

**EVALUATING PROPOSALS TO CREATE STRONGER PRIVACY PROTECTIONS  
FOR VICTIM-SURVIVORS OF HUMAN TRAFFICKING AND MIGRANT  
SMUGGLING VIS-A-VIS THE CONSTITUTIONAL RIGHT TO FREEDOM OF  
SPEECH AND EXPRESSION**

*Lorenz Fernand D. Dantes<sup>1</sup>*

### Introduction

The Philippines has a very long experience when it comes to migration, dating back to its early history.<sup>2</sup> Over time however, due to economic problems and the weakness of the domestic labor market, it has become a necessity rather than a choice for many Filipino migrants. Currently, the Philippines ranks among the top countries of origin for labor migrants coming from Asia.<sup>3</sup> It currently has more than six million emigrants, making it the country with the highest number of emigrants from the Southeast Asian region, as well as the ninth highest in the whole world.<sup>4</sup> In 2021, it continued to rank as one of the world's largest recipients of remittances, ranking among the top five globally alongside India, China, Mexico and Egypt. These remittances amounted to \$31.4 billion, representing a significant portion of the country's gross domestic product and an important source of income for recipient families.<sup>5</sup> It has become an important catalyst for the country's development, with one previous Philippine Development Plan even including among its goals the target of sending 1 million workers overseas every year.<sup>6</sup>

Given the above, it comes as no surprise that a culture of migration remains deeply ingrained and firmly established in Philippine society. Migrant work is now one of the top employment options for both skilled and unskilled Filipino laborers, with the deployment of Overseas Filipino Workers even increasing by an annual average of 9.6 percent at one point in our recent history.<sup>7</sup> It is reported that from 2000 to 2020, the Filipino migrant population grew by considerable numbers, the fifth largest growth behind only India, Syria, Venezuela and China.<sup>8</sup> Unfortunately, with the rise of migration came an increase in incidents involving human trafficking and migrant smuggling. Victims are often subjected to various transgressions, involving not only contract violations regarding pay and working conditions but also fraud and deception about the nature of work in the destination country, forced

---

<sup>1</sup> J.D., Ateneo De Manila University School of Law (2016); B.S. Legal Management, Minor in Economics, Ateneo De Manila University, (2012); Acting Director, Office of the Undersecretary for Migrant Workers' Affairs, Department of Foreign Affairs.

<sup>2</sup> Ana P. Santos, *Philippines: A History of Migration*, available at <https://pulitzercenter.org/stories/philippines-history-migration> (last accessed Jun. 2, 2022)

<sup>3</sup> Asian Development Bank, *Labor Migration in Asia*, 12 (2018) <https://www.adb.org/sites/default/files/publication/410791/adbi-labor-migration-asia.pdf>

<sup>4</sup> Migration Data Portal, *Migration data in South-eastern Asia*, available at <https://www.migrationdataportal.org/regional-data-overview/south-eastern-asia> (last accessed Jun. 2, 2022)

<sup>5</sup> Ben O. De Vera, *Cash remittances to PH hit new high of \$31.4B in 2021* available at <https://business.inquirer.net/341015/cash-remittances-to-ph-hit-new-high-of-31-4b-in-2021> (last accessed Jun. 2, 2022)

<sup>6</sup> Maruja M.B. Asis, *The Philippines: Beyond Labor Migration, Toward Development and (Possibly) Return*, available at <https://www.migrationpolicy.org/article/philippines-beyond-labor-migration-toward-development-and-possibly-return> (last accessed Jun. 2, 2022)

<sup>7</sup> Senate of the Philippines, *Overseas Filipino Workers at a Glance*, 1 (2012) <https://legacy.senate.gov.ph/publications/AG%202012-04%20-%20OFW.pdf>

<sup>8</sup> United Nations Department of Economic and Social Affairs, Population Division, *International Migration 2020 Highlights*, 17 (2020) <https://legacy.senate.gov.ph/publications/AG%202012-04%20-%20OFW.pdf>  
<https://www.un.org/en/desa/international-migration-2020-highlights>

labor, debt bondage, slavery prostitution, pornography, sexual assault and other forms manipulation, coercion and physical maltreatment.

In response, the Philippine government ramped up measures and programs to address the problem of human trafficking. Amongst its efforts *inter alia*, are the formation and strengthening of specialized inter-agency task forces tasked with investigation and prosecuting human traffickers and smugglers. It also established specialized shelters and one-stop service centers designed to assist victim-survivors of human trafficking.<sup>9</sup> For the period of 2020 to 2021 alone, these efforts resulted in the initiation of prosecution for almost four hundred (400) alleged human traffickers and the conviction of around eighty (80) more. Likewise, during this period, the Department of Foreign Affairs provided assistance to some 2,575 potential victims-survivors of human trafficking, which represents a welcome decrease in trafficking cases compared to previous numbers totaling 3,581 victim-survivors.<sup>10</sup>

The success of the Philippines in fighting human trafficking and migrant smuggling was recognized internationally, with the United States State Department granting the Philippines Tier 1 status in its Global Trafficking in Persons (TIP) back in 2016, a feat which it has subsequently maintained for six years straight as of this writing.<sup>11</sup> On its way to achieving this feat, one of the key partnerships that the government secured was with the media.<sup>12</sup> In doing so the government recognized the important role the media practitioners and investigative journalists play in combating human trafficking. By reporting and covering trafficking cases and stories of the victim-survivors, the media can educate and raise the awareness of the general public on relevant human trafficking issues, such as the *modus operandi* of trafficking syndicates and pertinent programs that provide specialized care for trafficking victim-survivors.

In crafting its reports and providing media coverage on human trafficking cases however, media practitioners must observe pertinent laws designed to protect the right to privacy of the victim-survivors of human trafficking. This includes the confidentiality provision under Section 6 of Republic Act 9208.

In its earliest iteration, Section 6 prohibited “any editor, publisher, and reporter or columnist in case of printed materials, announcer or producer in case of television and radio, producer and director of a film in case of the movie industry, or any person utilizing tri-media facilities or information technology to cause publicity of any case of trafficking in persons.”<sup>13</sup> However, this prohibition will

---

<sup>9</sup> Joyce Ann Rocamora, *PH efforts vs. human trafficking rewarded in US report*, available at <https://www.pna.gov.ph/articles/1145765> (last accessed Jun. 2, 2022)

<sup>10</sup> Department of Foreign Affairs, *Philippines Maintains Tier 1 In 2021 State Department Trafficking In Persons Report*, available at <https://dfa.gov.ph/dfa-news/dfa-releasesupdate/29192-philippines-maintains-tier-1-in-2021-state-department-trafficking-in-persons-report> (last accessed Jun. 2, 2022)

<sup>11</sup> Pilar Manuel, *PH keeps top classification in US anti-human trafficking report*, available at <https://www.cnnphilippines.com/news/2021/7/2/PH-Tier-1-2021-Trafficking-in-Persons-Report-US-State-Department.html> (last accessed Jun. 2, 2022)

<sup>12</sup> Butch M. Quejada, *LACAT, KBP magkasangga kontra human trafficking*, available at <https://www.philstar.com/bansa/2012/04/25/800068/iacat-kbp-magkasangga-kontra-human-trafficking> (last accessed Jun. 2, 2022)

<sup>13</sup> An Act To Institute Policies To Eliminate Trafficking In Persons Especially Women And Children, Establishing The Necessary Institutional Mechanisms For The Protection And Support Of Trafficked Persons, Providing Penalties For Its Violations, And For Other Purposes [Anti-Trafficking in Persons Act of 2003], Republic Act No. 9208 § 6 (2003).

only apply if the prosecution or trial is conducted behind closed-doors, thereby rendering a big gap in the privacy protections of the trafficking victim-survivors and plenty of leeway for media reporting.<sup>14</sup>

Recognizing this legal loophole, the legislature sought to strengthen the confidentiality provision when it passed Republic Act 10364. As presently worded, the provision now removed the requirement that the prosecution or trial be conducted behind closed-doors, to wit:

SEC. 7. *Confidentiality.* – At any stage of the investigation, rescue, prosecution and trial of an offense under this Act, law enforcement officers, prosecutors, judges, court personnel, social workers and medical practitioners, as well as parties to the case, shall protect the right to privacy of the trafficked person. Towards this end, law enforcement officers, prosecutors and judges to whom the complaint has been referred may, whenever necessary to ensure a fair and impartial proceeding, and after considering all circumstances for the best interest of the parties, order a closed-door investigation, prosecution or trial. The name and personal circumstances of the trafficked person or any other information tending to establish the identity of the trafficked person and his or her family shall not be disclosed to the public.

It shall be unlawful for any editor, publisher, and reporter or columnist in case of printed materials, announcer or producer in case of television and radio, producer and director of a film in case of the movie industry, or any person utilizing tri-media facilities or electronic information technology to cause publicity of the name, personal circumstances, or any information tending to establish the identity of the trafficked person except when the trafficked person in a written statement duly notarized knowingly, voluntarily and willingly waives said confidentiality.

Law enforcement officers, prosecutors, judges, court personnel, social workers and medical practitioners shall be trained on the importance of maintaining confidentiality as a means to protect the right to privacy of victims and to encourage victims to file complaints.<sup>15</sup> (Emphasis Supplied)

Although broader in its scope, the amendments introduced by Republic Act 10364 still suffer from a significant limitation. It specifies that the media is only prohibited from causing publicity to the name, personal circumstances, or any information tending to establish the identity of the trafficked person. This limitation attempts to balance the freedom of expression of the media practitioners and the right to privacy of the trafficking victim-survivors. Nonetheless, throughout the world, it has been recognized that merely hiding the name and the identity of the trafficking victim-survivors is usually not enough to safeguard the privacy of the victim-survivors. Sensationalism in the media, including those involving investigative journalism and public affairs programs and commentaries discussing human trafficking, can further traumatize victim-survivors of human trafficking and migrant smuggling.<sup>16</sup>

In other words, mere anonymity of the name and identity of the victim-survivors is not enough to protect them from privacy intrusions that can cause further emotional distress. For instance, the manner in which the story of the victim-survivors is portrayed in the news report or a documentary

---

<sup>14</sup> Id.

<sup>15</sup> An Act Expanding Republic Act No. 9208, Entitled "An Act To Institute Policies To Eliminate Trafficking In Persons Especially Women And Children, Establishing The Necessary Institutional Mechanisms For The Protection And Support Of Trafficked Persons, Providing Penalties For Its Violations And For Other Purposes [Expanded Anti-Trafficking in Persons Act of 2012], Republic Act No. 10364 § 10 (2012).

<sup>16</sup> Sophie Whisnant, *How the media perpetuates harmful misconceptions about human trafficking survivors*, available at <http://mediahub.unc.edu/how-the-media-perpetuates-harmful-misconceptions-about-human-trafficking-survivors/> (last accessed Jun. 2, 2022)

can cause further suffering and distress to the victim-survivors, especially if it involves publicly showing video footage or photographs which are sensitive to the victim-survivors. This holds true even if the identity of the victim-survivor remains anonymous. In addition, confidentiality of the trafficking victim's name, personal circumstances and identity will not protect them from other forms of media coverage that can still affect their privacy and cause them further suffering, such as unauthorized disclosure of other facts not covered by the confidentiality protections, inaccurate reporting on their trafficking case, employing insensitive interview questions, use of sensationalist language in reporting, employing victim-blaming narrative, and repeatedly attempting to contact the victim-survivors in order to secure their consent for an interview. In fact, intrusion into the privacy of the trafficking victim-survivor can still happen even if they knowingly, voluntarily and willingly waive the confidentiality of their name and identity such as when the media practitioner uses deceptive journalistic methods in the conduct of the interview like using ambush questions and hidden cameras/recorders, or when the media practitioner misrepresents or misquotes what the interviewee said. Moreover, investigative documentaries can feature scenes where the anonymous trafficking victim is accompanied by the journalist to the place where the trafficking occurred in order to acquire more in-depth information, thereby causing the anonymous victim to relive their undesirable experiences.<sup>17</sup>

Although media practitioners such as the *Kapisanan ng mga Brodkaster ng Pilipinas* (KBP) employ self-regulation through their own code of conduct, the age of social media has now made it possible for just about anyone to become a journalist. Social media has given anyone, even those who do not have any academic or professional background in ethical journalistic practices, the tools to broadcast news or report information to the public.

Perhaps recognizing this matter as well, the Senate passed Senate Bill 2449 on its third and final reading last February 2022. The Senate bill seeks to amend Republic Act 9208 as already amended previously by Republic Act 10364. In its proposed amendments to the confidentiality provision, it provides that:

It shall be unlawful for any editor, publisher, reporter or columnist in case of printed materials, announcer or producer in case of television and radio broadcasting and digital media, and producer and director of the film in case of the movie industry, to cause any publicity that may result in the further suffering of the victim. Any person or agency involved in the reporting, investigation or trial of cases of gender-based violence shall refrain from any act or statement that may be construed as blaming the victim or placing responsibility on the victim for the offense committed against them.<sup>18</sup> (**Emphasis Supplied**)

Curiously, its counterpart in the House of the Representatives, House Bill 10658, does not contain such provision. Nonetheless, the enrolled copy of the consolidated version of Senate Bill 2449 and

---

<sup>17</sup> Mary Kareen Gancio, *Human Trafficking Sa Kwaderno Ng Taga-Ulat: The Reporter's Notebook Episode, "Pinays for Export"* and the TIP Guidelines for Media Professionals (2011) (Research Paper, University of the Philippines)

<sup>18</sup> An Act Strengthening Protections Against Trafficking In Persons, Amending For This Purpose Republic Act No. 9208, As Amended By Republic Act No. 10364, Entitled 'an Act To Institute Policies To Eliminate Trafficking In Persons Especially Women And/Or Children, Establishing The Necessary Institutional Mechanisms For The Protection And Support Of Trafficked Persons', And Other Special Laws, Providing Penalties For Its Violations And For Other Purposes, S.B. 2449, 18th Cong., 3rd Regular Session, (2021)

House Bill 10658, was sent to the Office of the President on May 24, 2022 for the signature of the President.

As seen above, the proposed amendment now employs a more general phrasing, unhindered by narrow limitations and loopholes as can be seen in the language of the law under Republic Act 9208 and Republic Act 10364. The only qualification now is if it will result in further suffering of the trafficking victim. If eventually signed into a law, a question then arises if this push for greater privacy protection to victims of human trafficking and migrant smuggling constitutes as an unconstitutional infringement on the freedom of expression of reporters and media practitioners. In other words, will the prohibition on causing any publicity that may result in the further suffering to the trafficking victim operate as an unconstitutional prior restraint on free speech? The author submits that in this case, the need for stronger privacy protections to the victims takes precedence over concerns relating to freedom of expression.

### Overview of the Right to Privacy

It is said that every man possesses the right to privacy as a natural right.<sup>19</sup> It is so intimately connected with our personhood that without privacy, we lose our integrity as persons.<sup>20</sup> The need for privacy is something that human beings seek innately and instinctively. This is because there is a natural desire among human beings to keep certain things secret and hidden from others.<sup>21</sup> This holds true, perhaps even more, if they are victims of a crime.

Being an essential human need, the right to privacy is considered as one of the most fundamental rights available to man. Justice Brendais said it best in his dissent in *Olmstead v U.S.*, when he describes the right to privacy as “the most comprehensive of rights and the right most valued by civilized men.”<sup>22</sup>

It is this comprehensive nature that makes the right to privacy so powerful. The right to privacy covers a broad range of horizons and can be invoked in different contexts. It is present in different aspects of life and affords individuals various forms of protection in diverse types of situations.<sup>23</sup>

However, the flexibility of this right comes with a price. Its expansiveness makes it abstract and difficult to define.<sup>24</sup> Even if it is often defined in legal circles as the “right to be left alone”<sup>25</sup>, the expansive scope of the right to privacy is still very hard to grasp. It is difficult to determine with particularity when an individual should be left alone or when something must be hidden from the

---

<sup>19</sup> James Whitman, *The Two Western Cultures of Right to Privacy: Dignity versus Liberty*, 113 *YALE LAW JOURNAL* 1151, 1153 (2004)

<sup>20</sup> *Id.*

<sup>21</sup> Alexandra Rengel, *Privacy as an International Human Right and The Right to Obscurity in Cyberspace*, 2 *GRONINGEN JOURNAL OF INTERNATIONAL LAW* 33, 34 (2014)

<sup>22</sup> *Olmstead v. United States* 277 U.S. 438 (1928)

<sup>23</sup> Whitman, *supra* note 19 at 1154.

<sup>24</sup> Whitman, *supra* note 19 at 1153

<sup>25</sup> *Olmstead*, 277 U.S. at 478 (J. Brendais, Dissenting Opinion)

prying eyes of others. Indeed, from the high brass of the military establishment down to private individuals and trafficking victims, the concept of privacy differs within a single society.<sup>26</sup>

This should not come as a surprise, as the right to privacy essentially flows from an individual.<sup>27</sup> As every individual is unique and different, their concept of privacy also differs.<sup>28</sup> However, while the right to privacy varies from society to society, it is also universally recognized.<sup>29</sup> This seeming contradiction stems from the fact that within the right to privacy, there are still 4 values which are treasured by every individual, yet the appreciation of each value differs among them. These four values are Autonomy, Identity, Reputation, Seclusion.<sup>30</sup>

Autonomy upholds an individual's right to due process.<sup>31</sup> He has a right not to be intruded upon in different aspects of his life, particularly his actions and decisions.<sup>32</sup> This value was summed up by the case of *Morfe v. Mutuc*:

Protection of this private sector — protection, in other words, of the dignity and integrity of the individual — has become increasingly important as modern society has developed. All the forces of a technological age — industrialization, urbanization, and organization — operate to narrow the area of privacy and facilitate intrusion into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society<sup>33</sup> (Emphasis Supplied)

The second value is identity.<sup>34</sup> This refers to an individual's right against unauthorized appropriation of his name and likeness.<sup>35</sup> It can also refer to a right against publicity.<sup>36</sup> This often gives rise to appropriation torts as well as damages for infliction of distress. In American cases, the most common cause is when an unauthorized person uses the name or picture of another person for reporting, advertisements, and commercial endeavors.<sup>37</sup>

The third value is reputation.<sup>38</sup> This value refers to the right of an individual against disclosure of matters concerning his private life and against placing him in false light in the public eye.<sup>39</sup> The value of reputation serves as the rationale for false light torts, the prohibition against wiretapping and the

---

<sup>26</sup> Whitman, *supra* note 19 at 1153

<sup>27</sup> Oscar Tan, *Articulating the Complete Philippine Right to Privacy in Constitutional and Civil Law: A Tribute to Chief Justice Fernando and Justice Carpio*, 82 PHIL. LAW JOURNAL 78, 153 (2008)

<sup>28</sup> Whitman, *supra* note 19 at 1153

<sup>29</sup> *Id.*

<sup>30</sup> Tan, *supra* note 26 at 87

<sup>31</sup> *Id.* at 153

<sup>32</sup> *Id.*

<sup>33</sup> *Morfe v. Mutuc* 22 SCRA 424, 445 (1968)

<sup>34</sup> Tan, *supra* note 26 at 154

<sup>35</sup> Antonio T. Carpio, *Intentional Torts in Philippine Law*, 47 PHIL. LAW JOURNAL 649, 687 (1972)

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Tan, *supra* note 26 at 154

<sup>39</sup> Carpio, *supra* note 36 at 686

right against self-incrimination.<sup>40</sup> However, it must be remembered that there can be no privacy claims for matters which are already publicly known, no matter how personal they may be.<sup>41</sup>

The fourth and most-well known value is that of seclusion.<sup>42</sup> This is the value most important to the victims of human trafficking and migrant smuggling. In fact, it is from the value of seclusion that the right to privacy gets its other famous name, “the right to be left alone.”<sup>43</sup> It refers to an individual’s right to physical and mental solitude, or to his “peace of mind.”<sup>44</sup> All the other values, such as reputation, identity and autonomy, is just a manifestation of an individual’s desire for seclusion or to be “left alone.”<sup>45</sup> This value is the rationale for the rights against search and seizure, privacy of correspondence, intrusion torts, and all the other laws relating to privacy.<sup>46</sup> In other words, seclusion is the very essence of privacy. Justice Romero’s separate opinion in the case of *Ople v. Torres* explains this value very well:

What marks off man from a beast? Aside from the distinguishing physical characteristics, man is a rational being, one who is endowed with intellect which allows him to apply reasoned judgment to problems at hand; he has the innate spiritual faculty which can tell, not only what is right but, as well, what is moral and ethical. Because of his sensibilities, emotions and feelings, he likewise possesses a sense of shame. In varying degrees as dictated by diverse cultures, he erects a wall between himself and the outside world wherein he can retreat in solitude, protecting himself from prying eyes and ears and their extensions, whether from individuals, or much later, from authoritarian intrusions.<sup>47</sup>

These four values are what provide flexibility to the right to privacy. The four values allow it to evolve and be adopted across different legal systems. This is very evident in how the Philippines incorporated the right to privacy from foreign jurisprudence, especially from that of the United States.

Philippine jurisprudence on the right to privacy has been very much influenced by that of the United States.<sup>48</sup> Over the course of its history, the United States Supreme Court came out with numerous landmark decisions explaining the constitutional basis of the right to privacy. While most of these cases revolve around the concern of sexuality, it must be understood that the constitutional guarantee of right to privacy is not only limited to the concern of sexuality. In *Griswold v. Connecticut*, a case which involves a statute prohibiting the distribution of condoms, the Court explained that although there was no constitutional provision on the right to privacy, the Constitution still protects it by creating a penumbra of guarantees that join together to create such a right.<sup>49</sup> In a paragraph likewise invoked in Philippine court decisions concerning the right to privacy, the United States Supreme Court said:

---

<sup>40</sup> Tan, *supra* note 26 at 155

<sup>41</sup> Carpio, *supra* note 36 at 687

<sup>42</sup> Tan, *supra* note 26 at 153

<sup>43</sup> Tan, *supra* note 26 at 153

<sup>44</sup> Carpio, *supra* note 36 at 686

<sup>45</sup> Tan, *supra* note 26 at 153

<sup>46</sup> *Id.* at 155

<sup>47</sup> *Ople v. Torres* 293 SCRA 141, 171 (1998) (J.Romero, Separate Opinion).

<sup>48</sup> Carpio, *supra* note 120 at 686

<sup>49</sup> *Griswold v. Connecticut* 381 U.S. 479, 484 (1965)

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' The Fourth and Fifth Amendments were described in *Boyd v. United States*, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life'. We recently referred in to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people'. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.<sup>50</sup>

After providing for the constitutional basis of the right to privacy in *Griswold*, the court will go on to explain the qualification for invoking the right in the case of *Katz v. United States*. The court explained here the doctrine which became known as reasonable expectation of privacy. In this case, government agents electronically recorded a private conversation in an enclosed telephone booth and used it as evidence in a criminal case.<sup>51</sup> The United States Supreme Court sided with the accused in saying that by shutting the door in the telephone booth to place the call, the accused had a *reasonable expectation* that his words will not be broadcasted to the world.<sup>52</sup> However, it was the concurring opinion of Justice Harlan who made his own explanation of the doctrine, which caught the eye of many legal scholars and will often be quoted in future Supreme Court decisions, both in the U.S. and in the Philippines. In his concurring opinion, Justice Harlan explained that there are two requisites to properly invoke the right to privacy, "first, that a person have exhibited an actual (subjective) expectation of privacy"<sup>53</sup> and second, that "the expectation be one that society is prepared to recognize as reasonable."<sup>54</sup> By establishing these two, a person can establish a reasonable expectation of privacy and properly invoke his constitution right in proper courts of law.

However, the *Katz* standard of reasonable expectation is not the sole determinant in determining the violation of the right to privacy. In the more recent case of *United States v. Jones*<sup>55</sup>, which involves a GPS Tracker that was installed without permission on the vehicle of the accused, the prosecution sought to belittle the accused's claim to privacy by arguing that he has no reasonable expectations on the public roads.<sup>56</sup> The United States Supreme Court disagreed by saying that privacy rights of the accused do not rise and fall with the *Katz* formulation<sup>57</sup> In this case, the court clarified that what really determines the violation of the right is whether there has been a trespass on one's

---

<sup>50</sup> *Id.*

<sup>51</sup> *Katz v. United States* 389 U.S. 347, 348 (1967)

<sup>52</sup> *Id.* at 352

<sup>53</sup> *Id.* at 361 (J. Harlan, Concurring Opinion)

<sup>54</sup> *Id.*

<sup>55</sup> *United States v. Jones*, 565 U.S. 400 (2012)

<sup>56</sup> *Id.* at 409

<sup>57</sup> *Id.* at 406



person, property, houses, papers and effects. It does not matter whether this trespass was a physical intrusion or merely a technical one, stating that “the *Katz* reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test.”<sup>58</sup>

Also noteworthy in our study of the right to privacy is the ruling in the case of *Cox Broadcasting v. Cohn*, wherein the United States Supreme Court was confronted with the question involving freedom of the press and the right to privacy of rape victims. In this case, the press insisted on its right to publish the names of victims in a rape case.<sup>59</sup> The U.S. Supreme Court ruled by stating that trials are public proceedings and, as such, the press can report anything that happens there, including the names of the parties.<sup>60</sup> It explained that “the interests of privacy fade when the information involved already appears on public record.”<sup>61</sup> In understanding this ruling however, it must be recognized that the United States Supreme Court ruling is confined only to one specific form of intrusion, the public disclosure of a specific fact relating to the victim (i.e., name of the victim) which is already in the public record. Be that as it may, the ruling did not state that other forms of intrusion into the privacy of the victim would be just as permissible.

In the Philippines, one of the most significant analyses of the right to privacy was a speech made by Justice Reynato Puno. In his speech, “The Common Right to Privacy,” which would have big influence on our jurisprudence, Justice Puno provided for three main categories of the right to privacy:

Decisional Privacy	Right of individuals to make certain kinds of fundamental choices with respect to their personal autonomy
Situational Privacy	Right of individuals to feel privacy in a physical space, undisturbed by any form of trespass
Informational Privacy	Right of individuals to control information about themselves

In the 1987 Constitution, Article III, Section 2 is a good example of locational privacy, while Section 3 and Section 17 of Article III demonstrate informational privacy. Meanwhile, Sections 6, 8, 12, and 18(1) of Article III are good examples of decisional privacy.

In Philippine jurisprudence, *Morfe v. Mutuc* is the first definite and unequivocal ruling of the Philippine Supreme Court with regard to the right to privacy. In this case, the constitutionality of the provision of the anti-graft law, which requires public officers to periodically submit their statement of

<sup>58</sup> *Id.* at 409

<sup>59</sup> *Cox Broadcasting v. Cohn*, 420 U.S. 469, 472 (1975)

<sup>60</sup> *Id.* at 494,

<sup>61</sup> *Id.* at 495

assets and liabilities (SALN) was assailed as a violation of the right to privacy.<sup>62</sup> The Philippine Supreme Court, while disagreeing that such an obligation constitutes an invasion of privacy, declared that in the Philippine jurisdiction, there is a constitutional right to privacy.<sup>63</sup> In doing so, it echoed the ruling of the U.S. Supreme Court in the case of *Griswold v. Connecticut*.

However, the Philippine Supreme Court was also quick to clarify that constitutional right to privacy is more than just a penumbra or amalgamation of several constitutional guarantees. Rather, it is a separate and distinct right in and of itself. In the words of the court: “The constitutional right to privacy has come into its own. The right to privacy as such is accorded recognition independently of its identification with liberty. In itself, it is fully deserving of constitutional protection.”<sup>64</sup> In resolving the issue, the Supreme Court used the “rational relationship test” to assess whether an intrusion into an individual’s privacy is valid.<sup>65</sup> According to this test, as long as the intrusion is reasonably related to a valid and legitimate purpose, then the Court will uphold the intrusion.<sup>66</sup> In this case, it was adequately shown that public interest in accountability and transparency serves as a valid purpose in requiring submission of the SALN.

The Court followed up this pronouncement in *Ople v. Torres*. This case involves the constitutionality of an administrative order creating a national computerized identification system.<sup>67</sup> The court struck down the order saying that it violates the right to privacy. The Court stated that the right to privacy “was not engraved in our Constitution for flattery”<sup>68</sup> and that it is “one of the most threatened rights of man living in a mass society.”<sup>69</sup> The threats emanate from various sources — governments, journalists, employers, social scientists, etc.” In this case, the Philippine Supreme Court also identified more precisely, the penumbra from which the right of privacy is sourced. It listed the Constitution, the Revised Penal Code, the Anti-Wiretapping Act, the Bank Secrecy Act, the Intellectual Property Code, the Rules of Court, and the Civil Code, among others, as laws which protect an individual’s zone of privacy.<sup>70</sup> Just like any other fundamental right, the government is therefore burdened with proving that there exists a compelling state interest when it infringes upon the right to privacy and that it is not overbroad and vague.<sup>71</sup>

In addition to the laws mentioned in the *Ople v. Torres* ruling, other special laws that emphasize the penumbra of the right to privacy in our legal jurisdiction, include inter alia, the Kasambahay Law, which states that house helpers shall be guaranteed privacy at all times and prohibits them from publicly disclosing any communication or information pertaining to the members of the household.<sup>72</sup> The Philippine HIV and AIDS Policy Act, which provides for the confidentiality and privacy of any

---

<sup>62</sup> *Morfe*, 22 SCRA at 428

<sup>63</sup> *Id.* at 444

<sup>64</sup> *Id.* at 444

<sup>65</sup> *Id.* at 445

<sup>66</sup> *Id.*

<sup>67</sup> *Ople*, 293 SCRA at 144

<sup>68</sup> *Id.* at 170

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 157

<sup>71</sup> *Id.* at 158

<sup>72</sup> An Act Instituting Policies for the Protection and Welfare of Domestic Workers [The Kasambahay Law], Republic Act No. 10361 §§7, 10 (2012).

individual who has been tested for HIV, has been exposed to HIV, has HIV infection or HIV- and AIDS-related illnesses, or was treated for HIV-related illnesses.<sup>73</sup> The National Internal Revenue Code, which makes it unlawful to divulge any information regarding the income, inheritance and business of any taxpayer.<sup>74</sup> The Safe Spaces Act, which penalizes acts constituting gender-based online sexual harassment such as invasion of victim's privacy through cyberstalking and incessant messaging.<sup>75</sup> The Labor Code, which provides that any specific information disclosed by labor organizations in confidence shall not be revealed.<sup>76</sup> The Alternative Dispute Resolution Act, which declares as confidential all those information obtained in mediation proceedings.<sup>77</sup> The Data Privacy Act, which protects all personal information obtained through communication systems while providing for the creation of the National Privacy Commission as well as the procedure for collecting private information and the rights of individuals whose personal information was collected.<sup>78</sup> The Adoption law, which provides the confidentiality of all information obtained in adoption hearings.<sup>79</sup> Likewise, procedural laws provides for the privacy of privileged communications,<sup>80</sup> the privacy of an accused in criminal proceedings,<sup>81</sup> the privacy of physical and mental examination in discovery proceedings,<sup>82</sup> and for the remedy of the Writ of Habeas Data.<sup>83</sup>

As for international commitments and obligations, the Philippines is a party to the ASEAN Declaration on Human Rights which state that:

Every person has the right to be free from arbitrary interference with his or her privacy, family, home or correspondence including personal data, or to attacks upon that person's honour and reputation. Every person has the right to the protection of the law against such interference or attacks.<sup>84</sup>

In the International Covenant on Civil and Political Rights, the Philippines committed to a similar guarantee that states:

---

<sup>73</sup> An Act Strengthening the Philippine Comprehensive Policy on Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) Prevention, Treatment, Care, and Support, and, Reconstituting the Philippine National Aids Council (PNAC), Repealing for the Purpose Republic Act No. 8504, Otherwise Known as The "Philippine Aids Prevention and Control Act of 1998", and Appropriating Funds Therefor [Philippine HIV and AIDS Policy Act], Republic Act No. 11166 §44 (2018).

<sup>74</sup> An Act Amending the National Internal Revenue Code and For Other Purposes [NATIONAL INTERNAL REVENUE CODE], Republic Act No. 8424 §278 (1997).

<sup>75</sup> An Act Defining Gender-Based Sexual Harassment in Streets, Public Spaces, Online, Workplaces, and Educational or Training Institutions, Providing Protective Measures and Prescribing Penalties Therefor [Safe Spaces Act], Republic Act No. 11313 §12 (2018).

<sup>76</sup> A Decree Instituting a Labor Code [LABOR CODE], Presidential Decree No. 442, art. 231 (1974).

<sup>77</sup> An Act to Institutionalize the Use of Alternative Dispute Resolution System in the Philippines [Alternative Dispute Resolution Act], Republic Act No. 9285 §278 (2004).

<sup>78</sup> An Act Protecting Individual Personal Information in Information and Communications System in the Government and Private Sector [Data Privacy Act], Republic Act No. 10173 §§7, 11 (2012).

<sup>79</sup> An Act Establishing the Rules and Policies on Domestic Adoption of Filipino Children [Domestic Adoption Act], Republic Act No. 8552 §15 (1998).

<sup>80</sup> RULES OF EVIDENCE, rule 130, §§ 24,25

<sup>81</sup> 2000 Rules of Criminal Procedure, rule 115

<sup>82</sup> 1997 Rules of civil procedure, rule 28, §3

<sup>83</sup> THE RULE ON WRIT ON WRIT OF HABEAS DATA, A.M. No. 08-1-16-SC, January 22,2008, §1

<sup>84</sup> ASEAN Human Rights Declaration, Article 21, *adopted* November 18, 2012. 21st ASEAN Summit;

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.<sup>85</sup>

Both are identical to the earlier commitment made by the Philippines under the United Nations Declaration on Human Rights, which states:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.<sup>86</sup>

More specifically to victims of human trafficking and migrant smuggling, the Philippines is likewise a party to the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, which states that:

In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.<sup>87</sup>

Meanwhile, it is also important to note that the Philippine Supreme Court subsequently supplemented the rational relationship test in *Morfe v. Mutuc*, by adopting the reasonable expectation test, from Justice Harlan's concurring opinion in the aforementioned *Katz* ruling.<sup>88</sup> In this case, the Supreme Court declared that the administrative order failed to pass both tests. In doing so, the Court explained the nature of the right to privacy by stating that:

In no uncertain terms, we also underscore that the right to privacy does not bar all incursions into individual privacy. The right is not intended to stifle scientific and technological advancements that enhance public service and the common good. It merely requires that the law be narrowly focused and a compelling interest justify such intrusions. Intrusions into the right must be accompanied by proper safeguards and well-defined standards to prevent unconstitutional invasions. We reiterate that any law or order that invades individual privacy will be subjected by this Court to strict scrutiny.<sup>89</sup>

This pronouncement also echoes the earlier ruling of the Philippine Supreme Court in the case of *People v. CFI of Rizal*,<sup>90</sup> where the court aptly described the right to privacy as an:

Essential condition to the dignity and happiness and to the peace and security of every individual, whether it be of home or of persons and correspondence. Nothing is more closer to a man's soul than

---

<sup>85</sup> International Covenant on Civil and Political Rights, Article 17, *adopted* March 23, 1976, 999 U.N.T.S. 171

<sup>86</sup> G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 13, U.N. Doc. A/810 (December 10, 1948).

<sup>87</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Article 6, adopted May 28, 2002, 2237 U.N.T.S. 319

<sup>88</sup> *Id.* at 163,164

<sup>89</sup> *Ople*, 293 SCRA at 169

<sup>90</sup> *People v CFI of Rizal* 101 SCRA 86 (1980)

the serenity of his privacy and the assurance of his personal security. Any interference allowable can only be for the best of causes and reasons.<sup>91</sup>

In *Hing v. Choachuy*,<sup>92</sup> a case which involves the installation of CCTV cameras and taking of unauthorized pictures of complainant's place of business, the Philippine Supreme Court once again emphasized the reasonable expectation test and said that the nature of the right to privacy is:

The right to be free from unwarranted exploitation of one's person or from intrusion into one's private activities in such a way as to cause humiliation to a person's ordinary sensibilities. It is the right of an individual "to be free from unwarranted publicity, or to live without unwarranted interference by the public in matters in which the public is not necessarily concerned. Simply put, the right to privacy is "the right to be let alone.

x x x x

In ascertaining whether there is a violation of the right to privacy, courts use the "reasonable expectation of privacy" test. This test determines whether a person has a reasonable expectation of privacy and whether the expectation has been violated.<sup>51</sup> In *Ople v. Torres*, we enunciated that "the reasonableness of a person's expectation of privacy depends on a two-part test: (1) whether, by his conduct, the individual has exhibited an expectation of privacy; and (2) this expectation is one that society recognizes as reasonable." Customs, community norms, and practices may, therefore, limit or extend an individual's "reasonable expectation of privacy." Hence, the reasonableness of a person's expectation of privacy must be determined on a case-to-case basis since it depends on the factual circumstances surrounding the case.<sup>93</sup> (Emphasis Supplied)

### **Limitations on Freedom of Speech, Expression and of the Press**

The freedom of speech, of expression, and of the press is one of the most sacred rights guaranteed under the 1987 Constitution. Freedom of speech extends to every form of expression, whether oral, written or recorded. It also includes campaign speech, symbolic speech, commercial speech and peaceful picketing. It is reinforced by our international treaty obligations, such as International Covenant on Civil and Political Rights, which states that:

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.<sup>94</sup>

The constitutional prohibition against limitation of speech, expression and of the press rests primarily on two things: Prior Restraint and Subsequent Punishment. Prior restraint occurs when there is an attempt by the government to prevent the exercise of the right, such movie and press censorship. Freedom from prior restraint is largely freedom from government censorship of publications, whatever the form of censorship and regardless of whether it is wielded by the executive, legislative

---

<sup>91</sup> *Id.* at 101

<sup>92</sup> *Hing v Choachuy*, 699 SCRA 667 (2013)

<sup>93</sup> *Hing*, 699 SCRA at 676, 677

<sup>94</sup> International Covenant on Civil and Political Rights, Article 19, adopted March 23, 1976, 999 U.N.T.S. 171

or judicial branch of the government.<sup>95</sup> Subsequent punishment, on the other hand, occurs when punishment is imposed by the government after the right has been exercised, such as penalizing a journalist for making a specific kind of report. It must be remembered however, that the distinction is really hypothetical as the threat of a subsequent punishment could very well operate as a prior restraint.<sup>96</sup>

Over time, jurisprudence in the United States and the Philippines has identified certain types of speeches which are not protected by the Constitution. This includes those which are dangerous to national security,<sup>97</sup> those which incite sedition,<sup>98</sup> those which are libelous<sup>99</sup> and those which exhibit obscenity.<sup>100</sup>

For those which are protected however, jurisprudence has developed three types of tests before a limitation can be imposed on freedom of expression. These three tests were best explained by the Court in *Chavez v. Gonzales*, where it states that:

“(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.”<sup>101</sup>

Related thereto, the Philippine Supreme Court has also recognized that the exercise of freedom of expression and of the press is subject to reasonable limitations of time, place and manner. This type of regulation is known as a content-neutral regulation.<sup>102</sup> In case law, it is often compared to a content-based regulation.<sup>103</sup> Content-neutral regulations are merely concerned with the time, place and manner of the exercise of the right, while content-based regulations are based on the subject matter.<sup>104</sup> Content-neutral regulation does not, in any manner, affect or target the actual content of the message. It is not concerned with the words used, the perspective expressed, the message relayed, or the speaker's views.<sup>105</sup> If the regulation is content neutral, only substantial government interest is required

---

<sup>95</sup> 1-United Transport Koalisyon (1-UTAK) vs. Commission on Elections, 755 SCRA 441, 454 (2015)

<sup>96</sup> BERNAS, S.J., *supra* note 18 at 248-249.

<sup>97</sup> BERNAS, S.J., *supra* note 18 at 253.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 283

<sup>100</sup> Chavez v. Gonzales 545 SCRA 441,449 (2008)

<sup>101</sup> *Id.* at 487, 488

<sup>102</sup> *Chavez*, 545 SCRA at 493

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Loida Nicolas-Lewis vs Commission on Elections 913 SCRA 515, 554 (2019)

for its validity.<sup>106</sup> If the regulation is content-based, then it will be subjected to the strictest scrutiny of the clear and present danger test.<sup>107</sup>

The lesser form of scrutiny applied by the Court in content-neutral regulations is called the “intermediate approach.”<sup>108</sup> The main requirement imposed by Philippine jurisprudence for the intermediate approach is that the restriction be “narrowly-tailored to promote an important or significant governmental interest that is unrelated to the suppression of expression.”<sup>109</sup> In the combined jurisprudence of the United States and the Philippines, case rulings have identified residential privacy,<sup>110</sup> judicial independence,<sup>111</sup> public order,<sup>112</sup> cleanliness of parks,<sup>113</sup> religious freedom,<sup>114</sup> and even the decongestion of traffic in public streets,<sup>115</sup> as significant government interest justifying content-neutral regulation. One difference between U.S. and Philippine jurisprudence however, is that the United States Supreme Court ruling often emphasizes the requirement that alternative forms of communications must be left open.<sup>116</sup>

In order to determine whether a regulation is content-neutral or content-based, the United States Supreme Court has used the intent test, most significantly in the case of *Ward v. Rock against Racism*, to wit:

The principal inquiry in determining content-neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others. Government regulation of expressive activity is content-neutral so long as it is *justified* without reference to the content of the regulated speech.<sup>117</sup> (Emphasis Supplied)

This ruling foreshadowed the ruling of the Philippine Supreme Court in the case *Nicolas-Lewis v. COMELEC*, wherein a similar test was enunciated:

The particular law or regulation must be judiciously examined on what it actually intends to regulate to properly determine whether it amounts to a content-neutral or content-based regulation as contemplated under our jurisprudential laws. To rule otherwise would result to the absurd interpretation that every law or regulation relating to a particular speech is a content-based regulation. Such perspective

---

<sup>106</sup> Id.

<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> *Chavez*, 545 SCRA at 493

<sup>110</sup> *Frisby v. Shultz* 484 U.S. 474, 482 (1988)

<sup>111</sup> In Re: Petition to Annul En Banc Resolution A.M. 98-7-02 296 SCRA xi, xv (1998)

<sup>112</sup> *Reyes v Bagatsing* 125 SCRA 553, 563 (1983)

<sup>113</sup> *Clark v. CCNV* 468 U.S. 288, 296 (1984)

<sup>114</sup> *Ignacio v. Ela* 99 Phil. 347,351 (1956)

<sup>115</sup> *Schneider v. State* 308 U.S. 147, 160 (1939)

<sup>116</sup> *Frisby*, 487 U.S. at 481

<sup>117</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)

would then unjustifiably disregard the well-established jurisprudential distinction between content-neutral and content-based regulations.<sup>118</sup> (Emphasis Supplied)

Concurring with the abovementioned distinction between content-neutral and content-based regulation is the elucidation which was pronounced by the United States Supreme Court in the case of *Hill vs Colorado*. In this case, it was ruled that:

First, it is not a "regulation of speech." Rather, it is a regulation of the places where some speech may occur. Second, it was not adopted "because of disagreement with the message it conveys." This conclusion is supported not just by the Colorado courts' interpretation of legislative history, but more importantly by the State Supreme Court's unequivocal holding that the statute's "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech."<sup>119</sup> (Emphasis Supplied)

Proceeding from the above, one can deduce that in ascertaining if a regulation is content-neutral, one should look at key markers, such as whether the restrictions apply equally to all regardless of viewpoint, whether the statutory language makes no reference to the content of the speech and if the restriction was adopted because of disagreement with the message it conveys.

## Analysis

Having discussed the laws and jurisprudential doctrines on the right to privacy and freedom of expression, it is now imperative to determine whether the enhanced privacy restrictions for victims of human trafficking, as proposed by Senate Bill 2449, constitute an unconstitutional prior restraint.

We answer this in the negative. We can conclude in this case that the restriction proposed is a content-neutral regulation. Following the guidelines set forth in cases such as *Ward v. Rock against Racism*, *Nicolas-Lewis v. COMELEC*, and *Hill v. Colorado*, it is clear that the proposed regulation under Senate Bill 2449 is unrelated to the content of the expression. Senate Bill 2449 does not make any reference to the content of the regulated speech, nor is it concerned with the words used, the perspective expressed, the message relayed, or the speaker's views, but merely on its damage to the privacy rights of the trafficking victim. What is regulated is not the message it conveys but the manner of the speech, i.e., causing publicity that may result in further suffering to the victim. Furthermore, it applies equally to all media practitioners regardless of viewpoint.

The mere fact that the restrictions apply specifically to speech and expression relating to the case of the trafficking victims does not make it a content-based regulation. As stated in the case of *Nicolas-Lewis v. COMELEC*:

The fact that the questioned regulation applies only to political speech or election-related speech does not, by itself, make it a content-based regulation. It is too obvious to state that every law or regulation would apply to a particular type of speech such as commercial speech or political speech. It

---

<sup>118</sup> *Nicolas-Lewis*, 913 SCRA at 555

<sup>119</sup> *Hill v. Colorado* 530 U.S. 703, 719 (2000)



does not follow, however, that these regulations affect or target the content of the speech or expression to easily and sweepingly identify it as a content-based regulation.<sup>120</sup> (Emphasis Supplied)

This ruling is in concurrence with the opinion of the U.S. Supreme Court in the case of *McCullen v. Coakley*, where it was stated that “a facially neutral law does not become content-based simply because it may disproportionately affect speech on certain topics.”<sup>121</sup> Moreover, in the aforementioned case of *Hill v. Colorado*, it was emphasized that the mere fact that the statements must sometimes be examined to determine whether it is covered by the restriction is not determinant of the restriction becoming content-based, stating that :

It is common in the law to examine the content of a communication to determine the speaker's purpose. Whether a particular statement constitutes a threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods often depends on the precise content of the statement. We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.<sup>122</sup>

Even though the United States Supreme Court stated in the case of *McCullen v. Coakley* that a statute would not be content-neutral if it were concerned with “undesirable effects that arise from the direct impact of speech on its audience or listener’s reactions to speech,”<sup>123</sup> it still recognized therein that the restriction under its consideration is a content-neutral regulation because the problems identified to justify the restrictions will still “arise irrespective of any listener’s reactions.”<sup>124</sup> In this case, the same holds true as the damage to the privacy of the trafficking victims will still arise irrespective of any listener’s reaction.

*McCullen v. Coakley* also adds that a statute would be content-based if it required “enforcement authorities” to “examine the content of the message that is conveyed to determine whether a violation has occurred.”<sup>125</sup> However, it would be content-neutral if the Act would be violated not on what it said but simply on the place where it said. Following this logic, it is clear that a violation of the confidentiality provisions under Senate Bill 2449 would not require enforcement authorities to examine the content of the news report about the trafficking case, but merely whether it caused damage to the privacy rights of the trafficking victim. In other words, it is not concerned with what was said in the report, but with the invasion of privacy of the victim.

Corollary thereto, while it is true that Senate Bill 2449 can have the “inevitable effect” of restricting speech related to the trafficking cases more than speech on other subjects, *McCullen v. Coakley* guide us that the restriction should still be deemed content-neutral:

It is true, of course, that by limiting the buffer zones to abortion clinics, the Act has the “inevitable effect” of restricting abortion-related speech more than speech on other subjects. But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain

---

<sup>120</sup> Nicolas-Lewis, 913 SCRA at 555

<sup>121</sup> *McCullen v. Coakley* 573 U.S. 464, 480 (2014)

<sup>122</sup> *Hill*, 530 U.S. at 721

<sup>123</sup> *McCullen*, 573 U.S. at 481

<sup>124</sup> *McCullen*, 573 U.S. at 481

<sup>125</sup> *McCullen*, 573 U.S. at 479

topics. On the contrary, a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.<sup>126</sup> (Emphasis Supplied)

Having determined that the proposed regulation of speech and expression under Senate Bill 2449 is a content-neutral regulation, we can now examine if it satisfied jurisprudential requirements of validity.

According to the United States Supreme Court in the case of *United States v. O'Brien*, the four essential requisites for the validity of a content-neutral regulation are:

We think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>127</sup>

This was later on adopted by the Philippine Supreme Court in its rulings, such as in the case of *1-Utak v. COMELEC*, where it stated that:

A content-neutral regulation, *i.e.*, which is merely concerned with the incidents of the speech, or one that merely controls the time, place or manner, and under well-defined standards, is constitutionally permissible, even if it restricts the right to free speech, provided that the following requisites concur: *first*, the government regulation is within the constitutional power of the Government; *second*, it furthers an important or substantial governmental interest; *third*, the governmental interest is unrelated to the suppression of free expression; and *fourth*, the incidental restriction on freedom of expression is no greater than is essential to the furtherance of that interest.<sup>128</sup> (Emphasis Supplied)

In Senate Bill 2449, it is easy to see that the first, second and third requisites are easily complied with. It goes without saying that Senate Bill 2449 is within the power of the government to enact. Furthermore, the privacy of human trafficking victims is an important or substantial governmental interest unrelated to the suppression of free expression. Having said that, our point of inquiry should focus on the fourth criterion in the said test, *i.e.*, that the regulation should be no greater than what is essential to the furtherance of the governmental interest.

In evaluating the fourth criterion, the United States Supreme Court has consistently looked at the presence of ample alternative channels for speech and expression.<sup>129</sup> Philippine jurisprudence has adopted similar standards, as exemplified in the previously mentioned case of *Nicolas-Lewis v. COMELEC*, wherein the Philippine Supreme Court made the following disquisition:

The failure to meet the fourth criterion is fatal to the regulation's validity as even if it is within the Constitutional power of the government agency or instrumentality concerned and it furthers an important or substantial governmental interest which is unrelated to the suppression of speech, the

<sup>126</sup> *McCullen*, 573 U.S. at 480

<sup>127</sup> *United States v. O'Brien*, 391 U.S. 367, 377 (1968)

<sup>128</sup> *1-United Transport Koalisyon (1-UTAK)*, 755 SCRA at 457

<sup>129</sup> *Hill*, 530 U.S. at 726

regulation shall still be invalidated if the restriction on freedom of expression is greater than what is necessary to achieve the invoked governmental purpose.

In the judicial review of laws or statutes, especially those that impose a restriction on the exercise of protected expression, it is important that we look not only at the legislative intent or motive in imposing the restriction, but more so at the effects of such restriction when implemented. The restriction must not be broad and should only be narrowly-tailored to achieve the purpose. It must be demonstrable. It must allow alternative avenues for the actor to make speech.<sup>130</sup>

In making our analysis, it is important likewise to remember the pronouncement of the U.S. Supreme Court in the case of *Ward v. Rock against Racism* that a narrowly tailored regulation need not be the least restrictive or least intrusive means of serving the government's content-neutral interests.<sup>131</sup> The ruling explains this further by stating that:

So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.<sup>132</sup>

It is clear in this case that Senate Bill 2449 leaves open ample alternative channels for speech and expression. As stated in the American case of *Iskcon of Potomac v. Kennedy*, the restriction leaves open ample alternative communication channels if resorting to the alternative would not infringe on the autonomy of the speaker, if it would not make it less likely that they would reach their intended audience, or if it would not prevent them from revealing their identity or advocating their cause.<sup>133</sup> In this case, the autonomy of the media practitioners is not infringed as they are still free to report on trafficking cases. Neither will the enhanced confidentiality clause under Senate Bill 2449 prevent media practitioners from reaching their audience or to advocate their message.

In making our conclusion, we must also take into consideration the ruling of the Philippine Supreme Court in the case *Ayer Productions v. Capulong*, where it was confronted with the question of whether the claim to privacy can stifle freedom of expression.<sup>134</sup> Although the ruling did not answer the question directly, instead choosing to sidestep by stating that the subject matter of the case is not concerned with the privacy of former senator Juan Ponce Enrile as it is already a historical fact, the Philippine Supreme Court still recognized that “the limits of freedom of expression are reached when expression touches upon matters of essentially private concern.”<sup>135</sup>

## Conclusion

---

<sup>130</sup> Nicolas-Lewis, 913 SCRA at 557

<sup>131</sup> Ward, 491 U.S. at 798

<sup>132</sup> Ward, 491 U.S. at 800

<sup>133</sup> *Iskcon of Potomac v. Kennedy* 61 F.3d 949, 958 (D.C. Cir. 1995)

<sup>134</sup> *Ayer v. Capulong*, 160 SCRA 861, 870 (1988)

<sup>135</sup> *Id.* at 872 (citing *Lagunzad v. Vda De Gonzales* 92 SCRA 488,489)

Freedom of speech, expression and of the press is a fundamental right. It is one of the essential foundations of a democratic society. However, just like any right, it must be balanced with other societal interests such as the right to privacy. In balancing these two rights, it must be recognized that victim-survivors of human trafficking and migrant smuggling experience severe physical, mental and emotional suffering as a result of their ordeal, and must be given utmost assistance towards healing their physical and emotional wounds. Hence, even slight intrusions into their privacy would not only set them back on their road to recovery and recoupment, but it would give them new sources of emotional distress and traumatization. As such, the enhanced confidentiality provisions under Senate Bill 2449, once signed into law, would bring a welcome development that will help protect the privacy of trafficking victim-survivors, thereby aiding their recovery, rehabilitation and reintegration into society.