G.R. No. 184389 – Allan Madrilejos, Allan Hernandez, Glenda Gil, and Lisa Gokongwei-Cheng, *Petitioners* v. Lourdes Gatdula, Agnes Lopez, Hilarion Buban, and the Office of the City Prosecutor of Manila, *Respondents*.

Promulgated:

September 24, 2019

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DISSENTING OPINION

PERLAS-BERNABE, *J.*:

I dissent. As will be discussed below, the present petition assailing the constitutionality of Manila Ordinance No. 7780 or the "Anti-Obscenity and Pornography [O]rdinance of the City of Manila"[1] (Ordinance No. 7780) should not have been dismissed on the ground of mootness. Instead, the case should have been resolved by the Court on the merits and thereupon, decree the Ordinance's unconstitutionality based on the doctrine of overbreadth.

As background, the essential facts of this case are as follows: petitioners Allan Madrilejos, Allan Hernandez, Glenda Gil, and Lisa Gokongwei-Cheng (petitioners) were the respective editor-in-chief, managing editor, circulation manager, and president of Summit Publications, which publishes the FHM Magazine.[2] In 2008, they were charged before the City Prosecutor's Office of Manila for violating[3] Ordinance No. 7780, which proscribes the "printing, publishing, distribution, circulation, sale, and exhibition" as well as the "production, public showing[,] and viewing" of **obscene and pornographic acts or materials**.[4] The case was docketed as I.S. No. 08G-12234.

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1 Entitled "AN ORDINANCE PROHIBITING AND PENALIZING THE PRINTING, PUBLICATION, SALE, DISTRIBUTION AND EXHIBITION OF OBSCENE AND PORNOGRAPHIC ACTS AND MATERIALS AND THE PRODUCTION, RENTAL, PUBLIC SHOWING AND VIEWING OF INDECENT AND IMMORAL MOVIES, TELEVISION SHOWS, MUSIC RECORDS, VIDEO AND VHS TAPES, LASER DISCS, THEATRICAL OR STAGE AND OTHER LIVE PERFORMANCES, EXCEPT THOSE REVIEWED BY THE MOVIE, TELEVISION REVIEW AND CLASSIFICATION BOARD (MTRCB)," enacted by the City Council of Manila on January 28, 1993 and approved by the City Mayor on February 19, 1993.

2 See *rollo*, pp. 4-5.

3 They were likewise charged with violations of Articles 200 (Grave scandal) and 201, Paragraph 2 (a) (Immoral doctrines, obscene publications, and exhibitions and indecent shows) of the Revised Penal Code (see id. at 6).

4 See Section 3 of Ordinance No. 7780.
The Ordinance defines obscene and pornography as follows:
Section 2. Definition of Terms – As used in this ordinance, the terms:
A. Obscene shall refer to any material or act that is indecent, erotic, lewd or offensive or contrary to morals, good customs, or religious beliefs, principles or doctrines, or to any materials or act

Soon after, petitioners filed the instant petition for prohibition[5] against the prosecutors, herein respondents Lourdes Gatdula, Agnes Lopez, and Hilarion Buban of the City Prosecutor's Office of Manila (respondents), assailing the constitutionality of Ordinance No. 7780 for being "**patently offensive to [the] constitutional right to free speech and expression**" and for violating "privacy rights," among others.[6] They argue that the Ordinance's definitions of obscenity and pornography are unduly expansive as to disregard the guidelines prescribed in *Miller v. California*[7] (*Miller*),[8] to wit:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, x x x (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

For their part, respondents reason that the adoption of the *Miller* test, which is a common law test, "takes away the civil law aspect of criminal law." They likewise submit that since our statutes do not define what is obscene, the Ordinance's definition of obscenity could very well be the contemporary community standard under the *Miller* test.[9]

The *ponencia*, however, did not delve into the substantive arguments of the parties but instead, took cognizance of the supervening dismissal of I.S. No. 08G-12234 by virtue of the prosecutor's Resolution dated June 25, 2013,[10] which allegedly rendered moot and academic the present petition. According to the *ponencia*, "[p]etitioners' purpose in filing the present action was to stop the conduct of the preliminary investigation into their alleged violation of an unconstitutional statute – a process that concludes with an

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that tends to corrupt or deprive the human mind, or is calculated to excite impure imagination or arouse prurient interest, or is unfit to be seen or heard, or which violates the proprieties of language or behavior, regardless of the motive of the printer, publisher, seller, distributor, performer or author of such act or material, such as but not limited to:

1. Printing, showing, depicting or describing sexual acts;
2. Printing, showing, depicting or describing children in sexual acts;
3. Printing, showing, depicting or describing completely nude human bodies; and
4. Printing, showing, depicting or describing the human sexual organs or the female breasts.

B. Pornographic or pornography shall refer to such objects or subjects of photography, movies, music records, video and VHS tapes, laser discs, billboards, television, magazines, newspapers, tabloids, comics and live shows calculated to excite or stimulate sexual drive or impure imagination, regardless of motive of the author thereof, such as, but not limited to the following:

1. Performing live sexual acts in whatever form;
2. Those other than live performances showing, depicting or describing sexual acts;
3. Those showing, depicting or describing children in [sexual] acts;
4. Those showing, depicting or describing completely nude human body, or showing, depicting or describing the human sexual organs or the female breasts.

5 With Prayer for the Issuance of a Preliminary Injunction &/or Temporary Restraining Order; *rollo*, pp. 3-35.

6 See *rollo*, p. 8; emphasis supplied.

7 413 U.S. 15 (1973).

8 *Rollo*, pp. 15 and 18.

9 See id. at 364.

10 See id. at 438-439. See also *ponencia*, pp. 5-6.

Order whether or not to indict petitioners."[11] In any case, the *ponencia* observes that "[petitioners] have still failed to establish a cause of action to warrant a ruling in their favor[,]"[12] holding that they cannot mount a facial challenge against the Ordinance on the ground of overbreadth because "[t]he present petition does not involve a free speech case [as] it stemmed, rather, from an obscenity prosecution."[13]

Respectfully, I disagree.

First and foremost, it is my humble opinion that this case is not mooted by the dismissal of I.S. No. 08G-12234 because **the issue regarding the constitutionality of Ordinance No. 7780 is separate and distinct from the matter of petitioners' criminal prosecution**. From the records, it is clear that petitioners not only questioned the legality of the criminal prosecution against them but also the validity of Ordinance No. 7780 itself, invoking their constitutional right to free speech and expression. Verily, the criminal prosecution could have very well been terminated but the alleged curtailment of their free speech rights – and even so, other persons similarly situated as them – still looms in the horizon because Ordinance No. 7780 remains valid and subsisting. Case law states that:

> A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, **so that an adjudication of the case or a declaration on the issue would be of no practical value or use**. In such instance, there is no actual substantial relief which a petitioner would be entitled to, and which would be negated by the dismissal of the petition. Courts generally decline jurisdiction over such case or dismiss it on the ground of mootness. This is because the judgment will not serve **any useful purpose or have any practical legal effect** because, in the nature of things, it cannot be enforced.[14] (Emphases supplied)

To my mind, there is clearly still practical legal value to resolve the constitutionality issue with respect to Ordinance No. 7780 because nothing prevents the government from once more, prosecuting similar, future forms of expression based on the said ordinance's characterization of obscenity. Even more, the subsistence of the subject ordinance has the effect of chilling otherwise protected forms of free speech because of the impending threat of them being tagged under Ordinance No. 7780 as obscene. Therefore, the constitutionality issue persists as a live controversy that should not have evaded the Court's resolution on the merits on the ground of mootness.

Furthermore, contrary to the *ponencia*'s view, I respectfully submit that the facial challenge against Ordinance No. 7780 on overbreadth grounds is

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11 See *ponencia*, p. 14.
12 See id. at 15.
13 Id.
14 *Peñafrancia Sugar Mill, Inc. v. Sugar Regulatory Administration*, 728 Phil. 535 (2014).

proper. To be sure, "[t]he overbreadth doctrine x x x decrees that 'a governmental purpose may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms[,]'[15] and hence, a statute or ordinance may be declared as unconstitutional on this score. Jurisprudence illumines that "[b]y its nature, **the overbreadth doctrine has to necessarily apply a facial type of invalidation in order to plot areas of protected speech**, inevitably almost always under situations not before the court, that are impermissibly swept by the substantially overbroad regulation. Otherwise stated, a statute cannot be properly analyzed for being substantially overbroad if the court confines itself only to facts as applied to the litigants."[16]

The *ponencia* holds that a facial challenge on overbreadth grounds is only proper to analyze protected forms of speech; hence, it is improper to examine Ordinance No. 7780's constitutionality with the said lens because it punishes "obscenity" which is not protected speech.[17]

The *ponencia*'s stance seems to gloss over the fact that what is being assailed is the ordinance's very characterization of obscenity. *The Court is asked not to examine a material which is already determined to be obscene, but rather, to evaluate whether or not the very parameters used by the ordinance to determine obscenity itself is constitutionally valid.* There is a whale of a difference between the parameters of obscenity from the obscene material itself. The former is the very issue in this case and not the latter, to which the *ponencia*'s misdirected observation on overbreadth ought to apply. If a statute or ordinance foists unreasonable parameters for obscenity, then surely it will have the effect of sweeping unnecessarily and broadly areas of free speech which would have otherwise been deemed as protected under our Constitution. Accordingly, in this case, a facial challenge which assails Ordinance No. 7780's parameters of obscenity based on the overbreadth doctrine should apply.

That being said, and under the overbreadth framework, I express my agreement with the opinion of Associate Justice Marvic M.V.F. Leonen that Ordinance No. 7780 is unconstitutional. However, I find it opportune to clarify that **Ordinance No. 7780 is regarded as constitutionally infirm not because it transgresses the *Miller* test *per se*, but because it violates substantive due process under an "overbreadth" analysis, which is one of the known methods of reviewing the constitutionality of an ordinance or a law**.

To recount, petitioners argue that the Ordinance's definitions of obscenity and pornography are unduly expansive as to disregard the

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[15] See Concurring in the Judgment Opinion of Mr. Justice Vicente V. Mendoza in *Estrada v. Sandiganbayan*, 421 Phil. 290, 430 (2001); citing *NAACP v. Alabama*, 377 U.S. 288, 307, 12 L. Ed. 2d 325, 338 [1958]; and *Shelton v. Tucker*, 364 U.S. 479, 5 L. Ed. 2d 231 (1960).

[16] *Samahan ng mga Progresibong Kabataan v. Quezon City*, G.R. No. 225442, August 8, 2017 835 SCRA 350, 400; emphasis and underscoring supplied.

[17] See *ponencia*, p. 15.

guidelines prescribed in *Miller*. In *Fernando v. Court of Appeals*,[18] the Court observed that:

> There is no perfect definition of "obscenity" but the latest word is that of *Miller v. California* which established basic guidelines, to wit: (a) whether to the average person, applying contemporary standards would find the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[19]

As indicated above, **the *Miller* test consists of three (3) parameters to determine whether or not a particular material is considered "obscene"**; in consequence, if a material is considered obscene, then it can be the subject of government regulation without infringing on the author's freedom of speech and expression. Through these three (3) parameters, the *Miller* test aims to define into demonstrable criteria what may be properly considered as "obscene" under judicial standards, and in so doing, seeks to delimit the conceptual malleability of "obscenity." Practically speaking, a person's appreciation of obscenity may be based on his or her disposition, *mores*, or values. As such, *Miller* is a jurisprudential attempt to set a uniform benchmark for such a highly-subjective term.

Since *Miller* is a test to determine what is obscene or not, its proper application is to "zero-in" on the actual material. In this regard, ***Miller* is not – strictly speaking – the test to determine the constitutionality of a particular ordinance or statute**. However, this does not mean that the *Miller* parameters are completely taken out of the equation in constitutional entreaties related to free speech issues. **Since *Miller* provides the prevailing proper standard to determine what is obscene, an obscenity regulation that fails to take into account *Miller's* three (3) parameters effectively foists an overbroad definition of obscenity and therefore, dangerously suppresses what should have been protected speech or expressions**.

Ordinance No. 7780 provides:

> Section 2. Definition of Terms. – As used in this ordinance, the terms:
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> A. Obscene shall refer to any material or act that is indecent, erotic, lewd, or offensive, or contrary to morals, good customs, or religious beliefs, principles or doctrines, or to any material or act that tends to corrupt or deprive the human mind, or is calculated to excite impure imagination or arouse prurient interest, **or** is unfit to be seen or heard, or which violates the proprieties of language or behavior, regardless of the motive of the printer, publisher, seller, distributor, performer, or author of such act or material, such as but not limited to:

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[18] 539 Phil. 407 (2006).

[19] Id. at 417.

1. Printing, showing, depicting or describing **sexual acts;**
2. Printing, showing, depicting or describing children in sexual acts;
3. Printing, showing, depicting or describing **completely nude human bodies**; and
4. Printing, showing, depicting or describing the **human sexual organs or the female breasts.**

B. Pornographic or pornography shall refer to such objects or subjects of photography, movies, music records, video and VHS tapes, laser discs, billboards, television, magazines, newspapers, tabloids, comics and live shows calculated to excite or stimulate sexual drive or impure imagination, regardless of motive of the author thereof, such as, but not limited to the following:

1. Performing live sexual acts in whatever form;
2. Those other than live performances showing, depicting or describing **sexual acts**;
3. Those showing, depicting or describing children in [sexual] acts;
4. Those showing, depicting or describing **completely nude human body**, or showing, depicting or describing the **human sexual organs or the female breasts.**

C. Materials shall refer to magazines, newspapers, tabloids, comics, writings, photographs, drawings, paintings, billboards, decals, movies, music records, video and VHS tapes, laser discs, and similar matters.

Section 3. Prohibited Acts. The printing, publishing, distribution, circulation, sale, and exhibition of obscene and pornographic acts and materials and the production, public showing and viewing of video and VHS tapes, laser discs, theatrical or stage and other live performances and private showing for public consumption whether for free or for a fee, of pornographic pictures as herein defined are hereby prohibited within the City of Manila and accordingly penalized as provided herein.

Section 4. Penalty Clause: any person violating this ordinance shall be punished as follows:

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Provided, that in case the offender is a juridical person, the President and the members of the board of directors, shall be held criminally liable; Provided, further, that in case of conviction, all pertinent permits and licenses issued by the City Government to the offender shall be confiscated in favor of the City Government for destruction; Provided, furthermore, that in case the offender is a minor and unemancipated and unable to pay the fine, his parents or guardian shall be liable to pay such fine, Provided, finally, that **this ordinance shall not apply to materials printed, distributed, exhibited, sold, filmed, rented, viewed, or produced by reason of or in connection with or in furtherance of science and scientific research and medical or medically related art, profession, and for scientific and for educational purposes**. (Emphases supplied)

Clearly, the assailed Ordinance failed to take the *Miller's* guidelines into account in defining and penalizing obscenity under the parameters set therein.

In particular, *Miller's* first guideline ("whether the average person, applying contemporary community standards would find that the work, *taken as a whole*, appeals to the prurient interest") was exceeded, considering that Ordinance No. 7780 defines as obscene the mere depiction of "sexual acts" without looking at whether the dominant theme of the work has a tendency to excite lustful thoughts. While the phrase "act calculated to excite impure imagination or arouse prurient interest" appears in the Ordinance's definition of what is obscene, it is not the sole and definitive factor on what is obscene. Notably, such phrase is qualified by the conjunction "or", which means that it is an alternative to the other four phrases contained in the passage (*i.e.,* any material or act that is **(1)** indecent, erotic, lewd, or offensive; **(2)** contrary to morals, good customs, or religious beliefs, principles or doctrines; **(3)** is unfit to be seen or heard; or **(4)** which violates the proprieties of language or behavior, regardless of the motive of the printer, publisher, seller, distributor, performer, or author of such act or material). As such, Ordinance No. 7780 is unduly expansive.

Hypothetically therefore, under the Ordinance's definition, a short section in a publication describing a sexual act would be sufficient to penalize the producer even though the effect of the work, taken as a whole, is not to excite the prurient interest. This depiction is protected expression under *Miller.* It bears noting that "sex and obscenity are not synonymous," such that the portrayal of sex, by itself, is not sufficient to deny a material of constitutional protection.[20] However, Ordinance No. 7780 attempts to criminalize such portrayal without any regard as to whether or not the dominant theme of the material "appeals to the prurient interest" as required by *Miller.*

Miller's second guideline – that is, "whether the work depicts or describes, *in a patently offensive way*, sexual conduct," was likewise ignored, since the Ordinance disallows even the mere showing of completely nude human bodies, as well as of sexual organs. As explained in *Jenkins v. Georgia*,[21] the showing of nudity alone does not render a material patently offensive or obscene based on *Miller's* standards.

Finally, *Miller's* third guideline (*i.e.*, whether the work, taken as a whole, lacks serious *literary, artistic, political*, or scientific value) was disregarded. While the Ordinance contains a *proviso* that it shall not apply to materials made or used for "science and scientific research and medical or medically related art, profession, and x x x educational purposes," this *proviso*

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[20] *Roth v. United States*, 354 US 476 (1957). See also *Sable Communications v. FCC,* 492 US 115 (1989): "Sexual expression, which is indecent but not obscene is protected by the First Amendment."

[21] 418 US 153 (1974).

does not include the full range of considerations in *Miller* such that those with serious literary, artistic, and political value are still considered obscene. It bears noting that the *proviso* exempts art only when it is medically related even though *Miller* does not contemplate such restrictive appreciation of a material's artistic value.

Accordingly, by failing to take into account the *Miller* guidelines, whether implicitly or explicitly, in its characterization of what is "obscene," the assailed Ordinance unduly sweeps towards protected forms of speech and expression in violation of Section 4,[22] Article III of the Constitution. In *Adiong v. Commission on Elections*,[23] the Court has held that "[a] statute is considered void for overbreadth when it offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulations may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[24] To be sure, the "[o]verbreadth doctrine is a principle of judicial review that a law is invalid if it punishes constitutionally protected speech or conduct along with speech or conduct that the government may limit to further a compelling government interest. **A statute that is broadly written which deters free expression can be struck down on its face because of its chilling effect even if it also prohibits acts that may legitimately be forbidden**,"[25] as in this case. Hence, Ordinance No. 7780 is void for being overbroad. Accordingly, the petition should have been granted.

ESTELA M. PERLAS-BERNABE
Associate Justice

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22 Section 4. No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.

23 G.R. No. 103956, March 31, 1992, 207 SCRA 712.

24 Id. at 719-720.

25 <https://definitions.uslegal.com/o/overbreadth-doctrine/> (last visited October 16, 2019); emphasis supplied.