UNDERSTANDING FACIAL CHALLENGES*

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INTRODUCTION

A facial challenge is an elusive legal concept. According to some scholars, the U.S. Supreme Court has yet to articulate a consistent theory on the matter.[1] Truth be told, neither has ours.

A facial challenge is usually defined as a suit to have a law declared unconstitutional in its entirety.[2] However, while this definition captures the effect, it is silent as to the cause and its agent.

Accordingly, a facial challenge is defined herein as a suit to invalidate a law in its entirety for violating the Constitution, either because it has no valid application or, for public policy considerations, because it has at least one invalid application, whether to the plaintiff or a third party.

The rest of this Article is dedicated to elaborating each element of the definition as a modality for evolving a theoretical framework, which will then be applied to doctrines culled from selected Philippine and U.S. cases to test its explanatory power.

A facial challenge is a suit...

Suits are public or private.[3] Whether they are one or the other depends on the kind of right asserted. If it belongs to the community as such, then they are public; if to a person, then private.

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[1] Roger Pilon, *Facial vs. As-Applied Challenges: Does It Matter?*, (2008-2009) CATO S.C. REV. vii, ix.

[2] Richard Fallon, *Fact and Fiction About Facial Challenges*, 99 CAL. L. Rev. 915, 923 (2011) [hereinafter "Fallon"] "For the most part, both courts and commentators have tended to adopt a definition of facial challenges as ones seeking to have a statute declared unconstitutional in all possible applications."

[3] *See generally* Solomon Lumba, *Taxonomy of Suits*, 86 PHIL. L J. 512 (2012).

These suits may be against private persons or the government. A typical public suit against private persons is a criminal prosecution. An example of a public suit against the government is an action to compel the disclosure of information of public interest.[4] Examples of private suits against private persons or the government are actions based on tort or contractual breach.

Of special concern to us, however, are suits against the government which assail a law for violating the constitution. Their significance lies in their being governed by a unique set of rules relative to their effects, causes, and the agents that set them apart from all other actions.

...to invalidate a law in its entirety for violating the Constitution, either because it has no valid application...

For this subspecies of suits, the general rule is that laws can only be invalidated 'as applied' to a particular situation, leaving it presumably valid as to the others.[5] The reasons are political and practical. Politically, our system of government vests in the legislature the power to legislate. Out of respect for the order of things and in deference to a co-equal branch, courts favor partial invalidation to wholesale destruction.[6] Practically, in so far as laws seek to regulate personal behavior, there is always a potential for violating constitutional rights, making them ever susceptible to challenge in that regard. If every successful challenges invariably results in invalidation, public order can break down since the behavior in question will no longer be regulated in any way. Thus, the preference is to whittle at the unconstitutional aspects on a case-to-case basis or as applied.

Take for instance a statute that penalizes heinous crimes with death. Suppose a person with special needs successfully assails the measure for violating his constitutional right against cruel and unusual punishment. If it were struck down as a whole, heinous acts would be left unregulated even as to persons without special needs. Thus, courts are wont to declare the statute unconstitutional only with respect to persons with special needs, leaving it effective as to the rest.[7]

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[4] Tañada v. Tuvera, G.R. No. 63915, 136 SCRA 27, Apr. 24, 1985; 146 SCRA 446, Dec. 29, 1986.

[5] Yazoo and Mississippi Valley Railroad Company v. Jackson Vinegar Company, 226 U.S. 217 (1912).

[6] Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006).

[7] *See* Fallon, *supra* note 2, at 924.

As an exception, a facial challenge may be raised against laws that have no reasonably conceivable valid application. Suppose a statute criminalizes homosexuality. Such a measure can be facially challenged because it seems fairly obvious, at least in our jurisdiction, that no set of circumstances exists under which such a law would be valid. Thus, it would be a useless endeavor to carve out exceptions on a case-to-case basis when it is fairly apparent that there are none. We shall call this facial challenge Type I.

...or, for public policy considerations, because it has at least one invalid application...

As an exception to the exception, when certain public policy considerations are present, a facial challenge may be brought against laws that have at least one reasonably conceivable invalid application. We shall call this Type II.

To illustrate, imagine a statute that criminalizes breast exposure in movies. Such a measure is arguably valid if applied to pornographic films, but invalid as to others. In short, it is overbroad. Suppose that a producer of films that educate breastfeeding mothers is prosecuted thereunder and argues that the statute violates his free speech. If the court follows the general rule, it will nullify the statute as applied only to this type of film. The problem is that this nullification creates a chilling effect on other film producers because they are uncertain whether their films are prohibited. Each of them will have to file a case to know if their films are among the exemptions.

This chilling effect is unacceptable because the freedom to speak out, whether through film or otherwise, is our first bulwark against government tyranny. To prevent the diminution of this freedom, courts allow Type II facial challenges against overbroad or vague speech regulations. Thus, in our illustration, the statute will be declared void on its face, even if it would have been valid as applied to pornographic movies, simply because it is reasonably conceivably invalid as applied to other films. In essence, for public policy considerations, the burden is placed on the government to come up with a speech measure that is narrowly tailored.

...whether as to the plaintiff or a third party.

Whether a suit is public or private, the plaintiff must have standing to sue. As a general rule, the plaintiff has standing if he has an actual or expected injury-in-fact and injury-in-law.[8]

Injury-in-fact is damage that is materially different from that suffered by everybody else. For instance, we may all be saddened to see someone get hit by a car, but the injury-in-fact belongs to him alone. On the other hand, injury-in-law means a violation of a legal right.

Standing should not be confused with being a named party to a case although the two often concur. Hence, in a criminal prosecution, standing is with the government acting through the public prosecutor, but the named party is the "People."

The reasons for the general rule are practical. It tends to prevent courts from being swamped with cases by limiting the pool of potential plaintiffs. It also tends to help courts make better decisions because the proceedings will generally be more adversarial, contributing to a sharper presentation of the issues.[9]

There are various exceptions within our subspecies of suit, depending on whether the suit is public or private. If public, then the plaintiff need only have injury-in-fact, since the injury-in-law necessarily belongs to the community. As an exception to the exception, the plaintiff does not even have to have injury-in-fact if a citizen's suit is proper. It is proper when there is no one who suffered injury-in-fact,[10] or even if there is, if the issue raised is of transcendental importance.[11]

If the suit is private, the plaintiff who does not have injury-in-law is allowed to sue on behalf of the one who does, if he can show injury-in-fact, a close relationship with the latter who is unable to bring the suit himself.[12] The reason for the exception is that it strengthens the protection of constitutional rights without substantially undermining the practical considerations underlying

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[8] In ordinary civil actions, the existence of injury-in-fact or injury-in-law for purposes of standing can be challenged in a motion to dismiss for failure to state a cause of action, lack of legal capacity to sue, or a motion for summary judgment. *See* RULES OF COURT, Rule 16, § 1(b)(d) and Rule 35.

[9] *See* Baker v. Carr, 369 U.S. 186 (1962).

[10] Severino v. Governor-General, G.R. No. 6250, 16 Phil. 366, Aug. 3, 1910.

[11] David v. Gloria Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, May 3, 2006.

[12] Barrows v. Jackson, 346 U.S. 249 (1953).

the general rule. Thus, in *White Light v. City of Manila*,[13] motel operators were allowed to sue on behalf of their customers to challenge a city ordinance prohibiting "short-time" admission, because they suffered injury-in-fact in the form of lost income, and had close relations with their customers who might be reluctant to challenge the ordinance for violating their right to privacy due to the ignominy a suit might bring.

As an exception to the exception, whenever a Type II facial challenge is proper the plaintiff can vindicate an injury-in-law to another so long as he has an injury-in-fact. The reason is that the expected benefits from addressing the issue outweigh the potential disadvantages from further liberalizing the standing rules.

To illustrate this last exception, let us return to our hypothetical statute that criminalizes breast exposure in movies, modifying the facts a little so that it is the producer of pornographic films, instead of the producer of educational films for breastfeeding mothers, who is being prosecuted. Will the result be any different? No, the statute will still be declared totally void even though it is valid as applied to him, because it is reasonably conceivably invalid as applied to other producers. Essentially, the "porn" producer, because he suffered injury-in-fact by being prosecuted under the statute, has standing to vindicate the injury-in-law of the "non-porn" producers, even though they are not before the court, since the prevention of a chilling effect on free speech is an issue of transcendental importance.

In sum, the general rule is that government measures that purport to violate constitutional rights can only be challenged as applied, by the persons who suffered injury-in-fact and injury-in-law. The exception to the former is a Type I facial challenge. The exception to this exception is a Type II facial challenge. The exception to the latter is *White Light*. The exception to this exception is a Type II facial challenge.

Furthermore, since the relevant standing requirement depends on whether the suit is facial or as applied, courts can adopt the following general methodology to integrate them. *First*, they can dismiss the suit for lack of standing if the plaintiff did not suffer actual or expected injury-in-fact, unless it is a citizen's suit. *Second*, if the suit is private and the plaintiff is suing on behalf of another, they can dismiss the suit for lack of standing if he does not meet the *White Light* factors, unless a Type II facial analysis is unavoidable. *Third*, if the law is valid as applied to the plaintiff, they can dismiss the suit for lack of cause of action, unless a Type II facial invalidation is called for. *Lastly*, if the law is

[13] G.R. No. 122846, 576 SCRA 416, Jan. 20, 2009.

invalid as to plaintiff, they can invalidate the law as applied unless a Type I or II facial invalidation is necessary.

APPLICATIONS

A. Abortion

In *Roe v. Wade*,[14] the U.S. Supreme Court upheld a facial challenge to a statute prohibiting abortions except to save the mother's life. It could have nullified it as applied to pre-viability abortions, but the lack of a health exception was fatal whether pre- or post-viability. The statute in *Sternberg v. Carhart*[15] proscribing partial birth abortion met a similar fate due to the absence of a health exception, among others.

Yet, in *Ayotte v. Planned Parenthood*,[16] the Court refused to make an outright facial invalidation of a statute requiring parental notification for minors seeking an abortion although it also lacked a health exception. Believing that it was susceptible to an as applied treatment but unsure whether the legislature would have preferred such an outcome, it ordered a remand to determine legislative intent. Likewise, in *Gonzalez v. Carhart*,[17] the Court denied a facial challenge to a statute prohibiting partial birth abortion even though it had no health exception, finding it unnecessary to protect the mother's health.

One way to reconcile these four cases is to apply our framework and methodology. We can say that the Court treated *Roe* and *Sternberg* as Type I challenges, because it found the statutes reasonably conceivably invalid under any circumstance. Later, the Court realized that *Ayotte* could be viewed either as a Type I or an as applied challenge. If it chose the former, then it would have to strike down the statute, given that it could not make a saving construction without engaging in judicial legislation. However, such concern would be addressed if the legislature itself intended the statute to be susceptible to such a remedy, opening the door for the latter option. Thus, the remand. In *Gonzalez*, since the health exception was superfluous, then the statute was valid as applied to the plaintiffs. Inasmuch as there were no public policy considerations making a Type II analysis obligatory, then the inquiry stopped there.

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[14] 410 U.S. 113 (1973).
[15] 530 U.S. 914 (2000).
[16] 546 U.S. 320 (2006).
[17] 550 U.S. 124 (2007).

The facial challenge in *Sternberg* was also upheld because the statute placed an undue burden on mothers seeking abortion. In contrast, the facial challenge in *Gonzalez* involving a similar statute was denied for exactly the opposite reason. To harmonize the two, we can say that the Court could have invalidated the statute in *Sternberg* as applied to post-viable abortions had it had a health exception. In its absence, a Type I facial challenge was sustained. As for *Gonzalez*, inasmuch as the statute did not place an undue burden on mothers and there were no public policy considerations requiring a Type II analysis, then the statute was considered valid as applied.

B. Facial Challenge and Overbreadth

In *David v Arroyo*,[18] the Philippine Supreme Court held that "a facial challenge on the ground of overbreadth is the most difficult challenge to mount successfully, since the challenger must establish that there can be no instance when the assailed law may be valid." The Court seems to confuse a Type I facial challenge where the "challenger must establish that there can be no instance when the assailed law may be valid,"[19] and a Type II facial challenge, where the challenger need only prove a single instance of invalidity. Overbreadth falls under the latter.

In *U.S. v Salerno*,[20] the U.S. Supreme Court ruled that, "we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." Echoing this, the Philippine Supreme Court affirmed in *Southern Hemisphere v. Anti-Terrorism Council*[21] that, "[i]t is settled, on the other hand, that the application of the overbreadth doctrine is limited to a facial kind of challenge and, owing to the given rationale of a facial challenge, applicable only to free speech cases." However, in *Roe v. Wade*,[22] an overbroad statute was facially invalidated for violating the right to privacy. Does this mean that the pronouncements in *Salerno* and *Southern Hemisphere* are mistaken?

Not necessarily. A statute can be overbroad, whether it relates to speech or not. However, the former can never be invalidated as applied because of the chilling effect it would cause. Hence, any challenge is always facial. On the other hand, the latter might be invalidated facially or as applied, as seen in *Ayotte*. Accordingly, if we take the 'overbreadth doctrine' as a term of art applicable to

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[18] G.R. No. 171396, 489 SCRA 160, 239, May 3, 2006. (Emphasis omitted.)
[19] *Id.*
[20] 481 U.S. 739, 745 (1987). (Citation omitted.)
[21] G.R. No. 178552, 632 SCRA 146, 187, Oct. 5, 2010. (Emphasis omitted.)
[22] 410 U.S. 113 (1973).

statutes that could never be invalidated as applied, then the statements *Salerno* and *Southern Hemisphere* would be accurate.

C. Facial Challenge of Criminal Statutes

In *Romualdez v. COMELEC*,[23] the Philippine Supreme Court declared that a "facial invalidation or an 'on-its-face' invalidation of criminal statutes is not appropriate." Citing *Romualdez v. Sandiganbayan*, it reasoned that:

> In sum, the doctrines of strict scrutiny, overbreadth, and vagueness are analytical tools developed for testing "on their faces" statutes in free speech cases or, as they are called in American law, First Amendment cases. They cannot be made to do service when what is involved is a criminal statute. With respect to such statute, the established rule is that 'one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.' As has been pointed out, 'vagueness challenges in the First Amendment context, like overbreadth challenges typically produce facial invalidation, while statutes found vague as a matter of due process typically are invalidated [only] 'as applied' to a particular defendant.[24]

Such reasoning is attendant with difficulty. *Romualdez v. Sandiganbayan* did not say that facial invalidation of criminal statutes is inappropriate. What it said was, "[i]t is best to stress at the outset that the overbreadth and the vagueness doctrines have special application only to free-speech cases. They are not appropriate for testing the validity of penal statutes."[25] Therefore, *Romualdez v. Sandiganbayan* did not preclude the facial invalidation of criminal statutes on grounds other than overbreadth or vagueness. A statute criminalizing homosexuality, for instance, would arguably be facially invalid for violating substantive due process or equal protection.

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[23] G.R. No. 167011, 553 SCRA 370, 418, Apr. 30, 2008. In this case, the Supreme Court defined facial invalidation as "an examination of the entire law, pinpointing its flaws and defects, not only on the basis of its actual operations to the parties involved, but on the assumption or prediction that its very existence may cause others not before the court to refrain from constitutionally protected speech, or on the ground that they may be applied to others not before the court whose activities are constitutionally protected." *Id.* at n.36.

[24] G.R. No. 152259, 435 SCRA 371, 382-83, July 29, 2004, *citing* Estrada v. Sandiganbayan, G.R. No. 148560, 369 SCRA 394, 466, Nov. 19, 2001 (Mendoza, *J., concurring*).

[25] *Id.* at 381-382.

True, in *Disini v. Secretary of Justice*, citing the dissenting opinion of Justice Carpio in *Romualdez v. COMELEC*, the Court clarified that "we must view these statements of the Court on the inapplicability of the overbreadth and vagueness doctrines to penal statutes as appropriate only insofar as these doctrines are used to mount 'facial' challenges to penal statutes not involving free speech."[26] Still, the clarification does not go far enough, since it is not unimaginable for non-speech criminal statutes to be completely nullified due to vagueness, as in *Connally v. General Construction*.[27]

D. Facial Challenge as a First Amendment Challenge

In *Imbong v. Ochoa*,[28] the Philippine Supreme Court characterized a facial challenge in the United States as a First Amendment challenge, in contrast to the Philippines where it has received a broader application. To quote:

> In United States *(US)* constitutional law, a **facial challenge**, also known as a First Amendment Challenge, is one that is launched to assail the validity of statutes concerning not only **protected speech**, but also all other rights in the First Amendment. These include **religious freedom, freedom of the press**, and the **right of the people to peaceably assemble**, and to **petition the Government for a redress of grievances**. After all, the fundamental right to religious freedom, freedom of the press and peaceful assembly are but component rights of the right to one's freedom of expression, as they are modes which one's thoughts are externalized.
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> In this jurisdiction, the application of doctrines originating from the U.S. has been generally maintained, albeit with some modifications. While this Court has withheld the application of facial challenges to strictly penal statutes, it has **expanded** its scope to cover statutes not only regulating **free speech**, but also those involving **religious freedom**, and **other fundamental rights**. The underlying reason for this modification is simple. For unlike its counterpart in the U.S., this Court, under its expanded jurisdiction, is mandated by the Fundamental Law not only to settle actual controversies involving rights which are legally demandable and enforceable, but also **to determine whether or not there has been a grave abuse of discretion amounting to**

[26] G.R. No. 203335, 716 SCAR 237, 327, Feb. 18, 2014.

[27] 269 U.S. 385 (1926).

[28] G.R. No. 204819, 721 SCRA 146, 281-82, Apr. 8, 2014. (Emphasis in the original.)

> **lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.** Verily, the framers of Our Constitution envisioned a proactive Judiciary, ever vigilant with its duty to maintain the supremacy of the Constitution.

The characterization is false. To demonstrate, the statutes in *Obergefell v. Hodges*[29] and *Roe v. Wade*[30] were facially invalidated for violating the right to privacy. The statute in *Connally v. General Construction Co.*[31] was similarly struck down for violating the right to procedural due process. So too was the statute in *U.S. v. Lopez*[32] under the Commerce Clause.

CONCLUSION

Facial challenges bring together three great fields of law—human rights, governmental structure, and remedies. How seamlessly we can weave them together depends on how deep is our understanding of each. If we dig deep enough, the effort will not be fruitless, if only to get a glimpse of that fundamental unity and harmony underlying the law.[33]

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[29] 135 S. Ct. 2584 (2015).

[30] 410 U.S. 113 (1973).

[31] 269 U.S. 385 (1926).

[32] 514 U.S. 549 (1995).

[33] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-59, (2013).