimonial evidence on the basis of existing principles of admissibility of evidence. More specifically, in circumstances involving dying declarations and spontaneous exclamations made while, immediately prior, or subsequent to a startling occurrence as part of the *res gestae* ("first kind of *res gestae*") as exceptions to the hearsay rule under the Revised Rules of Evidence,[2] there arises the question of whether statements made through electronic means (which would otherwise ordinarily fall within the ambit of the aforementioned exceptions) may still be admitted as such, or whether a different set of rules must apply given their peculiar nature as evidence.

To illustrate, say A committed homicide against B, who was left alone under the circumstance of her impending death. Since B was in possession of her mobile phone, she sent a voice message to her friend C, saying that it was A who committed such crime against her, causing her demise. If the prosecution in a criminal action for B's death intends to present such voice message as evidence, the question arises—should the same be presented as a dying declaration following the standards laid down in the Revised Rules of Evidence, or should the voice message be categorized as audio evidence as defined under the Rules on Electronic Evidence, to be presented in a manner that complies with the rules set forth therein?

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[1] ELEC. EVID. RULE, Rule 1, § 1.

[2] RULES OF COURT, Rule 130, §§ 38, 44.

Ordinarily, and in exclusive compliance with the Revised Rules of Evidence, such voice message sent by B may be admissible as a dying declaration provided that the essential requisites therefor are present.[3] However, there appears to be an additional barrier—the relevant provisions of the Rules on Electronic Evidence which govern the admissibility of evidence in electronic form, such as the example illustrated above. As such, there are apparent gaps in existing evidentiary rules that hinder a full and complete understanding of the process by which evidence of such kind is admitted, when the same partakes of electronic form.

To date, there is no legal authority that clearly addresses the issue presented above. While there is an abundance of case law comprehensively tackling dying declaration and part of the *res gestae* as exceptions to the hearsay rule, there is nothing in jurisprudence that explicitly rules on the proper procedure for the presentation of such statements when made through an electronic device. Nonetheless, an examination thereof finds practical relevance in light of potential circumstances wherein a victim of a crime makes either an *antemortem* statement or one that qualifies under the first kind of *res gestae* through electronic devices found on their person.

A. Amendments Recognizing Electronic Evidence

The amendments in the Revised Rules of Evidence reflect the introduction and appreciation of evidence in electronic form.[4] While the 1989 Revised Rules of Evidence ("1989 Rules of Evidence") is devoid of any mention of the same, electronic forms of evidence have been explicitly incorporated in certain provisions of the Revised Rules of Evidence. This recognition can be seen in the inclusion of the concept of electronic production of documents in the Revised Rules of Evidence, which was absent in the 1989 Rules of Evidence. In particular, Sections 4 and 45 of Rule 130 under the Revised Rules of Evidence expressly mention evidence made through "electronic" means or reproduction.

Rule 130, Section 4, which governs what is considered as the original of a document, defines a duplicate as a "counterpart produced by the same impression as the original, or from the same matrix" or from other means, including "electronic re-recording."[5] On the other hand, Rule 130, Section

[3] *See* RULES OF COURT, Rule 130, § 38.

[4] SUPREME COURT OF THE PHILIPPINES, PRIMER ON THE 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE [hereinafter "SC EVID. PRIMER"] 2 (2020), *available at* https://sc.judiciary.gov.ph/2019-amendments-to-the-1989-revised-rules-on-evidence/.

[5] RULES OF COURT, Rule 130, § 4.

45, which is a new provision drawn from the old Section 43 of the same Rule, covers records in the course of regularly conducted business activity made through various modes, such as electronic means.[6]

Hence, it is clear that the framers of the Revised Rules of Evidence intended to recognize electronic forms of evidence. At this point, it is worth stressing that the two aforementioned provisions, Sections 4 and 45 of Rule 130 of the Revised Rules of Evidence, take the form of different kinds of evidence—documentary and testimonial respectively. Therefore, the Revised Rules of Evidence recognizes electronic forms of evidence both in the sphere of documentary and testimonial evidence.

B. The Peculiar Nature of Dying Declaration and the First Kind of *Res Gestae* vis-à-vis the Other Exceptions to the Hearsay Rule

While it is clear that the Revised Rules of Evidence recognizes electronic forms of evidence, the same is noticeably silent with respect to the specific situation wherein a dying declaration or a statement under the first kind of *res gestae* is made through electronic means. The same silence is apparent in the Rules on Electronic Evidence, which lacks any provision that can exactly apply to dying declaration and to the first kind of *res gestae* made through electronic means.

Preliminarily, the Revised Rules of Evidence provides a more comprehensive description of the concept of hearsay, which is defined as "a statement that one made by the declarant while testifying at a trial or hearing, *offered to prove the truth of the facts asserted therein*."[7] The Revised Rules of Evidence likewise clarifies that a statement is either an oral or written assertion, or a non-verbal conduct of a person.[8] As a general rule with respect to testimonial evidence, hearsay is inadmissible, subject to exceptions laid down in the Rules.[9]

Under the Revised Rules of Evidence, there are 13 exceptions to the hearsay rule,[10] most of which are retained from the 1989 Rules of Evidence. A perusal of the exceptions to the hearsay rule reveals the distinct character of dying declaration and the first kind of *res gestae,* which involves a singular

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[6] § 45.

[7] RULES OF COURT, Rule 130, § 37. (Emphasis supplied.)

[8] *Id.*

[9] *Id.*

[10] §§ 38–50.

statement made within indispensable temporal limitations and under specific human conditions. A dying declaration must be made under the consciousness of an impending death,[11] while the first kind of *res gestae* must be made before the declarant has time to devise a falsehood, and under the stress of excitement caused by the subject occurrence.[12] These extraordinary features separate dying declaration and the first kind of *res gestae* from the other exceptions to the hearsay rule in the context of scrutinizing the admissibility of those made through electronic means.

Given that the Revised Rules of Evidence lacks provisions which address the electronic modes of dying declaration and the first kind of *res gestae*, the ambiguity with respect to their admissibility as evidence when made through electronic means is underscored. The closest legal authority that can be resorted to is the Rules on Electronic Evidence.

In relation to this, it is clear from the tenor of the Rules on Electronic Evidence that it mostly covers electronic documents[13] or electronic data messages as defined under Rule 2 thereof.[14] The said Rules prescribes that an electronic document is admissible in evidence when it complies with the rules on admissibility provided for in the Rules of Court as well as other related laws, and is thereafter authenticated in the manner laid down therein.[15] While this seems to be a straightforward standard in admitting evidence, it must be noted that on its face, the same only applies to documentary evidence. On this point, documentary evidence is defined under the Revised Rules of Evidence as "writings, recordings, photographs or any material containing letters, words, sounds, numbers, figures, symbols, or their equivalent, or other modes of written expression *offered as proof of their contents*."[16]

In contrast, when referring to exceptions to the hearsay rule, the same is testimonial evidence "offered to prove the truth of the facts asserted therein,"[17] as mentioned earlier. We are then left with the question of how

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[11] People v. De Las Eras [hereinafter "*De Las Eras*"], G.R. No. 134128, 366 SCRA 231, 237, Sept. 28, 2001.

[12] People v. Calinawan [hereinafter "*Calinawan*"], G.R. No. 226145, 817 SCRA 424, 433, Feb. 13, 2017.

[13] *See* ELEC. EVID. RULE, Rules 2–7.

[14] ELEC. EVID. RULE, Rule 1, § 2.

[15] RCBC Bankard Services Corp. v. Oracion, G.R. No. 223274, 905 SCRA 219, 234, June 19, 2009.

[16] RULES OF COURT, Rule 130, § 2. (Emphasis supplied.)

[17] § 37.

testimonial evidence made through electronic means—specifically statements protected by exceptions to the hearsay rule—should be admitted and authenticated under the Rules on Electronic Evidence. This issue arises in view of the fact that the appreciation of electronic evidence in the Revised Rules of Evidence is not limited to documentary evidence, but extends to testimonial evidence.

Interestingly, Rule 8 of the Rules on Electronic Evidence pertains to business records as exception to the hearsay rule which ostensibly mirrors Rule 130, Section 45 of the Revised Rules of Evidence. Notwithstanding this, there is no explicit provision that similarly points to other exceptions to the hearsay rule, including the delicate statements made by the declarant if the same is a dying declaration or if it falls under the first kind of *res gestae*.

C. The Present Article

The present Article provides a comprehensive discussion on the obscure situation wherein a dying declaration or a statement falling under the first kind of *res gestae* is made through electronic means and is offered in evidence to prove the facts asserted therein. In doing so, this Article will present an analysis of the ambiguity with respect to the admissibility of the aforementioned exceptions to the hearsay rule in light of the Revised Rules of Evidence and the provisions of the Rules on Electronic Evidence. It will likewise tackle the history of dying declaration and part of the *res gestae*, and the basis for the admission thereof in evidence. The constitutional backdrop will be examined vis-à-vis existing evidentiary rules, leading to a possible recourse to harmonize them with a view to clearing any potential issues that may arise. Needless to say, it is imperative to delve into such issues to altogether avoid a conjectural and flimsy approach in the presentation and admission in evidence of the said statements made through electronic means, and to ultimately formulate precise guidelines therefor.

Part II of this Article will briefly review the concept of dying declaration and part of the *res gestae* as exceptions to the hearsay rule and the material provisions of the Rules on Electronic Evidence. It also presents an in-depth historical survey of these hearsay exceptions, revealing the essential reasons for their admission in evidence despite deviating from the general principle that hearsay evidence is inadmissible. Part III is an analysis of the perceptible ambiguity of the admissibility of these two exceptions in light of the insufficiency of the Rules on Electronic Evidence, and an exploration of the US case of *Lorraine v. Markel American Insurance, Co.* Part IV is an examination of the relationship of constitutional law and evidentiary rules

and a possible approach for the admissibility of dying declaration or a statement falling under the first kind of *res gestae* electronically made*,* with a view to harmonizing the same. This Article will likewise provide recommendations to more effectively address the seemingly unclear status of the admissibility of dying declaration and the first kind of *res gestae* made through electronic means.

II. DYING DECLARATION AND *RES GESTAE* AS HEARSAY EXCEPTIONS AND THE KEY PROVISIONS OF THE RULES ON ELECTRONIC EVIDENCE

A. Dying Declaration and Part of the *Res Gestae* as Exceptions to the Hearsay Rule

Before discussing the concepts of dying declaration and part of the *res gestae,* the paradigm shift of the longstanding hearsay rule shall first be considered.

The Revised Rules of Evidence has expanded the definition of hearsay statements as laid down in Rule 130, Section 37 thereof, to wit:

> *Sec. 37. Hearsay.* - Hearsay is a statement other than one made by the declarant while testifying at a trial or hearing, offered to prove the truth of the facts asserted therein. A statement is (1) an oral or written assertion or (2) a non-verbal conduct of a person, if it is intended by him or her as an assertion. Hearsay evidence is inadmissible except as otherwise provided in these Rules.
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> A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition; (b) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or (c) one of identification of a person made after perceiving him or her.[18]

The amended hearsay rule, which now gives a clear definition of hearsay, accommodates independently relevant statements. It is thus more in

[18] RULES OF COURT, Rule 130, § 37.

line with the essence of evidence law, which is to ascertain the truth about a particular fact.[19] Whereas in the old rules, the basis for an objection on the ground of hearsay would be lack of personal knowledge, under the new rules, the objection would be grounded on a lack of *firsthand* knowledge.[20]

Other than this paradigm shift, the rule is substantially the same. Hence, the underlying reason for the exclusion of hearsay statements are serious concerns about the reliability and trustworthiness of hearsay evidence. This is because such evidence is not subject to cross-examination by opposing counsel, who would not be able to test the perception, memory, veracity, and articulateness of the out-of-court declarant or actor upon whose reliability on which the worth of the out-of-court testimony depends.[21]

We also conduct a historical survey of dying declarations and part of the *res gestae* as exceptions to the hearsay rule. By consulting American cases, we see how these exceptions have survived consistent criticism grounded on the constitutional rights to confront and cross-examine the witness. These exceptions have always been considered useful, reliable, and trustworthy, consistent with fairness, truth, and justice.

B. History of Dying Declarations

The Philippines upholds the two traditional reasons for the admissibility of dying declarations. In a nutshell, these are (1) necessity, so justice will be served, and (2) reliability and trustworthiness due to the unique circumstances surrounding it. First, its admissibility is necessary because "the declarant's death renders impossible his [or her] taking the witness stand; and it often happens that there is no other equally satisfactory proof of the crime."[22] Second, it is reliable and trustworthy evidence that is "admitted on the theory that the conscious danger of impending death is equivalent to the sanction of an oath."[23]

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[19] Maria Filomena D. Singh, *The Hearsay Rule: A Paradigm Shift*, 65 ATENEO L.J. 1, 20 (2020).

[20] *Id.*

[21] VICENTE FRANCISCO, THE REVISED RULES OF COURT IN THE PHILIPPINES: EVIDENCE AS AMENDED BY SUPREME COURT RESOLUTION DATED MARCH 14, 1989 – BAR MATTER NO. 411 PART 1, RULES 128-130 (GENERAL PROVISIONS TO CHARACTER EVIDENCE) 518 (1991).

[22] *Id.* at 531.

[23] *Id.*

These traditional reasons can be traced back to the justifications under the early Federal Rules of Evidence of the United States, which in turn can be traced to early English common law. Six justifications come to mind, mostly developed from the 18th, to the early 20th centuries when dying declarations were more prevalent.[24]

First, on reliability, "because no one would dare face the wrath of God by dying with a lie on his or her lips, dying declarations are particularly trustworthy."[25] Second, a variation of the fear of divine punishment theory is the disengagement theory where "lying is pointless and cannot benefit the person soon to depart the world."[26] Third, on necessity, "those who make dying declarations are not around to be cross-examined later. These declarants frequently possess vital information."[27] Fourth, "death [...] [presents] a moment of moral seriousness and clarity."[28] Thus, the "powerful psychological pressures present" give "integrity and solemnity" to such words.[29] The fifth "is one of quasi-forfeiture. The reason the accused cannot confront the declarant is that the declarant is dead. The reason the declarant is dead is because the accused allegedly killed him, and now has the *chutzpah* to demand a live witness to cross-examine."[30]

In contrast to the first five justifications, the last one is more modern because it is developed under recent case law. Dying declarations are admitted only "because [...] [their] Founding Fathers, the authors of the Sixth Amendment [on confrontation], clearly did so."[31] This is the import of the conservative originalist approach in *Crawford v. Washington*.[32]

However, along with the justifications for dying declarations come criticisms. The threat of divine punishment may not influence all declarants, so they may be seen as "antiquated and parochial."[33] There are still "concerns about malice and vengeance leading to false statements" when it comes to the disengagement theory.[34] The necessity argument "proves too much. [...]

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[24] Aviva Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. ILL. L. REV. 1411, 1424.
[25] *Id.* at 1412–13.
[26] *Id.* at 1428.
[27] *Id.*
[28] *Id.* at 1429.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 1430.
[32] Crawford v. Washington [hereinafter "*Crawford*"], 541 U.S. 36 (2004).
[33] *Id.* at 1412.
[34] *Id.* at 1428.

Necessity is clearly a factor, but it cannot by itself be an explanation for admission without eviscerating the hearsay rule and right to confront witnesses."[35] In sum, the very reasons for admitting dying declarations—necessity and reliability—are questioned.

As to the justification for dying declarations as a mere historical anomaly, *Crawford* criticizes the doctrinal underpinnings of the dying declaration exception because "it did not protect core constitutional values."[36] Thus, instead of an "amorphous and unpredictable" reading of reliability, *Crawford* "commands" that "reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[37] Consequently, the use of dying declarations is limited strictly to testimonial statements, which are rigidly defined to ensure that the rights to confrontation and cross-examination are the primary considerations.[38] In effect, the result is a seemingly unreasonable exception to the hearsay rule that even conflicts with the constitutionally enshrined rights to confront and cross-examine the witness.

Going deeper into the implications of the exception's survival is also important. The exception is practically "trumped"[39] by other evidentiary rules and the constitutional rights to confront and cross-examine. For example, as previously mentioned, prevailing US case law enslaves the dying declaration exception to an arbitrarily rigid "categorization" between testimonial and nontestimonial statements, with the intention of upholding the constitutional rights of confrontation and cross-examination.[40] Ironically, however, the resulting problems of said constitutional test harms the rights meant to be protected, thus being unhelpful and devoid of historical basis.[41] Looking at the meanings given to the exception throughout history will prevent an unjustly rigid interpretation and application of the dying declaration.

Throughout history, the pattern of non-exclusion of dying declarations based on reliability and necessity has not been restricted by problematic categorization, and should stay so in present times for reasons

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[35] *Id.* at 1428–29.

[36] *Id.* at 1431.

[37] *Id.*

[38] *Id.* at 1429.

[39] Brandon Garrett, *Constitutional Law and the Law of Evidence*, 101 CORNELL L. REV. 57, 108 (2015).

[40] Orenstein, *supra* note 24, at 1431.

[41] *Id.* at 1442.

of practicality, fairness, truth, and justice. This insight applies in the Philippines. In *United States v. Gil*, statements were made 24 days after the event in question, but the court admitted and considered said statements as dying declarations. The dying declaration ("Gil came in and fired at once") was used to refute the claim of Gil that the victim insulted him, which provoked him to kill the latter.[42] Anent the allegation that the admission of the dying declaration violates the right of the accused to confront witnesses, the Court said that such rights were adopted from the United States, and that US case law and federal evidentiary rules recognized dying declarations as an exception to hearsay, thus upholding such rights.[43] Hence, nothing has changed when said rights of the accused are applied in the Philippines.[44] The same rights are also subject to the recognized exceptions in the US.[45]

C. History of the Parts of *Res Gestae*

The reasoning behind this exception is human experience. When "statements [are] made instinctively at the time of a specific transaction or event, without the opportunity for formulation of statements favorable to one's own cause, [they] are likely to cast important light upon the matter in issue."[46] Thus, "the law creates a presumption of truthfulness" for statements that are part of the *res gestae*.[47]

The *res gestae* exception can be traced back to the American Federal Rules. Early and recent literature on the history of said exception agree that the doctrinal basis for the rule is well-established.[48] However, they also observe that the rule is disputed because "the application of the principle is so varied that an attempt to reconcile them seems […] hopeless"[49] and that it "creates chaos in this subject."[50] In other words, the problem with the *res*

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[42] United States v. Gil, G.R. No. 4704, 013 Phil. 530, 535 (1909).

[43] *Id.* at 549.

[44] *Id.*

[45] *Id.*

[46] FRANCISCO, *supra* note 21, at 587.

[47] *Id.*

[48] "There is perhaps no principle in law, upon which the courts are more uniformly agreed than that of res gestae." Albert Sullard Barnes, *The Doctrine of Res Gestae*, Paper 230, *in* CORNELL LAW SCHOOL HISTORICAL THESES AND DISSERTATIONS COLLECTION 1 (1891). "It is clear that the basis for [res gestae] was never in issue." Edwin Teong Ying Keat, *Whither, hither, and thither,* Res Gestae*? A comparative analysis of its relevance and application*, 25 INT'L J. EVID. & PROOF 326, 327 (2021).

[49] Albert Sullard Barnes, *The Doctrine of Res Gestae*, Paper 230, *in* CORNELL LAW SCHOOL HISTORICAL THESES AND DISSERTATIONS COLLECTION 1 (1891).

[50] Edmund Morgan, *Res gestae*, 12 WASH. L. REV. 91, 91 (1937).

gestae principle has always been its application, not the justifications behind it.[51]

Building on the application problems, previous literature argues that "the nature of *res gestae* statements have not withstood the test of time or the scrutiny of modern commentators."[52] It explains that the "exception is especially disturbing in the context of the […] [constitutional rights to confront and cross-examine],"[53] daringly postulating that "Wigmore's suppositions regarding the nature of human behavior have been refuted by modern scholars,"[54] and that "to ensure the reliability of evidence[,] the opportunity to cross-examine is the most important."[55]

However, as to dying declarations, "precedents have recognized that statements admitted under a 'firmly rooted' hearsay exception are so trustworthy that adversarial testing would add little to their reliability."[56] In other words, throughout its history, the *res gestae* exception has also withstood persistent scrutiny rooted in the constitutional rights of confrontation and cross-examination. This is because it is rooted in reliability and trustworthiness, which are consistent with practicality, fairness, justice, and truth.

1. On Dying Declarations

Rule 130 Section 38 creates an exception from exclusion under the hearsay rule for dying declarations: "the declaration of a dying person, made under the consciousness of an impending death, may be received in any case wherein his or her death is the subject of inquiry, as evidence of the cause and surrounding circumstances of such death."[57] The requisites for admissibility of a dying declaration, which may be oral or written,[58] are as follows:

> (a) it concerns the cause and the surrounding circumstances of the declarant's death; (b) it is made when death appears to be

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[51] Edwin Teong Ying Keat, *Whither, hither, and thither,* Res Gestae*? A comparative analysis of its relevance and application*, 25 INT'L J. EVID. & PROOF 326, 327 (2021).

[52] James Donald Moorehead, *Compromising the Hearsay Rule: The Fallacy of Res Gestae Reliability*, 29 LOY. L.A. L. REV. 203, 205 (1995). (Emphasis supplied.)

[53] *Id.* at 239 n.183.

[54] *Id.* at 218.

[55] *Id.*

[56] *Id.* at 239 n.183, *citing* Idaho v. Wright, 497 U.S. 805, 820–21 (1990).

[57] RULES OF COURT, Rule 130, § 38.

[58] People v. Lazarte, G.R. No. 89762, 200 SCRA 361, 368, Aug. 7, 1991.

> imminent and the declarant is under a consciousness of his or her impending death; (c) the declarant would have been competent to testify had he or she survived; and (d) the dying declaration is offered in a case in which the subject of inquiry involves the declarant's death.[59]

2. On Parts of the Res Gestae

Closely related to Rule 130 Section 38 is Section 44, the exception of statements part of *res gestae*, which provides:

> *Part of the res gestae.* — Statements made by a person while a startling occurrence is taking place or immediately prior or subsequent thereto, under the stress of excitement caused by the occurrence with respect to the circumstances thereof, may be given in evidence as part of the res gestae. So, also, statements accompanying an equivocal act material to the issue, and giving it a legal significance, may be received as part of the res gestae.[60]

The requisites for admissibility are: "(1) the principal act, the *res gestae*, is a startling occurrence; (2) the statements were made before the declarant had time to contrive or devise; and (3) statements must concern the occurrence in question and its immediately attending circumstances."[61] The second element depends on the circumstances of each case,[62] so the rule now is that the *res gestae* exception is evaluated on a case-to-case basis.

There are two kinds of *res gestae*, each having their own requisites. First, to be a spontaneous statement: (1) there must be a startling occurrence; (2) the statement must relate to the circumstances of the startling occurrence; and (3) the statement must be spontaneous.[63] Second, verbal acts require that: (1) the fact or occurrence characterized must be equivocal; (2) the verbal acts must characterize or explain the equivocal act; (3) the equivocal act must be relevant to the issue; and (4) the verbal acts must be contemporaneous with the equivocal act.[64] As previously mentioned, this Article shall focus on the first kind of *res gestae*.

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[59] People v. Rarugal, G.R. No. 188603, 688 SCRA 646, 654, Jan. 16, 2013, *citing* People v. Maglian, G.R. No. 189834, 646 SCRA 770, 778, Mar. 30, 2011.

[60] RULES OF COURT, Rule 130, § 44.

[61] People v. Vargas, G.R. No. 230356, 920 SCRA 234, 247–48, Sept. 18, 2019.

[62] *See* People v. Putian, G.R. No. 33049, 74 SCRA 133, 139, Nov. 29, 1976; People v. Lungayan, G.R. No. 64556, 162 SCRA 100, 105–06, June 10, 1988.

[63] FRANCISCO, *supra* note 21, at 592.

[64] *Id.* at 609–10.

Four distinctions can be observed between *res gestae* and dying declarations: (1) in *res gestae*, it is the event itself which speaks, while in dying declarations, a sense of impending death takes the place of an oath and the law with regard to the declarant as testifying; (2) *res gestae* may be made by the killer after or during the killing, or by a third person, while dying declarations can be made by the victim only; (3) *res gestae* may precede, accompany, or follow the principal act, while dying declarations are confined to matters occurring after the homicidal act; and (4) the justification for *res gestae* is the spontaneity of the statement, while the justification for dying declarations is the trustworthiness of the person who was aware of his impending death.[65]

Even though a statement may not be considered a dying declaration, it may still be considered part of the *res gestae*.[66] Also, the fact that a victim's statement constituted a dying declaration does not preclude it from being admitted as part of the *res gestae*.[67]

D. Key Provisions of the Rules on Electronic Evidence

Initially, the Rules on Electronic Evidence only covered civil actions and proceedings, as well as quasi-judicial and administrative cases. On September 24, 2002, the Supreme Court issued A.M. No. 01-7-01-SC, a resolution which expanded the scope thereof to criminal cases. Hence, the standards provided for in the Rules on Electronic Evidence find application to virtually all kinds of proceedings involving electronic evidence as defined therein.

The Rules on Electronic Evidence applies whenever an electronic document or electronic data message is offered in evidence.[68] The Rules also provides the manner of authentication of electronic evidence, heavily drawing from the existing principles laid down in the 1989 Rules of Evidence, but tailoring the same to the specialized nature of electronic evidence.

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[65] *Id.* at 537.

[66] People v. Salison, G.R. No. 115690, 253 SCRA 758, 772, Feb. 20, 1996.

[67] People v. Putian, G.R. No. 33049, 74 SCRA 133, 139, Nov. 29, 1976.

[68] ELEC. EVID. RULE, Rule 1, § 1.

1. Amendments Recognizing Electronic Evidence

The amendments in the Revised Rules of Evidence reflect the introduction and appreciation of evidence in electronic form.[69] While the 1989 Revised Rules of Evidence ("1989 Rules of Evidence") is devoid of any mention of the same, electronic forms of evidence have been explicitly incorporated in certain provisions of the Revised Rules of Evidence. This recognition can be seen in the inclusion of the concept of electronic production of documents in the Revised Rules of Evidence, which was absent in the 1989 Rules of Evidence. In particular, Sections 4 and 45 of Rule 130 under the Revised Rules of Evidence expressly mention evidence made through "electronic" means or reproduction.

Rule 130, Section 4, which governs what is considered as the original of a document, defines a duplicate as a "counterpart produced by the same impression as the original, or from the same matrix" or from other means, including "electronic re-recording."[70] On the other hand, Rule 130, Section 45, which is a new provision drawn from the old Section 43 of the same Rule, covers records in the course of regularly conducted business activity made through various modes, such as electronic means.[71]

Hence, it is clear that the framers of the Revised Rules of Evidence intended to recognize electronic forms of evidence. At this point, it is worth stressing that the two aforementioned provisions, Sections 4 and 45 of Rule 130 of the Revised Rules of Evidence, take the form of different kinds of evidence—documentary and testimonial respectively. Therefore, the Revised Rules of Evidence recognizes electronic forms of evidence both in the sphere of documentary and testimonial evidence.

2. Kinds of Electronic Evidence

Electronic data message refers to information "generated, sent, received, or stored by electronic, optical, or similar means."[72] Electronic document, on the other hand, is defined under the Rules on Electronic Evidence as follows:

> (h) "Electronic document" refers to information or the representation of information, data, figures, symbols or other

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[69] SC EVID PRIMER, *supra* note 4.
[70] RULES OF COURT, Rule 130, § 4.
[71] § 45.
[72] Rule 2, § 1(g).

> modes of written expression, described or however represented, by which a right is established or an obligation extinguished, or by which a fact may be proved and affirmed, which is received, recorded, transmitted, stored, processed, retrieved or produced electronically. It includes digitally signed documents and any print-out or output, readable by sight or other means, which accurately reflects the electronic data message or electronic document. For purposes of these Rules, *the term "electronic document" may be used interchangeably with "electronic data message."*[73]

As the Rules on Electronic Evidence expressly provides, the terms "electronic document" and "electronic data message" may be used interchangeably, thus they cover characteristically similar evidence.

On the other hand, the Rules on Electronic Evidence also provides for specific kinds of electronic evidence—audio, video, and similar evidence,[74] as well as ephemeral electronic communications.[75] While the Rules on Electronic Evidence allows the admissibility of the former subject to authentication rules, the same contains no provision expressly defining this category of electronic evidence. Meanwhile, the latter is defined as evidence referring to "telephone conversations, text messages, chatroom sessions, streaming audio, streaming video, and other electronic forms of communication the evidence of which is not recorded or retained."[76]

3. Procedure for Admission in Evidence

The Rules on Electronic Evidence sets standards in the admissibility of electronic evidence, which as will be later demonstrated, mostly pertain to documentary evidence. For instance, Rule 4 thereof governs the Best Evidence Rule, which is an offshoot of the same rule found in the 1989 Rules of Evidence.[77] For purposes of this Article, the procedure for the admission of electronic evidence shall be specifically discussed.

For electronic documents, the Rules on Electronic Evidence provides that they are admissible if they are compliant with the rules on admissibility prescribed by the Rules of Court, and are authenticated in accordance with the Rules on Electronic Evidence.[78] For private electronic

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[73] § 1(h). (Emphasis supplied.)
[74] Rule 11, § 1.
[75] § 2.
[76] Rule 2, § 1(k).
[77] *See* RULES OF COURT (1989), Rule 130, §§ 3–4.
[78] ELEC. EVID. RULE, Rule 3, § 2.

documents, this may be done through any of three means which will later be discussed in detail.[79]

Electronically notarized documents, on the other hand, shall be considered public documents and proved as notarial documents in accordance with the Rules of Court.[80]

Electronic signatures are likewise recognized under the Rules on Electronic Evidence.[81] They may be authenticated through any of the following ways: "(a) [b]y evidence that a method or process was utilized to establish a digital signature and verify the same; (b) [b]y any other means provided by law; or (c) [b]y any other means satisfactory to the judge as establishing the genuineness of the electronic signature."[82]

The Rules on Electronic Evidence also provides for methods of proof such as the affidavit evidence and the cross-examination of deponent. Affidavit evidence points to an "affidavit stating the facts of direct personal knowledge of the affiant based on authentic records," with respect to all matters regarding the admissibility and evidentiary weight of an electronic document.[83] The latter, on the other hand, allows the adverse party to cross-examine the affiant as a matter of right.[84]

As to audio, video, and similar evidence, the same may be admitted, provided that it is presented before the court and "identified, explained, or authenticated" by either (1) "the person who made the recording," or (2) "some other person who is competent to testify on the accuracy" of such recording.[85] Furthermore, to authenticate ephemeral electronic communications, the following may be presented: (1) the testimony of a person who was a party thereto, (2) the testimony of a person who has personal knowledge thereof, or (3) other competent evidence.[86] Relatedly, if a telephone conversation or ephemeral electronic communication has been recorded, it shall be authenticated following the procedure for audio, video,

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[79] Rule 5, § 2. *See infra* Part III.B.
[80] § 3.
[81] Rule 6, § 1.
[82] § 2.
[83] Rule 9, § 1.
[84] § 2.
[85] Rule 11, § 1.
[86] § 2.

and similar evidence.[87] If the same is recorded in an electronic document, then it shall be authenticated as such.[88]

The Rules on Electronic Evidence succinctly provides the procedure for the situation wherein testimonial evidence is sought to be presented through electronic means. Rule 10 of the Rules on Electronic Evidence governs examination of witnesses, in that the presentation of testimonial evidence by electronic means may be authorized by the court, prescribing the terms and conditions therefor as may be necessary.[89] This electronic testimony shall then be properly transcribed by a stenographer, who shall certifying the transcript as correct.[90]

The following principles may be gathered from the foregoing rules on admissibility under the Rules on Electronic Evidence: (1) in the absence of direct proof of the authenticity of electronic evidence, any competent proof thereof may be admitted in the sound discretion of the court, and (2) the authentication requirements enshrined in the Rules on Electronic Evidence predominantly focus on documentary evidence, consequently leaving the considerations for the intricate nature of the hearsay exceptions as testimonial evidence unclear.

III. ANALYSIS OF THE PERCEPTIBLE AMBIGUITY

In Part II, the lack of clarity with respect to the standards for the admission of the exceptions to the hearsay rule when made through electronic means, was accentuated. On the other hand, the historical survey revealed the reliability and necessity of these hearsay exceptions, leading to their admission in evidence. When viewed together, there exists a perceptible ambiguity with respect to how these exceptions to the hearsay rule, when made through electronic means, may be admitted in evidence.

A. The Seeming Lack of Applicable Provisions in the Rules on Electronic Evidence

As pointed out earlier, the apparent focal point of the admissibility standards provided for by the Rules on Electronic Evidence is documentary

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[87] *Id.*
[88] *Id.*
[89] Rule 10, § 1.
[90] § 2.

evidence, albeit tersely touching on testimonial evidence in Rule 10 and the explicit mention of business records as exception to the hearsay rule.[91] In other words, there are no clear parameters as to the admission of electronic evidence when the same is sought to be admitted as testimonial evidence offered to prove the truth of the facts asserted therein,[92] rather than as proof of its contents as in documentary evidence.[93] This poses serious concerns amid the exceptional circumstances surrounding dying declaration and the first kind of *res gestae* in light of their inherent reliability as demonstrated earlier.

For purposes of illustrating this lack of clarity, the following shall be reviewed: (1) the standards for the admissibility of private electronic documents; (2) the standards for the admissibility of audio, photographic, video, and ephemeral evidence; and (3) the rule for examination of witnesses.

1. Standards for the Admissibility of Private Electronic Documents

To recall, electronic evidence may be admitted when it complies with the relevant provisions of the Rules of Court, and is authenticated under the Rules on Electronic Evidence.[94] Rule 5 of the Rules on Electronic Evidence provides that private electronic documents may be proved:

> (a) By evidence that it had been digitally signed by the person purported to have signed the same;
>
> (b) By evidence that other appropriate security procedures or devices as may be authorized by the Supreme Court or by law for authentication of electronic documents were applied to the document; or
>
> (c) By other evidence showing its integrity and reliability to the satisfaction of the Judge.[95]

Considering the foregoing, an attempt to analogously apply the authentication rules for electronic documents particularly laid down in the Rules on Electronic Evidence to dying declaration and the first kind of *res gestae,* which are testimonial evidence in nature, would be unavailing.

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[91] *See* ELEC. EVID. RULE, Rule 8.
[92] *See* RULES OF COURT, Rule 130, § 37.
[93] *See also* RULES OF COURT, Rule 130, § 2.
[94] ELEC. EVID. RULE, Rule 3, § 2.
[95] Rule 5, § 2.

First, one of the modes of authenticating private electronic documents is presenting evidence that the same has been "digitally signed" by the person alleged to have signed the same.[96] For self-explanatory reasons, it is practically impossible to digitally sign testimonial evidence.

Second, the means of authentication enumerated under Rule 5, Section 2(b) expressly mention that the same may be proved through evidence that the document had been subjected to proper procedures for authentication of electronic documents. To this point, the principle of *verba legis* comes into play, in that where the provision is plainly clear and free from any semblance of ambiguity, the same must be given its literal meaning.[97] Thus, these means of authenticating electronic evidence only cover documentary evidence in electronic form, to the exclusion of testimonial evidence.

The only means for authenticating private electronic documents that can be plausibly applied to testimonial evidence is the catch-all provision found in Rule 5, Section 2(c). Nonetheless, the same falls under the umbrella of authenticating electronic *documents*, and is premised thereon when read in conjunction with the two others means of authentication enumerated.

Thus, if testimonial evidence in electronic form is offered in evidence, the same cannot be authenticated under an analogous application of the standards for private electronic documents. Consequently, it cannot be admitted as evidence.

2. Standards for the Admissibility of Audio, Photographic, Video, and Ephemeral Evidence

On the other hand, audio, video, and similar evidence may be admitted in evidence if it complies with the following:

> Section 1. *Audio, video and similar evidence. – Audio, photographic and video evidence of events, acts or transactions* shall be admissible provided it shall be shown, presented or displayed to the court and shall be identified, explained or authenticated by the person who made the

[96] *Id.*

[97] H. Villarica Pawnshop, Inc. v. Soc. Sec. Comm'n, G.R. No. 228087, 853 SCRA 174, 193, Jan. 24, 2018.

> recording or by some other person competent to testify on the accuracy thereof.[98]

A cursory reading of the above-quoted provision reveals that it does not explicitly include testimonial evidence and instead seemingly points to documentary evidence. Rule 11, Section 1 includes only "[a]udio, photographic and video evidence of events, acts or transactions," which perceptibly refers to electronic evidence that is offered to prove the contents captured therein, rather than as proof of the truth of the facts sought to be established. In any case, it remains unclear whether this can form basis for the admissibility of dying declaration and the first kind of *res gestae* as testimonial evidence per se.

3. Rule for Examination of Witnesses

Lastly, Rule 10, Section 1 of the Rules on Electronic Evidence provides for the presentation of electronic testimony before the court, when authorized by the same after a summary hearing on such testimony.[99] While this provision explicitly covers testimonial evidence, it is unclear whether it can be used to admit a statement categorized as dying declaration or the first kind of *res gestae* made through electronic means. Thus, following the principle of *verba posterima propter certitudinem addita ad priora quae certitudine indigent sunt referenda,* which means that the subsequent section must be referred to in clarifying the preceding section that is doubtful in meaning,[100] the succeeding provisions under Rule 10 must be resorted to in order to find meaning in Section 1 thereof, to wit:

> Section 2. *Transcript of electronic testimony. – When examination of a witness is done electronically, the entire proceedings, including the questions and answers, shall be transcribed* by a stenographer, stenotypist or other recorder authorized for the purpose, who shall certify as correct the transcript done by him. The transcript should reflect the fact that the proceedings, either in whole or in part, had been electronically recorded.[101]

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[98] ELEC. EVID. RULE, Rule 11, § 1. (Emphasis supplied.)

[99] Rule 10, § 1.

[100] *Verba posterima propter certitudinem addita ad priora quae certitudine indigent sunt referenda,* BLACK'S LAW DICTIONARY (6th ed. 1990), *at* https://blacks_law.en-academic.com/43440/verba_posteriora_propter_certitudinem_addita%2C_ad_priora_quae_certitudine_indigent%2C_sunt_referenda.

[101] ELEC. EVID. RULE, Rule 10, § 2. (Emphasis supplied.)

Rule 2, Section 2 provides for the presentation of a witness that will testify *in court*, whose testimony shall be transcribed in accordance with the manner prescribed therein. This does not squarely find application in the issue raised in this Article, wherein the testimonial evidence in electronic form is the actual statement made by the declarant *out of court*, in the context of dying declaration and the first kind of *res gestae*.

To demonstrate using the example provided in Part I, where B made a dying declaration through a voice message on her mobile phone, Rule 10, Section 1 of the Rules on Electronic Evidence may apply to C, the witness who can testify on the voice message. The court may authorize C to testify by electronic means. However, the said provision does not exactly apply to the voice message sent by B, which is the kind of electronic evidence examined in this Article. Therefore, it remains unclear whether a dying declaration or a statement under the first kind of *res gestae* made through electronic means is covered by Rule 10.

B. Analogy to the Issue in *Lorraine v. Markel American Insurance Co.*

In line with the foregoing discussion, in the United States, the case of *Lorraine v. Markel American Insurance Co.*[102] is described as the "most comprehensive single opinion" with respect to the admissibility of electronically stored information ("ESI").[103] As such, it would be prudent to consult the opinion by the US District Court for the District of Maryland ("Maryland District Court") in *Lorraine* to more comprehensively assess the perceptible ambiguity on the admissibility of dying declaration and the first kind of *res gestae* made through electronic means.

Lorraine involves the enforcement of a private arbitrator's award with respect to the plaintiffs/counter-defendants' yacht.[104] In the course of the proceedings, copies of e-mail correspondences were presented as evidence.[105] These "unauthenticated" e-mails were described therein as "a form of computer generated evidence that pose evidentiary issues."[106]

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[102] Lorraine v. Markel American Ins. Co. [hereinafter "*Lorraine*"], 241 F.R.D. 534 (D. Md. 2007).

[103] Paul W. Grimm, Michael V. Ziccardi, & Alexander W. Major, *Back to the Future: Lorraine v. Markel American Insurance Co. and New Findings on the Admissibility of Electronically Stored Information*, 42 AKRON L. REV. 357, 360 (2009).

[104] *Lorraine*, 241 F.R.D. 534, 535.

[105] *Id.* at 537.

[106] *Id.*

Hence, the Maryland District Court delved into the admissibility of ESI, recognizing that at the time of the promulgation of *Lorraine*, there existed scant literature on "whether it constitutes 'such facts as would be admissible in evidence.'"[107]

In the Maryland District Court's opinion, an enumeration of evidence rules to consider whether ESI must be admitted in evidence was provided:

> Whether ESI is admissible into evidence is determined by a collection of evidence rules that present themselves like a series of hurdles to be cleared by the proponent of the evidence. Failure to clear any of these evidentiary hurdles means that the evidence will not be admissible. Whenever ESI is offered as evidence, either at trial or in summary judgment, the following evidence rules must be considered: (1) is the ESI *relevant* as determined by Rule 401 (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be); (2) if relevant under 401, is it *authentic* as required by Rule 901(a) (can the proponent show that the ESI is what it purports to be); (3) if the ESI is offered for its substantive truth, is it *hearsay* as defined by Rule 801, and if so, is it covered by an applicable exception (Rules 803, 804 and 807); (4) is the form of the ESI that is being offered as evidence an *original* or *duplicate* under the original writing rule, of if not, is there admissible secondary evidence to prove the content of the ESI (Rules 1001-1008); and (5) is the probative value of the ESI substantially outweighed by the danger of *unfair prejudice* or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance. Preliminarily, the process by which the admissibility of ESI is determined is governed by Rule 104, which addresses the relationship between the judge and the jury with regard to preliminary fact finding associated with the admissibility of evidence. Because Rule 104 governs the very process of determining admissibility of ESI, it must be considered first.[108]

By way of summary, *Lorraine* provides for a criteria based on evidentiary rules in deciding whether ESI offered may be admitted in evidence, namely: (1) relevance; (2) authenticity; (3) disqualification for being hearsay, unless covered by an exception thereto; (4) whether the ESI is an

[107] *Id.* at 537–38.
[108] *Id.* at 538.

original or duplicate; and (5) whether the probative value of the ESI is greater than the danger of unfair prejudice.

Furthermore, *Lorraine* particularly tackles the admissibility of ESI for hearsay issues and it expounds on the relevant rules and exceptions under the Federal Rules of Evidence.[109] Drawing from the same, *Lorraine* provided guidelines on how to analyze issues with respect to the admissibility ESI in the face of the hearsay rule, to wit:

> In summary, when analyzing the admissibility of ESI for hearsay issues, counsel should address each step of the inquiry in order: *does the evidence contain a statement, made by a person, which is offered for its substantive truth*, but which does not fall into the two categories of statements identified in 801(d)(1)(A) and 801(d)(2). *If, as a result of this analysis, a determination is made that the evidence is hearsay, then it is inadmissible unless it covered by one of the exceptions* found in Rules 803, 804 and 807.
>
> *If ESI has cleared the first three hurdles by being shown to be relevant, authentic, and admissible under the hearsay rule or an exception thereto*, it must also be admissible under the original writing rule before it can be admitted into evidence or considered at summary judgment.[110]

Lorraine provides multiple levels of analysis with respect to the admission of ESI in evidence. First, a determination must be made on whether the subject electronic evidence is offered for its substantive truth, i.e., to prove the facts claimed therein. If it is determined to be hearsay, then it is inadmissible in evidence—unless it is within the ambit of any of the exceptions to the hearsay rule. If such electronic evidence has been demonstrated as "relevant, authentic, and admissible under the hearsay rule or an exception thereto,"[111] then it must be scrutinized through the lens of other existing evidentiary rules with respect to admissibility before being declared as admissible. In the context of *Lorraine*, the issue was on whether the ESI offered was an original or a duplicate.

Another important principle from *Lorraine* is the categorization of ESI as hearsay in relation to whether or not it was created by a "human declarant."[112] As enunciated by Grimm, et al. in their comprehensive analysis

[109] *Id.* at 537–54.
[110] *Id.* at 576–77. (Emphasis supplied.)
[111] *Id.* at 576.
[112] Grimm et al., *supra* note 103, at 398.

of *Lorraine*, if the "electronic or digital evidence" was not made by a "human declarant," then the same cannot be considered hearsay.[113] Conversely, electronic evidence made by a human declarant may be considered hearsay, unless it falls within the exceptions.

Lorraine shows that electronic evidence may contain statements that are offered to prove the truth of the facts asserted therein and may be considered hearsay. Applied to our Revised Rules in Evidence, the same may be regarded as testimonial evidence. As such, it is not impossible to admit statements constituting dying declarations or the first kind of *res gestae* made through electronic means as testimonial evidence despite the current ambiguity in terms of their admissibility, considering our Rules on Electronic Evidence.

C. Originalist Approach vs. Liberal Reading of the Hearsay Exceptions

As tackled in Part II, the dying declaration and *res gestae* exceptions have been consistently admitted on the basis of reliability and necessity without any categorical distinctions or requirements that would otherwise exclude them. Yet a revisiting of our Rules on Electronic Evidence highlights the ambiguity of whether these statements would qualify as said exceptions when made through electronic means. The incompatibility of the elements of said exceptions laid down in the Revised Rules of Evidence, and the requirements of authentication found in the Rules on Electronic Evidence, just like in the United States, point back to objections on the basis of the constitutional rights of confrontation and cross-examination. Thus, the Revised Rules on Evidence accentuates the myopic view that constitutional tests should be the only consideration, automatically displacing traditional evidence rules.

Simply put, there are two opposing sides: (1) a conservative originalist reading of the dying declaration and *res gestae* exceptions that puts primacy on constitutional rights, treating the hearsay exceptions as "mere historical anomaly;"[114] and (2) a liberal reading of said exceptions that puts value in its relevance, as seen through the lens of evidentiary rules. We thus end up trying to find a middle ground for two schools of thought with the question, "Where should we draw the line?" However, at this point of the

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[113] *Id.*

[114] Orenstein, *supra* note 24, at 1446.

discussion, we should instead ask, "Is the middle ground really in the middle? *Should* the middle ground be in the middle?"

To answer the latter, no, it should not. The law cannot be fixed to favor any one group—in this case, constitutional rights automatically trumping evidentiary rules—when it clearly loses relevance by prejudicing others.

Ironically, history and tradition are on the side of relevance of the dying declaration and *res gestae* exceptions. As previously observed, these exceptions to the hearsay rule, instead of "being a categorical exception to confrontation, […] served as […] [reasonable,] pragmatic, flexible instrument[s] [throughout history]."[115]

Even in modern times, we have newfound utility for these exceptions. This Article inquires, "If an electronic device is found on the person of a deceased containing evidence that points to the killer, would it be admissible in evidence?" Extrajudicial killings are rampant,[116] and victims thereof may have an electronic device on their person. Also, we consider the gender aspect, where "many of the confrontation cases involve social phenomena where the women are nameless and, because of evidence rules, voiceless. We can rightfully question the ability of courts to understand the complicated dynamics of domestic violence as they try to pigeonhole the declarations of victims."[117]

Hence, this Article submits that the sheer ambiguity of dying declarations and the first kind of *res gestae* made through electronic means in terms of admission into evidence—whether through the lens of the Rules on Electronic Evidence or as electronic evidence in nature—*should not altogether bar their admission as hearsay exceptions.* These exceptions are respected in Philippine case law and historically have steadily overcome constitutional hurdles as they are consistent with fairness, truth, and justice. They have also been accepted in consideration of "the needs of victims […] and the practicalities of prosecution."[118]

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[115] *Id.* at 1445.

[116] *See* Mong Palatino, *Alarming Pattern of Killings Continues in the Philippines*, DIPLOMAT, Mar. 15, 2023, *at* https://thediplomat.com/2023/03/alarming-pattern-of-killings-continues-in-the-philippines/.

[117] Orenstein, *supra* note 24, at 1459–60.

[118] *Id.* at 1439.

Besides, admissibility is different from probative value,[119] and while the rules on dying declarations and *res gestae* talk about getting the evidence into the record, it does not mean that when the declaration is admitted, it automatically establishes the fact. Rather, the court still needs to consider other evidence adduced and weigh their probative value.

IV. THE RELATIONSHIP OF CONSTITUTIONAL LAW AND EVIDENCE LAW

Drawing from *Lorraine* that electronic evidence containing statements offered as proof of the truth of the facts asserted therein may be admitted in evidence as such, and the two clashing schools of thought with respect to constitutional criticisms of dying declaration and part of the *res gestae* as opposed to putting more weight on their relevance, we discuss in this part the interplay of constitutional law and evidentiary rules. Such relationship shall form basis to possibly admit dying declarations or statements under the first kind of *res gestae* made through electronic means, anchored on the importance of the relevant constitutional rights, and the traditional reliability and trustworthiness of dying declaration and parts of the *res gestae*.

A. The Constitutional Basis of Dying Declaration and Parts of the *Res Gestae* and Existing Evidentiary Rules

The non-exclusion of the dying declaration and *res gestae* exceptions are rooted in reliability. There are two keywords here: (1) non-exclusion and (2) reliability. Previous literature points out that "[w]here evidence law cannot easily get reliability right[,] […] [it tends] to prefer admissibility of evidence."[120] In other words, while these exceptions have been consistently admitted into evidence, non-exclusion does not always equate to reliability, or at least to the level of reliability sought by critics, as reliability can mean different things in different areas of the law. Critics say that a constitutional test rooted in constitutional rights should be the primary consideration to address their reliability concerns.[121]

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[119] Mancol v. Dev. Bank of the Phil. [hereinafter, *"Mancol"*], G.R. No. 204289, 846 SCRA 131, 143, Nov. 22, 2017.

[120] Garrett, *supra* note 39, at 103.

[121] *Crawford*, 541 U.S. 36 (2004); James Donald Moorehead, *Compromising the Hearsay Rule: The Fallacy of Res Gestae Reliability*, 29 LOY. L.A. L. REV. 203, 239 n.183 (1995). (Emphasis supplied.)

In the Philippines, the 1987 Constitution enjoys a higher position over other laws and is dubbed the "fundamental law of the land in the Philippines"[122] because it contains matters of State policy. On the other hand, "evidence is the means, sanctioned by [the] rules, of ascertaining in a judicial proceeding the truth respecting a matter of fact."[123] The Constitution gives the Supreme Court the power to make these rules.[124]

At first blush, one might immediately invoke the primacy of the Constitution to trump evidentiary rules, and supposedly, all other rules should be derived from the Constitution. However, as demonstrated through the differing meanings attributed to reliability by evidence law and constitutional law, other rules may conflict with the Constitution. The conflict between these two areas of law is rooted in differing policy considerations—*constitutional law focusing on fair trial principles, and evidence law asserting reliability of evidence.*

Each side isolates the other, but both actually serve the same overarching principles of fairness, truth, and justice. Instead of looking at it as choosing one side over the other, however, we should look at it as constitutional rights being informed and finding meaning in evidentiary rules. History, context, experience, policy, and relevance should not be shunned from the discussion.

Thus, this Article submits that generally, constitutional rights should not automatically displace other evidentiary rules. Constitutional law and evidence law should not be treated as separate sides that cannot be reconciled. A harmonious relationship between the two areas of law can be fostered if courts "positively engage with evidence-law rules and application."[125]

Hence, "in areas such as constitutional evidence law where policy often does matter to interpretation,"[126] the first step should be articulating "whether a constitutional right implicates evidential rules" and "the relevant

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[122] *Philippines – Southeast Asia Seurity Laws*, INTL COMM'N OF JURISTS WEBSITE, *at* https://www.icj.org/south-east-asia-security-laws/philippines-southeast-asia-security-laws/#:~:text=The%20Constitution%20(1987)%20is%20the,human%20rights%20(article%20XIII).

[123] RULES OF COURT, Rule 128, § 1.

[124] CONST. art. VIII, § 5(5).

[125] Garrett, *supra* note 39, at 121.

[126] *Id.*

underlying values."[127] The next question should be "whether [conflict] can be avoided by a narrower construction of the constitutional right, interpreting the right as compatible with evidentiary concerns."[128] Courts should also make "efforts to explain [how] […] constitutional test[s] [are] compatible with evidence-law values."[129] Finally, "courts can and should seek to accommodate constitutional and evidence-law concerns, or clearly define the difference in approach."[130]

In relation to the issue arising from dying declaration and the first kind of *res gestae* made through electronic means, the constitutional rights to confront and cross-examine, in the context of modern concerns brought about by electronic evidence rules, are better informed and find deeper meaning when juxtaposed with the non-exclusion of these two exceptions to the hearsay rule.

At any rate, even if courts invoke constitutional rights and adopt a policy change restricting or even abandoning these hearsay exceptions, American case law is a testament to problems that will still arise, and constitutional law will have to turn to evidence law for solutions.[131] For example, *Crawford v. Washington* overturned *Ohio v. Roberts*.[132] *Crawford* provides the constitutional test limiting dying declarations to a strict definition of testimonial statements.[133] This test brings about constitutional problems concerning what the requirements are for testimonial statements. First, in *Davis v. Washington*, the US Supreme Court admitted that it had to "determine more precisely which police interrogations produce testimony."[134] Second, *Giles v. California*, tackles the issue on "forfeiting the right of confrontation."[135] Third, in *Melendez-Diaz v. Massachusetts*, the Court rejects "that the confrontation requirement would be burdensome."[136] In this scenario, then, evidentiary rules will still inform and give meaning to constitutional rights.

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[127] *Id.* at 120.
[128] *Id.* at 121.
[129] *Id.* at 105.
[130] *Id.* at 120.
[131] *Id.* at 119.
[132] Orenstein, *supra* note 24, at 1430–39
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*

Ultimately, the well-put observations of recent literature are deeply underscored: "constitutional rights can safeguard against evidence-law rules and litigation practices that place accuracy and fairness in jeopardy. In return, evidence law has something to offer constitutional theory: to improve the effectiveness of constitutional protections and to prevent unanticipated erosion of constitutional rights."[137]

B. Two-Pronged Analysis of Dying Declaration and the First Kind of *Res Gestae* Made Through Electronic Means

As established earlier, constitutional principles protect the rights to cross-examination and confrontation embedded in the authentication of evidence, while evidentiary rules put emphasis on the relevance and inherent reliability of exceptions to the hearsay rule. It was likewise discussed that constitutional rights do not necessarily operate to the exclusion of evidentiary rules.

Following the analogous principles in *Lorraine,* it is clear that hearsay analysis and authentication are distinct hurdles in the process of admitting evidence, especially electronic evidence. This can be gleaned from the pertinent criteria for admitting electronic evidence as exceptions to the hearsay rule laid down therein, namely: (1) determining whether the subject electronic evidence is "offered for its substantive truth" and if the same is hearsay or otherwise falls under an exception thereto; and (2) proving its authenticity.[138]

As such, there is a route that can be taken to altogether address the present issue—to determine whether the subject evidence falls squarely under dying declaration or the first kind of *res gestae* as defined in the Revised Rules of Evidence, and thereafter to liberally scrutinize the authenticity thereof with the guidance of the pertinent provisions in the Rules of Electronic Evidence. We thus propose a two-pronged test that will subject electronic evidence both to hearsay analysis and to authentication.

First, it must be determined whether the elements and/or requisites for dying declaration or the first kind of *res gestae* are present in the electronic evidence being offered.

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[137] Garrett, *supra* note 39, at 122.

[138] *Lorraine,* 241 F.R.D. 534, 538.

If the electronic evidence is offered as dying declaration, the requisites are:

1. The statement contained in the electronic evidence has to do with the crime as well as the surrounding circumstances of the declarant's death;

2. When the statement was made by the declarant through electronic means, they were under the consciousness of

3. their impending death;

4. Had they survived, the declarant would have been competent to appear as a witness; and

5. The declaration made through electronic means was offered in a criminal case for homicide, murder, or parricide, wherein the declarant was the deceased victim.[139]

If the electronic evidence is offered as the first kind of *res gestae*, the requisites are:

1. The principal act (*res gestae*) is a startling occurrence;

2. The declarant made the statement through electronic means without having sufficient time to fabricate it;

3. The statement was made through electronic means under the stress of excitement caused by the occurrence; and

4. The statement made through electronic means has to do with the aforementioned startling occurrence and its direct surrounding circumstances.[140]

Second, if the electronic evidence offered complies with the abovementioned requisites, then the analysis must proceed to the next test—liberally authenticating the evidence using the means under the Rules on Electronic Evidence.

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[139] *See De Las Eras,* 366 SCRA 231, 237–38.
[140] *See Calinawan*, 817 SCRA 424, 433.

The Rules on Electronic Evidence, as elucidated in Part II, accepts any competent proof of the authenticity of electronic evidence in the absence of direct proof to that effect, subject to the sound discretion of the court. Hence, for purposes of this proposed test, such principle shall form basis for the intended authentication of electronic evidence in various forms, considering which rule substantially resembles the same, and which finds the most plausible application thereto.

For statements made through electronic means in written form, like short message service ("SMS"), private chat, and similar evidence, the same may be authenticated through Rule 5, Section 2 (b) and (c) of the Rules on Electronic Evidence. Meanwhile, statements made through electronic means in audio form, such as voice messages, recorded audio calls, or other auditory forms of communication, may be authenticated through the means laid down in Rule 11, Section 1. This same provision may be referred to if the offered electronic evidence is a video, such as video messages or recorded video calls. If the electronic evidence was not retained or recorded, it is considered ephemeral evidence[141] which may be authenticated following Rule 11, Section 2.

When the court is convinced of the authenticity of the electronic evidence containing a dying declaration or a statement falling under the first kind of *res gestae*, then the same must be admitted as such. However, it must be pointed out that nothing precludes other modes of authentication when the court allows the same.

[141] *See* ELEC. EVID. RULE, Rule 2, § 1(k).

This proposed two-pronged test is summarized in the table below:

TABLE 1. Proposed Two-Pronged Analysis of Dying Declaration and the First Kind of *Res Gestae* Made Through Electronic Means

Form of Electronic Evidence	First Test (Hearsay Analysis)		Second Test (Authentication)
	Offered as Dying Declaration	*Offered as the First Kind of Res Gestae*	
Written form of communication, such as SMS, chats, and similar evidence	1. The statement contained in the electronic evidence has to do with the crime as well as the surrounding circumstances of the declarant's death; 2. When the statement was made by the declarant through electronic means, they were under the consciousness of their impending death; 3. Had they survived, the declarant would have been competent to appear as a witness; and 4. The declaration made through electronic means was offered in a criminal case for homicide, murder, or parricide, wherein the declarant was the deceased victim.	1. The principal act (*res gestae*) is a startling occurrence; 2. The declarant made the statement through electronic means, without having sufficient time to fabricate; 3. The statement made through electronic means were under the stress of excitement caused by the occurrence; and 4. The statement made through electronic means has to do with the aforementioned startling occurrence and its direct surrounding circumstances.	1. "By evidence that other appropriate security procedures or devices as may be authorized by the Supreme Court or by law for authentication of electronic documents were applied to the document," ELEC. EVID. RULE, Rule 5, § 2(b); or 2. "By other evidence showing its integrity and reliability to the satisfaction of the Judge," § 2(c).
Audio form of communication, such as voice messages, recorded audio calls, and similar evidence			1. "By the person who made the recording," Rule 11, § 1; or 2. "By some other person who is competent to testify on the accuracy" of such recording," *id.*
Video form of communication, such as video messages, recorded video calls, and similar evidence			
Electronic evidence not retained or recorded			1. "By the testimony of a person who was a party" thereto; 2. By the testimony of a person who has personal knowledge thereof; or 3. By other competent evidence, Rule 11, § 2.

With this proposed two-pronged test, the protections enshrined in the Constitution and the purpose of evidentiary rules are harmonized by taking into consideration the inviolable rights to cross-examination and confrontation, while maintaining the reliability and trustworthiness of the exceptions to the hearsay rule.

V. RECOMMENDATIONS

Through US case law, we see how electronic evidentiary rules bring reliability problems with regard to the two hearsay exceptions. After articulating these reliability concerns, this section shall provide justifications on why some reliability concerns are merely incidental to the primary policy considerations, and propose guidelines on how to address them, which can be adopted by the Supreme Court pursuant to their rule-making powers.

To recall, documentary evidence is offered as proof of their contents,[142] while statements under hearsay exceptions are offered as proof of the truth of the facts stated therein.[143] Thus, when two supposedly distinct hurdles in admitting evidence are intertwined, there can be conflict. Specifically, the admission of dying declarations and *res gestae* made through electronic means as proof of the truth of the facts asserted in these statements therein becomes unclear, resulting in issues that even involve constitutional rights.

To resolve this conflict, the Supreme Court should take note of the following reliability concerns when it crafts the rules on electronic evidence associated with these two hearsay exceptions:

First, the authentication of electronic signatures can be questioned in the context of these hearsay exceptions. Utilizing a method or process to establish and verify signatures[144] is highly questionable conduct against dying declarations. "A fixed belief that death is impending and is certain to follow immediately, or in a very short time, without an opportunity of retraction and in the absence of all hopes of recovery"[145] becomes highly suspect. Similarly, "a spontaneous and instinctive reaction, during which interval certain statements are made under such circumstances as to show lack of

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[142] *See* ELEC. EVID. RULE, Rule 6, § 2(a).
[143] *See* ELEC. EVID. RULE, Rule 6, § 2(a).
[144] *See* ELEC. EVID. RULE, Rule 6, § 2(a).
[145] FRANCISCO, *supra* note 21, at 531.

forethought or deliberate design in the formulation of their content"[146] is doubtful. Other means provided by law, particularly the Electronic Commerce Act, even requires "a prescribed procedure [of signing] not alterable by the parties interested in the electronic document."[147] Finally, "other means satisfactory to the judge as establishing the genuineness of the electronic signature"[148] is meant to serve as a catch-all provision, but the judge must also reconcile these means with the peculiar elements of the two hearsay exceptions. Besides, this mode assumes that the document contains an electronic signature, which may even rarely be the case.

On the second mode, the Supreme Court has not authorized other appropriate security procedures or devices for authentication of electronic documents.[149] Assuming there were, we recall the discussion on methods of authenticating electronic signatures, questioning their compatibility with the elements of the dying declaration and *res gestae* exceptions.

As to the third mode, "other evidence showing its integrity and reliability to the satisfaction of the [j]udge"[150] is meant to be a catch-all provision. Under the third mode, authenticity is "proven by the testimony of a person who was a party to the same or has personal knowledge thereof."[151] This mode involves someone who has "participated in or observed the event reflected by the exhibit."[152] Supposedly, personal knowledge is satisfied if: (1) the witness participated in the communications, (2) said witness identifies an electronic device showing that he or she received the evidence, and (3) the witness states that said device has not been tampered with.[153] Still, the problem falls in the verification of the witness' statements and of the electronic device which could have been fabricated, reflecting the general reliability concerns attached to electronic evidence. Furthermore, it is highly improbable that someone witnessed the sender making and sending the evidence, considering the peculiar elements of the dying declarations and *res gestae* exceptions.

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[146] *Id.* at 586.

[147] Rep. Act No. 8792 (2000), § 8.

[148] ELEC. EVID. RULE, Rule 6, § 2(c).

[149] Francis Lim, *Are social media posts admissible in evidence?*, INQUIRER.NET, May 1, 2014, *at* https://business.inquirer.net/169386/are-social-media-posts-admissible-in-evidence.

[150] ELEC. EVID. RULE, Rule 5, § 2(c).

[151] Rule 11, § 2.

[152] *Lorraine,* 241 F.R.D. 534, 545.

[153] *Id.*

Authentication of ephemeral evidence is the same as the third mode of authenticating private electronic documents. In effect, the mode of authentication depends on the bare allegations of the witness—"your word against mine." Reliability becomes especially dire in the context of authenticating ephemeral evidence, which are "not recorded or retained."[154] This mode, then, leads to reliability problems and objections grounded on upholding the rights to confront and cross-examine.

It bears stressing that although authentication modes are inclusive and may be accepted as judges deem fit, these do not escape the reliability concerns grounded on constitutional rights. Also, beyond these three modes, parties themselves may stipulate on the existence and authenticity of these documents, or even waive authentication requirements altogether. Still, these arrangements do not address the issue of admitting dying declarations and *res gestae* in the context of electronic evidentiary rules and constitutional rights.

In fact, these authentication modes already delve into the specifics. Even generally, whether an electronic statement can be made at all in light of the peculiar elements of dying declarations and *res gestae* is highly questionable.

To address these concerns, we may find guidance in *Lorraine,* which recommends ways in authenticating electronic documents in line with Rule 901(b).[155] Specifically, some of these methods are: testimony of a witness with knowledge; comparison by trier or expert witness; distinctive characteristics and the like; voice identification; and and process or system.[156]

In essence, these methods are grounded on the principles saying that authentication: (1) requires only a light burden of proof and may thus be liberally construed; (2) may be done by expert witness or factfinder; (3) may be satisfied by circumstantial evidence; and (4) may be described through a process or system which produces evidence stored in or generated by computers proves the accuracy of the result.[157] Clearly, these principles render some reliability concerns mentioned above to be incidental to policy considerations. At the same time, more specific guidelines on the

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[154] ELEC. EVID. RULE, Rule 2, § (k).
[155] *Lorraine,* 241 F.R.D. 534, 544–50.
[156] *Id.* at 544.
[157] *Id.* 545–49.

authentication of electronic evidence may be derived from these principles by the Supreme Court.

Finally, to recapitulate, while this Article talks about the non-exclusion of dying declaration and *res gestae* exceptions made through electronic means, admissibility is a different matter from probative value.[158] Hearsay exceptions may not be excluded in evidence but their weight must be assessed in light of other evidence in record. Specifically, Rules on Electronic Evidence, enumerated the factors to consider in the assessment of an electronic document's evidentiary weight, thus:

> (a) The reliability of the manner or method in which it was generated, stored or communicated, including but not limited to input and output procedures, controls, tests and checks for accuracy and reliability of the electronic data message or document, in the light of all the circumstances as well as any relevant agreement;
>
> (b) The reliability of the manner in which its originator was identified;
>
> (c) The integrity of the information and communication system in which it is recorded or stored, including but not limited to the hardware and computer programs or software used as well as programming errors;
>
> (d) The familiarity of the witness or the person who made the entry with the communication and information system;
>
> (e) The nature and quality of the information which went into the communication and information system upon which the electronic data message or electronic document was based; or
>
> (f) Other factors which the court may consider as affecting the accuracy or integrity of the electronic document or electronic data message.[159]

[158] *Mancol*, 846 SCRA 131, 143.
[159] ELEC. EVID. RULE, Rule 7, § 1.

VI. CONCLUSION

A dying declaration or a statement falling under the first kind of *res gestae,* when made through electronic means, poses the question on whether the same may be admitted as such under the Revised Rules of Evidence, or if they must be necessarily subject to admissibility rules, specifically that of authentication, in the Rules on Electronic Evidence.

Based on a historical survey of dying declaration and parts of the *res gestae*, as well as an analysis of the perceptible ambiguity of their admissibility when made through electronic means, this Article suggests that there is a middle ground between the seemingly opposing schools of thought. As a matter of fact, the constitutional principles ingrained in the authentication of evidence may be harmonized with evidentiary rules that uphold the relevance, reliability, and trustworthiness of exceptions to the hearsay rule.

This Article examined the obscure situation wherein a dying declaration or a statement falling under the first kind of *res gestae* is made through electronic means, considering its implications to potential victims of crimes and other offenses, and the prevalence of electronic devices. In addition, it seeks to open the discussion on providing expansive parameters for the admissibility of novel forms of evidence, with the goal of expediting the litigation of cases, and minimizing the tribulations brought about by the procedural aspects thereof. In the end, what is sought is fairness and justice, echoing the existing principles of constitutional law and evidentiary rules, which ultimately point to the same.

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