DEFENDING "SAFE SPACES": HATE SPEECH AND THE CONSTITUTIONAL MANDATE TO UPHOLD THE DIGNITY OF COMMUNITIES*

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ABSTRACT

In April 2019, the Safe Spaces Act was enacted into law, prohibiting gender-based harassment in streets, public places, and online spaces. The passage of this law forms part of the global trend of regulating hate speech. In light of this development, this Note presents two distinct, yet interrelated, arguments on how hate speech may be treated under Philippine law and jurisprudence. First, this Note compares hate speech with existing categories of unprotected speech, *i.e.* those beyond the ambit of the constitutional guarantee to free speech. In both cases, the State seeks to prevent a social harm—in hate speech, bias-motivated harm—by regulating speech that is "of slight social value." Second, even assuming that hate speech remains protected, it may still be regulated. The Safe Spaces Act illustrates a tension between two conflicting social values, both of which are recognized by the 1987 Constitution: on one hand, the constitutional guarantee of free speech and, on the other, the State's duty to reduce—or even eliminate—sector-specific barriers to dignity. Reviewing the jurisprudence on social justice, this Note finds that the duty to uphold dignity is located in a preferred position in the Constitution, thus capable of outweighing the absolute protection of low-value speech, such as hate speech.

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> *"Imagine walking down the streets and alleys of the city, and being subjected to catcalls of that sort and wolf-whistles from jeering bystanders. Imagine feeling reduced to the sum of your body parts, imagine being judged for the way you dress. And then imagine having to fear this every day of your life, imagine never feeling safe in the public spaces of the city that you call your home."*
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> —Senator Risa Hontiveros[1]

I. INTRODUCTION: "SAFE SPACES"

In her sponsorship speech, Senator Risa Hontiveros recounted the harsh and chilling experiences that many women and lesbian, gay, bisexual, and transgender ("LGBT") individuals had, and continue to have, in the streets and in public spaces.[2] Recognizing this and the "right to be protected" in these spaces,[3] Senator Hontiveros filed Senate Bill No. 1326,[4] which sought to penalize gender-based harassment in the streets and in public spaces, including privately-owned places that are open to the public.

Earlier versions of the bill, popularized as the "Safe Spaces Bill" or the "Bawal Bastos Bill," were passed in both chambers of Congress.[5] After President Rodrigo Duterte approved its enrolled version, Republic Act ("R.A.") No. 11313 ("Safe Spaces Act") was signed into law on April 17, 2019.[6] The newly-enacted Safe Spaces Act penalizes gender-based harassment

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[1] Risa Hontiveros, *Press Release: Sponsorship Speech of AKBAYAN Senator Risa Hontiveros on "Safe Streets, Public Spaces and Workplaces Bill,* SENATE OF THE PHILIPPINES, Aug. 22, 2017, *available at* http://www.senate.gov.ph/press_release/2017/0822_hontiveros3.asp.

[2] *Id.*

[3] *Id.*

[4] S. No. 1326, 17th Cong., 1st Sess. (2017). Safe Streets and Public Spaces Act of 2017.

[5] Gaea Katreena Cabico, *Senate ratifies bicam report on Safe Spaces Act*, PHIL. STAR GLOBAL, Feb. 6, 2019, *available at* https://www.philstar.com/headlines/2019/02/06/1891392/senate-ratifies-bicam-report-safe-spaces-act.

[6] The law was signed into law on April 17, 2019, but it was only publicly released a month after, on July 15, 2019. *See* Nestor Corrales, *No more catcalling: Duterte signs 'Bawal Bastos' law*, PHIL. DAILY INQUIRER, July 15, 2019, *available at* https://newsinfor.inquirer.net/1142021/no-more-catcalling-duterte-signs-bawal-bastos-law#ixzz5tqhAsyIR. Initial reports on the Safe Spaces Act stipulated that it lapsed into law on April 21, 2019, a month after the

in streets, public places, and online spaces.[7] The term "public spaces" includes privately-owned places open to the public, such as malls, bars, and public utility vehicles.[8] The Safe Spaces Act also amends R.A. No. 7877, also known as the Anti-Sexual Harassment Act of 1995, by expanding the latter's definition of workplace and education-related harassment, and by assigning harsher penalties for offenders, employers, and schools.[9]

The law defines "crimes of gender-based streets and public spaces sexual harassment" as those "committed through any unwanted and uninvited sexual actions or remarks against any person regardless of the motive for committing such action or remarks."[10] Section 4 of the law provides a non-exhaustive list of acts that fall under this category, which includes:

> catcalling, wolf-whistling, unwanted invitations, misogynistic, transphobic, homophobic and sexist slurs, persistent uninvited comments or gestures on a person's appearance, relentless requests for personal details, statement of sexual comments and suggestions, public masturbation or flashing of private parts, groping, or any advances, whether verbal or physical that is unwanted and has threatened one's sense of personal space and physical safety, and committed in public spaces such as alleys, roads, sidewalks, and parks. Acts constitutive of gender-based streets and public spaces sexual harassment are those performed in buildings, schools, churches, restaurants, malls, public washrooms, bars, internet shops, public markets, transportation terminals or public utility vehicles.[11]

The Safe Spaces Act also imposes heavy penalties for gender-based harassment in streets and public spaces. The penalties vary depending on the severity of the offense. Whereas a first-time offender will be penalized with only a fine of PHP 1,000.00 and 12 hours of community service, a third-time offender may be punished with imprisonment of *arresto mayor* in its maximum or a fine of PHP 100,000.00.[12]

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submission of its enrolled version. *See* Senate of the Philippines, *Hontiveros on the Safe Spaces Act lapsing into law: A MASSIVE VICTORY, MAJOR PUSH BACK AGAINST "BASTOS CULTURE,"* SENATE OF THE PHILIPPINES, May 29, 2019, *available at* https://www.senate.gov.ph/press_release/2019/0529_hontiveros1.asp.

[7] Rep. Act No. 11313 [hereinafter "Safe Spaces Act"] (2019).

[8] Safe Spaces Act, § 2(g).

[9] Safe Spaces Act, art. IV–V.

[10] Safe Spaces Act, art. I, § 4, ¶ 1.

[11] Safe Spaces Act, art. I, § 4, ¶ 2.

[12] Safe Spaces Act, art. I, § 11.

The enactment of the Safe Spaces Act can be described as part of the global trend of hate speech legislation. Section 4 of the Act, as provided above, contains a prohibition on gender-based harassment that includes hate speech. It prohibits *"misogynistic, transphobic, homophobic and sexist slurs"* both in public[13] *and* online spaces.[14] This prohibition has likewise been extended to the workplace, which now prohibits "conduct based on sex affecting the dignity of a person."[15] Hate speech is commonly conceptualized as speech that offends or incites hatred against someone on the basis of race, gender, or some other characteristic that relates to a protected group or class.[16] This concept will be explored in more detail in the succeeding sections.

Many foreign countries, such as Canada, Germany, the United Kingdom, and Singapore, have laws that criminalize or regulate the use of hate speech. International covenants, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, also contain some form of hate speech regulation. These legal instruments will be discussed in depth in the succeeding sections of this Note. At this point, what must be emphasized is that these international and foreign instruments all construe hate speech as a limitation to freedom of expression.

In contrast to the numerous hate speech legislative measures enacted by different countries, the United States ("U.S.") does not have any law that criminalizes or even regulates hate speech. The U.S. Supreme Court has consistently ruled that hate speech comes within the ambit of what is protected under the freedom of speech. In *R.A.V. v. City of St. Paul*,[17] the Court struck down as unconstitutional an ordinance which prohibits speech or symbols that incite or provoke violence on the basis of race, gender, or religion. The Court explained that this prohibition amounted to viewpoint discrimination and ran counter to the freedom of speech guaranteed by the First Amendment.[18] As recently as 2017, the U.S. Supreme Court has again maintained the view that hate speech is a protected speech.[19]

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[13] Safe Spaces Act, art. I, § 4, ¶ 1. (Emphasis supplied).

[14] Safe Spaces Act, § 12. "[U]nwanted sexual misogynistic, transphobic, homophobic and sexist remarks and comments online whether publicly or through direct and private messages" constitute gender-based online sexual harassment.

[15] Safe Spaces Act, § 16(b).

[16] Raoul Angelo de Fiesta Atadero, *A Mandate Against Hate: Finding and Founding Philippine Law on LGBT Hate Crimes*, 88 PHIL. L.J. 699, 728 (2014).

[17] R.A.V. v. St. Paul, 505 U.S. 377 (1992).

[18] *Id.* at 391–92.

[19] Matal v. Tam, 582 U.S. (2017), *citing* U.S. v Schwimmer, 279 U. S. 644, 655 (1929) (Holmes, *J., dissenting*). "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"

In the Philippines, there is a dearth of jurisprudence on hate speech. While our Supreme Court has extensively ruled upon and discussed other forms of unprotected speech, as will be discussed in the subsequent sections, no case has explicitly and directly tackled the constitutionality of hate speech legislation. Furthermore, no case has also defined the concept of hate speech in our jurisdiction.

Given that the Philippine Bill of Rights is based primarily on its American counterpart, and that the Philippine Supreme Court had long adopted doctrines from American jurisprudence,[20] a central question arises—is hate speech given the protection and preferred status[21] accorded to freedom of speech? Furthermore, is the Safe Spaces Act considered a form of hate speech legislation that can be challenged on the ground of freedom of speech?

This Note aims to present and address the constitutional issues that arise from these questions. Part II discusses the Safe Spaces Act and its corresponding legal and social contexts. By looking into the limitations of the existing law on sexual harassment, it discusses the framework introduced by the Safe Spaces Act, specifically, the provisions on homophobic, transphobic, and sexist slurs. Part III introduces the concept of "hate speech" and discusses how it is defined in legal scholarship, international law, and foreign jurisprudence. The subsequent sections seek to define the contours of free-speech jurisprudence in the Philippines and apply it in the context of regulating hate speech. In particular, Part IV assesses whether or not and to what extent hate speech, as described in the Safe Spaces Act, falls under "unprotected speech." Part V explores whether its regulation constitutes "content-based regulation."

Given the similarities between American and Philippine jurisprudence on free speech, this Note also argues that the Social Justice provisions, found in Article XIII of the 1987 Constitution, make a crucial difference, at least, as applied to hate speech. By creating a constitutional mandate to uphold the inherent dignity of individuals, and by recognizing the role of communities in the development thereof, the State becomes duty-bound to reduce—or even eliminate—sector-specific barriers to dignity. To illustrate this, Part VI discusses how the delegates of the 1986 Constitutional Commission understood "social justice" and how the Supreme Court has interpreted its interplay in the application of the Bill of Rights.

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[20] U.S. v. Bustos, 37 Phil. 731 (1918).

[21] *See* Chavez v. Gonzales, G.R. No. 168338, 545 SCRA 441 (2008).

II. THE SAFE SPACES ACT AND GENDER-BASED HARASSMENT

Prior to the Safe Spaces Act, cases of sexual harassment were primarily governed by R.A. No. 7877, more popularly known as the Anti-Sexual Harassment Act of 1995 ("ASH Law").[22] Enacted on July 25, 1994, the ASH Law punishes work- and education-related sexual harassment, defined as an act "committed by an employer, employee, manager, supervisor, agent of the employer, teacher, instructor, professor, coach, trainor, or any other person who, having authority, influence or moral ascendancy over another in a work or training or education environment, demands, requests or otherwise requires any sexual favor from the other, regardless of whether the demand, request or requirement for submission is accepted."[23]

Compared to the Safe Spaces Act, the scope of ASH Law is narrower in at least three ways. First, its definition of "sexual harassment" is expressly limited to those committed in a "work or training or education environment." Sections 3(a) and 3(b) further qualify this. For an act to be considered as work-related harassment, the offender must have made sexual favors as a condition to the victim's enjoyment of her employment[24] and its corresponding rights, privileges, and opportunities. Such act would also be considered work-related sexual harassment if it resulted into an "intimidating, hostile, or offensive environment for the employee."[25] Education-related sexual harassment is committed in a similar manner.[26] Apart from making sexual favors as condition for education-related benefits,[27] sexual harassment can also be committed if the offender requested sexual favors to someone who is under his care or supervision or someone whose education is entrusted to him.[28]

Second, sexual harassment can only be punished under the ASH Law if it is committed by an "employer, employee, manager, supervisor, agent of the employer, teacher, instructor, professor, coach, trainor, or any other person who, having authority, influence or moral ascendancy over another in a work or training or education environment."[29] These positions—*i.e.*

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[22] Rep. Act No. 7877 [hereinafter "ASH Law"] (1995). Anti-Sexual Harassment Act of 1995.

[23] ASH Law, § 3.

[24] ASH Law, § 3(a).

[25] ASH Law, § 3(a)(3).

[26] ASH Law, § 3(b).

[27] ASH Law, § 3(b)(3). This includes grades, honors, scholarships, and other benefits and privileges that a student may be entitled to.

[28] ASH Law, § 3(b).

[29] ASH Law, § 3.

positions of "authority, influence or moral ascendancy"—allow offenders to solicit sexual favors in the manner defined in Sections 3(a) and 3(b).

Third, and most glaringly, the term "sexual harassment" as used in the ASH Law is mostly limited to sexual favors that must be committed by persons of authority. While the Court has clarified that the object of workplace harassment is the power used by a superior to his subordinates, and not sexual desire *per se*, most cases that reached the Supreme Court involve those that have clear sexual undertones.[30]

The narrow focus of the ASH Law ignores and overlooks the actual realities experienced by victims of harassment—in the workplace, school, or otherwise. First, while it is true that sexual harassment indeed happens in the workplace, a baseline survey conducted by the Social Weather Stations and the United Nations Entity for Gender Equality and the Empowerment of Women ("UN WOMEN") shows that around 70% of sexual harassment experienced by women were committed by a total stranger.[31] From the 88% of female respondents[32] who experienced some type of sexual harassment at least once in their lifetime, 58% of them experienced it in the streets and other public spaces.[33] While many of these cases involved harassers asking sexual favors, through sexual jokes, language, and cat-calling, for example, some are committed through means that do not expressly demand sexual favors, but

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[30] *See In re* Unitan, A.C. No. 5900, (2019). "[W]hat the law aims to punish is the undue exercise of power and authority manifested through sexually charged conduct or one filed with sexual undertones". *See also* Floralde v. Ct. of Appeals, G.R. No. 123048, 337 SCRA 371, 374–75 (2000). "Sexual harassment in the workplace is not about a man taking advantage of a woman by reason of sexual desire; it is about power being exercised by a superior officer over his women subordinates. The power emanates from the fact that the superior can remove the subordinate from his workplace if the latter would refuse his amorous advances." *See also* Jacutin v. People, G.R. No. 140604, 378 SCRA 453, 455–457 (2002). A 22-year nurse was sexually molested by her superior as a subject of his "research" program. *See also* Esteban v. Sandiganbayan, G.R. No. 146646, 453 SCRA 236, 237–39 (2005). Respondent used his position of Judge to gain sexual favors from his court's bookkeeper. *See finally* Domingo v. Rayala, G.R. No. 155831, 546 SCRA 90, 95 (2008). "Sexual harassment is an imposition of misplaced "superiority" which is enough to dampen an employee's spirit and her capacity for advancement. It affects her sense of judgment; it changes her life."

[31] Jessica Bartolome, *The numbers are alarming: Sexual harassment vs women in PHL*, GMA NEWS ONLINE, Mar. 8, 2016, *available at* https://www.gmanetwork.com/news/lifestyle/healthandwellness/558251/the-numbers-are-alarming- sexual-harassment-vs-women-in-phl/story/; *See also* Social Weather Stations, *SWS presents key findings of Survey on Sexual Violence against Women and Girls in Quezon City at UN WOMEN Presscon*, SOCIAL WEATHER STATIONS, Mar. 11, 2016, available at https://www.sws.org.ph/swsmain/artcldisppage/?artcsyscode=ART-20160525150531.

[32] *Id.* The baseline survey included female and male respondents from two *barangays* in Quezon City.

[33] *Id.*

nevertheless inflict fear and harm on its victim.[34] Acts, such as stalking, voyeurism, and utterance of sexist, homophobic, and transphobic slurs, are examples of this.

The inadequacy of the ASH Law, coupled with the absence of remedies for victims of sexual harassment outside the school and the workplace, provided the gap that then-"Safe Spaces Bill" sought to fill in. In the 17th Congress, lawmakers from both chambers filed their respective versions of the bill. In the Senate, several versions of the bill were filed—Senate Bill Nos. 1250,[35] 1254,[36] and 1326[37]—before its authors, Senators Grace Poe and Risa Hontiveros, substituted them with Senate Bill No. 1558.[38] In the same manner, House Bill No. 8794[39] substituted three related bills authored by Representatives Ramon V.A. "RAV" Rocamora,[40] Tomasito Villarin,[41] and Michelle M. Antonio.[42] Both chambers approved these bills on its third reading and, shortly after, consolidated these two versions.

Signed into law on April 17, 2019, R.A. No. 11313 or the Safe Spaces Act punishes gender-based harassment committed in streets, public places, and online spaces. It also expands (*e.g.* to include peer-to-peer and subordinate-to-superior harassment), and assigned heavier penalties for offenders of workplace- and education-related harassment.[43]

Moreover, the Safe Spaces Act introduced the concept of "gender-based harassment," which the law defines as an act "committed through any unwanted and uninvited sexual actions or remarks against any person regardless of the motive for committing such action or remarks."[44] This definition of "gender-based harassment" slightly differs from the definition in

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[34] *Id.*

[35] S. No. 1250, 17th Cong., 1st Sess. (2016). Expanded Anti-Sexual Harassment Act of 2016.

[36] S. No. 1254, 17th Cong., 1st Sess. (2016). Anti-Sexual Harassment Act of 2016.

[37] S. No. 1326, 17th Cong., 1st Sess. (2017). Safe Streets and Public Spaces Act of 2017.

[38] S. No. 1558, 17th Cong., 2nd Sess. (2017). Safe Streets, Workplaces and Public Spaces Act of 2017.

[39] H. No. 8794, 17th Cong., 2nd Sess. (2018). Safe Street, Public and Online Spaces Act of 2017.

[40] H. No. 5213, 17th Cong., 1st Sess. (2017). Comprehensive Anti-Sexual Harassment Act of 2017.

[41] H. No. 5781, 17th Cong., 1st Sess. (2017). Safe Streets and Public Spaces Act of 2017.

[42] H. No. 5956, 17th Cong., 2nd Sess. (2017). Anti-Street, Public and Online Harassment Act of 2017.

[43] Safe Spaces Act, art. IV–V.

[44] Safe Spaces Act, art. I, § 4, ¶ 1.

the Senate Bill No. 1558: "unwanted comments, gestures, and actions forced upon a person in a public space without their consent and is directed at them because of their actual or perceived sex, gender, gender expression, or sexual orientation and identity."[45]

It is worth noting, however, that the Safe Spaces Act nevertheless includes in its punishable acts "misogynistic, transphobic, homophobic and sexist slurs [. . .] committed in public spaces."[46] Similarly, "unwanted sexual, misogynistic, transphobic and sexist remarks and comments online"[47] are considered as online gender-based harassment and shall be punished with the penalty of *prision correccional* in its medium period or a fine of up to PHP 500,000.00 (or, upon the Court's discretion, both).[48]

Slurs made on the basis of one's actual or perceived sexual orientation, gender identity, and gender expression ("SOGIE") are punished under the Safe Spaces Act. This prohibition can be considered as a form of hate speech legislation. Generally defined as statements committed on the basis of one's membership in a group, hate speech made on the basis of SOGIE is clearly punished by the Safe Spaces Act. The next section further discusses the concept of "hate speech" and its definitions in legal scholarship. By surveying related developments in international and foreign law, the section also locates the Safe Spaces Act in the global trend towards upholding the dignity of all persons, especially marginalized and disadvantaged sectors of society.

III. THE CONCEPT OF HATE SPEECH

A. Definition

Much of the literature and discussion on hate speech acknowledge that there is no universal definition of hate speech.[49] The laws regulating and restricting hate speech, as will be discussed later on, vary in their definition. Atadero defines hate speech as "speech that disparages, intimidates, or incites hatred against protected classes based on race, ethnicity, religion, sexual orientation, and other characteristics."[50] Webb defines it as "speech that is

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[45] S. No. 1558, 17th Cong., 2nd Sess. § 3 (2017).

[46] Safe Spaces Act, art I, § 4, ¶ 1.

[47] Safe Spaces Act, § 12.

[48] Safe Spaces Act, § 12.

[49] Roni Cohen, *Regulating Hate Speech: Nothing Customary about It*, 15 CHI. J. INT'L L. 229, 251 (2014); Eur. Ct. of Hum. Rts., Press Unit, *Factsheet-Hate Speech* (July 2013), *available at* http://www.echr.coe.int/Documents/FSHate-speech-ENG.pdf.

[50] Atadero *supra* note 16, at 728.

abusive, offensive, or insulting that targets an individual's race, religion, ethnicity, or national origin."[51] Other definitions expand the coverage of what is considered hate speech. Legal scholar Jeremy Waldron defined hate speech as "statements by which a group of people are threatened insulted or degraded on account of their race, color, national or ethnic origin."[52] The European Court of Human Rights has also referred to hate speech as "*all forms of expression* which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance."[53] These definitions seem to indicate that hate speech goes beyond mere verbal speech, but includes written or other non-verbal forms of speech.

There have also been attempts to define elements or characteristics of hate speech to differentiate it from other forms of speech. The Icelandic Human Rights Center identifies three elements of hate speech: intent to stir up hatred against a certain group of people, incitement to hatred, and a causal link which establishes that the expression of hate will cause harm.[54] However, given the lack of a universal definition of hate speech, elements vary from country to country. For example, some countries have hate speech laws where intent is immaterial or where incitement need not be proven.[55] These specific laws will be discussed more thoroughly in the succeeding sections of this Note.

Bhikhu Parekh defines the essential features of hate speech as follows: firstly, it is directed against a specified or easily identifiable individual or group of individuals based on an arbitrary and normatively irrelevant feature; secondly, it explicitly or implicitly ascribes to the group an undesirable quality, thereby stigmatizing the group; and, lastly, the speech causes the target group

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[51] Thomas Webb, *Verbal Poison-Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System*, 50 WASHBURN L.J. 445, 447 (2011).

[52] Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1597–98 (2010), *citing* THE PRINCIPAL DANISH CRIMINAL ACTS 64 (Malene Frese Jensen,Vagn Greve, Gitte Hoyer, & Martin Spencer eds., 3d ed. 2006).

[53] Erbakan v. Turkey, Eur. Ct. of Hum. Rts., App. 59405/00, ¶ 56 (July 6, 2006). (Emphasis supplied.)

[54] Jóna Aðalheiður Pálmadóttir and Iuliana Kalenikova, *Hate Speech; An Overview and Recommendations for Combating It*, ICELANDIC HUMAN RIGHTS CENTRE WEBSITE, *at* http://www.humanrights.is/static/files/Skyrslur/Hatursraeda/hatursraeda-utdrattur.pdf (last visited June 7, 2019).

[55] Sandra Coliver, *Hate Speech Laws: Do They Work?* in STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION, AND NON-DISCRIMINATION 363 (Sandra Coliver, Kevin Boyle, Frances D'Souza eds. 1992). "France, Denmark, Germany, and the Netherlands each have at least one law which permits criminal conviction for hate speech regardless of intent or likelihood of breaching the peace."

to be viewed negatively or to become the target of hostility.[56] This also considers incitement, at least in the immediate sense, as immaterial to the definition of hate speech. This is explained eloquently in the following paragraph:

> Although hate speech breathes the spirit of exclusion and violence, it does not necessarily or by definition result in violence or public disorder. The speaker or his/her audience might consider it prudent not to act on it. Also, the targeted group might either exercise self-restraint or be too timid or intimidated to fight back. It is therefore a mistake, commonly made, to define hate speech as only that which is likely to lead to public disorder and to proscribe it because or only when it is likely to do so. What matters is its content – what it says about an individual or a group – and its long-term effect on the group and the wider society, rather than its immediate consequences in terms of public disorder.[57]

Many writers seem to lean toward this view of defining hate speech, a view where intent to stir up hatred or incitement to hatred is immaterial. This viewpoint of defining hate speech focuses not solely on the content of the speech, whether it contains hateful words or epithets, but also on the effects of the speech on the targeted community. What is essential in this perspective, therefore, is that the speech, when uttered, brings about harm to the target community, and that such harm is tantamount to discrimination of the particular target community.[58]

The main difference between this set of elements as explained by Parekh and the previous one given by the Icelandic Human Rights Centre is that the former recognizes that hate speech *per se* does not necessarily result in violence or public disorder.[59] While the speech may lead to incitement of hatred against the group, this is not necessary for such speech to be classified as hate speech. Furthermore, the use of offensive, angry, or abusive language is also not important in determining whether the speech is hate speech.[60] Parekh also notes that hate speech can only be determined in light of historical and cultural contexts,[61] thus lending another possible reason why a standard

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[56] Bhikhu Parekh, *Is there a Case for Banning Hate Speech?* in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 37 (Michael Herz and Peter Molnar, eds. 2012).

[57] *Id.*, at 41.

[58] Katharine Gilbar, *Hate Speech – Definitions & Empirical Evidence*, 32 CONST. COMMENT. 619, 612 (2017).

[59] Parekh, *supra* note 56, at 41.

[60] *Id.*

[61] *Id.*

and universal definition of hate speech has not been determined. What is considered hate speech in some countries may not be such in others, and vice-versa.

The International Criminal for Tribunal in Rwanda ("ICTR"), in the case of *Prosecutor v. Nahimana*,[62] has elaborated on the concept of hate speech and on its difference from incitement. The case deals with the Rwandan Genocide where the accused, among others, was charged with the crimes of persecution on political and racial grounds, and public incitement to genocide (under Article 3 of the Statute annexed to Security Council Resolution 955)[63] through radio broadcasts and newspaper publications that targeted the Tutsi ethnic group.[64] In its ruling, the ICTR elaborated on the crime of persecution and on its relation to hate speech, as well as the difference between the crime of persecution and the crime of incitement.

> 1072. [T]he crime of persecution was held to require "a gross or blatant denial of a fundamental right reaching the same level of gravity" as the other acts enumerated as crimes against humanity under the Statute. The Chamber considers it evident that hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Article 3(h) of its Statute. [...] Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group member in and of itself, as well as in its other consequences, can be an irreversible harm.
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> 1073. Unlike the crime of incitement, which is defined in terms of intent, the crime of persecution is defined also in terms of impact. It is not a provocation to cause harm. It is itself the harm. Accordingly, there need not be a call to action in communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence. [...] In Rwanda, the virulent writings of *Kanguru* and the incendiary broadcasts of RTLM functioned [like poison that infected the minds of people], conditioning the Hutu population and creating a climate of harm, as evidenced by the extermination and genocide that followed.[65]

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[62] Case No. ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003).

[63] U.N. Doc. S/RES/955 (1994).

[64] Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003).

[65] *Id.* at ¶¶ 1072–73. (Citations omitted.)

What is common, however, among these definitions is that the speech is proscribed because of its apparent offensive or discriminatory content. Furthermore, a central and common element of hate speech among its different definitions is that the speech is bias-motivated. In his article about hate crimes, Atadero discusses the concept of bias-motivation:

> This bias motive separates hate crimes from ordinary crimes—"the perpetrator intentionally [chooses] the target of the crime because of some protected characteristic." This target may be an individual or a group, as well as property "associated with a group that shares a particular characteristic." This protected characteristic, meanwhile, is a characteristic shared by a group, examples being the factors of race, language, religion, ethnicity, nationality, sexual orientation, gender, and others.
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> Two models of defining the bias motive thus emerge: the animus model and the discriminatory selection model:
>
> > The discriminatory selection model of [hate] crimes defines these crimes in terms of the perpetrator's discriminatory selection of his victim. Under this model, it is irrelevant why an offender selected his victim on the basis of race or group; it is sufficient that the offender did so. Alternatively, the racial animus model of bias [hate] crimes defines crimes on the basis of the perpetrator's animus for the racial or ethnic group of the victim and the centrality of this animus in the perpetrator's motivation for committing the crime.[66]

There have also been some criticisms raised at the use of the term "hate speech." Writers argue that to use the term "hate speech" would be to emphasize the feeling of hatred[67] present in the speakers rather than the effects of the speech on the target community. Jeremy Waldron also believes that the term is misleading because it wrongly suggests that the role of hate speech laws would be to "change people's attitudes or control their thoughts."[68] As previously discussed, these writers are of the view that hate speech, and therefore hate speech laws, should focus on the harm done to the target communities. Thus, Waldron proposes to use the term "group libel" or

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[66] Atadero, *supra* note 16, at 712–13. (Citations and emphasis omitted.)

[67] Atadero, *supra* note 16, at 40; Waldron, *supra* note 52, at 1601.

[68] Waldron, *supra* note 52, at 1601.

"group defamation"[69] so as to shift the emphasis on the defamation itself and not on the feeling of hatred. While the term has been used in Philippine jurisprudence in its literal sense, *i.e.* defamation or libel against a specific group or class,[70] the term has also been used to refer to hate speech.[71] Waldron, however, clarifies that his use of the term is individualistic in its goal:

> The first thing to note is that it is not the group as such that we are ultimately concerned about – as one might be concerned about a community, a nation, or a culture (as distinct from its members). The concern in the end is individualistic. But, as I have already said, group defamation laws do not concern themselves with particularized individual reputation. They look instead to the basics of social standing and to eh association that is made [...] between the denigration of that basic standing and some characteristic associated more or less ascriptively with the group or class.[72]

What this means is that the term "group defamation" is not to be used in its literal sense, *i.e.* defaming or libeling an entire group *per se*. The victim is still an individual or a particular group of individuals to whom the speech is directed against. However, the aspect of "group" is present because the defamation focuses on group-defining characteristics that the speech ascribes to the individual because of his or her membership in the group. This defamation causes harm because of the stigma or undesirable quality that is ascribed to the group. For the purposes of this Note, however, the term "hate speech" will be used as this is what is widely used.

Given the lack of a standard and universal definition of hate speech, it follows that there is also no "correct" set of elements used to determine whether a speech falls into the category of hate speech. However, some common elements seem to concur among the various definitions. Firstly, the speech is made against certain qualities of an individual that relates to that individual being part of a group, such as race, gender, religion, or national origin. Secondly, the speech tends to cause harm to or hatred against the targeted individual or group. Lastly, the speech is bias-motivated, meaning that the victim is discriminated against because of the qualities ascribed to him as part of the targeted group or community.

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[69] Waldron, *supra* note 52, at 1601.

[70] *See* MVRS Publications, Inc. v. Islamic Da'Wah Council of the Phil., Inc., G.R. No. 135306, 396 SCRA 210 (2003).

[71] *See* Waldron, *supra* note 52, at 1602. The Penal Code of Germany and the French Law of the Press are examples.

[72] *See* Waldron, *supra* note 52, at 1609.

The authors realize that to attempt to create a standardized definition of hate speech—one that will satisfy current international and municipal statutory frameworks and constitutional limits—is a herculean task. Therefore, this Note will not attempt to do so. Rather, it will give a survey on how laws and jurisprudence from different countries define and frame hate speech to fit their respective statutes and constitutions. Through these examples, the relevant provisions of the Safe Spaces Act will be analyzed to determine two things: first, whether such provisions may be construed as hate speech legislation, and second, whether such provisions are constitutional in light of the constitutional protection afforded to freedom of speech. Given the dearth of jurisprudence and legislation that tackles hate speech, the Act will be analyzed using the common elements of hate speech as discussed in this section.

B. Hate Speech Regulation in Foreign International Law

1. International Treaties

Multiple international treaties and conventions provide some form of regulation on hate speech. While these documents themselves do not explicitly mention the term "hate speech," the regulated speech easily falls within the categories of speech described as "hate speech." Being a signatory to these international treaties and conventions, the Philippines is thus bound to follow and enforce them.

The first international convention that regulates hate speech is the United Nations Universal Declaration of Human Rights ("UDHR", "Declaration"), promulgated in 1948.[73] The UDHR contains over 30 articles that recognize the "inherent dignity and [...] equal and inalienable rights of all members of the human family"[74] and aims to impose upon its signatory countries the "promotion of universal respect for and observance of human rights and fundamental freedoms."[75] Multiple provisions of the UDHR either explicitly or impliedly provide limitations to this freedom when it comes to hate speech. Article 7 provides that individuals are entitled to "equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."[76] Furthermore, the Declaration also provides that "in the exercise of his rights and freedoms,

[73] Universal Declaration of Human Rights [hereinafter "UDHR"], U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

[74] UDHR, pmbl. ¶ 1.

[75] UDHR, pmbl. ¶ 6.

[76] UDHR, art. 7.

everyone shall be subject only to such limitations as are determined by law solely for the purpose of *securing due recognition and respect for the rights and freedoms of others* and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[77] Thus, these two rights are limited in the sense that they cannot be used to denigrate, in any way, the dignity and equality of other individuals. As rights enshrined in Article 1 of the UDHR, dignity and equality should be upheld in the exercise of the other rights in the Declaration.

More explicit in its prohibition of hate speech is the International Covenant on Civil and Political Rights ("ICCPR").[78] The ICCPR was signed by the Philippines in 1966 and ratified in 1986 without any reservations.[79] Article 19 of the ICCPR guarantees the right to freedom of expression. However, such right is explicitly limited by the third paragraph of the article itself:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. *It may therefore be subject to certain restrictions, but these shall only be such as are provided by law* and are necessary:
>   (a) *For respect of the rights or reputations of others*;
>   (b) For the protection of national security or of public order (ordre public), or of public health or morals.[80]

The United Nations Human Rights Committee, in its General Comments, has elaborated upon the restrictions to the freedom of expression provided by Article 19 of the ICCPR. It explained that "certain restrictions on the right are permitted which may relate either to the interests of other

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[77] UDHR, art. 29. (Emphasis supplied.)

[78] International Covenant on Civil and Political Rights [hereinafter "ICCPR"], U.N. doc. A/6316 (Dec. 16, 1966).

[79] *See Status of Ratification – Interactive Dashboard*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE COMMISSIONER WEBSITE *at* http://indicators.ohchr.org/ (last visited June 14, 2019).

[80] ICCPR, art. 19. (Emphasis supplied).

persons or to those of the community as a whole."[81] Under this article, speech such as the questioning of the existence of gas chambers in Nazi camps[82] and calling upon Christians to question the Jewish faith[83] can be validly restricted in order to "protect the Jewish communities' right to be protected from religious hatred."[84] Article 20 of the ICCPR further contains an express prohibition on hate speech: "*[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*"[85]

Some treaties provide for a more specific proscription of hate speech based on the content of the speech. One of these is the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"),[86] a treaty which the Philippines is a party to. This convention was adopted to promote equality and reduce racial discrimination in the signatory countries.[87] Article 4 of the ICERD specifically deals with "dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin."[88] The ICERD goes a step further than the ICCPR because the former requires states to "adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination" and declare such incitement and dissemination of ideas as punishable by law.[89] Thus, there is a specific directive for States to actually pass hate speech legislation—a call to action that the ICCPR does not include.

2. Foreign Laws

Many foreign states established various forms of regulation of hate speech. Some countries regulate this speech through their laws; many others countries regard it as completely an unprotected form of speech beyond the ambit of constitutionally protected speech. These countries treat hate speech as violative of human dignity and equality, thus going against their respective

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[81] Human Rights Committee, *CCPR General Comment No. 10: Article 19 (Freedom of Opinion)* (June 29, 2003), ¶ 4.

[82] Faurisson v. Fr., U.N. Doc. CCPR/C/58/D/550/1993 (1996).

[83] Ross v. Can., U.N. Doc. CCPR/C/70/D/736/1997 (2000).

[84] *Id.* ¶ 11.5 *citing* Faurisson v. Fr., U.N. Doc. CCPR/C/58/D/550/1993 (1996).

[85] ICCPR, art. 20. (Emphasis supplied.)

[86] International Convention on the Elimination of All Forms of Racial Discrimination [hereinafter "ICERD"], 660 U.N.T.S. 195, Jan. 4, 1969.

[87] Webb, *supra* note 51, at 457 n.119.

[88] ICERD, art. 4.

[89] ICERD, art. 4.

constitutions which contain guarantees in protecting human dignity and promoting equality.

One of such countries is Canada. While the Canadian Charter of Rights and Freedoms guarantees freedom of expression and opinion,[90] the same Charter provides that such freedom is restricted by "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[91] Thus, it is clear that the freedom of expression in Canadian jurisdiction is not an absolute concept. This allows for hate speech legislation to be passed, as hate speech is inherently violative of the dignity of the targeted community.[92] Indeed, pursuant to this restriction on the freedom of expression in Canadian jurisdiction, hate speech is regulated by various provisions in the Canadian Criminal Code. It punishes both willful promotion of hatred[93] and incitement to hatred.[94] As what can be implied from the language of the provision, the difference between the two crimes is the element of intent. On the one hand, the use of the word "willful" in the crime of willful promotion suggests that the purpose of the offender is to evoke hatred against the identifiable group. On the other hand, the crime of incitement to hatred requires no such intent. Instead, what is required is that the hatred is actually incited and such hatred is "likely to lead to a breach of peace."[95] Thus, in the latter, what is determinative is not the intent but the result of the speech; whereas, in the former, the result is immaterial as long as there is a "willful" or purposeful use of hateful speech. The term "identifiable group" encompasses a wide range of groups, protecting "any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability."[96]

In the landmark case of *Regina v. Keegstra*,[97] the Supreme Court of Canada upheld the provisions criminalizing hate speech, and extensively discussed its concept. The case involved Keegstra, a high school teacher, who made anti-Semitic statements in front of his students. He was charged with

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[90] Canada Charter of Rights and Freedoms, § 2b, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, ch. 11.

[91] Canada Charter of Rights and Freedoms, § 1.

[92] *See* Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003).

[93] CAN. CRIM. CODE. R.S.C. 1985, ch. C-46, § 319 (2).

[94] CAN. CRIM. CODE. R.S.C. 1985, § 319 (1).

[95] CAN. CRIM. CODE. R.S.C. 1985, § 319 (1).

[96] CAN. CRIM. CODE. R.S.C. 1985, § 318 (4). The same meaning is given to "identifiable group" as used in the two crimes by virtue of § 319 (7).

[97] 3 S.C.R. 697 (1990).

willful promotion of hatred, but he argued that the provision violated his freedom of expression.[98] The question that the Court sought to resolve was whether section 1 of the Canadian Charter of Rights and Freedoms can be applied, such that the statute unlawfully limits Keegstra's freedom of expression. The Court ultimately held that section 319 (2) does not constitute a violation of freedom of expression. In arriving at this ruling, the Court considered the objective of the statute and its proportionality.[99] To determine whether there is proportionality between the statute's objective and the measures adopted, the following factors are considered: first, a rational connection between the measure and the objective; second, the right must be impaired only minimally by the measure; and third, proportionality between the effects of the measures and the objective.[100] Using this test, the Court found a substantial objective in prohibiting hate speech that necessitates the limitation of the freedom of expression.

> Parliament has recognized the substantial harm that can flow from hate propaganda, and in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension in Canada has decided to suppress the willful promotion of hatred against identifiable groups. The nature of Parliament's objective is supported not only by the work of numerous study groups, but also by our collective historical knowledge of the potentially catastrophic effects of the promotion of hatred. Additionally, the international commitment to eradicate hate propaganda and the stress placed upon equality and multiculturalism in the Charter strongly buttress the importance of this objective. I consequently find that the first part of the test under s. 1 of the Charter is easily satisfied and that a powerfully convincing legislative objective exists such as to justify some limit on freedom of expression.[101]

In the United Kingdom, the Equality Act of 2010 is the most recent legislation that governs hate speech. It repealed all previous anti-discrimination laws, and consolidated their contents into one single act. Thus, the Equality Act of 2010 replaced the previous framework of having multiple laws that govern certain communities (*e.g.* the Race Relations Act for racial discrimination, the Sex Discriminations Act).[102] The act classified the

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[98] *Id.* at 698.

[99] *Id.* at 734–735, *citing* Regina v. Oakes, 1 S.C.R. 103 (1986).

[100] Regina v. Keegstra, 3 S.C.R. 697, 735 (1990), *citing* Regina v. Oakes, 1 S.C.R. 103 (1986).

[101] Regina v. Keegstra, 3 S.C.R. 697, 758 (1990). (Citations omitted.)

[102] U.K. Government Equalities Office, *Equality Act 2010: Guidance*, GOV.UK, *at* https://www.gov.uk/guidance/equality-act-2010-guidance (last accessed June 24, 2019).

following as "protected characteristics": age, disability, marriage and civil partnership, pregnancy and maternity, race, religion, sex, sexual orientation, and gender reassignment.[103] Under this Act, hate speech may constitute harassment and is thus penalized because it violates the dignity of another person.[104]

In contrast to the "protected characteristics" recognized in the United Kingdom, in Germany, hate speech regulation is specifically focused on racial and religious discrimination. This is because of the dominant role that race and religion played in the history of Germany, specifically the "Third Reich's historical record against the Jews, especially its virulent hate propaganda and discrimination which culminated in the Holocaust."[105] Article 5 (2) of Germany's Basic Law provides that constitutional rights, such as the freedom of expression, shall be limited by the "provisions of general laws, [and] provisions for the protection of young persons and [by] the right to personal honour."[106] There are both criminal and civil actions against hate speech.[107] The German Criminal Code contains a prohibition of inciting hatred "against segments of the population or [calling] for violent or arbitrary measures against them."[108] The object of the materials must be any "national, racial, or religious group."[109]

One specific kind of hate speech that is prohibited by the German Criminal Code is Holocaust denial, or what the German courts refer to as "engaging in the 'Auschwitz lie.'"[110] This is penalized by the following provisions:

> (3) Whosoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6 (1) of the Code of International Criminal Law, in a manner capable of disturbing the public peace shall be liable to imprisonment not exceeding five years or a fine.
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> (4) Whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of,

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[103] U.K. Equality Act, § 4 (2010).

[104] U.K. Equality Act, § 26 (1).

[105] Michael Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1548 (2003).

[106] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [hereinafter "Basic Law"], art. 5 (1).

[107] Rosenfeld, *supra* note 105, at 1551.

[108] STRAFGESETZBUCH [hereinafter "GER. CRIM. CODE"], § 130 (1).

[109] *Id.*

[110] Rosenfeld, *supra* note 105, at 1551; Cohen, *supra* note 49, at 240.

> glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment not exceeding three years or a fine.[111]

The foregoing discussion of hate speech regulations in Canada, United Kingdom and Germany demonstrate how such regulation is prevalent in the West, particularly in Europe. In contrast, such regulation is not as common in Asian countries. As an example, hate speech is not criminalized in Japan. Although it is a party to the ICERD and ICCPR,[112] Japan only passed a law against hate speech in 2016 despite nationwide rallies in 2013 calling for the government to enact such laws.[113] The Hate Speech Act of 2016, which was passed in May 2016, does not, however, criminalize and penalize hate speech. There is no provision explicitly penalizing or prohibiting hate speech. Instead, it "defines the responsibility of the state and municipalities in taking measures against hate speech, such as setting up consultation systems and better educating the public on the need to eradicate such language."[114] Thus, what the Act merely does is to give responsibilities for the government to implement different measures[115] as well as start the enactment of a consultation system for disputes.[116]

Singapore may be said to be an exception since it has the Maintenance of Religious Harmony Act. The said Act prohibits "causing feelings of enmity, hatred, ill-will or hostility between different religious groups"[117] The same prohibition is also in place in Singapore's Penal Code, although this prohibition goes beyond religious discrimination and also extends to racial hate speech.[118]

3. Comparison of Foreign Hate Speech Laws and the Safe Spaces Act

This section has shown a survey of international and foreign domestic laws that regulate or criminalize hate speech. Some are based on express constitutional mandates or enabling laws, while others are based on historical experiences that paved the way for a realization that such speech should not be tolerated or given protection. The common trend in all these laws is that

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[111] GER. CRIM. CODE, §§ 130 (3)–(4).

[112] *See supra* nn. 78, 86.

[113] Tomohiro Osaki, *Diet passes Japan's first law to curb hate speech*, THE JAPAN TIMES WEBSITE, *available at* https://www.japantimes.co.jp/news/2016/05/24/national/social-issues/diet-passes-japans-first-law-curb-hate-speech/ (last accessed June 24, 2019).

[114] *Id.*

[115] Japan Hate Speech Act, art. 4 (2016).

[116] Japan Hate Speech Act, art. 5.

[117] Sing. Maintenance of Religious Harmony Act, ch. 167, §§ 8(1)(a), 9(1).

[118] SING. PEN. CODE § 298(a).

hate speech is considered "unprotected speech," *i.e.* speech that is outside the protection given to freedom of expression or speech. Despite the differences in defining hate speech, all of these instruments—be it domestic or international—seek to uphold human dignity and promote equality. The following part will discuss the concept of unprotected speech in more detail. By looking at existing categories of unprotected speech in American and Philippine jurisprudence, the following part will discuss whether hate speech is unprotected speech.

Unlike in the foregoing foreign laws, the object of the Safe Spaces Act is neither race, ethnicity, nor religion. In the case of "misogynistic, transphobic, homophobic and sexist slurs," the protected trait is an individual's SOGIE.[119] The law that resembles this the most would be the United Kingdom's Equality Act of 2010, which considers sex and sexual orientation as protected characteristics.[120] Furthermore, the same mechanism or prohibition seems to apply. Both laws do not explicitly prohibit or penalize hate speech *per se*, but consider it as a form of harassment. In the United Kingdom's Equality Act, hate speech becomes a form of harassment when it violates the dignity of another or creates a hostile or offensive environment on the basis of a protected characteristic.[121] Beyond its specific similarities with the law in the United Kingdom, the Safe Spaces Act also shares a fundamental characteristic with the other foreign laws on regulating hate speech: the thrusts to protect the dignity of groups, and to promote equality.[122]

IV. HATE SPEECH AND UNPROTECTED SPEECH

A. The Distinction between Protected and Unprotected Speech

Aside from the country's ratification of various international human rights instruments, another argument for regulating hate speech in the Philippines is its similarity to existing categories of unprotected speech. In this jurisdiction, all forms of speech are presumed to be protected speech. However, as summarized in the case of *Chavez v. Gonzales*,[123] not all categories

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[119] Safe Spaces Act, § 4.
[120] *See supra* notes 102–104 and accompanying text.
[121] U.K. Equality Act, § 26(1).
[122] Safe Spaces Act, § 2.
[123] G.R. No. 168338, 545 SCRA 441 (2008).

of speech are treated equally. Speaking on behalf of the Supreme Court, Chief Justice Reynato S. Puno explained that

> *[s]ome types of speech may be subjected to some regulation by the State under its pervasive police power, in order that it may not be injurious to the equal right of others or those of the community or society.* The difference in treatment is expected because the relevant interests of one type of speech, *e.g.*, political speech, may vary from those of another, *e.g.*, obscene speech. Distinctions have therefore been made in the treatment, analysis, and evaluation of the permissible scope of restrictions on various categories of speech.[124]

This distinction between "protected" speech (*e.g.* political and religious speech) and "unprotected" speech (*e.g.* libel, obscenity, and fighting words) traces its origins to the Court's adoption of the "two-class" doctrine developed in the United States cases of *Chaplinsky v. New Hampshire*[125] and *Roth v. United States.*[126] Both of these cases involved constitutional challenges against the regulation of a certain type of speech—in *Chaplinsky*, "fighting words"; in *Roth*, obscenity—and were cited by our Supreme Court in a number of cases.[127] Adopting this doctrine, the Court has ruled that certain types of speech, *e.g.* those that are deemed harmful or those that lack even a "slight social value," are not covered by constitutional protection.[128]

In the 1985 case of *Gonzales v. Kalaw Katigbak*,[129] the Philippine Supreme Court resolved whether the government may classify an artistic expression—in this case, a movie—as obscene. In its discussion of the social value of obscenity, the Court cited *Roth* and *Chaplinsky* and explained why obscenity falls beyond the ambit of constitutional protection:

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[124] *Id.* at 486. (Emphasis supplied, citations omitted.)

[125] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[126] Roth v. United States, 354 U.S. 476 (1957).

[127] As of the time of writing, nine cases ruled by the Philippine Supreme Court has cited Chaplinsky v. New Hampshire. Seven of these refer to the Chaplinsky's "two-tier" theory. *See* MVRS Publ'ns v. Islamic Da'wah Council of the Phil., G.R. No. 135306, 396 SCRA 210 (2003); Gonzales v. Katigbak, G.R. No. 69500, 137 SCRA 717 (1985); Philippine Journalists Inc. v. Thoenen, G.R. No. 192601, 697 SCRA 103 (2013); Disini v. Sec'y of Justice, G.R. No. 203335, 723 SCRA 109 (2014); Soriano v. Laguardia, G.R No. 164785, 587 SCRA 79 (2009); Social Weather Stations, Inc. v. Comm'n on Elections, G.R. No. 208062, 755 SCRA 124 (2015); *In re* Jurado, A.M. No. 93-2-037-SC, 243 SCRA 299 (1995); Spouses Imbong v. Ochoa, Jr., G.R. No. 204819, 721 SCRA 146 (2014); People v. Larrañaga, G.R. No. 138874, 421 SCRA 530 (2004).

[128] *In re* Jurado, A.M. No. 93-2-037-SC, 243 SCRA 299 (1995).

[129] G.R. No. 69500, 137 SCRA 717 (1985).

> All ideas having even the slightest redeeming social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion - have the full protection of the guaranties, *unless excludable because they encroach upon the limited area of more important interests*. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.[130]

Similarly, in the 1995 case of *In re: Jurado*,[131] the Court found Atty. Emil Jurado, a lawyer and a journalist, guilty of contempt for recklessly and deliberately reporting false statements against the Judiciary. Citing *Chaplinsky*, Chief Justice Andres Narvasa explained that deliberately false reports, such as those that Atty. Jurado published, "belong to that category of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[132] This doctrine has since been cited more frequently in subsequent and more recent cases involving freedom of speech.[133]

This part puts forward the argument that hate speech, akin to these existing categories of unprotected speech, may and should be regulated. To do this, it reviews the jurisprudence on unprotected speech (such as libel, obscenity, and fighting words), ascertains the Court's justification for not according such speech constitutional protection, and draws similarities between hate speech and these "unprotected" categories of speech.

1. Defamation

One category of unprotected speech is defamation. In this jurisdiction, defamation generally refers to the acts of libel and slander, both of which are defined in the Revised Penal Code ("RPC"). Article 353 of the RPC defines libel as a "public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead."[134] If such defamatory act is committed orally, the act shall constitute the crime of slander.[135] Persons who are proven to have written or uttered defamatory

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[130] *Id.* (Emphasis supplied.)
[131] *In re* Jurado, 243 SCRA at 303.
[132] *Id.*
[133] *See supra* note 127.
[134] REV. PEN. CODE, art. 353.
[135] REV. PEN. CODE, art. 358–59.

speech may incur not only criminal liability, but also the corresponding civil liabilities that arise therein.[136]

Whether or not the defamatory statement is in written or oral form, or whether or not the cause of action is criminal or civil, the primary object of defamation is the public and malicious imputation against another person's reputation. As noted by Associate Justice Vicente V. Mendoza, unlike libel laws in the United States, the crime of libel in this jurisdiction has "never been considered as a mere breach of the peace ordinance but a law for the protection and vindication of private reputation."[137] For this reason, as he pointed out, libel is classified under the category of "crimes against honor," not "crimes against public order."[138] Indeed, defamation's reference to private reputation is manifest in *each* of its elements. In the case of *Vasquez v. Court of Appeals*, the Court ruled that the following elements must first be present to prove that a material is libelous: "(a) the allegation of a discreditable act or condition concerning another; (b) publication of the charge; (c) identity of the person defamed; and (d) existence of malice."[139]

i. Publication

For an act of speech to be considered libelous, it must be made public. This requirement is met when the malicious imputation against another person's reputation has been communicated to a third person.[140]

This element is essential in proving defamation because reputation is necessarily relational. Quoting Chief Justice Puno, the Supreme Court in *MVRS Publications v. Islamic Da'wah Council of the Philippines*[141] defines defamation as a matter of "relational interest," as "it involves the opinion of others in the community may have, or tend to have of the plaintiff." Not being known to third persons, a malicious imputation against another's reputation

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[136] CIVIL CODE, art 30. When a separate civil action is brought to demand civil liability arising from a criminal offense, and no criminal proceedings are instituted during the pendency of the civil case, a preponderance of evidence shall likewise be sufficient to prove the act complained of; CIVIL CODE, art. 33. In cases of defamation, fraud, and physical injuries a civil action for damages, entirely separate and distinct from the criminal action, may be brought by the injured party. Such civil action shall proceed independently of the criminal prosecution, and shall require only a preponderance of evidence.

[137] Vicente V. Mendoza, *The Decriminalization of Libel is Not the Way*, 82 PHIL. L.J. 288 (2008).

[138] *Id.* at 289.

[139] Vasquez v. Ct. of Appeals, G.R. No. 118971, 314 SCRA 460, 471 (1999).

[140] *Id.*

[141] MVRS Publ'ns v. Islamic Da'wah Council of the Phil., G.R. No. 135306, 396 SCRA 210 (2003).

would not injure anyone in the first place. The "mere fact that the plaintiff's feelings and sensibilities have been offended" is insufficient in sustaining a case of defamation.[142] After all, reputation refers to the "estimate in which others hold [a person], not the good opinion which he has of himself."[143]

ii. Identity of the person defamed

Another element of defamation is its reference to another person's reputation. As described in *MVRS Publications* and *Vasquez*, reputation refers to how other people in the community sees an individual. While this element does not require a person to be named,[144] it requires that the subject of the alleged act is at least identifiable. In other words, it must be proved that "at least a third person could identify someone as the object of the libelous publication."[145]

Identifiability is necessary in defamation, since, without it, no injury to anyone's reputation could have been inflicted. The presence of this element is most elaborated and especially salient in group-libel cases. For example, in the case of *Newsweek, Inc. v. Intermediate Appellate Court*, the subject of the suit was the article "Island of Fear," which allegedly misrepresented Negros Occidental as a "place dominated by big landowners [. . .] who not only exploited the impoverished and underpaid sugarcane workers/laborer, but also brutalized and killed them with impunity." The private respondents, who were associations of sugarcane planters in the province, claimed that such imputations turned them into "objects of hatred, contempt, and hostility."[146] Dismissing their "class suit" for libel, the Court held that the private respondents lacked any cause of action to file a suit for libel, since the article was not "so sweeping or all-embracing as to apply to every individual in the class or group."[147] The Court reaffirmed this doctrine in *MVRS Publications*, where the subject of the complaint was a newspaper article, suggesting that Muslims worship pigs and revere them as sacred objects.[148] Just like in

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[142] *Id.* at 224.

[143] Vasquez v. Ct. of Appeals, G.R. No. 118971, 314 SCRA 460, 471 (1999).

[144] Borjal v Ct. of Appeals, G.R. No. 126466, 301 SCRA 1 (1999).

[145] *Vasquez*, 314 SCRA at 471.

[146] Newsweek, Inc. v. Intermediate App. Ct., G.R. No. 63559, 142 SCRA 171, 174 (1986).

[147] *Id.* at 176.

[148] MVRS Publ'ns. v. Islamic Da'wah Council of the Phil., G.R. No. 135306, 396 SCRA 210, 217 (2003). The subject of the complaint for libel and damages is an article published in *Bulgar*, a daily tabloid published by MVRS Publications. It contained the following excerpt:

ALAM BA NINYO?

Newsweek, the Court dismissed the petitioner's "class suit" and similarly ruled that the article was not "so sweeping [. . .] to apply to every individual in the class or group."[149] The Court, speaking through Associate Justice Josue N. Bellosillo, further noted that reputation is "personal in character for every person." Applying this in the case, he further discussed that

> *[a]n individual Muslim has a reputation that is personal, separate and distinct in the community.* Each Muslim, as part of the larger Muslim community in the Philippines of over five (5) million people, belongs to a different trade and profession; each has a varying interest and a divergent political and religious view – some may be conservative, others liberal. A Muslim may find the article dishonorable, even blasphemous; others may find it as an opportunity to strengthen their faith and educate the non-believers and the "infidels." There is no injury to the reputation of the individual Muslims who constitute this community that can give rise to an action for group libel.[150]

The rulings in *Newsweek* and *MVRS Publications* show why "class-suit" complaints for libel are often unsuccessful. As illustrated in both cases, the subject of the alleged libelous act must be identified or, at least, identifiable, since the primary object of libel is individual reputation. In cases where the defamatory statement refers to a group or a class, it is much more difficult to establish any direct reference to anyone's personal reputation or, much more, any injury inflicted upon it.

2. Obscenity

Just like defamatory speech, obscenity is also generally regarded as unprotected speech. As discussed in *Gonzales v. Kalaw*, obscene speech is unprotected and thus may be regulated for its utter lack of any "redeeming social importance."[151] In the earlier case of *People v. Kottinger*,[152] the Court

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> Na ang mga baboy at kahit anong uri ng hayop sa Mindanao ay hindi kinakain ng mga Muslim?
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> Para sa kanila ang mga ito ay isang sagradong bagay. Hindi nila ito kailangang kainin kahit na sila pa ay magutom at mawalan ng ulam sa tuwing sila ay kakain. Ginagawa nila itong Diyos at sinasamba pa nila ito sa tuwing araw ng kanilang pangingilin lalung-lalo na sa araw na tinatawag nilang 'Ramadan'.

[149] *Id.* at 269.

[150] *Id.* at 220–221. (Emphasis supplied.)

[151] Gonzales v. Kalaw-Katigbak, G.R. No. 69500, 137 SCRA 717 (1985).

[152] People v. Kotingger, 45 Phil. 353, 356 (1923).

adopted a minimalist definition of obscenity: an act that violates "chastity, decency and delicacy," which, in turn, is to be decided in a case-to-case basis. Since then, the Court has acknowledged the vagueness and inadequacy of such definition and had sought to adopt more precise tests to identify whether a material is obscene.

In the case of *People v. Go Pin*[153] and *People v. Padan*,[154] the Court ruled that the defining feature of obscene speech is its lack of any redeeming quality. In both of these cases, the Court sought to distinguish artistic displays of nudity from obscenity. In *People v. Go Pin,* the accused was charged with and convicted of violating Article 201 of the RPC for exhibiting indecent and immoral films in a recreation center in Manila. As a defense, Go Pin pointed out that the subject film is akin to artistic displays of nudity and, for this reason, should not be punished. On this issue, the Court explained that

> [i]f such pictures, sculptures and paintings are shown in art exhibits and art galleries for the cause of art, to be viewed and appreciated by people interested in art, there would be no offense committed. *However, the pictures here in question were used not exactly for art's sake but rather for commercial purposes. In other words, the supposed artistic qualities of said pictures were being commercialized so that the cause of art was of secondary or minor importance.* Gain and profit would appear to have been the main, if not the exclusive consideration in their exhibition; and *it would not be surprising if the persons who went to see those pictures and paid entrance fees for the privilege of doing so, were not exactly artists and persons interested in art and who generally go to art exhibitions and galleries to satisfy and improve their artistic tastes, but rather people desirous of satisfying their morbid curiosity and taste, and lust, and for love for excitement,* including the youth who because of their immaturity are not in a position to resist and shield themselves from the ill and perverting effects of these pictures.[155]

The case of *People v. Padan* was decided in a similar manner. Here, the manager, ticket collector, and performers of a live exhibition of sexual acts were charged with violating Article 201 of the RPC. Similar to what the Court did in *Go Pin*, the Court addressed the "defense of artistic displays of nudity."

> In those cases, one might yet claim that there was involved the element of art; that connoisseurs of the same, and painters and sculptors might find inspiration in the showing of pictures in the nude, or the human body exhibited in sheer nakedness, as models

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[153] People v. Go Pin, 97 Phil. 418 (1955).
[154] People v. Padan, 101 Phil. 749 (1957).
[155] People v. Go Pin, 97 Phil. 418 (1955). (Emphasis supplied.)

> in tableaux vivants. *But an actual exhibition of the sexual act, preceded by acts of lasciviousness, can have no redeeming feature. In it, there is no room for art. One can see nothing in it but clear and unmitigated obscenity, indecency, and an offense to public morals, inspiring and causing as it does, nothing but lust and lewdness, and exerting a corrupting influence specially on the youth of the land.* We repeat that because of all this, the penalty imposed by the trial court on Marina, despite her plea of guilty, is neither excessive nor unreasonable.[156]

These two cases are two of the only few obscenity-related cases to have reached the Supreme Court.[157] Just like *Go Pin* and *Padan*, most of these cases only pertain to either pornography or other public displays, which may arouse "prurient interest."[158]

However, in the 2008 case of *Soriano v. Laguardia*,[159] the Court held that obscenity need not be limited to these acts alone. This case involved Eliseo F. Soriano, the host of the general-viewership program *Ang Dating Daan*, and the remarks he made in the show:

> *Lehitimong anak ng demonyo; sinungaling;*
>
> *Gago ka talaga Michael, masahol ka pa sa putang babae o di ba. Yung putang babae ang gumagana lang doon yung ibaba, [dito] kay Michael ang gumagana ang itaas, o di ba! O, masahol pa sa putang babae yan. Sabi ng lola ko masahol pa sa putang babae yan. Sobra ang kasinungalingan ng mga demonyong ito.*[160]

Because of these remarks, the Movie and Television Review and Classification Board ("MTRCB") preventively suspended the show *Ang Dating Daan* for 20 days and, after due investigation, suspended Soriano from hosting the show for three months. Filing this before the Supreme Court, Soriano argued, among other things, that the suspension violated his constitutional rights to free speech, free press, and the free exercise of religion. Ruling in

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[156] People v. Padan, 101 Phil. 749 (1957). (Emphasis supplied.)

[157] Upon a cursory survey of jurisprudence, at least nine cases discuss obscenity as a primary issue. Most of these are concerned with violations of Article 201 of the RPC or other special laws governing pornography. *See* Pita v. Ct. of Appeals, G.R. No. 80806, 178 SCRA 362, (1989); Fernando v. Ct. of Appeals, G.R. No. 159751, 510 SCRA 351 (2006); Gonzales v. Kalaw Katigbak, G.R. No. 69500, 137 SCRA 717 (1985); People v. Kottinger, 45 Phil. 353 (1923); People v. Go Pin, 97 Phil. 418 (1955); People v. Padan, 101 Phil. 749 (1957); Nogales v. People, G.R. 191080, 660 SCRA 475 (2011); Disini v. Sec'y of Justice, G.R. No. 203335, 723 SCRA 109 (2014).

[158] Gonzales v. Kalaw-Katigbak, G.R. No. L-69500, 137 SCRA 717 (1985).

[159] Soriano v. Laguardia, G.R. No. 164785, 587 SCRA 79 (2009).

[160] *Id.*

favor of MTRCB, the Court classified Soriano's statement as obscene, "at least with respect to the average child."[161] In upholding Soriano's suspension, Associate Justice Presbitero Velasco, Jr., emphasized that the show was for general viewership; as such, children could have easily misunderstood and picked up his "unbridled use" of obscene language. He explains

> The term "putang babae" means "a female prostitute," a term wholly inappropriate for children, who could look it up in a dictionary and just get the literal meaning, missing the context within which it was used. [...] Children could be motivated by curiosity and ask the meaning of what petitioner said, also without placing the phrase in context. They may be inquisitive as to why Sandoval is different from a female prostitute and the reasons for the dissimilarity. *And upon learning the meanings of the words used, young minds, without the guidance of an adult, may, from their end, view this kind of indecent speech as obscene, if they take these words literally and use them in their own speech or form their own ideas on the matter.* [...] Undeniably the subject speech is very suggestive of a female sexual organ and its function as such. *In this sense, we find petitioner's utterances obscene and not entitled to protection under the umbrella of freedom of speech.*[162]

As discussed in this section, the Court has defined obscenity in numerous ways. Most of the obscenity-related cases that reach the Supreme Court pertain to either pornography or other matters related to sex or acts of lasciviousness. However, in the *Soriano* case, the Court has expanded the definition of obscenity to those that are "obscene at least to a child." Whatever way obscenity is defined, it is clear from these cases that its object is the protection of public morals and, in particular, the protection of children from immorality.

3. Fighting Words and Vexatious Speech

When the Philippine Supreme Court adopted the *Chaplinsky* doctrine, it also classified "fighting words" as unprotected speech. After all, *Chaplinsky* involved a constitutional challenge against the Offensive Conduct Law of New Hampshire, which renders "any offensive, derisive or annoying word to anyone who is lawfully in any street" illegal.[163] The Court in *Chaplinsky* categorized this law as a regulation of "fighting words," which are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[164] As of the time of writing, the Philippine Supreme

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[161] *Id.* at 100.

[162] *Id.* at 101–102. (Emphasis supplied.)

[163] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[164] *Id.*

Court has not ruled upon a case involving "fighting words." It is worth noting, however, that the Philippines adopted laws that may be regarded as regulating some types of "fighting words." The closest to this definition is unjust vexation under paragraph 2 of Article 287 of the RPC.

> Art. 287. *Light coercions.* – Any person who, by means of violence, shall seize anything belonging to his debtor for the purpose of applying the same to the payment of the debt, shall suffer the penalty of *arresto mayor* in its minimum period and a fine equivalent to the value of the thing, but in no case less than 75 pesos.
>
> Any other coercions or unjust vexations shall be punished by *arresto menor* or a fine ranging from 5 pesos to 200 pesos, or both.[165]

Described in *Maderazo v. People*,[166] the crime of unjust vexation is defined as a "form of light coercion which is broad enough to include any human conduct which, although not productive of some physical harm, would unjustly annoy or irritate an innocent person." The object of unjust vexation is "whether the offender's act caused annoyance, irritation, torment, distress or disturbance to the mind of the person to whom it is directed."[167] While not limited to verbal or written speech, these definitions resemble what was referred to in *Chaplinsky* as "fighting words."[168]

Apart from unjust vexation, a cause of action related to "fighting words" is intentional tortious acts under Article 26 of the Civil Code.

> Art. 26. Every person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons. The following and similar acts, though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention and other relief:
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> (1) Prying into the privacy of another's residence:
>
> (2) Meddling with or disturbing the private life or family relations of another;
>
> (3) Intriguing to cause another to be alienated from his friends;
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> (4) Vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect, or other personal condition.[169]

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[165] REV. PEN. CODE, art. 287.

[166] Maderazo v. People, G.R. No. 165065, 503 SCRA 234 (2006).

[167] People v. Reyes, 60 Phil. 369 (1934).

[168] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[169] CIVIL CODE, art. 26.

In his article on intentional tort in Philippine jurisprudence, Associate Justice Antonio T. Carpio described Article 26 as a "sorely neglected" but "perhaps one of the most fertile sources of tort action in the Civil Code."[170] Included in its "protective mantle" is the right to peace of mind, which, in his words, is "akin to the American tort of intentional infliction of mental distress."[171] Similar to that of unjust vexation, the object of intentional tortious acts under Article 26 is the mere presence of mental distress. He discussed this concept further by concluding that

> [m]ost cases which have recognized intentional infliction of mental distress involved physical illness suffered by the plaintiff as a result of the offensive words or acts. A handful of decisions, however, have granted recovery on the ground of extreme outrage without any showing of physical illness. The view that physical illness is immaterial in infliction of mental distress appears to be applicable in this jurisdiction since Article 26 itself creates a cause of action for violation of the right to "peace of mind." Violation of the right in itself constitutes a legal injury sufficient to support the action. Physical illness is material only as a circumstance of aggravation which will serve to increase the damages recoverable.[172]

More than three decades after the publication of the article, Associate Justice Carpio revisited the concept of intentional torts in his dissenting opinion in *MVRS Publications*.[173] In this case, the majority opinion dismissed the petition for libel and damages on the ground that emotional distress is "personal in nature" and thus cannot be invoked in a class suit.[174] While agreeing that the petitioners indeed lacked a cause of action for "group libel," he stated that they should be awarded damages under Article 26. To support this point, he clarified, as he did in his article, the object of Article 26:

> In intentional infliction of mental distress, the gravamen of the tort is not the injury to plaintiff's reputation, but the harm to plaintiff's mental and emotional state. In libel, the gist of the action is the injury to plaintiff's reputation. Reputation is the community's opinion of what a person is. In intentional infliction of mental distress, the opinion of the community is immaterial to the existence of the action although the court can consider it in awarding damages. What is material is the disturbance on the

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[170] Antonio Carpio, *Intentional Torts in Philippine Law,* 47 PHIL L.J. 649, 686 (1972).

[171] *Id.* at 687.

[172] *Id.* at 688. (Citations omitted.)

[173] MVRS Publ'ns. v. Islamic Da'wah Council of the Phil., G.R. No. 135306, 396 SCRA 210 (2003) (Carpio, *J., dissenting).*

[174] *Id.* at 247–58.

> mental or emotional state of the plaintiff who is entitled to peace of mind. The offensive act or statement need not identify specifically the plaintiff as the object of the humiliation. What is important is that the plaintiff actually suffers mental or emotional distress because he saw the act or read the statement and it alludes to an identifiable group to which he clearly belongs.[175]

Just like libel and obscenity, regulating unjust vexation (under Article 287 of the RPC) and intentional tortious acts (under Article 26 of the Civil Code) also reflects the State's commitment to provide remedies for emotional and mental distress arising from such vexatious acts.

B. Hate Speech as Unprotected Speech?

As discussed in the previous section, some types of speech can be regulated and punished by the State. Drawing from *Chaplinsky*, the types of speech reviewed here are beyond the ambit of constitutional protection for two reasons. Firstly, unprotected speech may be regulated since it is deemed harmful and thus "the prevention and punishment of which has never been thought to raise any Constitutional problems."[176] As discussed in this part, each category of unprotected speech refers to an object that the State seeks to protect its citizens from. For libel, this object is private reputation; for obscenity, public morals; and for vexatious speech, emotional distress. The cases reviewed in the previous section show the extent to which the Court values these interests over time and, as such, the regulation of these types of speech has been allowed by the Court[177] or has not been challenged at all.[178]

Hate speech, as understood in an earlier section of this Note, may fall under this category. Just like existing categories of unprotected speech, the regulation of hate speech also seeks to prevent a specific category of harm: bias-motivated harm. As Jeremy Waldron observed, hate-speech laws do not necessarily address individual honor or "self-esteem."[179] Instead, what it is designed to remedy are attacks against an individual's dignity, understood "in the sense of a person's basic entitlement to be regarded as a member of society in good standing, as someone whose membership of a minority group does not disqualify him or her from ordinary social interaction."[180] In this sense,

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[175] *Id.* (Citations omitted.)

[176] *See supra* note 125.

[177] *See supra* notes 127, 157.

[178] To date, neither unjust vexation nor intentional torts have been constitutionally challenged, despite both involving some form of speech regulation.

[179] *See* Jeremy Waldron, THE HARM IN HATE SPEECH 105–43 (2012).

[180] *Id.* at 105.

hate speech is considered an obstacle that members of marginalized and disadvantaged sectors and communities have to overcome to realize their inherent right to dignity. As elaborated in the next section, the protection and enhancement of the dignity of all persons, regardless of their membership in a certain group or sector, are a constitutional mandate on the part of the State.

Secondly, the regulation of unprotected speech would not curtail the free exchange of ideas and its corresponding benefits, since these types of speech are "of such slight social value as a step of truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[181] How this applies to the regulation of hate speech is clear. Certainly, some acts generally regarded as "hate speech" contain negligible social value. Arguing that speech, such as cursing, cat-calling, and wolf-whistling in public spaces, are *absolutely* protected by the Constitution is a difficult position to defend, especially in the context of existing limitations on speech. Further, as explained in the Explanatory Note of the Senate Bill No. 1326,[182] regulating gender-based harassment was a response to the curtailment of the freedoms, well-being, and the health of women and LGBT persons in public spaces.

However, it is as difficult to deny that the possibility that some acts construed as "hate speech" may infringe upon protected classes of speech. Consider the prohibition on "sexist, homophobic, and transphobic slurs" in the Safe Spaces Act. Several interpretations of this term may include acts that are otherwise protected – if not, preferred – by the Constitution. For example, in 2018, a number of religious organizations attended the Metro Manila Pride March and "heckled" its attendees, who are mostly members of the LGBT and their allies.[183] Armed with signs and placards that read "It's Not OK to be Gay!" and "HE WHO SINS IS OF THE DEVIL," the anti-LGBT protesters encouraged Pride attendees to "go home" and to "keep from sinning."[184] Pointing to a group of female attendees, a man announced through a megaphone, "This lady is a sinner! Be careful she might rape

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[181] MVRS Publ'ns. v. Islamic Da'wah Council of the Phil., G.R. No. 135306, 396 SCRA 210 (2003) (Carpio, *J., dissenting).*

[182] S. No. 1326, 17th Cong., 1st Sess., Exploratory Note (2017). Safe Streets and Public Spaces Act of 2017.

[183] Katrina Domingo, *'Repent to God': Hecklers crash Pride March in Marikina,* ABS-CBN NEWS, June 30, 2018, *available at* https://news.abs-cbn.com/news/06/30/18/repent-to-god-hecklers-crash-pride-march-in-marikina.

[184] *Id.;* Jessica Bartolome, *Anti-LGBT group holds own rally at Pride parade in Marikina, gets called 'Bible idolaters,'* GMA NEWS ONLINE, June 30, 2018, *available at* https://www.gmanetwork.com/news/news/metro/658775/anti-lgbt-group-holds-own-rally-at-pride-parade-in-marikina-gets-called-bible-idolaters/story/.

you."[185] Another heckler shouted "Repent, you sinners, and God will forgive you!" addressing it to the attendees of the Pride March.[186]

On the one hand, the acts described here clearly fall under the general description of "sexist, homophobic, or transphobic slurs." These acts can be considered hate speech, as they refer to a person's membership to a group and are made precisely *because* of such membership. On the other hand, however, such acts may also be construed as religious speech, which the Court in *Soriano* defines as speech that "express[es] any particular religious belief."[187] While the same Court regarded *Soriano*'s statements as obscene rather than religious, it cannot be denied, as described in the immediately preceding paragraph, that referencing religious doctrine may, as a result, offend or injure some members of society (especially, sexual minorities such as the LGBT).

This presents the limitation of the argument developed in this section. Even if hate speech is to be considered as unprotected speech, regulating it may still infringe upon some categories of protected speech. Without narrowing down the definition of hate speech, the regulation may constitute a content-based regulation, *i.e.* a restriction of speech that is based on the subject matter of the speech,[188] which is presumed to be unconstitutional.

V. BALANCING FREE SPEECH AND DIGNITY OF GROUPS

As discussed in Part III, regulating hate speech is akin to regulating existing categories of unprotected speech. However, as similarly pointed out, hate speech legislation may infringe upon protected categories of speech, most especially political and religious speech. This section discusses the tests that content-based regulation should overcome in order to be held constitutional. In particular, it focuses on the balancing of interests test, as the regulation of hate speech presents an apparent tension between two social values—free speech and the dignity of groups and communities.

A. Content-based regulation and tests

While all types of prior restraints are presumed to be invalid and unconstitutional, the Court in *Chavez v. Gonzales*,[189] clarifies that "not all prior

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[185] Domingo, *supra* note 183.

[186] *Id.*

[187] Soriano v. Laguardia, G.R. No. 164785, 587 SCRA 79 (2009).

[188] *See infra* Part V.A.

[189] Chavez v. Gonzales, G.R. No. 168338, 545 SCRA 441 (2008).

restraints are invalid" and "[c]ertain previous restraints may be permitted by the Constitution."[190] In this jurisdiction, three tests had been applied to evaluate the constitutionality of speech regulation: the dangerous tendency test,[191] the clear and present danger test,[192] and the balancing of interests test.[193] In his *ponencia* in *Chavez*, Chief Justice Puno differentiated these three tests, their definitions, and their objects:

> (a) the dangerous tendency doctrine which permits limitations on speech once a rational connection has been established between the speech restrained and the danger contemplated; (b) the balancing of interests tests, used as a standard when courts need to balance conflicting social values and individual interests, and requires a conscious and detailed consideration of the interplay of interests observable in a given situation of type of situation; and (c) the clear and present danger rule which rests on the premise that speech may be restrained because there is substantial danger that the speech will likely lead to an evil the government has a right to prevent. This rule requires that the evil consequences sought to be prevented must be substantive, "extremely serious and the degree of imminence extremely high."[194]

While the Philippine Supreme Court has generally applied the clear and present danger test, all of these three tests have been applied in the Philippine jurisdiction.[195] This section, however, focuses on the balancing of interests test. In particular, this section argues that the most suitable and appropriate test to assess hate-speech legislation is the balancing of interests test because it involves the "conflicting social values" of free speech and dignity of groups.

1. Balancing of Interest Test

As noted in *Chavez*, the Court has generally applied the clear and present danger rule in assessing the constitutionality of a governmental act regulation speech. In what instances, then, has the balancing of interests test been used before? In what circumstances can it be appropriately applied? The Court has applied the balancing-of-interest test in at least two cases: *Ayer*

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[190] *Id.*

[191] *See* Cabansag v. Fernandez, 102 Phil. 151 (1957); Gonzales v. Comm'n on Elections, 137 Phil. 471 (1969).

[192] *See* Cabansag v. Fernandez, *Id.*; Gonzales v. Kalaw Katigbak, G.R. No. 69500, 137 SCRA 717 (1985).

[193] Soriano v. Laguardia, G.R. No. 164785, 587 SCRA 79 (2009).

[194] *Id.* at 487–88.

[195] *Id.*

Productions v. Capulong[196] and *Soriano v. Laguardia*[197]. Both of these cases concern an apparent tension between two "conflicting social values."

In *Ayer Productions v. Capulong*, the Court balanced the right to free speech and free press of the plaintiff with the right to privacy of a public figure. In this case, Ayer Productions sought to produce "The Four Day Revolution," a movie about the EDSA People Power Revolution of 1986. Among the characters in the motion picture is a character based on Juan Ponce Enrile, then the Secretary of National Defense and the private respondent in this case. Despite initial requests to stop using Enrile's character, Ayer Productions continued with the production of the movie. In turn, Enrile filed a petition for preliminary injunction, arguing that Ayer Production's actions violated his right to privacy.[198]

In this case, the Court balanced two countervailing social values—the right to privacy of Enrile and the right to free speech and free press of Ayer Productions. The Court noted that the right to free speech is not an absolute right. In the previous case *Lagunzad v. Soto*, the right to privacy of the deceased subject of a film has been accorded greater weight than the producer's right to free speech. In balancing these two interests, the Court elaborated first on the nature of the alleged infringement upon the plaintiff's private life. As Associate Justice Florentino P. Feliciano noted

> The line of equilibrium in the specific context of the instant case between the constitutional freedom of speech and of expression and the right of privacy, may be marked out in terms of a requirement that the proposed motion picture must be fairly truthful and historical in its presentation of events. There must, in other words, be no knowing or reckless disregard of truth in depicting the participation of private respondent in the EDSA Revolution. There must, further, be no presentation of the private life of the unwilling private respondent and certainly no revelation of intimate or embarrassing personal facts. The proposed motion picture should not enter into what Mme. Justice Melencio-Herrera in Lagunzad referred to as "matters of essentially private concern." To the extent that "The Four Day Revolution" limits itself in portraying the participation of private respondent in the EDSA Revolution to those events which are directly and reasonably related to the public facts of the EDSA Revolution, the intrusion into private respondent's privacy cannot be regarded as

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[196] Ayer Productions v. Capulong, G.R. No. 82380, 160 SCRA 861 (1988).
[197] Soriano v. Laguardia, G.R. No. 164785, 587 SCRA 79 (2009).
[198] Ayer Productions v. Capulong, G.R. No. 82380, 160 SCRA 861 (1988).

> unreasonable and actionable. Such portrayal may be carried out even without a license from private respondent.[199]

More than two decades after *Ayer*, the Court applied the balancing of interests test again in *Soriano*. Here, the Court sought to balance the plaintiff's right to free speech, on the one hand, and the State's responsibility to protect children against obscene and morally-corrupting speech, on the other.

The Court applied the balancing of interests test to weigh, on the one hand, the freedom of speech of Soriano and, on the other hand, the moral well-being of children. In his *ponencia*, Associate Justice Velasco declared that

> [p]etitioner's offensive and obscene language uttered in television broadcast, without doubt, was easily accessible to the children. His statements could have exposed children to a language that is unacceptable in everyday use. As such, the welfare of children and the State's mandate to protect and care for them, as *parens patriae*, constitute a substantial and compelling government interest in regulating petitioner's utterances in TV broadcast as provided in PD 1986.[200]

The tipping point in this case is the Court's classification of Soriano's speech as "obscene, at least to children." Granted with less protection, and outweighed by the State's interest and mandate to protect children, the "balancing" in this case was in favor of limiting speech.

Both *Ayer Productions* and *Soriano* concern the balancing of "conflicting social values." The balancing of interest test is based upon the assumption that "constitutional freedoms are not absolute, not even those stated in the free speech and expression clause, and that they may be abridged to some extent to serve appropriate and important interests."[201] It is worth noting that the values "counterbalanced" with free speech—the right to privacy in *Ayer Productions* and the duty to protect children in *Soriano*—can likewise be found in the Constitution. In assessing the constitutionality of hate speech laws using the balancing of interests test, a countervailing social value must first be determined. This section argues that, in the case of hate speech legislation like the Safe Space Act, this "social value" is the State's constitutional mandate in upholding the dignity of groups and sectors.

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[199] *Id.* at 876.

[200] *Id.* at 110.

[201] *Id.*, *citing* Gonzales v. Comm'n of Elections, G.R. No. 27833, 27 SCRA 835 (1969) (Castro, *J., dissenting*).

B. The Constitutional Mandate of Upholding and Protecting Dignity

In explaining his vote in approving the draft Constitution, Commissioner Jose N. Nolledo compared it to its predecessors, describing it as "far superior" and thus "deserv[ing] the full support of the people."[202] To him, this is because "[a]ll the provisions of the 1986 Constitution are designed to attain the common good, to fully respect human rights, and to raise the dignity of the human personality."[203] More specifically, the concept of dignity can be expressly found in two provisions in the 1987 Constitution. First, Section 11 of Article II (Declaration of State Policies) mandates the State to "value[ ] the dignity of every human person and guarantee[ ] full respect for human rights."[204]

Similarly, in Section 1, Article XIII (Social Justice and Human Rights), the Constitution mandates Congress to "give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce the social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good."[205]

Taken together, these two constitutional provisions imply two things: first, dignity is inherent in every human person; and second, the State is mandated to "protect and enhance" it. The mandate to protect and enhance the dignity of all persons is not limited to upholding personal dignity alone. Operating under a Constitution that recognizes inequalities and inequities among different sectors of society, the State must also recognize the reality that many groups and sectors encounter challenges and barriers that prevent its members from fulfilling their right to dignity. This view is implied in Commissioner Edmundo G. Garcia's characterization of the role of "man" in society:

> First[ly], man is a person with personal dignity and possessed of certain rights which the State did not confer and cannot take away. He can never illegitimately become simply the instrument of another man or of the State. Also, man has certain inalienable rights which are inherent to his dignity.

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[202] V RECORD CONST. COMM'N 927 (Oct. 12, 1986).
[203] *Id.*
[204] CONST. art. II, § 11.
[205] CONST. art. XIII, § 1.

> *Secondly – and this is very important – he is by nature a member of various communities.* He is a member of the family; he can be a member of indigenous communities; he can be a member of a sector; and finally he is a member of the national and the world community. *He needs these communities to achieve his full development as a person. The communities themselves are concerned about his welfare.* And just as he receives from them, he is obliged to contribute to them. So, the definition that we originally agreed on in the Committee but which is not part of the *Article is that social justice is a condition of the structures and institutions of society which reflect on the one hand the inherent dignity and inalienable rights of the person, and the obligation of the community to use the material wealth and political power at its disposal for the welfare of all its members, especially the poor and the weak; and on the other hand, the individual's obligation to the community and to the welfare of all its members.*[206]

The view that persons are as much individuals as they are members of communities implies that the State recognizes the importance of developing and protecting these communities to pursue the "full development" of persons and their dignity. Thus, laws that focus on the dignity of groups, *i.e.* those that recognize sector-specific issues, are not only compatible with this framework of dignity, but also, and more importantly, is mandated by the Constitution itself.

1. Laws Recognizing the Dignity of Groups and Sectors

In fact, before the enactment of the Safe Spaces Act, Congress had already enacted numerous laws that provide special attention to certain groups and sectors. The rationale of these laws is not to accord such groups a separate "group-based dignity." Instead, the rationale is the correction of group-based inequities. In the words of Chief Justice Puno, these laws are "ameliorative" measures that seek to "improve the lot of the disadvantaged."[207] In other words, the object of these laws is to eliminate the social structures and barriers that prevent the marginalized and disadvantaged from fulfilling their constitutional right to dignity. Set in the context of existing inequalities and inequities, these ameliorative measures are important, if not necessary, in the State's fulfillment of these constitutional mandates.

In the case of women, for example, Congress has acknowledged its mandate to reduce inequality between women and men and protect women

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[206] II RECORD CONST. COMM'N 620 (Aug. 2, 1986). (Emphasis supplied.)

[207] *See* Garcia v. Drilon, G.R. No. 179267, 699 SCRA 352 (2013) (Abad, *J.*, *concurring*), *citing* REYNATO PUNO, EQUAL DIGNITY AND RESPECT: THE SUBSTANCE OF EQUAL PROTECTION AND SOCIAL JUSTICE (2012).

from gender-specific barriers to their individual dignity, by passing numerous laws to achieve this end. The most comprehensive of these laws is R.A. No. 9710, otherwise known as the Magna Carta of Women ("MCW"). In pursuance to the Philippines' ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and in recognition of the State's mandate to ensure the fundamental and substantive equality between women and men, Congress passed the MCW in 2008, with the goal of implementing policies, programs, and mechanisms that abolish "unequal structures and practices that perpetuate discrimination and inequality."[208] Other laws on women's human rights include R.A. No. 9262 (Anti-Violence against Women and their Children of 2004 or the "Anti-VAWC law"), R.A. No. 7877 (Anti-Sexual Harassment Act of 1995 or the "ASH law"), and R.A. No. 6955 (Mail-Order Bride Act of 1990). All of these laws pertain to the dignity of women in specific domains and contexts, seeking to address the issues that threaten their dignity therein.

2. Dignity in the Safe Spaces Act

By penalizing acts of gender-based harassment, the Safe Spaces Act addresses numerous aspects of dignity in public spaces, such as emotional and physical well-being and the mere guarantee to be seen and treated as equal. As explained in an earlier section, the Safe Spaces Act was a response to the inadequacy of existing laws and the continuing threat to the dignity and self-actualization of persons in public spaces, especially women and LGBT persons. Representative Rocamora, one of the principal authors of House Bill No. 8974, believes that the law would foster "a culture of respect for women and LGBT people."[209] He adds that "the core of this bill is the recognition of everyone's dignity and that no one should be subjected to unwanted overtures or get called demeaning names."[210] Similarly, Senator Hontiveros described harassment's negative effects on its victims, noting that it "hampers freedom of movement," "reduces the ability to participate in school, work and public life, and access to essential services and their enjoyment of cultural and recreational opportunities," and "negatively impacts their health and well-being."[211]

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[208] Rep. Act No. 9710 (2008), § 2. Magna Carta of Women.

[209] Charissa Luci-Atienza, *Anti-'bastos' act authors urge Duterte to sign it into law*, MANILA BULLETIN, Feb. 7, 2019, *available at* https://news.mb.com.ph/2019/02/07/anti-bastos-act-authors-urge-duterte-to-sign-it-into-law/.

[210] *Id.*

[211] S. No. 1326, 17th Cong., 1st Sess., Exploratory Note (2017). Safe Streets and Public Spaces Act of 2017.

The law reflects this intent, stating in its Declaration of Principles, that it derives its purpose from the State's policy "to value the dignity of every human person and guarantee full respect for human rights. It is likewise the policy of the state to recognize the role of women in nation-building and ensure the fundamental equality before the law of women and men."[212] Understood in this sense, the regulation of gender-based hate speech protects not only individual interest, but also, an individual's dignity as a member of a community, group, or sector. As Jeremy Waldron put it, hate-speech laws address the harm inflicted against an individual's "basic entitlement to be regarded as a member of society in good standing."[213] Persons who experienced hate speech report varying manifestations of harm—from feeling insulted, upset, and angry,[214] to being silenced and withdrawing from social participation,[215] to restricting their ability to identify with their community and, as a result, excluding them even further.[216] As displayed in the Safe Spaces Act and other laws regarding women's human rights, it is not enough to uphold measures addressing individual dignity if sector-specific threats, such as gender-based harassment, continue to exist.

VI. THE INTERPLAY OF THE SOCIAL JUSTICE PROVISIONS AND THE BILL OF RIGHTS IN THE 1987 CONSTITUTION

The previous section lays down the argument for balancing free speech and the dignity of communities and groups. By introducing the constitutional mandate to uphold and enhance dignity, and by arguing that this concept of dignity contemplates the recognition of sector-specific issues, it puts forward the argument that dignity is indeed a "social value" that may be used to "counterbalance" the exercise of free speech.

This section further discusses the primacy of dignity in the context of the Constitution's adoption of the Social Justice provisions. On the matter of dignity and human rights, it features at least two radical departures from its previous iterations. Firstly, equality in the 1987 Constitution has surpassed the strict and formal conception espoused in previous Constitutions. For Commissioner Ponciano L. Bennagen, the addition of Article XIII on Social Justice and Human Rights is an attempt to develop "a Filipino style theory of the State," overcoming the classical, mostly American conception of the State

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[212] Safe Spaces Act, § 2.

[213] Waldron, *supra* note 179.

[214] Katharine Gelber & Luke McNamara, Evidencing the harms of hate speech, 22 SOC. IDENTITIES 1, 10–12 (2015).

[215] Gelber & McNamara, *supra* note 214, at 11–12.

[216] Gelber & McNamara, *supra* note 214, at 11–12.

that values formal equality.[217] When asked by Commissioner Francisco A. Rodrigo about his conception of "equality" in the context of a Constitution that embraces social justice, Father Joaquin G. Bernas, S.J. responded by saying that

> FR. BERNAS: At present, in the literature on this subject, the word "equality" is used but it is not meant to be a mathematical equality. *What is meant when there is an appeal to equality is that everyone should have at least the minimum requirement to live with dignity.* It is not absolute equality, because even if were to divide the world today into equal parts so that each one would get absolutely the same share, within a short period we would be unequal again because of unequality [sic] of talents, and so forth. *What is important is that in a society, everyone should have the opportunity to live with dignity.* In other words, democracy should include a guarantee of freedom from hunger, freedom from want and not just the consecrated liberties that we usually talk of – freedom of the press, freedom of religion, and so forth.[218]

This recognition of a "minimum requirement to live with dignity" is illustrated in Article XIII on Social Justice and Human Rights. While the right to dignity and the concept of social justice has been recognized in both the 1935[219] and the 1973[220] Constitutions, the concept has been radically developed in the 1987 Constitution which devoted an entire Article elaborating the concept and, in turn, endowing special recognition and protection to the disadvantaged and marginalized. This creates a Constitution that, in the words of Commissioner Felicitas S. Aquino, "assumes a very peculiar bias [. . .] in favor of the underprivileged."[221] Father Bernas further explains this "bias" and its implications on legal interpretation:

> As already explained under Article II, Section 10, social justice in the Constitution is principally the embodiment of the principle that those who have less in life should have more in law. *It commands a legal bias in favor of those who are underprivileged.* The import of social justice that has developed in various decisions is that when the law is clear and valid, it simply must be applied; *but when the law can be*

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[217] II RECORD CONST. COMM'N 661 (Aug. 4, 1986).

[218] I RECORD CONST. COMM'N 41 (June 4, 1986). (Emphasis supplied.)

[219] CONST. (1935) art. II, § 5. The promotion of social justice to insure the well-being and economic security of all the people should be the concern of the State.

[220] CONST. (1973) art. II, § 6. The State shall promote social justice to ensure the dignity, welfare, and security of all the people. Towards this end, the State shall regulate the acquisition, ownership, use, enjoyment, and disposition of private property, and equitably diffuse property ownership and profits.

[221] II RECORD CONST. COMM'N 653 (Aug. 4, 1986).

> *interpreted in more ways than one, an interpretation that favors the underprivileged must be favored.*[222]

While not self-executory,[223] the Social Justice Provisions may shape the application of other provisions in the Constitution, including the Bill of Rights. During the deliberations, Commissioner Regalado E. Maambong addressed Father Bernas to clarify the role of the other provisions, such as the Social Justice provisions, in interpreting certain rights accorded in the Constitution. Father Bernas agreed with Commissioner Maambong that the Bill of Rights does not "limit[] the people to the rights" enumerated therein.[224] Instead, other provisions in the Constitution may still be consulted and, despite not being enumerated in the Bill of Rights, should not be construed as "any less of a right."[225]

Father Bernas made a similar point in explaining the interplay of the Social Justice provisions and the Bill of Rights in defining "just compensation" in agrarian reform. He noted that there is no "incompatibility" between these provisions, as the former only seeks to "fine-tune the meaning of just compensation" used in the latter.[226] The Court has held on numerous occasions that Article XIII, particularly its provisions related to housing and land reform, may modify the government's exercise of eminent domain, *e.g.* on just compensation[227] and the definition of public use.[228] Other provisions in the Constitution, such as Article XIII, may be consulted in understanding the nature of certain rights. After all, as Associate Justice Marvic Mario Victor F. Leonen noted in his dissenting opinion in *Zabal v. Duterte*, the Social Justice provisions are "not merely sardonic normative ornaments" and, as such,

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[222] JOAQUIN BERNAS., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES (2009), 1237. (Emphasis supplied.)

[223] *See* Serrano v. Gallant Mar. Serv., Inc., G.R. No, 167614, 582 SCRA 254 (2009).

[224] I RECORD CONST. COMM'N 707 (July 17, 1986).

[225] *Id.*

[226] II RECORD CONST. COMM'N 647 (Aug. 4, 1986).

[227] *See* Land Bank v. Domingo, G.R. No. 168533, 543 SCRA 627 (2008). "The deliberations of the 1986 Constitutional Commission on this subject reveal that just compensation should not do violence to the Bill of Rights but should also not make an insurmountable obstacle to a successful agrarian reform. Hence, the landowners' right to just compensation should be balanced with agrarian reform." *See also* Land Bank v. Honeycomb Farms, G.R. No. 169903, 667 SCRA 255 (2012). In this case, the Court held Land Bank may apply its mandatory formula for determining an initial estimate of just compensation, as it is the agency's mandate under the Comprehensive Agrarian Reform Law. However, the Court also clarified that private landowners are still entitled to just compensation, in its fullest sense, whether or not the taking is for agrarian reform.

[228] *See* Sumulong v. Guerrero, G.R. No. L-48685, 154 SCRA 461 (1987), *citing* CONST. art. XIII, § 9, the Court reiterated that public housing constitutes "public use," as contemplated in the exercise of eminent domain.

"[t]he Constitution mandates more sensitivity towards several classes and identities found within our society."[229]

Legal scholars have interpreted and written on the potential application of the Social Justice provisions in particular legal contexts—for instance, on social policies (such as the Social Reform Agenda),[230] hate crime,[231] property,[232] agrarian reform,[233] indigenous peoples,[234] and the Expanded Equal Protection Clause.[235] This Note seeks to apply these lessons on the primacy of the dignity of marginalized and disadvantaged sectors and argue that their right to dignity may be used to "counter balance" and outweigh the absolute protection of injurious, degrading, and low-value speech.

This section discusses how the Court has interpreted and applied the interaction between the Bill of Rights and the Article on Social Justice—in particular, in the doctrine of Expanded Equal Protection Clause found in the cases of *Central Bank*, *Serrano*, *Garcia*, and *Ang Ladlad*.

A. The Expanded Equal Protection Clause

The doctrine of Expanded Equal Protection is one of the most salient illustrations of the interplay between Article III and Article XIII. The concept of Expanded Equal Protection was first introduced in the case of *Central Bank (now Bangko Sentral ng Pilipinas) Employees Association v. Bangko Sentral ng Pilipinas*,[236] where the Court adopted a "stricter" level of scrutiny against a law that created substantial distinctions on the basis of rank and economic class. In this case, the rank-and-file employees[237] of the Bangko Sentral ng Pilipinas ("BSP") assailed the constitutionality of R.A. No. 7653 (or the New Central Bank Act), which exempted employees whose salary grade is Salary Grade 20 or higher from the Salary Standardization Law ("SSL"). According to the

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[229] Zabal v. Duterte, G.R. No. 238467 (2019) (Leonen, *J.*, *dissenting*).

[230] Alberto Muyot, *Social Justice and the 1987 Constitution: Aiming for a Utopia,* 70 PHIL L.J. 310 (1996).

[231] Atadero, *supra* note 16, at 794–95 (2014).

[232] Raul Pangalangan, *Property as a "Bundle of Rights": Redistributive Takings and the Social Justice Clause,* 71 PHIL L.J. 141, 162–67 (1996).

[233] *Id. See also* Christian Monsod, *Social Justice*, 59 ATENEO L.J. 691, 713–21 (2014).

[234] Monsod, *supra* note 233.

[235] REYNATO PUNO, EQUAL DIGNITY AND RESPECT: THE SUBSTANCE OF EQUAL PROTECTION AND SOCIAL JUSTICE (2012).

[236] Central Bank Emps. Ass'n., Inc. v. Bangko Sentral ng Pilipinas, G.R. No. 148208, 446 SCRA 299 (2004).

[237] The term "rank-and-file employees," in this case, includes employees whose Salary Grade is below Salary Grade 20.

rank-and-file employees, the assailed law created an undue and unreasonable classification between them and other BSP employees, as the supposed objective of the law was to "establish professionalism and excellence at all levels." Further, the law also created a distinction between the rank-and-file employees of BSP and those of other Government Financial Institutions ("GFIs"), the latter being exempted from the SSL as well. The Court ruled in favor of the rank-and-file employees, explaining that the subsequent enactment of SSL exemptions of other GFIs created an undue classification between them and other rank-and-file employees.

What makes this case even more significant, however, is its discussion of how Article XIII of the Constitution affects the application of the Equal Protection Clause. Noting that the rank-and-file employees "represent the politically powerless" and were accorded special protections in the Constitution, a stricter level of scrutiny must be adopted. In the words of the *ponente* of this case, then Associate Justice and later Chief Justice Puno, "rational basis should not suffice" in cases "where the classification violates a fundamental right, or prejudices persons accorded special protection by the Constitution." The Chief Justice explains that the constitutional obligation to protect labor is "incumbent not only on the legislative and executive branches but also on the judiciary." In this case, the Court applied the Equal Protection Clause as "a major cutting edge to eliminate every conceivable irrational discrimination in our society. Indeed, the social justice imperatives in the Constitution, coupled with the special status and protection afforded to labor, compel this approach."[238]

As later noted by Chief Justice Puno himself,[239] the case of *Central Bank Employees* marked a significant departure from the American jurisprudence on equal protection. The Expanded Equal Protection Clause derives its "doctrinal support" from the 1987 Constitution's clear and unequivocal commitment to promote social justice. This commitment to social justice is what differentiates the Philippine Constitution from its predecessors and its American counterparts. He explains that

> [w]e should not place undue and fawning reliance upon [American and English jurisprudence] and regard them as indispensable mental crutches without which we cannot come to our own decisions through the employment of our own endowments. *We live in a different ambience and must decide our own problems in the light of our own interests and needs, and of our qualities and even idiosyncrasies as a*

[238] Central Bank Emps. Ass'n., Inc. v. Bangko Sentral ng Pilipinas, G.R. No. 148208, 446 SCRA 299 (2004).

[239] Puno, *supra* note 235.

> *people, and always with our own concept of law and justice.* Our laws must be construed in accordance with the intention of our own lawmakers and such intent may be deduced from the language of each law and the context of other local legislation related thereto. *More importantly, they must be construed to serve our own public interest which is the be-all and the end-all of all our laws. And it need not be stressed that our public interest is distinct and different from others.*[240]

In his 2012 book, *Equal Dignity and Respect: The Substance of Equal Protection and Social Justice*, Chief Justice Puno named this concept the "Expanded Equal Protection Clause" and thoroughly traces its historical and theoretical development.[241] Comparing the Court's ruling in *Central Bank Employees* and its previous applications of equal protection, he noted that

> [i]n the first decade of the twenty-first century, the Court predominantly continued to employ the anti-classification approach through reiteration of the reasonable classification test or *Vera's* four-fold test [...] There were, however, two significant developments brought about by the landmark case of *Central Bank (now Bangko Sentral ng Pilipinas) Employees Association v. Bangko Sentral ng Pilipinas. First, the Court, taking an anti-subordination stance, acknowledged indirect discrimination or discrimination not by intent, but through the effects of legislation on a disadvantaged group specially protected by the 1987 Constitution. Second, it interpreted the equal protection guarantees as a guarantee of "asymmetrical equality" tilted in favor of the socially disadvantaged when it characterized labor as a specially protected disadvantaged group whose classification – if burdensome to the group – triggered the Court's use of stricter judicial scrutiny.*[242]

Chief Justice Puno's discussion of the Expanded Equal Protection heavily references the peculiarities of the 1987 Constitution, as opposed to previous constitutions. It is the inclusion of social justice through Article XIII, and the delegates' departure from a formal and mathematical conception of equality, that empowered the Court in "expanding" the application of the Equal Protection Clause. The Expanded Equal Protection Clause was similarly applied in the case of *Serrano v. Gallant Maritime Services, Inc.*,[243] wherein an Overseas Filipino Worker ("OFW") assailed the constitutionality of R.A. No. 8042 (or the Migrant Workers Act of 1995), for creating undue classifications among OFWs and between OFWs and local workers. Agreeing

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[240] Central Bank Emps. Ass'n., Inc. v. Bangko Sentral ng Pilipinas, G.R. No. 148208, 446 SCRA 299 (2004). (Emphasis supplied.)

[241] Puno, *supra* note 235.

[242] *Id.* at 317–318. (Emphasis supplied, citations omitted.)

[243] Serrano v. Gallant Mar. Serv., Inc., G.R. No, 167614, 582 SCRA 254 (2009).

with the petitioner on this issue, the Court struck down Section 10, paragraph 5 of R.A. No. 8042 as unconstitutional and, in turn, awarded the petitioner his salaries for the entire unexpired portion of his contract of employment. In arriving at this ruling, the Court reiterated the doctrine established in *Central Bank Employees:* Section 3 of Article XIII "clothes [labor] with the status of a sector for whom the Constitution urges protection through executive and legislative action and judicial recognition."[244]

However, at the same time, the Court, through Associate Justice Alicia Austria-Martinez, sought to clarify the nature and extent of applying Article XIII provisions *vis-a-vis* Article III. Citing the case of *Agabon v. National Labor Relations Commission*,[245] the Court noted that

> [t]hus, the constitutional mandates of protection to labor and security of tenure may be deemed as self-executing in the sense that these are automatically acknowledged and observed without need for any enabling legislation. *However, to declare that the constitutional provisions are enough to guarantee the full exercise of the rights embodied therein, and the realization of ideals therein expressed, would be impractical, if not unrealistic.* The espousal of such view presents the dangerous tendency of being overbroad and exaggerated. *The guarantees of "full protection to labor" and "security of tenure", when examined in isolation, are facially unqualified, and the broadest interpretation possible suggests a blanket shield in favor of labor against any form of removal regardless of circumstance.* This interpretation implies an unimpeachable right to continued employment-a utopian notion, doubtless-but still hardly within the contemplation of the framers. Subsequent legislation is still needed to define the parameters of these guaranteed rights to ensure the protection and promotion, not only the rights of the labor sector, but of the employers' as well. Without specific and pertinent legislation, judicial bodies will be at a loss, formulating their own conclusion to approximate at least the aims of the Constitution.
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> *Ultimately, therefore, Section 3 of Article XIII cannot, on its own, be a source of a positive enforceable right to stave off the dismissal of an employee for just cause owing to the failure to serve proper notice or hearing. As manifested by several framers of the 1987 Constitution, the provisions on social justice require legislative enactments for their enforceability.*[246]

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[244] *Id.*

[245] Agabon v. NLRC, G.R. No. 158693, 442 SCRA 573 (2004).

[246] Serrano v. Gallant Mar. Serv., Inc., G.R. No. 167614, 582 SCRA 254, 300–301 (2009). (Emphasis supplied.)

Together with *Central Bank Employees, Serrano* illustrates how and to what extent Article XIII of the 1987 Constitution shapes the application of the Equal Protection Clause. By defining constitutionally-protected sectors, Article XIII mandates the State (which includes the Judiciary) to effectuate the kind of equality contemplated in the 1987 Constitution. It is worth noting, however, that these two cases involved only the protection of labor. As of the time of writing, the Court has yet to apply the Expanded Equal Protection Clause to other sectors such as women and the LGBT. However, several Associate Justices contemplated such potential application in their Separate Opinions.

One of these cases is *Garcia v. Drilon*,[247] a case which involved a constitutional challenge to R.A. No. 9262, otherwise known as the Anti-Violence against Women and Their Children Act, filed by a husband who was charged with violating the said law. According to him, R.A. No. 9262 is an "anti-male," "husband-bashing," and "hate-men" law, for dismissing male victims of spousal violence and for allegedly protecting female perpetrators of violence. The majority opinion, penned by Associate Justice Estela Perlas-Bernabe, dismissed the petition by explaining that R.A. No. 9262 satisfied the four-fold test of a valid classification, and, thus, did not violate the Equal Protection Clause.[248] The law indeed rested on substantial distinctions, as the relationship between men and women remain unequal, and, at the same time, women are still more likely to be victims of violence. Further, Associate Justice Perlas-Bernabe further clarified that the law does not single out men and husbands as perpetrators, citing the gender-neutral wording of the law.[249]

As pointed out by then Associate Justice and later Chief Justice Teresita L. de Castro,[250] the majority opinion adopted the rational-basis test in applying the Equal Protection Clause. Three of the four Separate Opinions focus on the issue of what level of scrutiny must be applied in cases involving sex and gender. Interestingly, these Opinions significantly differ in their recommendations.

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[247] Garcia v. Drilon, G.R. No. 179267, 699 SCRA 352 (2013).

[248] *Id.* citing Victoriano v. Elizalde Workers' Union, G.R. No. 24246, 59 SCRA 54 (1974). The majority opinion states "[a]ll that is required of a valid classification is that it be reasonable, which means that the classification should be based on substantial distinctions which make for real differences; that it must be germane to the purpose of the law; that it must not be limited to existing conditions only; and that it must apply equally to each member of the class. This Court has held that the standard is satisfied if the classification or distinction is based on a reasonable foundation or rational basis and is not palpably arbitrary."

[249] *Id.*

[250] Garcia v. Drilon, G.R. No. 179267, 699 SCRA 352 (2013). (De Castro, *J., concurring*).

In his Separate Concurring Opinion, Associate Justice Arturo D. Brion concurred with the majority opinion's application of the rational-basis test. He makes two distinct arguments to justify this choice. First, he notes the inconsistency that would be brought about by the application of the Expanded Equal Protection Clause in this case:

> The Constitution itself has made special mention of women and their role in society (Article II) and the assistance and protection that must be given to children irrespective of sex. *It appears highly inconsistent to me under this situation if the Court would impose a strict level of scrutiny on government – the primary implementor of constitutional policies – and lay on it the burden of establishing the validity of an Act directly addressing violence against women and children.*[251]

According to him, the application of the strict level of scrutiny brings about certain "risks," including the "possibility that our social legislations will always be subject to heightened scrutiny."[252] The remarks of Associate Justice Brion brings to mind that the Expanded Equal Protection Clause may similarly apply to laws that *favor* constitutionally-protected sectors. As already noted, the Expanded Equal Protection Clause has only been applied twice in the Court's majority opinion, both of which sought to challenge a law that discriminates such sectors by *disadvantaging* them. The question now is whether or not such strict level of scrutiny still applies in cases where the government-sanctioned discrimination is in favor of the marginalized and the disadvantaged.

Associate Justice Brion's second point rests on the premise that, in creating the law, Congress did not intend "to classify women and children as a group against men."[253] Noting that the intent of the law is "to harmonize family relations and protect the family as a basic social institution,"[254] he underscored the risk of granting an "uneven equality" among members of the family unit:

> The family is a unit, in fact a very basic one, and it cannot operate on an uneven standard where measures beyond what is necessary are extended to women and children as against the man – the head of the family and the family provider. The use of an expanded equal protection clause only stresses the concept of an uneven equality

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[251] *Id.* at 473–74. (Brion, *J.*, *concurring*). (Emphasis supplied.)
[252] *Id.*
[253] *Id.*
[254] *Id.*

> that cannot long stand in a unit living at close quarters in a situation of mutual dependency on one another. *The reasonableness test, on the other hand, has been consistently applied to allow the courts to uphold State action as long as the action is found to be germane to the purpose of the law, in this case to support the unity and development of the family. If we are to deviate from or to modify this established standard of scrutiny, we must do so carefully and for strong justifiable reasons.*[255]

Concurring with much of the majority opinion, Chief Justice de Castro notably disagreed with regard to the level of scrutiny to be applied in the present case. Citing Chief Justice Puno's concurring opinion in *Ang Ladlad LGBT Partylist v. Commission on Elections*,[256] she argued that intermediate scrutiny must apply in cases involving classifications made on the basis of gender and illegitimacy.[257] The intermediate level of scrutiny requires that the assailed governmental act "serve an important governmental objective" and that it "be substantially related to the achievement of those objectives." Applying this to the facts of the case, Chief Justice de Castro explained that

> Republic Act No. 9262, by affording special and exclusive protection to women and children, who are vulnerable victims of domestic violence, undoubtedly serves the important governmental objectives of protecting human rights, insuring gender equality, and empowering women. The gender-based classification and the special remedies prescribed by said law in favor of women and children are substantially related, in fact essentially necessary, to achieve such objectives. Hence, said Act survives the intermediate review or middle-tier judicial scrutiny. The gender-based classification therein is therefore not violative of the equal protection clause embodied in the 1987 Constitution.[258]

Arguing for the application of the Expanded Equal Protection Clause in this case, Associate Justice Roberto A. Abad "hinges" his concurring opinion on Chief Justice Puno's elaboration of the concept in his book *Equal Dignity and Respect*.[259] Quoting Chief Justice Puno, Associate Justice Abad noted that the Expanded Equal Protection Clause "only applies to the government's ameliorative action or discriminatory actions intended to improve the lot of the disadvantaged."[260]

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[255] *Id.* (Emphasis supplied.)

[256] Ang Ladlad LGBT Partylist v. Comm'n on Elections, G.R. No. 190582, 618 SCRA 32 (2010) (Puno, *J, dissenting*).

[257] Garcia v. Drilon, G.R. No. 179267, 699 SCRA 352 (2013) (De Castro, *J., concurring*).

[258] *Id.*

[259] *Id.* at 362 (De Castro, *J., concurring*).

[260] *Id.* at 543.

This answers the questions raised in Associate Justice Brion's Separate Opinion. In particular, does the Expanded Equal Protection Clause also apply in cases where the government discriminates *in favor* of constitutionally-protected sectors? In theorizing the mechanics of the Expanded Equal Protection Clause, Chief Justice Puno explains that:

> [s]hould the court find the assailed action ameliorative, it is deemed constitutional and a full discrimination analysis in stage one of the adjudication guidelines is no longer necessary. However, if the government fails to establish the ameliorative character of the assailed action, the court should conduct a full stage one analysis to determine discrimination, or proceed under the traditional Equal Protection Clause if discrimination is not alleged.[261]

Applying this in the present case, Associate Justice Abad points out that R.A. No. 9262 is "not a form of reverse discrimination" but rather, an ameliorative action, in pursuance of the State's mandate to uphold the fundamental equality of women and men before the law and to reduce the inequalities and inequities among all people. In sum, Associate Justice Abad's Separate Opinion answers, to some extent, a few of the questions raised by Associate Justice Brion. In cases where an assailed act infringes upon the rights of a constitutionally-protected sector, strict scrutiny shall be applied, as in *Central Bank Employees* and *Serrano*. However, in cases of ameliorative measures, *i.e.* those that remedy existing inequities in favor of disadvantaged sectors, such measures shall be presumed constitutional.

From this, an important question arises: what sectors can be considered as "disadvantaged" or "constitutionally-protected"? Certainly, the sectors that are included in Article XIII can be considered to fall under this category. Labor,[262] farmers and farmworkers,[263] fisherfolk,[264] the urban and rural poor,[265] and women[266] are referred to in several provisions in Article XIII. As stated, the Expanded Equal Protection Clause has not been applied in any of these sectors, except labor; but the Court is certainly not precluded from doing so.

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[261] *Id.*
[262] CONST. art. XIII, § 3.
[263] CONST. art. XIII, § 5.
[264] CONST. art. XIII, § 7.
[265] CONST. art. XIII, § 10.
[266] CONST. art. XIII, § 14.

Further, in Chief Justice Puno's dissenting opinion in *Ang Ladlad*,[267] he suggests that this list is not exhaustive. He reviewed the factors that may be used to determine whether a class is protected or not. Citing U.S. cases, he explained that the U.S. Supreme Court has considered the following factors:

> (1) The history of invidious discrimination against the class burdened by the legislation;
> (2) Whether the characteristics that distinguish the class indicate a typical class member's ability to contribute to society;
> (3) Whether the distinguishing characteristic is "immutable" or beyond the class member's control; and
> (4) The political power of the subject class[268]

Ang Ladlad is a case that concerns the application of a partylist, which is mostly composed of persons identifying as LGBT, to be accredited by the Commission on Elections. The latter dismissed the application, stating that the partylist espoused doctrine constituting "immorality which offends religious beliefs."[269] While the majority opinion dismissed the petition on other grounds,[270] Chief Justice Puno opined that the LGBT sector is a "class in themselves for the purposes of the equal protection clause."[271] He pointed out that LGBT persons have "suffered a history of purposeful unequal treatment" brought about by an attribute they cannot change. According to him, this, should have triggered at least an intermediate level of scrutiny, as it concerned a classification on the basis of gender.[272] Chief Justice Puno's opinion in *Ang Ladlad* suggests that it is not only the provisions of Article XIII that define constitutional protection. One may argue that the sectors enumerated in the Constitution are not exhaustive and are merely initial.

While not self-executory, Article XIII can, and should, be consulted in reading into the rights accorded in other parts of the Constitution. Mandated to curb inequalities and inequities among the sectors and the communities in Philippine society, the State cannot ignore this goal, even if it concerns another right recognized by the Constitution. As discussed, dignity, especially in the context of Social Justice, is located in a preferred position in

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[267] Ang Ladlad LGBT Partylist v. Comm'n on Elections, G.R. No. 190582, 618 SCRA 32 (2010) (Puno, *J., dissenting*).

[268] *Id.* at 96–97.

[269] Ang Ladlad LGBT Partylist v. Comm'n on Elections, G.R. No. 190582, 618 SCRA 32 (2010).

[270] *Id.*

[271] Ang Ladlad LGBT Partylist v. Comm'n on Elections, G.R. No. 190582, 618 SCRA 32 (2010) (Puno, *J., dissenting).*

[272] *Id.*

the Constitution; and is thus capable of outweighing the absolute protection of low-value speech, such as hate speech.

Apart from this, and similar to the discussion on the Expanded Equal Protection Clause, the Social Justice provisions may also inform the *type* of test that courts may employ in assessing dignity-related speech regulations. Ameliorative measures, such as the Safe Spaces Act, should enjoy a heightened presumption of constitutionality. More than the clear and present danger test, the balancing of interests test discussed in the last section captures more precisely the inherent tension between the countervailing social values of free speech and dignity in hate speech legislation.

VII. CONCLUSION

This Note has explored the concept and definition of hate speech as well as its status in both international law and foreign domestic laws. While there is no standard or universal definition of hate speech, common elements among various definitions have been identified: *i.e.* that hate speech is bias-motivated and is targeted against another individual for some characteristic that is ascribed to a protected class. While many Western nations have enacted legislation criminalizing or regulating hate speech—recognizing it as a form of unprotected speech that is outside the ambit of the freedom of expression—the United States and the Philippines are part of the few countries that have not yet done so, given the preferred status accorded to freedom of speech as a constitutional right. Given that hate speech is similar to other forms of unprotected speech (*e.g.* libel, obscenity, and fighting words), this Note has argued that hate speech legislation should pass constitutional muster.

Regulating or criminalizing hate speech may be considered as a limitation on freedom of speech. However, the authors argue that such restriction is valid in light of the peculiarities and mandates of the 1987 Constitution. The framers of the Constitution intended our Constitution to be one that would protect the dignity inherent in individuals and groups; it is a Constitution that affords special protection to the marginalized and powerless.

The enactment of legislation such as the Safe Spaces Act, which contains a provision on regulating hate speech, is a welcome phase in our history. The authors view this legislation, as well as those that are similar to it, as breathing life into the Social Justice provisions of the Constitution. As discussed extensively above, these provisions mandate the State to curb

inequalities and inequities in society. It should be emphasized that our Bill of Rights should not be read in isolation—Article XIII on Social Justice should influence how our rights are enforced and protected.

Thus, the authors forward that our courts should also consider Article XIII when deciding on the constitutionality of a piece of legislation. Case law is filled with pronouncements that the freedom of speech is a preferred right—and the authors believed that this status is rightly conferred. However, even a preferred right has limits. Justice Melencio-Herrera, in her *ponencia* in *Lagunzad v. Soto vda de Gonzalez*,[273] pronounced that "the limits of freedom of expression are reached when expression touches upon matters of essentially private concern."[274] This Note forwards that the limits of freedom of expression are reached when expression and speech would touch upon matters of human dignity.

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[273] G.R. No. 32066, 92 SCRA 476 (1979).
[274] *Id.* at 489.

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